REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 689 OF 2008

PRISCILLA NDULULU KIVUITU & MUSILI KIVUITU

(SUING AS THE PERSONAL REPRESENTATIVES OF

SAMUEL MUTUA KIVUITU (DECEASED).....1ST PETITIONER

ROSE WANGUI NGURE, PAUL MWAURA & HARIT AMRITLAL

SHETH (SUING AS THE PERSONAL REPRESENTATIVES OF

KIHARA MUTTU (DECEASED)).....2ND PETITIONER

JACK B TUMWA.....3RD PETITIONER

ANNE WAMBAA.....4TH PETITIONER

JEREMIAH MATAGARO.....5TH PETITIONER

MWENDA THIRIBI.....6TH PETITIONER

JAMES RAYMOND NJENGA.....7TH PETITIONER

ABDI M. IBRAHIM.....8TH PETITIONER

ANNE M MUASYA.....9TH PETITIONER

FELICITA N.OL CHURIE.....10TH PETITIONER

JOSEPH H DENA.....11TH PETITIONER

JOSEPH K. SITONIK.....12TH PETITIONER

LUCIANO R. RAIJI.....13TH PETITIONER

MILDRED APIYO OWUOR.....14TH PETITIONER

MUTURI KIGANO.....15TH PETITIONER

SAMUEL ARAP NGENY.....16TH PETITIONER

PAMELA MWIKALI TUTUI.....17TH PETITIONER

DAVID ALFRED NJERU NADAMBIRI.....18TH PETITIONER

RACHEL WANJALA KILETA.....19TH PETITIONER

SAMUEL NYANCHAMA MAUNGO.....20TH PETITIONER

SHEM SANYA BALONGO.....21STPETITIONER

DANIEL WASIKE WAMBURA.....22ND PETITIONER

ELECTORAL COMMISSION OF KENYA.....23RD PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

INTERIM INDEPENDENT

ELECTORAL COMMISSION.....3RD RESPONDENT

JUDGMENT

1. When this petition was first filed in court on 11th November, 2008, the late Samuel Mutua Kivuitu, the late Kihara Muttu, Jack B Tumwa, Anne Wambaa, Jeremiah Matagaro, Mwenda Thiribi, James Raymond Njenga, Abdi M. Ibrahim, Anne M Muasya, Felicita N. OlChurie, Joseph H Dena, Joseph K. Sitonik, Luciano R. Raiji, Mildred Apiyo Owuor, Muturi Kigano, Samuel Arap Ngeny, Pamela Mwikali Tutui, David Alfred Njeru Nadambiri, Rachel Wanjala Kileta, Samuel Nyanchama Maungo, Shem Sanya Balongo, Daniel Wasike Wambura and Electoral Commission of Kenya were named as the 1st to 23rd petitioners respectively. Samuel Mutua Kivuitu and Kihara Muttu passed away during the pendency of this matter and they were substituted by the legal representatives of their estates. Priscilla Ndululu Kivuitu and Musili Kivuitu represent the estate of Samuel Mutua Kivuitu whereas Rose Wangui Ngure, Paul Mwaura and Harit Amritlal Sheth represent the estate of Kihara Muttu.

2. The Attorney General, the Speaker of the National Assembly and the Interim Independent Electoral Commission are the 1st, 2nd and 3rd respondents respectively.

3. The petitioners have amended their petition five times. The last amended petition is the one titled "Third Further Re-Amended Petition" dated 7th May, 2014 and filed on the same date. They seek redress as follows:

> a. **THAT a declaration be issued to declare that The Constitution of Kenya (Amendment) Act, 2008 is unconstitutional to the extent that it provides for the removal of the Petitioners from their officials (sic) as electoral commissioners.**

b. **THAT a declaration be issued to declare that the removal of the Petitioners from their respective offices as members of the Electoral Commission of Kenya established under Article 41 of the former Constitution of Kenya through Section 41(14) of The Constitution of Kenya (Amendment) Act, 2008 is unconstitutional.**

c. **THAT a declaration be issued to declare that the 3rd Respondent acted in contempt of Court in allowing the debate and passage of the Constitution of Kenya (Amendment) Bill, 2008 by the National Assembly.**

d. **THAT a declaration be issued declaring that the Constitution of Kenya (Amendment) Bill, 2008 is void for having been passed in violation of the standing orders made under Section 56 of the Constitution.**

e. **THAT a declaration be issued declaring that the removal of the Petitioners cannot be removed from their respective offices as members of the Electoral Commission of Kenya violated section 41 of the Constitution. (sic).**

f. **THAT a declaration be issued to declare that the removal of the 1st – 21st Petitioners as members of the Electoral Commission of Kenya vide the Constitution Kenya (Amendment) Act, 2008 is unconstitutional.**

g. **THAT a declaration be issued declaring that the security of tenure conferred upon the Petitioners by section 41 of the former Constitution was an absolute prohibition against their removal by any person or authority created or subject to the Constitution of Kenya save the Tribunal established under Section 41 of the former Constitution.**

h. **THAT a declaration be issued to declare that save as provided for under section 41 of the former Constitution, the Government of Kenya, the National Assembly or any other person or authority under the Constitution had no right or power to derogate, violate or otherwise interfere with the tenure of the Petitioners as Members of the Electoral Commission of Kenya.**

i. **THAT a declaration be issued to declare that under Section 41 of the former Constitution process for the removal of any or all of the 1st – 21st Petitioners for alleged inability to exercise the functions of his office or for misbehavior is a judicial process.**

j. **THAT a declaration be issued to declare that Section 41(14) of the Constitution of Kenya (Amendment) Act, 2008 is a legislative judgement against the 1st – 21st Petitioners contrary to Section 41(5) of the former Constitution.**

k. **THAT a declaration be issued to declare that Section 41(14) of the Constitution of Kenya (Amendment) Act, 2008 is unconstitutional for vesting judicial power in Parliament with in order to remove the 1st– 21st Petitioners from office as Members of the Electoral Commission of Kenya. (sic).**

l. **THAT a declaration be issued to declare that the removal of the Petitioners from their respective offices of commissioners of the Electoral Commission of Kenya pursuant to Section 41(14) of the Constitution of Kenya (Amendment) Act, 2008 save in accordance with section 41 of the Constitution violated the right to protection of law and fair hearing under sections 70 and 77 of the former Constitution in respect of each Petitioner.**

m. **THAT a declaration be issued to declare that the removal of the 1st – 21st Petitioners from their respective offices as members of the Electoral Commission of Kenya and /or termination of their respective term of office secured by Sections 41 and 104 of the former Constitution violate the right to protection from deprivation of property under section 75 of the former**

Constitution in respect of each Petitioner.

n. **THAT a declaration be issued to declare that pursuant to Sections 41 and 104 of the former Constitution, the 1st – 21st Petitioners are entitled to payment of all salaries and allowances payable to each of them during the remainder of their respective terms as members of the Electoral Commission of Kenya.**

o. **THAT a mandatory injunction be issued to compel the Government of Kenya to pay the 1st – 21st Petitioners all salaries and allowances payable to each of them during the remainder of their respective terms as members of the Electoral Commission of Kenya.**

p. **THAT a declaration be issued to declare that the removal of the 1st - 21st Petitioners from their respective offices as members of the Electoral Commission of Kenya and/or termination of their tenure of office secured by sections 41 and 104 of the former Constitution is jointly and severally discriminatory of itself and in its effect within the meaning of section 82 of the former Constitution of Kenya.**

q. **THAT a declaration be issued declaring that the doctrine of separation of powers subsumed by the division of powers and functions under the Kenya Constitution prohibits the National Assembly from passing any law to usurp or arrogate to itself the powers and functions vested in the Tribunal envisaged under section 41 of the former Constitution and the High Court under Sections 10, 44 and 123 (8) of the former Constitution.**

r. **THAT a declaration be issued to declare that the National Assembly had no power under sections 30, 46, 47, 54 and 56 of the former Constitution to derogate, curtail, violate or otherwise compromise the Petitioners' security of tenure as Commissioners of the Electoral Commission of Kenya as it purported to do through the Constitution of Kenya (Amendment) Act, 2008.**

s. **THAT a declaration that the Petitioners are entitled to damages as redress in respect of each of the above rights that have been violated by the promulgation of the Constitution of Kenya (Amendment) Act, 2008."**

4. The petitioners also seek a declaration that they are entitled to be paid special damages. They have tabulated the special damages which they believe each petitioner is entitled to. The petitioners also pray for the costs of the petition and interest on the awards where applicable.

HISTORICAL BACKGROUND

6. The late Samuel Mutua Kivuitu, the late Kihara Muttu and the 3rd to 22nd petitioners were commissioners of the defunct Electoral Commission of Kenya (ECK), the 23rd Petitioner. They directed, supervised and presided over the general elections of 27th December, 2007. At the conclusion of the elections, winners of parliamentary and civic seats were announced and on 30th December, 2007 the ECK, through Kenya Gazette Notice No. 12612, declared Hon. Mwai Kibaki as the person elected President of the Republic of Kenya. Upon the announcement of the presidential results, the country experienced acts of violence related to the announcement of the results, necessitating external intervention which came through the Committee of Eminent African Persons chaired by the former Secretary-General of the United Nations Mr. Kofi Annan.

7. On 25th February, 2008 H.E. President Mwai Kibaki and Hon. Raila Odinga signed the National Accord which among other things led to the formation of a Coalition Government. The National Accord committed the country to the implementation of a reform agenda which would, among other things, address the question of recurrent conflicts. Pursuant to the peace accord, H.E. President Mwai Kibaki appointed the Independent Review Commission (IREC) under the chairmanship of Judge Johann Kriegler under the Commissions of Inquiry Act, Cap 102.

8. According to Kenya Gazette Notice No. 1983 of 14th March, 2008, among the things the IREC was expected to do was to look into the constitutional and legal framework that formed the basis of the conduct of the general elections of 2007; examine the organizational and management structure of the ECK in order to assess its independence and capacity during the preparation and conduct of the 2007 elections; investigate the organization and conduct of the 2007 electoral operations; examine the public participation in the 2007 electoral process and the electoral environment, including the roles and the conduct of the political parties, media, civil society and observers; investigate the vote counting and tallying for the entire election with special attention to the presidential election; and assess the functional efficiency of the ECK and its capacity to discharge its mandate.

9. At the conclusion of the exercise, the IREC was expected to recommend electoral reforms including constitutional, legislative, operational and institutional aspects, as well as accountability mechanisms for the ECK Commissioners and staff pertaining to electoral malpractices in order to improve future electoral processes.

10. The IREC presented its report titled *"Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007"* to H.E. President Mwai Kibaki on 17th September, 2008. In a nutshell, the report recommended fundamental amendments to the laws governing the conduct and management of elections in Kenya. The IREC report presented to the President on 17th September, 2008 shall henceforth be referred to as "*the Kriegler Report*".

11. Through Constitution of Kenya (Amendment) Act No. 10 of 2008 (hereinafter simply referred to as "the 2008 Amendment"), the ECK was disbanded and replaced by a body known as the Interim Independent Electoral Commission (IIEC). Also created by the 2008 Amendment was a body known as the Interim Independent Boundaries Review Commission (IIBRC). There were other amendments introduced through the 2008 Amendment.

12. On 27th August, 2010, the Constitution of Kenya 2010 (hereinafter simply referred to as the 2010 Constitution) was promulgated. Article 88(1) of the 2010 Constitution established the Independent Electoral and Boundaries Commission (IEBC) which is the body currently charged with the conduct of elections in Kenya.

13. The 2010 Constitution repealed the Constitution on which this petition is anchored. It is also necessary to note that this petition was filed prior to the 2008 Amendment. On 11th November, 2008, this Court (Nyamu, J (as he then was)) issued a conservatory order restraining the Government of Kenya from taking or commencing any executive or legislative action or process to disband or abolish the ECK and/or removing its members from office pending hearing and determination of the application. The conservatory order was by consent extended on 24th November, 2008 until further orders of the Court. Despite the existence of the said order, the 2008 Amendment was nevertheless effected by Parliament.

THE PETITIONERS' CASE

14. In brief, the petitioners' case is that there is need to interpret the meaning and import of their security of tenure, the independence of the ECK, the scope of the legislative power of the National Assembly, the nature and limits of checks and balances under the Constitution and whether in a constitutional democracy any organ or authority established by the Constitution can claim and exercise absolute powers over or in respect of other organs and constitutional offices.

15. It is the petitioners' argument that under sections 30, 46 and 47 of the repealed Constitution, the National Assembly had no power to validly pass a constitutional amendment to strip the ECK commissioners of their security of tenure in order to circumvent the necessity of complying with the process of their removal as set out in Section 41 of the same Constitution. According to the petitioners, the 2008 Amendment circumvented the provisions of Section 41 of the pre-2008 Constitution whose aim was to shield the ECK from interference by the Executive and/or the Legislature.

16. It is the petitioners' case that an independent, permanent and substantive electoral body was one of the basic organs of the repealed Constitution critical to the safeguard of democracy, political accountability and free and fair elections. They therefore hold the view that the ECK could not have been replaced by a temporary body constituted by the National Assembly and solely or mainly accountable to it, considering that the election of members of the National Assembly was to be supervised by that body.

17. The petitioners submit that under sections 30 and 47 of the repealed Constitution, Parliament was vested with limited power to alter the Constitution. It is the petitioners' case that Parliament had no power to alter the following doctrines which were embedded in the Constitution:

a. The Republican character of the Kenyan Nation State;

b. Supremacy of the Constitution which means and implies that all organs of Government or the state were subordinate to the Constitution and their powers and functions were to be exercised in conformity with the Constitution and without subverting or undermining the limitations, checks and balances necessary for democratic, orderly and accountable governance;

c. The sovereignty of the people embodied in repository of the ultimate political power in the citizens of Kenya which is exercisable through regular, free and fair elections supervised by an independent electoral commission whose tenure is secured and guaranteed by the Constitution;

d. The doctrine of separation of powers;

e. The independence of the Judiciary;

f. Democratic government in which the head of the Executive and members of legislative branches are elected directly by the citizens;

g. Rule of law and the Bill of Rights enforceable by a superior court with original jurisdiction to adjudicate all legal disputes; and

h. Security of tenure of judges, Attorney General and other holders of constitutional offices and commissions including the ECK.

18. The petitioners contend that Parliament could not legitimately and/or lawfully amend the Constitution to strip off the independence or tenure of constitutional office holders, abolish constitutional organs, offices or commissions in order to remove the holders and transfer their functions to temporary bodies. They therefore contend that the 2008 Amendment was in breach of Sections 41 and 104 of the Constitution and was therefore unconstitutional and a serious abuse of the legislative powers of Parliament.

19. The petitioners postulate that the procedure for removal of the ECK commissioners as was set out in Section 41 of the Constitution prior to the 2008 Amendment embodied the right to a fair hearing, due process and protection of law enshrined in sections 70 and 77 of the repealed Constitution. It is the petitioners' view that their removal without compliance with Section 41 amounted to violation of their fundamental rights enshrined in sections 70 and 77 of the Constitution. Further, that had their removal complied with Section 41, they would have been entitled to appear before a tribunal thus complying with the requirement that the removal of constitutional office holders is premised on a finding of good cause in a judicial process. They therefore submit that Parliament effectively usurped a judicial function in removing members of the ECK through the legislative mechanism of constitutional amendment.

20. The petitioners assert that a critical element of the security of tenure that had been conferred upon them by the Constitution was the guarantee and security of their remuneration which was provided for in Section 104 of the repealed Constitution. It is their case that the financial, professional and career rights that were vested by sections 41 and 104 of the repealed Constitution amounted to proprietary interests in their tenure which was protected by Section 75 of the Constitution. They therefore conclude that their

removal from office in a manner inconsistent with sections 41 and 104 of the repealed Constitution amounted to a violation of their constitutional rights under Section 75 of the same Constitution.

21. The petitioners state that the Kriegler Report had recommended a raft of institutional and constitutional amendments to reform the ECK and the electoral and political systems. In their view, the act of restricting the changes to the ECK was actuated by political malice, ulterior motives and amounted to discrimination. Further, that the abolishment of the ECK and its replacement by the IIEC was based on a forlorn hope that a new Constitution would be in place within 15 months of the repeal of Section 41 of the repealed Constitution.

22. The petitioners contend that Parliament had no power under Section 47 of the repealed Constitution to amend the Constitution in order to create a politically motivated legal bypass to remove constitutional office holders from office contrary to the procedure set out in the Constitution. The petitioners hold the view that allowing such an amendment to pass would create room for Parliament to amend the Constitution and remove other constitutional office holders like the President, the Speaker of Parliament, judges, the Attorney General, members of the Public Service Commission and the Controller and Auditor-General.

23. It is the petitioners' argument that Parliament had no power to bridge, curtail or whittle down or otherwise compromise the judicial power conferred upon the tribunal by Section 41 of the repealed Constitution in respect of the removal of members of the ECK. They also argue that Parliament could not act in a manner that would result in the dilution of the jurisdiction of the High Court as expressed under Section 123(8) of the same Constitution. The petitioners submit that the functions of the tribunal and the High Court extended to the determination of the question whether the ECK had exercised its functions in accordance with the Constitution or any other law.

24. The petitioners assert that their removal was an abuse of legislative power and contempt for the repealed Constitution since Parliament's action amounted to a legislative judgement against the ECK members as a substitute for judicial power vested in the tribunal and the High Court. They contend that the abolition of the ECK and the removal of its members through a constitutional amendment were punitive and yet ECK had not been tried and found guilty of any offence thus warranting the punishment of disbandment and removal of its members. It is the petitioners' case that the amendment of Section 60 so as to enable the establishment of an Interim Independent Constitutional Dispute Resolution Court amounted to a change of the basic structure of the Constitution. Further, that such a Court was not in any way independent as it was beholden to the MPs who created it.

25. The petitioners aver that the abrupt termination of their tenure without notice entitles them to damages. They therefore claim three months' salary in lieu of notice, gross salary for the remaining contract period of each commissioner, a commutation of their annual leave entitlement for damages and gratuity.

26. The petitioners aver that since the 2008 Amendment was premised on the Kriegler Report's adverse findings on the ECK's role in the conduct of the 2007 general elections, the legality and legitimacy of the election of H.E. President Mwai Kibaki and all Members of Parliament had been eroded and voided by the 2008 Amendment and the logical thing for the President and MPs to do was to vacate their seats. In the alternative, they urge the Court to declare null and void the Gazette Notices declaring the election of the President and Members of Parliament with effect from the date the 2008 Amendment came into force. They also urge the Court to declare null and void and quash the certificates given to the President and MPs showing them as duly elected in the 2007 General Election.

27. The petitioners wrapped up their case by contending that despite the promulgation of the 2010 Constitution, their cause of action remains alive and this Court is enjoined to give appropriate redress.

28. In order to firm up their case, the petitioners made submissions. On the supremacy of the Constitution, the petitioners submit that Section 3 of the former Constitution of Kenya provided for the supremacy of the Constitution which was to have the force of law throughout Kenya. The petitioners

relied on the decision of Ringera, J (as he then was) in **Njoya & 6 others v Attorney General & 3 others (No 2) [2004] 1 KLR 261** (hereinafter simply referred to as "**Njoya 2"**) in which the learned Judge stressed that this Court's most sacrosanct duty is to uphold the supremacy of the Constitution.

29. On the strength of the decision in the above cited case, the petitioners submit that Parliament had no power to and could not, in the guise of amendment, either change the basic features of the Constitution or abrogate and enact a new Constitution. It is their case that a contrary interpretation would have meant that Parliament could have enacted that Kenya could cease to be a sovereign Republic and become an absolute monarchy, or that all the legislative, executive and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be co-optional, or that all fundamental rights could stand suspended and such other absurdities which would result in there being no Constitution.

30. Still stressing the need to protect the supremacy of the Constitution, the petitioners cited the decision in **Nairobi H.C. Miscellaneous Application No. 22 of 2004 Peter O. Ngoge v The Hon. Francis Ole Kaparo & 4 others** in which this Court (J. G. Nyamu, R. Wendo and G. A. Dulu, JJ) stated, *inter alia,* that the supremacy clause of the Constitution is the basis upon which the High Court determines whether any law or action by any organ of the State is consistent or inconsistent with the Constitution. In that case the Court stated that this Court has power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. This power extends to intervening in parliamentary procedures, powers and privileges in order to ensure constitutional compliance with democratic values. According to the petitioners, nothing is immune from the courts' scrutiny, if the same is in conflict with the Constitution.

31. It is the petitioners' contention that even in the current constitutional dispensation, the supremacy of the Constitution is a key constitutional principle as was stated by this Court (R. Mwongo, H. Omondi, C. Meoli, M. Ngugi and H. Chemitei, JJ) in **Judicial Service Commission v Speaker of the National Assembly & 8 others (2014) eKLR.**

32. The petitioners conclude their submission on this particular issue by stating that if Parliament were, for example, to purport to exercise judicial power (except over contempt in the House) this Court would have been entitled to intervene appropriately under sections 3, 60 and 84 of the repealed Constitution. They assert that in Kenya it is the courts that are the protectors of the supremacy of the Constitution as well as the interpreters of the Constitution and all legislation.

33. Turning to the question of the conservatory orders issued by the Court the petitioners submit that the issuance of orders with respect to a decision or act of Parliament is not a novelty. It is their case that this is a recognition that there has been a sea change in governance, from the situation in which Parliament was deemed, and deemed itself, supreme, to a constitutional dispensation where the Constitution is the overlord and all organs of state are its handmaidens. In support of their argument they cited the decision in the South African case of **De Lille & Another v. The Speaker of the National Assembly (1998)(3) SA 430(C**) where the Court stated:

> **"The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."**

34. The petitioners also rely on the decision in **Speaker of National Assembly v De Lille MP & Another 297/98 (1999)(ZASCA50)**where upon the Speaker appealing the above cited decision, the appellate Court stated:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

35. Similarly, in **Doctors for Life International v Speaker of the National Assembly and Others CCT 12/05 (2006) ZACC 11 at para 38**, the Court held that:

"But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament "must act in accordance with, and within the limits of, the Constitution", and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled." Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations. This Court "has been given the responsibility of being the ultimate guardian of the Constitution and its values." Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that "the obligations imposed by [the Constitution] must be fulfilled." It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

[References excluded]

36. According to the petitioners, further evidence of the equality of the three arms of government is found in the statement of Ringera, J in **Njoya 2** to the effect that:

"The concept of Constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it."

37. On the safeguards in removal of statutory or constitutional office holders, the petitioners point to the case of **Taib vs. Minister for Local Government & 4 Others (2008) 3 KLR (EP) 433** in which the Court of Appeal held, *inter alia,* that because nominated councillors did not serve at the pleasure of the Minister for Local Government, even in the absence of express provisions, a nominated councillor could not be removed without due process.

38. The petitioners also cite the decision of the Court of Appeal in **Makokha & 4 Others v Sagini & 2 Others [1994] KLR 46** to emphasise the requirement for compliance with the law when removing an employee whose employment is guaranteed by statute. One of the holdings in that case was that some employees in public positions may have their employment guaranteed by statute and cannot be lawfully removed unless the formal requirements laid down by statute are observed.

39. The petitioners point out that it is not enough to say that they can be compensated for the loss of their jobs as their positions had statutory underpinning. In support of this argument the decision in **Republic v Judges & Magistrates Vetting Board & Ex parte Hon. Lady Joyce Khaminwa (2013) eKLR** is cited. In that case the Court stated that:

"It was submitted on behalf of the respondent that even if the applicant is removed from her position as a Judge and she were to succeed in this application she would be compensated for the loss she would have be sustained. It is now trite that the position of a Judge of a Superior

Court cannot be treated in the same manner as that of an ordinary employment. A Judge of a Superior Court's position has statutory underpinning hence it is not the kind of position where it can be said that the loss of the status can be compensated in monetary terms. See Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai. 20 of 1994."

40. On whether the commissioners of the ECK could be removed without compliance with Section 41 (repealed by the 2008 Amendment), the petitioners contend that the only way to remove them was through a tribunal appointed by the President. On this argument they cited the decision in **Odinga & Others vs. Chesoni and Another [1993-2009] 1 EAGR 384** where the Court stated that:

"No other provision exists in our Constitution creating causes and courses of action. Indeed it is not that all sections of the Constitution must be contended in court anyway. The provision for the Electoral Commission is such a section. Under Section 41(1) the Electoral Commission is established with its Chairman plus the members. This is a presidential prerogative. The qualifications for an Electoral Commission's members are set out in Section 41(3). The manner to remove a Commission member is by a Presidential Tribunal appointed under Section 41 and (6). Reasons for removal fall in sub-section (5). There is no room for this Court to declare any Electoral Commission member "unfit and disqualified" therefore removing him from the Electoral Commission. That is how the legislature intended it to be and this Court will not arrogate to itself the duty or anything regarding removal of electoral Commission members."

41. On their contention that the 2008 Amendment amounted to usurpation of judicial power by Parliament, the petitioners argue that when they were removed from office in December, 2008 judicial power under the existing constitutional order vested in the Judiciary. On the authority of **Njoya 2** they submit that no legislative or executive action of the State whether contained or expressed as a decree, statute or constitutional amendment can take judicial power away from the courts and vest it elsewhere.

42. In support of this assertion the petitioners cite the decision of the Supreme Court of Malaysia in **Public Prosecutor vs. Dato Yap Peng [1988] LRC (Const.) 69** where it was held that a legislative provision conferring the power of transfer of cases on the prosecutor was invalid as it encroached on the judicial power to adjudicate disputes. The Court opined that the power of the public prosecutor did not extend to regulation of criminal procedure or the jurisdiction of the courts, but related only to the prosecution, not trial, of criminal proceedings. His power to institute proceedings was complete once the court was seized of jurisdiction. From then the whole conduct of the proceedings should be within the exclusive judicial power of the court until their conclusion. At page 88 of that decision, Abdoolcader, S.C.J. defined judicial power as **"the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties."**

43. On the importance of protection of individual rights by the courts, the petitioners cited the decision of the Court of Appeal in **Thomas P.G. Cholmondeley v Republic, Nairobi Criminal Appeal No. 116 of 2007 (unreported)** where it was stated that:

"We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the Courts must try to keep the lion away from the lamb. In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person

and the state. No statute gives the state such privileges, and the Constitution, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the Court."

44. The petitioners contend that the actions of the ECK could only be questioned through court action. In support of this proposition they cited the decision in **The Electoral Commission of Kenya v Attorney-General [1993-2009] 1 EALR 610** where it was stated that:

"I find that procurement is central to the exercise of ECK powers pursuant to section 41(8) and in the exercise of its powers it enjoys autonomy subject to section 123(8) of the Constitution and since the Review Board is not a court it cannot lawfully exercise its power on the ECK. I find and hold that the exercise of any powers by the Board is *ultra vires* section 41(9) and section 128(8) (sic) of the Constitution and therefore regulations 40, 41 and 42 are *ultra vires* and void in relation to ECK only. For the avoidance of doubt the regulations are lawful as regards any other specified public entities.

However the autonomy of the ECK is not absolute in that section 123(8) of the Constitution provides that any question relating to the exercise of the powers of the ECK can only be entertained and determined by the Court…."

45. On the High Court's jurisdiction to enforce fundamental rights and interpret the Constitution, the petitioners contend that this power is not abridgeable. They assert that under sections 3, 83, 84 and 123(8) of the former Constitution the High Court was vested with jurisdiction to interpret the Constitution and enforce the Bill of Rights. They submit that this jurisdiction was considered as vital to maintain constitutionalism and protect basic human rights in any constitutional democracy.

46. The petitioners cite various authorities in support of this proposition. In **The Queen v Big M. Drug Mart Ltd (Others Intervening) [1986] LRC (Const.) 332** it was stated at page 356 that:

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

47. At page 374, the Supreme Court of Canada opined that:

"While it remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the legislature has acted within its constitutional authority in division of powers terms, the Charter demands an evaluation of the infringement by even *intra vires* legislation of the fundamental rights and freedoms of the individual. It asks not whether the legislature has acted for a purpose that is within the scope of the authority of that tier of government, but rather whether in so acting it has had the effect of violating an entrenched individual right. It is, in other words, first and foremost an effects-oriented document."

48. On the principles governing the interpretation of the Constitution, the petitioners referred to the case of **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others v The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** where it was opined:

"The General provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore

endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights; our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

49. The petitioners assert that the Constitution can only be amended by following the process outlined in the Constitution. In support of this argument the petitioners cite the decision in **Macharia v Murathe & Another, Nairobi HCEP No. 21 of 1998 (2008) 2 KLR (EP) 189 (HCK)** where the Court cited with approval the statement at pages 763-4 in the Indian case of **Re under Article 143 Constitution of India-All India Reporter 1965 (vol 52) p745** that:

"In a democratic Country governed by a written constitution, it is the Constitution which is supreme and sovereign…….it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because art 368 of the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.''

50. The petitioners' contention that this Court has a duty to safeguard basic human rights and the rule of law is anchored on, among other decisions, the case of **Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All ER, 138** in which it was stated at page 150 that:

"Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

51. The petitioners contend that the courts must always be in the forefront in protecting the human rights of the individual and the responsibility vested on the courts as protector of human rights is one that should not be abdicated under whatever circumstances. To drive this point home they cite the recent ruling by the Court of Appeal in **Attorney General & Another v Coalition for Reform and Democracy & 7 Others [2015] eKLR** where the Court stated that:

"It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar or interests perceived to be of greater moment in moments such as this."

52. The petitioners assert that the 2008 Amendment was carried out in clear breach of a court order. They

aver that when the court order was brought to the attention of the Speaker by a Member of Parliament, the Speaker delivered a ruling on 27th November, 2008 in which he stated that the order of the Court made in this matter **"does not and, indeed, cannot prevent Parliament from carrying out its legislative functions."**

53. According to the petitioners, the Speaker's communication from the Chair was in contempt of the court order and the 2008 Amendment was thus invalid. One of the cases cited in support of this argument is that of **Commercial Bank of Africa v Ndirangu (1990-1994) EA 69 (CAK)** in which the Court observed that:

> **"It is imperative that Orders of the Court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the Courts. The blatant disobedience of the Court's consent order in this case renders any transactions in breach of the order to be void and the learned Judge was fully justified in making the orders complained of. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court."**

54. It is the petitioners' case that once a court order is issued, the same ought to be obeyed and the decision of the Speaker to allow the debate to continue was in utter contempt of the Court. The petitioners referred to the case of **Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others 2014 eKLR** in which the Court stated:

> **"We cannot over emphasis the fact that court orders once issued must be obeyed by those against whom they are directed unless or until they are either discharged or set aside. More so because once a court order is issued, it binds all and sundry, the mighty and the lowly equally, and the County Assembly and the Senate are no exception. The developing trend in our country where parties to litigation appear to be choosing which court orders to obey or disobey must be stopped in order to build the public confidence in the rule of law."**

55. On the question of redress, the petitioners contend that under Section 84 of the former Constitution the High Court could give any appropriate order or declaration to redress proven breach of constitutional rights and freedoms. They also point to the fact that Article 23 of the current Constitution sets out a broad range of remedies that the High Court may grant in order to uphold and safeguard the Bill of Rights.

56. It is the petitioners' case that the contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered because of such contravention. Such redress can include compensation for loss of earnings. In the case of constitutional office holders, they are entitled to full pay until the tribunal submits its recommendation. In support of their position the petitioners have cited the following cases: **Marete v Attorney General [1987] KLR 690; Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 others (2006) eKLR;** and **Gad David Ojuando v Prof. Nimrod Bawibo & 2 Others, Court of Appeal at Kisumu Civil Appeal No. 336 of 2005 (unreported).**

THE 1ST RESPONDENT'S CASE

57. The thrust of the 1st Respondent's argument is that by dint of Article 2(3) as read with Article 259(3) and Section 28(1) of the Sixth Schedule of the 2010 Constitution, this Court lacks jurisdiction to entertain the petition herein.

58. According to the 1st Respondent, Section 1(b) of Sixth Schedule of the 2010 Constitution defines "Electoral Commission" as the Interim Independent Electoral Commission. Section 28(1) of the said Schedule then goes ahead to give constitutionality and legality to the Interim Independent Electoral Commission by providing that:

> **"The Interim Independent Electoral Commission established under section 41 of the former**

Constitution shall continue in office in terms of the former Constitution for its unexpired term or until the Independent Electoral and Boundaries Commission established under this Constitution is established, whichever is later."

59. The 1st Respondent contends that if the petition is allowed, it would amount to questioning the legality or the validity of the 2010 Constitution and this would be contrary to Article 2(3) of the said Constitution.

60. With respect to the substance of the petitioners' claims, the 1st Respondent submits that the petitioners' grievances relate to their employment and by dint of the 2010 Constitution those are matters that fall into the province of the Industrial Court (now the Employment and Labour Relations Court). The 1st Respondent urges this Court to refer the matter to the Employment and Labour Relations Court.

61. Citing the decision of D. S. Majanja, J in **United States International University (USIU) v Attorney General [2012] eKLR,** (USIU) the 1st Respondent contends that the Employment and Labour Relations Court is empowered to deal with employment and labour relations matters and all fundamental rights ancillary to and incidental to employment and labour relations including the interpretation of the Constitution in matters before that Court.

62. While the 1st Respondent appreciates the existence of Section 22(1) of the Sixth Schedule of the 2010 Constitution, it submits that the said Section was only applicable as long as the Employment and Labour Relations Court had not been set up. Section 22(1) of the Sixth Schedule of the 2010 Constitution states:

"All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."

63. The 1st Respondent contends that Section 22 of the Sixth Schedule of the 2010 Constitution should be interpreted in the language of Majanja, J in **USIU** (supra) to the effect that:

"A corresponding court to the High Court, that is the Industrial Court, has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour matters whether filed in the High Court before or after the establishment of the Industrial Court."

64. On the need to first establish whether this Court has jurisdiction, the 1st Respondent relies on the decisions of this Court (Ojwang, J) (as he then was)) in **Misc. Application No. 639 of 2005 Boniface Waweru Mbiyu v Mary Njeri and Another** and that of the Supreme Court in **Re Matter of the Interim Independent Electoral Commission, Constitutional Application No. of 2011.** According to the 1st Respondent, jurisdiction flows from the law and where the Court establishes that it has no jurisdiction then it must lay down its tools without further ado.

65. Another ground taken up by the 1st Respondent is that the substance of the petition has since become moot. The 1st Respondent submits that with the promulgation of the 2010 Constitution, the former Constitution and in particular the 2008 Amendment ceased to have the force of law in Kenya and rendering an opinion as to its constitutionality will therefore be engaging in an academic exercise which is not the business of the Court. The 1st Respondent asserts that courts are established to adjudicate on real issues of facts and law to which the decisions rendered will be capable of implementation.

66. It is the 1st Respondent's submission that there is a substantive jurisdictional limitation of the mandate of the courts. The import of this limitation is that only cases presenting justiciable controversies are to be decided. If the controversy is hypothetical or if the judgement of the Court for some other reason cannot

operate to grant any actual relief, the case is moot and the court is without power to render a decision. The 1st Respondent therefore urges this Court to dismiss the petition on this preliminary point of law.

67. Turning to the 2008 Amendment, the 1st Respondent contends that the passage of that law complied with the provisions of the repealed Constitution. It is the 1st Respondent's case that once Parliament complied with the provisions of Section 47, then this Court has no business looking into the matter. It is submitted that the former Constitution clearly provided that a certificate of the Speaker was conclusive as regards the proceedings in the Assembly and was not to be questioned in any court. The 1st Respondent asserts that any declaration that the process was unconstitutional would amount to taking away the sovereign power of the people of Kenya donated to Parliament to make legislation.

68. On the petitioners' contention that the disbandment of the ECK was unconstitutional and that the 2007 general elections ought to have been declared null and void, the 1st Respondent urges this Court to reject those arguments. The 1st Respondent's case is that the 2008 Amendment did not alter the basic structure of the Constitution and neither did it amount to enactment of a new Constitution.

69. In this respect, the 1st Respondent argues, firstly, that the ECK was not a key component of the repealed Constitution as it did not form part of the Independence Constitution but was only brought in by the 1997 constitutional amendment brokered by the Inter Party Parliamentary Group (IPPG). According to the 1st Respondent, this fact alone is sufficient to demonstrate that the ECK was not part of the basic structure of the Constitution but a creature of a constitutional amendment.

70. Secondly, the 1st Respondent submits that if ECK could be considered as forming the basic structure of the Constitution, then the same was hinged on the existence of an electoral process, the mandate of the ECK, its independence and security of tenure. It is the 1st Respondent's case that these key ingredients were retained by the 2008 Amendment and it is untenable to claim that the basic structure was distorted.

71. The 1st Respondent asserts that the 2008 Amendment could not have retrospectively affected the results of the 2007 General Election. The decision in **Application No. 2 of 2011, Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others** is cited in support of the argument. In that case the Supreme Court stated:

> **"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."**

Therefore, according to the 1st Respondent, a retrospective application of the 2008 Amendment would adversely impact on the rights of those who were elected in the 2007 general elections.

72. As regards the petitioners' prayer for an order for payment of salaries and allowances for the remainder of their terms as members of the ECK, the 1st Respondent contends that the abolishment of their offices and the consequential termination of their employment was a result of a valid and constitutional operation of the law in pursuit of the will of the people. Further, that fair labour practices connote fair remuneration for the work done, not remuneration for work not done. The 1st Respondent postulates that employment rights are subject to limitation including limitation by operation of the law as

happened in this matter. The 1st Respondent concedes that the petitioners may only be entitled to gratuity payable in accordance with their contracts of service for the period they had served.

73. The 1st Respondent therefore seeks the dismissal of the petition with costs.

THE 2ND RESPONDENT'S CASE

74. The 2nd Respondent's first ground of objection to the petition is premised on the lack of jurisdiction by this Court to hear a suit filed against the Speaker of the National Assembly in respect of acts of the Speaker in exercise of the powers conferred and vested in him by the Constitution of Kenya, the Standing Orders and the National Assembly Powers and Privileges Act.

75. Secondly, the 2nd Respondent contends that the petitioners lack *locus standi* to seek a declaration that all Members of Parliament were not validly elected as they have not demonstrated, as required by Section 44 of the repealed Constitution, that they were registered as voters in the electoral areas of the said Members of Parliament. Further, that even though the orders the petitioners seek are only available in election petitions, they have failed to comply with the procedure set out in Section 44 of the repealed Constitution and the repealed National Assembly and Presidential Elections Act for filing election petitions thus rendering their petition incurably defective and contrary to the provisions of the law.

76. Thirdly, the 2nd Respondent contends that Parliament properly exercised its powers under the repealed Constitution by enacting the 2008 Amendment. In addition, the 2nd Respondent asserts that the constitutional principle of separation of powers precludes the High Court from exercising any jurisdiction over the proceedings of Parliament.

77. The 2nd Respondent also contends that joining the 2nd Respondent to these proceedings offends the principle of parliamentary privilege. The 2nd Respondent's case is that where an enactment is contested, neither the National Assembly nor the Speaker of the National Assembly is a party to the matter as the proceedings of the House are privileged. According to the 2nd Respondent, the only issue should be the constitutionality of the enactment and to hold otherwise would be an attack on the independence of the National Assembly. Such an action would amount to intimidation of the Members of Parliament and would be tantamount to an attempt to gag or prevent Parliament from carrying out its legislative mandate.

78. The 2nd Respondent states that Section 56 of the repealed Constitution provided *inter alia* that Parliament may make standing orders regulating the procedure of the Assembly and in accordance with that Section, the National Assembly (Powers and Privileges) Act (Cap.12) had been enacted, section 12 of which barred any challenge to the proceedings or decision of the Assembly or the Committee of Privileges in any court. Further, that Section 29 of the same Act provides that neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by the Act or the Standing Orders.

79. In further support of the 2nd Respondent's argument, the statement in **The Republic v The Judicial Commission of Inquiry into the Goldenberg Affair, HC Misc. Application No. 102 of 2006** to the effect that the Court had no authority to intervene in the business of Parliament was cited. In that case, the Court proclaimed:

> **"We find that the fact that s 4 and s 12 of the National Assembly (Powers & Privileges Act) were made pursuant to s 57 of the Constitution is significant in that, it gives the two sections constitutional underpinnings in that the two sections reinforce the principle of separation of powers and therefore any finding which purports to encroach on a decision of Parliament which is made within its constitutional territory or mandate would also be unconstitutional and the courts and other judicial bodies should be, in the forefront of avoiding any possible constitutional conflicts in all their undertakings…..**

…the Respondents need not worry that the Court will import the ruling of the Hon Francis Ole Kaparo, the learned Speaker of the National Assembly, into this judgment or thereby influenced. The Court is keenly aware of this delicate balance because of the constitutional importance of Parliament retaining control over its own proceedings and because of the extent of parliamentary privilege as stated in sections 56 and 57 of the Constitution and expressly reaffirmed in section 12 of the National Assembly (Powers and Privileges) Act. The ruling by the Honourable Speaker of the National Assembly is therefore a matter both extraneous and external to this judgment."

80. The 2nd Respondent also relied on the decision in **Nairobi HCCC No. 394 of 1993, Raila Odinga v Francis Ole Kaparo and the Clerk of the National Assembly** which cited with approval **Stockdale v Hansard [1839] 9 Ad. & El** at page 209 where their Lordships observed that:

"Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere."

81. Other decisions cited by the 2nd Respondent in support of the argument that the Judiciary cannot interrogate the proceedings of Parliament are: **Misc. Civil App. No. 747 of 2006, Republic v Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others** and **Kiraitu Murungi & 6 Others v Hon. Musalia Mudavadi & Another, Nairobi HCCC No. 1542 of 1997.**

82. On the argument that the Speaker's decision to allow the debate on the 2008 Amendment to proceed despite the existence of these proceedings breached the *sub judice* rule, the 2nd Respondent contends that the rule was not breached. It is the 2nd Respondent's case that the essence of the *sub judice* rule in the Standing Orders of Parliament is that no member should refer to a matter which is the subject of active civil or criminal litigation and whose discussion would prejudice its fair determination. The 2nd Respondent contends that the *sub judice* rule is not an absolute rule as it depends on the discretion of the Speaker of the National Assembly. The 2nd Respondent submits that the rule was made by the House for the orderly conduct of its own affairs and the determination of its application is in the sole discretion of the Speaker; it is supposed to be construed in such a manner as to prevent undue public interest and attention in a matter already active before a court of law as to unduly seem to influence the court to rule in a particular manner. However, it is also supposed to be construed in a manner that prevents the gagging of Parliament from debating matters of national importance and carrying out its constitutional mandate by persons rushing to Court and filing a suit for the purpose. The 2nd Respondent asserts that the Judiciary is an independent constitutional organ and judges are not expected to be influenced in their decisions merely because cases have been discussed outside the courts.

83. The 2nd Respondent therefore contends that the petitioners' argument that an alleged breach of the Standing Orders made under Section 56 of the former Constitution renders the 2008 Amendment unconstitutional lacks a basis in law. Further, that what the Speaker simply did through the communication from the Chair was to state the correct constitutional position as regards the functions of Parliament. The 2nd Respondent also submits that neither the National Assembly nor its Speaker were parties to this petition, and nor were any orders directed or served upon them while debate on the 2008 Amendment was going on.

84. On the contention by the petitioners that the Attorney General was privy to extension of the conservatory orders on the 24th of November 2008, the 2nd Respondent asserts that this fact is not relevant to the conduct of the business of Parliament as the Attorney General was but an *ex officio* Member of the House and could not vote in any business of the House. According to the 2nd Respondent, the interpretation of the *sub judice* rule, as a Standing Order in the National Assembly is not the business of the Court. At best, the Court should only be concerned that Parliament considered it when Parliament deemed it necessary. It is the 2nd Respondent's view that it is a serious attack on the independence of Parliament if a Speaker's ruling is made the subject of litigation.

85. On the constitutionality of the 2008 Amendment, the 2nd Respondent submits that the amendment was constitutional. According to the 2nd Respondent, an amendment to the Constitution can only be invalidated if the procedure provided for its enactment has been disregarded. In support of this argument the 2nd Respondent referred the Court to the opinion of Lenaola, J. in **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013] eKLR** where he stated:

> **"In the case of Premier of Kwa Zulu Natal v President of the Republic of South Africa (1996) (1)(SA) 769, the Court dealt with the issue whether a constitutional amendment could possibly violate the spirit of the constitution. The Court stated that;**
>
> **"There is a procedure which is prescribed for amendments to the constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable.""**

86. The 2nd Respondent's case is that the impugned 2008 Amendment was enacted by the National Assembly pursuant to its amending powers under Section 47 of the repealed Constitution and all thresholds for securing the amendment were met. The 2nd Respondent asserts that the purpose of the impugned 2008 Amendment was to facilitate the exercise of the constituent power of the people which must never be fettered.

87. The 2nd Respondent contends that what would amount to changing the basic structure of the Constitution was defined in **Njoya 2** as:

> **"It would be tantamount to an affirmation, for example, that Parliament could enact that Kenya cease to be a sovereign republic and become an absolute monarchy, or that all the legislative, executive and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be co-optional, or that all fundamental rights could stand suspended and such other absurdities which could result in there being no "this Constitution of Kenya". In my judgment, the framers of the Constitution could not have contemplated or intended such an absurdity."**

88. It is the 2nd Respondent's case that abolishing the ECK under the former Constitution cannot be construed as an 'absurdity' and therefore an affront to the basic structure of the Constitution.

89. Relying on the political question doctrine the 2nd Respondent argues that the issues raised by the petitioners are not justiciable and the same were better left to other branches of government to deal with. The 2nd Respondent contends that the relevant political questions were raised by the crisis following the 2007 general elections and were phrased by the Kenya National Dialogue and Reconciliation Team (KNDRT) under Agenda Item Three as follows:

> **"We recognize that there is a serious crisis in the country, we agree a political settlement is necessary to promote national reconciliation and unity…… A political settlement is necessary to manage a broad reform agenda and other mechanisms that will address the root cause of the crisis."**

90. According to the 2nd Respondent, a sequel to 'Agenda 3' was the *'Agreement on the Principles of Partnership of the Coalition Government'* dated 28th February 2008, which laid the basis for the passing of the 2008 Amendment and the National Accord and Reconciliation Act, 2008 and both came into force on the 20th of March 2008. The former constituted a radical amendment to the Constitution by providing under Section 3A that **'consistency under this Constitution shall not apply in respect of an Act made pursuant to section 15A (3)',** this in reference to the National Accord and Reconciliation Act which radically reduced the executive power of the President on a temporary basis in order to facilitate the sharing of executive power with the Prime Minister.

91. The 2nd Respondent contends that by reason of the 'Political Question', the 2008 Amendment not only abolished the ECK, but also provided a constitutional basis for the replacement of the Constitution through a referendum, including also the establishment of the Interim Independent Constitutional Dispute Resolution Court with exclusive jurisdiction to hear and determine matters arising from the review of the Constitution. The latter nipped the original jurisdiction of the High Court. The 2nd Respondent argues that the Kenyan polity required saving and extreme measures had to be taken to obviate the burning of the entire country.

92. The 2nd Respondent urges this Court, in determining the constitutionality of the impugned 2008 Amendment Act, to apply the historical, prudential and harmonious interpretation of the Constitution bearing in mind that the Constitution is a living tree.

93. On the application of the political doctrine question, the petitioners referred to the decision in **HC Misc Civil Application No. 677 of 2005, Patrick Ouma Onyango & 12 Others v Honourable Attorney General & 2 Others.**

94. On another aspect, the 2nd Respondent urged this Court to respect the separation of powers between the Judiciary and Parliament in order to avoid friction between the two arms of government. According to the 2nd Respondent, in order to allow harmonious functioning of the organs of government, there cannot be a 'pure' doctrine of separation of powers. The three organs of State must, as much as possible, employ coordinated action in order to sustain the polity. The 2nd Respondent anchors its argument on a ruling delivered by then Speaker of the National Assembly Hon. Kenneth Marende on 3rd February, 2011 in the matter of the alleged unconstitutionality of the nomination of certain constitutional office holders.

95. In that ruling the Speaker stated:

> **"The view that it can fall to another organ whether the Executive or the Judiciary to determine for Parliament a matter before Parliament is, to my mind, constitutional heresy, which I would urge that every person in this country and more so, in this House, completely purges and disabuses themselves of. This disposes also of the question whether or not the Speaker can properly interpret the Constitution or that this function belongs to the judiciary. The answer, of course, is that in so far as a constitutional question arises before the House, within the conduct of the business of the House, it is the constitutional duty of the Speaker to interpret the Constitution to that extent and for that purpose alone so as to enable the House to proceed with its constitutional functions. It is not fathomable and it would be a grave negation of the Constitution that the House should adjourn or otherwise suspend its business and seek the directions of another body or organ before it can proceed."**

96. Turning to the alleged breach of the petitioners' fundamental rights and freedoms, the 2nd Respondent firstly asserts that the power to create an office, under the law generally includes the power to modify or abolish it. According to the 2nd Respondent, under the former Constitution, the amending and altering powers as provided by Section 47 rested with Parliament.

97. Secondly, the 2nd Respondent is of the opinion that there is no property in a public office and there cannot be tenure to a non-existent office and hence the question of impairment of security of tenure does not arise in circumstances of abolition of office. Security of tenure is at the risk of invalidity of the law granting tenure.

98. The 2nd Respondent cites the case of ***Eckerson v City of Des Moines, 137 Iowa 452***, and in which the Iowa Supreme Court observed as follows:

> **"Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected. And as no contract exists in favor of the incumbent of an office, it does not remain for him to quarrel with the method or**

procedure adopted. In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing therefor the right of the incumbent to further act ceases that instant, notwithstanding the term for which he was elected has not expired."

99. The 2nd Respondent also cites *Westel Woodbury Willoughby* in his treatise '**The Constitutional Law of the United States'** in which he states that public office is not a property or contractual right. He states as follows:

"……his removal from office or the abolishment of the office itself gives to him no cause of action against the State. Thus in Butler v Pennsylvania after defining vested private rights of property, the court said " The contracts designated to be protected by the tenth section of first article of that instrument are contracts by which perfect rights, certain definite, fixed, private rights or property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is a matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principle of compact and equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor promised, would appear to be neither reconcilable with natural justice nor common sense….."

100. Contending that fundamental human rights and freedoms are not immutable, the 2nd Respondent submits that the same can be abridged or abrogated in accordance with the Constitution. In support of this proposition, reference is made to the judgement of H.R. Khanna, J in the **Kesavananda Bharati v State of Kerala (1973) 4 SCC 255** at paragraph 1413 where he states that:

"Question then arises as to whether there is any power under Article 368 of amendment of Part 111 so as to take away or abridge fundamental rights. In this respect we find that Article 368 contains provisions relating to amendment of the Constitution. No words are found in Article 368 as may indicate that a limitation was intended on the power of making amendment of Part 111 with a view to take away or abridge fundamental rights. On the contrary, words used in Article 368 are that if the procedure prescribed by that Article is complied with, the Constitution shall stand amended. The words "The Constitution shall stand amended" plainly cover the various articles of the Constitution, and I find it difficult in the face of those clear and unambiguous words to exclude from their operation the articles relating to fundamental rights under Part 111 of the Constitution."

101. In further support of this contention, the 2nd Respondent refers to decision of the Court of Appeal in **Dennis Mogambi Mong'are v Attorney General & 3 Others Civil Appeal No. 123 of 2012** in so far as security of tenure in constitutional offices is concerned. In that case A. K. Murgor had this to say:

"With reference to the security of tenure of judges, it must be appreciated that this entitlement is a constitutional prerogative, granted by the Constitution. As to whether such privileges continue in perpetuity would be dependent on the existence of a constitutional provision providing for them. However, when the provision ceased to exist by virtue of the promulgation of a new constitution, it followed that the privilege or entitlement referred to would stand extinguished, or altered. In the presence circumstances, and with the promulgation of the current Constitution, the privilege would be bestowed following confirmation of suitability to serve in office. For this to occur, Judicial Officers would be

required to fulfil certain conditions precedent. In the case of serving judicial officers, the condition precedent were the declaration of suitability by the Vetting Board. In the case of Judges appointed under the new Constitution order, after due appointment and administration of an oath to serve the Republic of Kenya under the Constitution. Without the fulfilment of the aforementioned condition precedent, the entitlement to security of tenure would cease, or never come into being as the case maybe. With regard to the argument that serving judicial officer had a legitimate expectation to serve until retirement age, I consider that, the promulgation of a new constitution as constituting exceptional circumstances that can validly oust the legitimate expectations of any serving public officer including judges and magistrates."

102. As for the import of Section 104 of the repealed Constitution, the 2nd Respondent asserts that it cannot aid the petitioners as the provision that **'any pension payable in respect of his service in that office shall not be altered to his disadvantage after his appointment'** would only be relevant if an office was not abolished. The 2nd Respondent submits that if the argument of the petitioners is accepted, then the people would never be able to order their affairs and abolish offices that are no longer needed by the public. It is the 2nd Respondent's case therefore that as long as the constitutional amendment is in accordance with the law, the petitioners cannot claim salaries and remuneration for the remaining period of their terms.

103. The 2nd Respondent also argues that the petition before this Court is moot since the ECK is permanently disbanded and the Interim Independent Electoral Commission has since the promulgation of the Constitution of Kenya 2010 been replaced by the Independent Electoral and Boundaries Commission. Further, that none of the various sections of the former Constitution, including Sections 1, 1A, 10, 30, 41, 42(A), 44, 47, 84, 104, & 123 (8), relied on by the petitioners are saved by the 2010 Constitution. The 2nd Respondent is of the opinion that whilst the Constitution preserves causes of action that arose before the promulgation of the Constitution, these constitute the normal disputes between individuals and legal entities. The petitioners, on the contrary are challenging amendments to the former Constitution, the very basis for the current constitutional order.

104. In support of this argument the 2nd Respondent cites the case of **Borowski –versus –Attorney General of Canada [1989] 1 S.C.R.342,** in which the Court was of the view that the approach with respect to mootness involves firstly determining whether the requisite tangible and concrete dispute has disappeared rendering the issues academic and secondly if so, then decide if the Court should exercise its discretion to hear the case.

105. With regard to the issue of jurisdiction, the 2nd Respondent contends that the petition is a labour dispute and this is not the proper forum to ventilate those issues. Reliance is placed on the decisions in **Yassin Jama & 2 Others (Suing in their Capacity as the Chairman, Secretary and Treasurer Respectively of Namanga Islamic Centre) v Trustees of Kokini Muslim Union & 2 Others [2013] eKLR** and **United States International University (USIU) v Attorney General [2012] eKLR**.

106. The 2nd Respondent also contends that it is no longer tenable for the ECK which is no longer in existence to remain a Petitioner in this matter. In addition, it is contended that since the commissioners were employees of the ECK, the ECK is the only body that could have borne their grievances. It is also submitted that there is no cause of action against the 2nd Respondent, as the petitioners are not the employees of the Speaker of the National Assembly.

107. The 2nd Respondent's parting shot is that a finding in favour of the petitioners amounts to a coup against the 2010 Constitution of Kenya as the petition challenges its various provisions including the establishment of the Independent Electoral and Boundaries Commission, the savings made under Schedule Six, which is an integral part of the Constitution and Article 259 of the Constitution. Furthermore, the impugned 2008 Amendment was the basis for the people of Kenya to vote at the Referendum and thereafter promulgate their Constitution.

108. The 2nd Respondent submits, further, that a favourable ruling for the petitioners would also raise a cause of action for all persons who lost office as a result of the promulgation of the 2010 Constitution or those who consider themselves aggrieved in other respects by reason of the new constitutional order. The 2nd Respondent contends that the multiplicity of such suits cannot be fathomed.

109. Finally the 2nd Respondent asserts that the petition is not warranted, is frivolous and vexatious. The petition raises no justiciable questions and does not advance the public interest. The remedies sought are outrageous and contemptuous of Kenyans and attempt to punish Kenyan taxpayers for having exercised their constituent power. Furthermore the claim for special damages of approximately Kenyan Shillings 500 million lacks substance, and no documents in proof of the sum claimed are provided.

110. The 2nd Respondent therefore prays for the dismissal of the petition with costs being awarded against the petitioners.

THE 3RD RESPONDENT'S CASE

111. The 3rd Respondent opposed the Petition through the grounds of objection dated 25th January, 2010 as follows:

> *"1. The Petition filed herein does not raise any constitutional law issue that merits the hearing of the same in court. The grievance of the Applicant is not in the realm of constitutional Law, but one that hinges on the abolishment of an office. That does not cloth the applicants with a constitutional claim and remedy.*
>
> *2. The Petition as framed is an abuse of the court process. It challenges the sovereign right of Parliament to amend the constitution of Kenya. The applicants lack the locus standi to make the challenge they make.*
>
> *3. The Petition at best or the grievance the applicants raises is in the nature of a complaint by an employee against the employer. The Petition ought to be litigated in the Industrial Court.*
>
> *4. The amendment that constitutionally terminated the employment of the applicants was of a nature that the Parliament in Kenya is constitutionally empowered to make. It didn't touch on the basic structure of the constitution.*
>
> *5. The Petition is frivolous, vexatious and amounts to gross abuse of the court process.*
>
> 6. *In Light of the current constitutional making process, the Petition herein does not lie in law."*

112. The 3rd Respondent also filed affidavits sworn by Mohamud Jabane, the Manager, Legal Services and P. C. Tororey, the Director of Legal and Public Affairs. From the affidavits it is clear that the additional grounds upon which the 3rd Respondent opposes this case are:

> *a. That the petitioners' claims emanate from a labour dispute as the same is premised upon the salaries and allowances purportedly owed to them as a result of their removal from the from their positions as commissioners of the defunct ECK and as such the petitioners ought to have filed their claim in the Industrial Court (now the Employment and Labour Relations Court) established under Article 162 (2) (a) of the Constitution of Kenya, 2010. Further that since the Employment and Labour Relations Court is of the same status with this Court, this Court has no jurisdiction to handle the matter.*
>
> *b. That the petitioners' Third Further Re-Amended Petition, though filed as a constitutional petition, fails to meet the threshold of a constitutional petition as enunciated in Anarita Karimi-v-Republic [1979] KLR 154 and later and more profoundly in the Court of Appeal decision in Mumo Matemu-v-Trusted Society of Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012.*

c. That even if the petitioners' Third Further Re-Amended Petition raised any constitutional infringement, which it does not, it is now trite law that the Employment and Labour Relations Court has the requisite jurisdiction to determine the same.

d. That the petitioners' Third Further Re-Amended Petition constitutes an abuse of the court process and is merely a stratagem by the petitioners to seek reliefs that are not available to them.

e. That the 3rd Respondent is not only a stranger to the alleged claim of Kshs. 457,662,318 but denies the same in toto.

f. That the Third Further Re-Amended Petition, as drawn, does not demonstrate any constitutional infringement and should be dismissed with costs.

113. The 3rd Respondent contends that this Court has no jurisdiction to handle the petition. The 3rd Respondent stated that as was stated by Nyarangi, J in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** jurisdiction is everything and without it a Court cannot take any further step. Further, that by virtue of the fact that Article 165(3)(d) of the 2010 Constitution bestows upon this Court the requisite jurisdiction, this Court is consequently not only a creature of the Constitution but its subordinate. It reasonably follows that any act by this Court, such as clothing itself with jurisdiction not granted by the Constitution, is ultimately illegal and invalid vide the provisions of Article 2(4).

114. According to the 3rd Respondent, the foundation of the petitioners' case is that the 2008 Amendment that abolished the ECK was tainted with illegality and therefore any subsequent body emanating therefrom such as the Interim Independent Boundaries Commission and ultimately the Independent Electoral and Boundaries Commission should suffer the same fate. Consequently, the 3rd Respondent submits that the petitioners are in essence arguing that Article 88 of the 2010 Constitution that establishes the Independent Electoral and Boundaries Commission is unconstitutional. Further, that the petitioners are urging the Court to look at Article 88 in isolation and effectively declare the same unconstitutional having purportedly emanated from an unconstitutional legislative process.

115. It is the 3rd Respondent's submission that Article 88 cannot be looked at in isolation as the same will be tantamount to challenging the entire *grundnorm* which is expressly prohibited by Article 2(3). The 3rd Respondent asserts that Article 88 is a valid provision of the 2010 Constitution and therefore this Court does not have the power to declare the same unconstitutional. In support of this argument the 3rd Respondent relies on the case of **Esposito Franco v Independent Electoral & Boundaries Commission & Another [2013] eKLR.**

116. The 3rd Respondent submits that once the 2010 Constitution was promulgated, after ratification by the citizenry of Kenya, the IEBC became a creature of the Constitution vide Article 88 as read with section 28(1) of the Sixth Schedule and its constitutionality is duly protected by Article 2(3). It is the 3rd Respondent's submission that although this Court has the jurisdiction to interpret the Constitution, it lacks the jurisdiction to challenge an entrenched constitutional provision and in the same vein lacks the requisite jurisdiction to entertain the petition.

117. The 3rd Respondent urges this Court not to interpret Article 88 of the 2010 Constitution in isolation but to adopt the cardinal principle of constitutional interpretation that the entire Constitution must be read as an integrated whole, and that no one particular provision destroys the other but each sustains the other. In support of this argument the 3rd Respondent cited the decisions of the Court of Appeal of Uganda in **Major General David *Tinyefuza v Attorney General, Constitutional Petition No.1 of 1996*** and the High Court of Kenya in **John Harun Mwau & 3 Others v Attorney General & 2 Others [2012] eKLR.**

118. Still on the issue of jurisdiction, the 3rd Respondent contends that the petition does not raise any constitutional law issue that merits the hearing of the same by way of a constitutional petition. The 3rd Respondent asserts that the grievance of the petitioners is not in the realm of constitutional law, but one

that hinges on the abolishment of an office and such a grievance does not cloth the petitioners with a constitutional claim and remedy. According to the 3rd Respondent, the petitioners are aggrieved by the act of abolition of the office known as the ECK through the parliamentary legislative process and the said abolishment was well within the mandate donated to Parliament by the repealed Constitution. Citing sections 47, 45 and 30 of the repealed Constitution, the 3rd Respondent submits that Parliament was the sole repository of legislative power and its decision to abolish the ECK cannot be questioned by the Court or the petitioners. It is the 3rd Respondent's case that Parliament in exercise of its mandate through the 2008 Amendment abolished the petitioners' offices and the organisation known as the ECK.

119. As to whether the said Amendment constituted an alteration of the basic structure of the Constitution, the 3rd Respondent submits that the abolishment of the ECK did not, by any stretch of imagination, alter the basic structure of the Constitution. According to the 3rd Respondent, Government comprises of the Executive, Judiciary and Parliament and thus abolishing a commission charged with governing elections, as an interim measure to pave way for the restructuring and building credence for the body, cannot be alteration of the basic structure.

120. The 3rd Respondent contends, in reliance on the words of the court in **Njoya 2** which we have set out elsewhere in this judgment, that from the examples given by the Court in Njoya 2, the 2008 Amendment was nowhere near or close to altering the basic structure of the Constitution.

DETERMINATION

121. At the outset, we wish to state that this judgement is written in the context of the repealed Constitution and some of the views we express herein may not necessarily be applicable or appropriate to the 2010 Constitution.

122. In our view the petitioners' case can be summarised as follows:

a. The Government of Kenya had no power to abolish the ECK and remove its members through executive and or legislative action.

b. The various provisions of the 2008 Amendment are unconstitutional.

c. The Interim Independent Electoral Commission was not an independent commission and was an agency of the National Assembly.

d. The 2008 Amendment was unconstitutional as it was done in contempt of a court order and in violation of the Standing Orders of Parliament.

e. The security of tenure conferred upon the petitioners was an absolute prohibition against their removal by any person or authority created or subject to the repealed Constitution.

f. The removal of the petitioners as provided by Section 41 (repealed by the 2008 Amendment) was through a judicial process whilst Section 41(14) introduced by the 2008 Amendment constituted legislative judgment against the petitioners and was in breach of the doctrine of separation of powers.

g. The removal of the petitioners constituted a violation of their right to protection of law and fair hearing contrary to sections 70 and 77; a violation of their right to protection from deprivation of property contrary to Section 75; and was discriminatory contrary to Section 82.

h. The petitioners were entitled to remain in office and/or were entitled to their salaries and allowances for the residue of their terms in office.

i. The supremacy of the repealed Constitution barred the National Assembly from exercising its

powers under Section 47 to abolish other organs of the Constitution such as the ECK.

j. The National Assembly had no power to alter the basic structure of the Constitution by abolition and creation of offices and institutions.

k. The removal of the petitioners pursuant to the findings of the Kriegler Report compromised the legitimacy of the 2007 general elections and the results of the parliamentary and presidential elections should be annulled and the notices in the Kenya Gazette conveying those results should be quashed.

l. The right, power and privilege of abolishing and replacing constitutional organs and commissions in the repealed Constitution vested in the people of Kenya through the review process that birthed the 2010 Constitution.

m. The Interim Independent Constitutional Dispute Resolution Court established under Section 60A of the 2008 Amendment was unconstitutional and the jurisdiction of the High Court under the repealed Constitution was not ousted and Parliament had no power to compromise or otherwise take away the original jurisdiction of the High Court.

n. The petitioners pray for award of damages and costs of the petition.

123. The respondents' opposition to the application is that:

a. The petition does not raise any constitutional issue that merits the hearing of the same in Court. The grievance of the petitioners is not in the realm of constitutional law, but one that hinges on the abolishment of an office

b. The petition as framed is an abuse of the court process. It challenges the sovereign right of Parliament to amend the Constitution. The petitioners lack the *locus standi* to make such a challenge.

c. The issues raised in the petition are in the nature of a complaint by an employee against an employer and the petition ought to be litigated in the Employment and Labour Relations Court.

d. The 2008 Amendment that constitutionally terminated the employment of the petitioners was of a nature that the Parliament in Kenya was constitutionally empowered to make as it did not touch on the basic structure of the Constitution.

e. The 2008 Amendment was a prelude to the 2010 Constitution and any challenge to that Amendment is an attack on the 2010 Constitution and this is contrary to Article 2(3) which forbids any challenge to the validity or legality of the 2010 Constitution before any court or other State organ.

f. The petition is frivolous, vexatious and amounts to gross abuse of the court process.

124. In our view, the issues that emerge from the respective cases of the parties summarised above can be condensed into three broad issues namely:

i. **Whether this Court has jurisdiction to entertain this petition;**

ii. **Whether the 2008 Amendment to the Constitution was unconstitutional; and**

iii. **Whether the petitioners are entitled to any relief.**

125. We have already set out in detail the position of each of the parties in this matter. We will now proceed to state our position on the issues raised.

Whether this Court has Jurisdiction to entertain this Petition.

126. It is trite law that jurisdiction is everything and without jurisdiction, a court lacks the basis for entertaining a matter-see **The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1.**

127. The respondents have throughout the trial of this matter insisted that this Court has no jurisdiction to handle this matter. Their claim that this Court has no jurisdiction is based on various grounds. The first ground is that the doctrine of separation of powers denies this Court jurisdiction to interrogate the activities of Parliament. Secondly, it is asserted that the petitioners' claim is a labour dispute which ought to have been litigated before the Employment and Labour Relations Court which is the body legally mandated to hear such disputes. Thirdly, the respondents contend that this petition indirectly challenges the 2010 Constitution and this Court has no jurisdiction to entertain the same by virtue of Article 2(3) which provides that **"the validity or legality of this Constitution is not subject to challenge by or before any court or other State organ".**

128. Prior to the 2008 Amendment, the jurisdiction of the High Court was provided by Section 60(1) in the following terms:

> **''There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other written law.''**

126. Following the 2008 Amendment, Section 60(1) read as follows:

> a. **''There shall be a High Court, which shall be a superior court of record, and which shall subject to section 60A have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other written law.''**

130. Section 60A (1) which was introduced by the 2008 Amendment stated that:

> **"Notwithstanding section 60 there shall be an Interim Independent Constitutional Dispute Resolution Court which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the constitutional review process."**

131. It is therefore apparent that the 2008 Amendment only affected the jurisdiction of the High Court in so far as it related to disputes arising from the constitution-making process.

132. Article 165 of the current Constitution establishes the High Court and at Clause 3 grants it jurisdiction to hear any question regarding the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution.

133. The repealed Constitution and the current one clothed the High Court with jurisdiction to handle issues that emanate from the activities that are undertaken by the legislature and the executive. For example, in the case of **Peter Ngoge v Francis Ole Kaparo & 4 Others [2007] eKLR** the Court held that:

> **"We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the Court's scrutiny, if in conflict with the Constitution."**

134. As for the current Constitution, this position was affirmed by the Court of Appeal in the case of **Commission for the Implementation of the Constitution v The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012,** when it stated that:

> **"As we have already stated earlier in this judgment, Parliament in enacting the legislation under review clearly had in mind considerations other than those spelt out in the Constitution and the Hansard Reports on their debates on the same are clear testimony to the fact. The question that then falls to be determined is whether, in the face of such constitutional failures on the part of Parliament, the Courts should adopt a passive and aloof attitude. We think not. We do not deign to intrude into, less still take over the legislative function of Parliament. Our role is as was expressed by the High Court in the case of FEDERATION OF WOMEN LAWYERS KENYA (FIDA K) & 5 OTHERS Vs. ATTORNEY GENERAL & ANOR PETITION NO. 102 OF 2011, [2011] eKLR;**
>
> **"In actual fact it is the court's sole mandate to provide checks and balances for the executive and the court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandate. We find that to do otherwise would be dereliction of our constitutional mandate."**
>
> **In delivering itself as aforesaid, the Court in FIDA-K was not propounding a strange species of jurisprudence, for courts of law have for ages been the interpreters of what is constitutionally valid and what is not. The constitutional interpretation jurisdiction that resides in the High Court, and which we must exercise when sitting on appeals from its determinations, is a critical and vital one. This is especially so when it comes to testing the constitutionality of legislative actions that touch on the special safeguards and protections that have progressively been adopted to protect persons and groups that are vulnerable or disadvantaged. In such instances, it is for the court to robustly and firmly affirm those protections that from their very nature may seem a counter-majoritarian irritation to those that have the weight or the numbers on their side.''**

135. In **Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 Others [2014] eKLR,** this Court cited the decision of the Court of Appeal and proceeded to state that:

> **"The position enunciated so succinctly by the Court of Appeal is a position we wish to associate ourselves with. The Constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so. It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the Constitution including the determination of:**
>
> > **"(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
> >
> > **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;"**

136. The Court of Appeal in the already cited case of **Commission for the Implementation of the Constitution v The Attorney General & Another** did in fact acknowledge that even prior to the promulgation of the 2010 Constitution, this Court's jurisdiction included the interpretation of the Constitution. The Court stated:

> **"Indeed, even before the Constitution came into force, Ringera J. (as he then was) had in NJOYA & 6 OTHERS Vs. ATTORNEY GENERAL & 3 OTHERS (No. 3) [2008]2KLR (E.P) 658 at 674, while discussing constitutional values and principles that undergird the Constitution, stated as follows;**

"I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited Government under the Rule of law. Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it." (Emphasis ours)

We respectfully endorse the sentiments of Ringera J. and state that it cannot be open to any organ of state to act in any manner that violates the Constitution. The doctrine of parliamentary supremacy that once gave parliament near-unbridled right to legislate as it pleased is now of only historical significance in an epoch when the Constitution and the Constitution alone lays claim to supremacy and every act of every organ must be judged against its peremptory requirements. That task of judging whether an action passes constitutional muster is placed upon the superior courts."

137. It is our view that at the time this matter was filed, the mandate for interpreting the Constitution lay with the High Court. The petitioners before us seek interpretation of certain constitutional questions. Although we agree with the respondents that some of the issues raised by the petitioners were in the realm of an employer-employee dispute, we note that the Industrial Court as it existed in 2008 was just but a tribunal which had no jurisdiction to interpret the Constitution-see **Kenya Airways Limited v Kenya Airline Pilots Association, Nairobi H.C. Civil Application No. 254 of 2004** and **Mecol Limited v Attorney General & 7 Others [2006] eKLR.**

138. The 1st Respondent contends that after the promulgation of the 2010 Constitution, this matter ought to have automatically been transferred to the Employment and Labour Relations Court for hearing and disposal. The statement of Majanja, J in the **USIU** case is cited in support of this proposition. We do not wish to speculate on the circumstances under which the statement in that case was made. Our understanding of Section 22 of the Sixth Schedule is that matters that were filed prior to the 2010 Constitution could either proceed to conclusion before the courts which were already seized of the matters or they could be transferred to the Employment and Labour Relations Court. They could also be dealt with as directed by the Chief Justice or the Registrar of the High Court. The fact that this matter was not transferred to the Employment and Labour Relations Court does not therefore deprive this Court of the jurisdiction to hear the same. This particular argument by the respondents therefore fails.

139. There is the contention by the respondents that by virtue of the doctrine of separation of powers and the political question, this Court is precluded from exercising any jurisdiction over the proceedings of Parliament. These may indeed appear to be valid defences against the Court's intervention in the activities of Parliament.

140. The answer to the respondents' assertions is that the constitutional doctrine of separation of powers does not shield Parliament when it acts unconstitutionally. This doctrine is meant to delineate the operational areas of the three arms of government and where any of the three arms of government violates the Constitution, it is the duty of this Court to state so. For example, Parliament cannot pass unconstitutional laws and hide behind this doctrine. The exercise of power by every organ of state must be founded upon and guided by the Constitution. Anything done outside the remit of the Constitution cannot stand and it is the duty of the Court to determine whether an act done in the name of the Constitution is indeed constitutional.

141. In the post-2010 Constitution jurisprudence, there are a plethora of authorities to back our position-see **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 Others [2014] eKLR; Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013] eKLR.**

142. We only need to cite the decision of Lenaola, J in the case of **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] eKLR** where he opined that:

''…it is not in doubt that the unconstitutional exercise of its mandate by Legislature cannot

be shielded from judicial scrutiny on account of the doctrine of separation of power. I say so because Article 1(3) of the Constitution has made it clear that the state organs upon which sovereign power is vested shall perform their functions in accordance with the Constitution. The Constitution is supreme and is thus binding upon all persons and all sate organs including the 1st and 2nd Respondents. To my mind, the separation of power principle contained in the Constitution is not absolute and the Courts as the defenders and protectors of the Constitution have been allowed to interfere where there is a violation or threat of violation of the Constitution. I am in agreement in that regard with the sentiments expressed in *Republic v Independent Electoral & Boundaries Commission and Others ex-parte Cllr Elliot LidubwiKihusa and Others Nairobi HC KJR Misc Applic. No. 94 of 2012* where it was stated that:

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

I agree and in the instant case, the Petitioners have pleaded a threaten violation of the Constitution, and I find that this Court must determine whether such a threat exists or not."

143. The position as enunciated in the above cited case, and which position we agree with, is the position that prevailed in the era of the former Constitution. The position was clearly expressed by the Court in the already cited case of **Peter Ngoge [supra].**

144. In addition, the position was affirmed beyond peradventure by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR,** in which the Court expressed itself *inter alia* as follows:

"It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution. It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another. However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from

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

145. In the circumstances we hold that not only was the Court (Nyamu, J) (as he then was) entitled to issue conservatory orders, but it is also within this Court's lawful mandate to carry out an enquiry into alleged unconstitutional acts of Parliament.

Whether this Court has Jurisdiction to Grant the Prayer to Invalidate the 2007 General Election

146. The other ground in opposition to this petition is that this Court has no jurisdiction to deal with the prayer for invalidation of the results of the 2007 General Election. A reading of Section 44 of the repealed Constitution together with the repealed National Assembly and Presidential Elections Act shows that the procedure for challenging the results of a presidential or a parliamentary election was through an election petition. There is no election petition before this Court and this particular prayer cannot stand. The Court of Appeal in the case of **The Speaker of the National Assembly v Njenga Karume, Civil Application No. 92 of 1992** expressly stated that the manner of approaching the Court in an election matter is through an election petition and once Parliament had set out a procedure for approaching the Court, that procedure must be followed.

147. The Court of Appeal reaffirmed this position in **Kipkalya Kiprono Kones v Republic & 6 Others [2006] eKLR** when it stated that:

''We have said enough, we think to show that the procedure of judicial review, like that of plaint or any such like procedure, is and was not available to the parties aggrieved by the acts or omissions of the Commission. We re-assert, as we previously did, that the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly Presidential Elections Act. *Section 44* of the Constitution merely talks of an "application" being made to the High Court. But *section 19 (1)* of the Act specifically provides that the application to the High Court … *"shall be made by way of petition"*

That has been the way, is the way and shall continue to be the way until and unless Parliament decrees otherwise.''

148. The manner in which the petitioners approached this Court on this question was therefore both unconstitutional and unlawful.

149. Assuming the petitioners had approached the Court through the right procedure, there are other reasons why this particular prayer ought to be dismissed. In the first place, the elections which the petitioners challenge were given constitutional validity by sections 10 and 12(1) of the Sixth Schedule of the 2010 Constitution. Secondly, the President and the Members of Parliament elected in the 2007 general election have since served their terms and it would be a futile exercise to invalidate their

elections. Thirdly, the President and Members of Parliament were not parties to these proceedings and it would be contrary to the rules of natural justice to issue adverse orders against them without affording them a chance to be heard.

150. We are therefore in agreement with the respondents that this prayer was entirely misplaced and unwarranted.

Whether the 2008 Amendment to the Constitution was Unconstitutional

151. The petitioners have alleged that the 2008 amendment to the Constitution was unconstitutional, for various reasons. They submit, first, that the 2nd Respondent acted in contempt of Court when he allowed debate on the Constitutional Amendment Bill despite the Court having issued an order on 11th November, 2008 barring disbandment of the ECK. The respondents' response is that the 2nd Respondent was not a party to these proceedings at that time. This is a flippant argument. The Court's order was brought to the attention of the Speaker who issued a communication from the Chair dismissing the order. That the 2nd Respondent was not a party to the proceedings at that time is immaterial as the Attorney General who was the chief government advisor by virtue of Section 26(2) of the repealed Constitution was a party to the case. Was Parliament not part of the Government of Kenya?

152. We have already affirmed that this Court was only executing its mandate under the repealed Constitution when it issued the conservatory order. The importance of complying with Court orders by each and every person or entity was recently stressed in the case of **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 Others [2014] eKLR** in which this Court nullified the impeachment of the Governor of Embu on the main ground that the same had proceeded despite there being a Court order that had stopped the proceedings.

153. We also wish to associate ourselves with the decision in **Judicial Service Commission v Speaker of the National Assembly & Another Petition No. 518 of 2013** where the Court expressed itself as follows:

> **"In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void. If therefore it turns out that the action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed."**

154. The record and subsequent events shows that Parliament did not heed the Court order but proceeded to do exactly what the Court had restrained the Legislature and the Executive from doing. Whether that should render the 2008 Amendment void is a question that we will answer shortly.

155. The core issue in this case is whether a constitutional amendment can be declared unconstitutional. In **Njoya 2,** Ringera, J (as he then was) opined that:

> **"I have weighed the heavy and elaborate submission presented to the court. Having done so, I must begin by affirming that the court's most sacrosanct duty is to uphold the supremacy of the Constitution. The court must follow the clear command of the Constitution. And what is the clear command of the Constitution in this aspect of the matter? I have come to the unequivocal conclusion that Parliament had no power under the provisions of Section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place. I have come to that conclusion on three premises: First, a textual appreciation of the pertinent provision alone compels that conclusion. The dominant word is "alter" the Constitution. The modes of alteration are amendment, modification, re-enactment, suspension, repeal and the making of a different provision in the place of the repealed one. The emphasis in subsection 6(b) is alteration by those modes of <u>this Constitution</u>. To my mind the provision plainly means that**

Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution. A new Constitution cannot by any stretch of the imagination be the existing Constitution as amended. And the word <u>re-enact</u> does not mean, as counsel for the 2nd respondent understood it to mean, the replacement of the Constitution with a new one. It simply means, to enact again, to revive. One can only re-enact a past provision, that is bring back into the Constitution a provision which had earlier been in it but had been removed in exercise of the power of amendment…..

It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered. Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute or reconstitute the framework of Government, in other words, make a new Constitution. That being so, it follows *ipso facto* that Parliament being one of the creatures of the Constitution it cannot make a new Constitution. Its power is limited to the alteration of the existing Constitution only. Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the peoples sovereignty; (ii) Constitutionalism betokens limited powers on the part of any organ of Government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ; it follows that the power vested in Parliament by Sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution: no more and no less."

156. In **Nairobi High Court Petition No. 496 of 2013, Commission for the Implementation of the Constitution v The National Assembly of Kenya & Another,** Lenaola, J dealt at length, albeit in the context of the 2010 Constitution, with the question as to whether a constitutional amendment can be declared unconstitutional and concluded that:

"69. I have taken the trouble to explain the situation in India, South Africa and Germany so as to demonstrate; firstly that our Constitution has also those principles it holds dear and those this Court cannot abrogate from. In that regard, Article 10 has set out national values and principles of governance which bind all state organs, state officers, and all persons whenever any of them applies, enacts or interprets any law or makes or implements public policy decisions…

70…….

71. Secondly, I have done so as to demonstrate that where the basic structure or the design and architecture of our Constitution is under threat, this Court can genuinely intervene and protect the Constitution."

157. The Supreme Court of India in **Kesavananda Bharati v State of Kerala (1973) 4 SCC 255** outlined the doctrine of the basic structure of the Constitution. Justice Hans Raj Khanna asserted that the Constitution possesses a basic structure of constitutional principles and values and any amendment that distorts the principles and values of the Constitution can be declared unconstitutional.

158. We agree with the sentiments expressed by Ringera, J in **Njoya 2,** that an amendment that upsets the basic structure of the Constitution could not be effected by Parliament without involving the people.

159. In a country like ours which has a history of disrespect for the sanctity of the Constitution, the jurisprudence propagated in the **Njoya 2** case was necessary. This may explain why the people of Kenya, aware of the frequent and frivolous amendments to the repealed Constitution, provided in Article 255 of the 2010 Constitution that:

"255.(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the

amendment relates to any of the following matters—

a. **the supremacy of this Constitution;**

b. **the territory of Kenya;**

c. **the sovereignty of the people;**

d. **the national values and principles of governance mentioned in Article 10 (2) (*a*) to (*d*);**

e. **the Bill of Rights;**

f. **the term of office of the President;**

g. **the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;**

h. **the functions of Parliament;**

i. **the objects, principles and structure of devolved government; or**

j. **the provisions of this Chapter.**

(2) A proposed amendment shall be approved by a referendum under clause (1) if—

(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(b) the amendment is supported by a simple majority of the citizens voting in the referendum.

(3) An amendment to this Constitution that does not relate to a matter mentioned in clause (1) shall be enacted either—

a. **by Parliament, in accordance with Article 256; or**

b. **by the people and Parliament, in accordance with Article 257."**

160. It is clear from the above-cited provision that there are amendments that can only be done with the involvement of the citizens by way of a referendum (Article 255 (1)) or popular initiative involving at least one million registered voters (Article 257 (1)). Even where Parliament has been mandated to amend the Constitution, it can only do so after the amendment Bill has been subjected to public discussion (Article 256 (2)). The voice of the people is a voice that cannot be ignored when it comes to the amendment of the 2010 Constitution.

161. We wonder whether, in light of the provisions in the 2010 Constitution, the proposition that Parliament cannot amend the Constitution in a manner that may result in the distortion of the basic structure still has a place in our jurisprudence. However, this is not an issue that has been taken up with us and we will say no more about it.

162. The question would then be whether the 2008 Amendment of Section 41 distorted the basic structure of the repealed Constitution. If the amendment was in respect of the 2010 Constitution, the answer to that question would, without doubt, be in the affirmative. We say so since Article 255(1)(g) provides that any amendment which relates to **"the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies"** should be approved by a referendum.

According to Article 248(1), the Independent Electoral and Boundaries Commission is one of the commissions to which Chapter Fifteen applies. The people of Kenya therefore deemed it important that only a referendum can approve any amendment touching on the IEBC. The importance of the IEBC in the functioning of our democracy cannot be overemphasized.

163. The repealed Constitution did not, however, have a provision outlining its basic principles and values. A look at the repealed Constitution will however reveal what the makers of that Constitution thought were the cornerstones of the Kenyan State. They were the Executive, Parliament and the Judicature. The legislature could not, however, function without democratic elections. That explains the basis of Section 41 which clearly provided at subsections 5, 6, 7 and 8 for the removal of a commissioner of ECK. Subsections 5 and 6 provided for the grounds and method for removal of a commissioner as follows:

> **"41(5) A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with this section.**
>
> **(6) A member of the Commission shall be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under sub-section (7) and the tribunal has recommended to the President that he ought to be removed from office for inability as aforesaid or for misbehaviour."**

164. The ECK was also protected by Section 41(9) from interference as follows:

> **"In the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority."**

165. In our view, the protection given to the commissioners was to enable them deliver free and fair elections to the people of Kenya. The protection was not meant to secure the jobs of the commissioners for their personal interests. The security provided was in the interest of the public. The trust Kenyans had in the ECK was severely shaken by the violence that greeted the announcement of the presidential elections on 30th December, 2007. That violence is what informed the 2008 Amendment of the repealed Constitution.

166. We have considered the findings and recommendations of the Kriegler Report on the 2007 general elections. A look at the summary of conclusions at pages 8-10 of the Report clearly painted the ECK as an inept and incompetent organization that lacked independence. Some of the statements at pages 9-10 of the Report are to the effect that:

> **"The conduct of the 2007 elections was so materially defective that it is impossible-for IREC or anyone else-to establish true or reliable results for the presidential and parliamentary elections. IREC has, however, established by means of statistical analysis of a sample of constituencies that innumerable elementary mistakes in tallying and/or transcribing results as well as patent mistakes of omission, duplication and confusion were made.**
>
> **Therefore, although there is room for honest disagreement as to whether there was rigging of the presidential results announced by the ECK, the answer is irrelevant, as (i) the process was undetectably perverted at the polling stage, and (ii) the recorded and reported results are so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible".**

167. The Report went on to state at page 10 that:

> **"The manner of appointment of commissioners and the structure, composition and management system of the ECK are materially defective, resulting in such a serious loss of**

independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it."

168. The IREC thus found the ECK culpable for the post-election violence and Parliament was simply acting on its recommendations by enacting the 2008 Amendment. It appears to us therefore that the 2008 Amendment was an amendment driven by public interest. It appears to have been motivated by the need to ensure that Kenyans did not again experience what they had undergone as a result of the 2007 general elections. There was a need to ensure fair and peaceful elections and that is why there was a focus on reforms of the electoral body.

169. The petitioners have asked us whether what happened was legal. We have already concluded that a constitutional amendment which violates the basic structure of the Constitution can be deemed unconstitutional. We have also concluded that for a democratic society to function there must be free and fair elections. One of the pillars of free and fair elections is an independent electoral body. On the face of it, it would therefore appear that the 2008 Amendment was unconstitutional. However, the circumstances surrounding the 2008 Amendment must be interrogated before a determination can be reached as to whether the amendment was unconstitutional.

170. We have already stated above what, on the material before us, explains what necessitated the 2008 Amendment. On the material before us, it does not appear that Parliament's action was driven by selfish motives or bad faith. Rather, its action seems to have been in the interest of Kenya, was in accordance with its role as a custodian of the public interest and the recommendations of IREC.

171. In the place of ECK, an interim independent electoral body was set up under Section 41A. According to Section 41A(13) that established the IIEC, the IIEC was to "**stand dissolved twenty four months after the commencement of this Section or three months after the promulgation of a new Constitution, whichever is the earlier."** The IIEC was to, *inter alia*, reform **"the electoral process and management of elections in order to institutionalize free and fair elections."**

172. The commissioners of the IIEC were to be appointed by Parliament and removed by Parliament. The petitioners are probably right that the IIEC did not meet the basics of what can be said to be an independent body capable of conducting free and fair elections. We, however, do not deem it necessary to explore this argument further since the IIEC has since been replaced by the IEBC and was not in any case expected to conduct a general election.

173. However, although Parliament was informed by the imperative to have in place a functional electoral body, the manner in which the 2008 Amendment was effected, in so far as it impacted on the positions of the commissioners of ECK, did not meet the basic standards of fairness. At the very least, the petitioners were entitled, if they were to be removed, to be subjected to a process that accorded with the basic tenets of natural justice, in particular, the right to be heard. The rules of natural justice required that they should have been served with the allegations against them and given a chance to respond to them-see **De Souza v Tanga Town Council [1961] E.A. 377**. More importantly, the right to a hearing was inbuilt into Section 41 of the Constitution which was amended by the 2008 Amendment. A perusal of the Kriegler Report shows that the petitioners were not given the opportunity to explain their individual roles in the 2007 general elections.

174. We observe that the Kriegler Commission attributed the political violence to the ECK and the wider Kenyan society and counselled at page 10 of the Report as follows:

"This culture of electoral lawlessness has developed over many years and cannot be reversed without a concerted, non-partisan commitment to electoral integrity on the part of political leaders, which commitment will need to be sustained and monitored over time."

175. Should the petitioners have been in any way personally liable for the violence that ensued after the 2007 elections, the politicians who incited their supporters to violence and the supporters who heeded the advice are as guilty as the petitioners for the violence that engulfed the country at the material time. The

petitioners' view that they were the easy scapegoats for the violence and that as a result all the blame was heaped on them may not altogether be unfounded. That we have a culture of seeking scapegoats for national and institutional failures, as well as for any calamity that the nation encounters, is obvious and needs no elaboration.

176. In saying so, we do not in any way intend to disrespect the many innocent Kenyans who lost their lives, property and/or were displaced during the post-election violence. Nor should this judgment be deemed to be a vindication of the role played by the petitioners in the conduct of the maligned general elections. That issue, however, is not strictly within the scope of this inquiry. What we are simply saying is that in a civilized society, like the one we claim to be or aspire towards, no man however grievous the allegations against him, should be condemned unheard. We hope that no Kenyan will in future be subjected to the treatment that the petitioners were subjected to by Parliament.

Whether the Petitioners are Entitled to Any Relief

177. In considering what relief, if any, the petitioners are entitled to, we must bear in mind the practicalities of this matter in light of constitutional reforms which have taken place since 2008. We note that the country has moved on and there is a new Constitution in place. Article 2(2) of the 2010 Constitution provides that "***No person may claim or exercise State authority except as authorised under this Constitution.***" The same Constitution in Article 1(1) provides where the sovereign power is reposed and states that:

> "***All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***".

Article 1(2) on the other hand provides that:

> "***The people may exercise their sovereign power either directly or through their democratically elected representatives.***"

Indirect exercise of sovereign power is however, delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. Article 2(3) on the other hand provides that:

> "***The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ***."

178. What comes out clearly from the foregoing is that whereas the Court is empowered to inquire into the process of constitutional amendment, once the said process is found to have been legal and constitutional, the Court cannot go round it and make orders whose effect would be to negate any of the constitutional provisions including the sovereignty of the people.

179. In this case, through the 2010 Constitution, the people of Kenya in exercise of their sovereign power, effectively replaced the ECK and its successors with the IEBC. In our view, whatever irregularities which might have been committed in the process of the enactment of the 2008 Amendment were, unless the same could be sustained under the current Constitution, cured by the enactment and promulgation of the 2010 Constitution. It is not and it cannot be contended that the 2010 Constitution, which was itself a product of the 2008 Amendment was unconstitutionally enacted and promulgated. Further, the said Constitution at section 28 of the Sixth Schedule expressly recognised the existence of the IIEC, the successor to the ECK.

180. On the inviolability of the Constitution, the Court in Petition No. 146 of 2011 – **Dennis Mogambi Mong'are vs. Attorney General and Others** expressed itself *inter alia* as follows:

> **"The question we must ask ourselves is this: is it open to this court to question the sovereign will of the people and decide that one part of their Constitution is null and void, and not**

another? We must emphatically say no. The authority conferred upon us by the people of Kenya is to give effect to the whole Constitution. When the people of Kenya voted in favour of the Constitution, they made a decision to make a break with the past and bring in a new constitutional dispensation on the basis of the values and principles set out in the Constitution…The transitional provisions contained in the Sixth Schedule are intended to assist in the transition into the new order, but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. These transitional provisions are as much a part of the Constitution and as much an expression of the sovereign will of the people as the main body of the Constitution."

181. In addition , as was held in **Njoya 2**:

''..It [sovereignty] is the power to constitute a frame of Government for a community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government and the power involved in governing."

182. The power to constitute a frame of Government for a community, in our view, encompasses the power to provide for the process and the players in the said process. It therefore follows where people have directly enacted unto themselves a Constitution which recognises existing or past institutions, this Court cannot under the guise of constitutional interpretation or application, undo that which the people have decided. Similarly, where the people in the exercise of their sovereign power, constitutionally exercised, have unreservedly done away with or discarded existing or past institutions, this Court cannot in the purported exercise of judicial authority breathe life into or resurrect such institutions.

183. It follows that this Court cannot find that the IIEC which is expressly recognised under the 2010 Constitution was unlawfully established. That being the position, it would be a constitutional aberration to hold that the ECK which was replaced by the IIEC, a body recognised as valid under the current Constitution, was unconstitutionally disbanded and its Commissioners unlawfully bundled out of office.

184. In our view, issuing declarations as framed by the petitioners will no longer serve any purpose. Such declarations may not only serve to undermine the foundation of the 2010 Constitution but may also amount to challenging the validity or legality of the same, contrary to Article 2(3) of the 2010 Constitution, and in our view, we have no jurisdiction to do so. We do not think that is what the petitioners desire to achieve. At the end of the day, it is clear that almost all the issues raised in this petition have been overtaken by events.

185. The question that remains is whether the petitioners are entitled to some form of compensation as a result of the abrupt termination of their services. Given our findings above, the petitioners would only be entitled to whatever was owed to them prior to the 2008 Amendment. As we have no evidence of what was owed to them, we direct that such amounts (if any) be assessed by the Deputy Registrar and payment thereof be made to the petitioners by the State.

186. In the circumstances, save for the finding that the petitioners are entitled to what was due to them at the time of the constitutional amendment in 2008, this petition fails.

187. With regard to costs, which are in the discretion of the Court, and taking into account the nature of this matter, we order each party to meet its own cost of these proceedings.

Dated, and Signed at Nairobi this 30th day of April, 2015

W. KORIR MUMBI NGUGI G V ODUNGA

JUDGE JUDGE JUDGE

Dated, Delivered and Signed at Nairobi this 30th day of April, 2015

G V. ODUNGA

JUDGE