REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 182 OF 2015

CENTRE FOR RIGHTS EDUCATION &

AWARENESS (CREAW)……..….PETITIONER

VERSUS

THE HON ATTORNEY GENERAL ……...1ST RESPONDENT

THE COMMISSION ON THE IMPLEMENTATION

OF THE CONSTITUTION (CIC) ……..…….....2ND RESPONDENT

JUDGMENT

Introduction

1. The Constitution of Kenya has been described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. At its core is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all hitherto marginalized and excluded groups get a chance at the table.

2. The Constitution, which was promulgated on 27th August 2010, therefore contains specific provisions on how the inclusion and participation of all is to be achieved. At Article 10, the Constitution contains the national values and principles of governance in the following terms:

> ***10.(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***
>
> ***(c) makes or implements public policy decisions.***

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

3. Article 27 sets out the non-discrimination provisions as follows:

27.(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

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

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

4. With regard to the electoral system, the Constitution provides at Article 81, so far as is relevant for present purposes, that:

81. The electoral system shall comply with the following principles—

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

(b) <u>not more than two-thirds of the members of elective public bodies shall be of the same gender;</u>

(c) fair representation of persons with disabilities;

(Emphasis added)

5. Article 100, which is titled “Promotion of Representation of Marginalised Groups”, provides as

follows:

> ***100.Parliament shall enact legislation to promote the representation in Parliament of—***
>
> ***(a) women;***
>
> ***(b) persons with disabilities;***
>
> ***(c) youth;***
>
> ***(d) ethnic and other minorities; and***
>
> ***(e) marginalised communities.***

6. It is the question of how to bring into reality what the petitioner describes as the promise to the women of Kenya contained in the above provisions, their participation in the National Assembly and Senate, that is at the core of the petition now before me.

Background

7. In 2012, prior to the general elections scheduled for 2013, and which were eventually held on 4th March 2013, the Attorney General sought an Advisory Opinion from the Supreme Court in **Advisory Opinion No. 2 of 2012 In the matter of Gender Representation in the National Assembly and the Senate**. In the said Reference, the Attorney General sought the Court's opinion on two disparate issues, the first of which relates to the present petition and was as follows:

> ***A. Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?***

8. In its Advisory Opinion dated 11th December 2012, the Supreme Court held, inter alia, as follows at paragraphs 70, 71, 74, 78 and 79:

> ***"[70] We consider that Article 81(b), which stands generally as a principle, would only transform into a specific, enforceable right after it is supported by a concrete normative provision….***
>
> ***[71] When, however, we examine Article 81(b) in the context of Articles 97 [on membership of the National Assembly] and 98 [on membership of the Senate], then we must draw the conclusion that it has not been transformed into a full right, as regards the composition of the National Assembly and Senate, capable of direct enforcement. Thus, in that respect, Article 81(b) is not capable of immediate realization, without certain measures being taken by the State. Article 81(b) is also not capable, in our opinion, of replacing the concrete normative provisions of Articles 97 and 98 of the Constitution: these two Articles prescribe in clear terms the composition of the National Assembly and the Senate. For Articles 97 and 98 to support the transformation of Article 81(b) from principle to right, the two would have to be amended to incorporate the element which learned counsel, Mr. Kanjama referred to as the "hard gender quota." In the alternative, a legislative measure [as contemplated in Article 27(8)] would have to be introduced, to ensure compliance with the gender-equity rule, always taking into account the terms of Articles 97 and 98 regarding numbers in the membership of the National Assembly and the Senate.***
>
> ***[72]….***

[73] Only an adjustment to Article 81(b) following the path we have described above, will fall within the terms of the main clause in Article 81, that "the electoral system shall comply with [the principles enumerated in paragraphs (a) – (e) of the Article]."….

[74] As Article 81(b) of the Constitution standing as a general principle cannot replace the specific provisions of Articles 97 and 98, not having ripened into a specific, enforceable right as far as the composition of the National Assembly and Senate are concerned, it follows – and this is the burden of our Opinion on this matter – that it cannot be enforced immediately. If the measures contemplated to ensure its crystallization into an enforceable right are not taken before the elections of 4 March 2013, then it is our opinion, Article 81(b) will not be applicable to the said elections. The effect is that Article 81(b) of the Constitution is amenable only to progressive realization – even though it is immediately applicable in the case of County Assemblies under Article 177.

9. Having thus expressed itself, the Supreme Court then posed the following question at paragraph 75 of its Advisory Opinion:

[75] "That leaves open the question: if Article 81(b) is not applicable to the March 2013 general elections, in relation to the national legislative organs, then at what stage in the succeeding period should it apply?"

10. Its response to this question is contained in paragraphs 77-80 of its Advisory Opinion:

[77]"We see as the requisite manner to develop the principle in Article 81(b) of the Constitution into an enforceable right, setting it on a path of maturation through progressive, phased-out realization. We are, in this regard, in agreement with the concept urged by learned amicus Mr. Kanjama, that hard gender quotas such as may be prescribed, are immediately realizable, whereas soft gender quotas, as represented in Article 81(b) with regard to the National Assembly and Senate, are for progressive realization….

[78] This, we believe, answers the compelling question raised in contest to the case for progressivity, by learned counsel Mr. Nderitu and Ms. Thongori: When will the future be, as baseline of implementation of the gender-equity rule?

[79] <u>Bearing in mind the terms of Article 100 [on promotion of representation of marginalised groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.</u>

[80] <u>The foregoing opinion is a basis for action in accordance with the terms of Article 261(6), (7), (8) and (9) under the "Transitional and Consequential Provisions" of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions.</u>"(Emphasis added)

11. It is pursuant to the above pronouncements by the Supreme Court that the petitioner has now approached this Court, alleging a failure on the part of the respondents to abide by the Advisory Opinion and take the requisite measures for the realization of the gender equity rule.

The Petition

12.The petitioner contends that in order to give effect to the Supreme Court's Advisory Opinion as well as the respective constitutional and legal provisions, certain legislative actions, possibly with a bearing on constitutional amendments, were required to be taken by 27th August 2015. They observe that we are now counting days to the date set by the Supreme Court, the 27th of August 2015, and legislative measures are yet to be taken to bring into force the two thirds gender representation rule in the National Assembly and

Senate. They lay the blame for this failure on the respondents.

13. They assert that Article 261(4) of the Constitution imposes on the 1st respondent, in consultation with the 2nd respondent, the constitutional obligation to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament enact the legislation within the stipulated period. They contend that from the date of the Advisory Opinion on 11th December 2012, and indeed from the date of promulgation of the Constitution on 27th August 2010, the 1st and 2nd respondents are yet to prepare the relevant Bill for tabling before Parliament for implementation of Articles 27(8) and 81(b) of the Constitution. They contend that there is therefore a threat of violation of the Constitution, and they seek the following orders from the Court:

> ***a. A declaration that to the extent that the 1st and 2nd Respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012, they have violated their obligation under article 261(4) of the Constitution to "prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified".***
>
> ***b. A declaration that the foregoing failure, refusal and or neglect by the 1st and 2nd Respondent is a threat to a violation of articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.***
>
> ***c. An order of mandamus directed at the 1st and 2nd Respondents directing them to within such time as this court shall direct prepare the relevant Bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.***
>
> ***d. Costs of or incidental to this Petition.***
>
> ***e. Such other order or relief as this court may deem just or expedient***.

The Response

14. The respondents do not oppose the factual basis of the petition. They agree that the Supreme Court in its Advisory Opinion did state that the two thirds gender rule provisions in the Constitution should be effected by the 27th of August 2015. They however, oppose the petition on two disparate grounds. For the 1st respondent, the Office of the Attorney General (hereafter **"AG"**) established under Article 156 of the Constitution, this petition is premature as the 27th of August 2015 has not yet arrived, and Parliament has the mandate to extend the time for enacting any legislation required under the Constitution. It is also the AG's contention that his office has taken reasonably practicable steps to enable Parliament enact the requisite legislation.

15. The 2nd respondent, the **Commission for the Implementation of the Constitution** (hereafter **"CIC"**), takes the position that it has no obligation under the Constitution for the enactment of the requisite legislation, and it is its case therefore that it is improperly joined in this petition. Its case is that the petition should have been filed against Parliament; that Article 261(4) is not justiciable; that the petition is premature, and finally, that CIC is not subject to the control or authority of any person.

16. On 5th May 2015, the **Kenya Women Parliamentary Association (KEWOPA)** and the **Centre for Multiparty Democracy (CMD)** applied and were granted leave to participate in the proceedings as interested parties. The petition was argued before me on 6th June 2015.

The Submissions

Submissions by the Petitioner

17. The petitioner's case is set out in the petition dated 5th May 2015, an affidavit sworn by Ms. Ann Njogu on the same date, and submissions dated 19th May and 3rd June 2015. Oral submissions were made on its behalf by Learned Counsel, Mr. Elisha Ongoya.

18. The petitioner's position is that it has lodged the present petition in order to realize the promise made to the women of Kenya, and to translate that promise to a reality. It poses the question how long the promise can be postponed, and whether the legitimate expectation that the promise given to women by the people of Kenya in their capacity as sovereign will come to a reality.

19. According to the petitioner, this petition is about the realization of three provisions of the Constitutions. These are Article 81(b) which provides, with respect to the representation of the people, the principle that "not more than two-thirds of the members of elective public bodies shall be of the same gender." The second is Article 27(8) of the Constitution which provides that the state shall take legislative and other measures to put in place the principle that not more than two thirds of elective and appointive bodies shall be of the same gender. The third is Article 100 which requires the enactment of legislation to provide for representation of marginalized groups.

20. The petitioner submits that the Constitution must be construed to give effect to the intention of the drafters. It observes that Article 27(8) is in the Chapter on the Bill of Rights, and in this regard, it relies on the provisions of Article 259 of the Constitution which provides for the manner in which the Constitution should be interpreted, chief among its provisions, at Article 259(a), being that the Constitution shall be interpreted in a manner which promotes the values, purposes and principles of the Constitution, and at Article 259(b), that it shall be interpreted in a manner that advances the rule of law and human rights.

21. Mr. Ongoya asked the Court to be guided by the decision in the case of **Coalition for Reform and Democracy & Others vs The Attorney General-High Court Petition No. 628 of 2014** on the principles applicable in constitutional interpretation.

22. The petitioner further submits that the provisions of Article 81(b) have been the subject of interpretation by the Supreme Court in Advisory Opinion No 2 of 2012. It contends that at para 78 of the opinion, the majority opinion of the Court was that the legislative measures with respect to Article 81(b) should be taken by 27th August 2015.

23. According to the petitioner, because of the hierarchical order of our courts, this Court is bound to give effect to the decision of the Supreme Court. The petitioner relied on the decision of the Supreme Court in **Constitutional Opinion No 2 of 2011-(Advisory Opinion) In the Matter of the Interim Independent Electoral Commission** with respect to the binding nature of the Supreme Court's Advisory Opinions.

24. With respect to the implementation of the Supreme Court's Opinion on the two thirds gender rule, Mr. Ongoya submitted that such execution is specifically vested in the respondents by the Constitution under Article 261(4). According to Mr. Ongoya, Article 261(4) imposes an obligation on the AG in consultation with CIC to prepare Bills for tabling before Parliament; such Bills to be prepared as soon as reasonably practicable to enable Parliament pass the legislation within the period specified, with respect to the gender rule, the 27th of August 2015.

25. The petitioner submits that the AG and CIC have failed to exercise their constitutional mandate under Article 261(4). It contends that the Court has therefore the jurisdiction to compel them to exercise their statutory power by the issue of an order of Mandamus, placing reliance on the decision in **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR.** It is its position that the AG and CIC are legally bound to originate the requisite Bills, they have

failed to do so, and the Court should order them to do that which they are required by law to do.

26. According to the petitioner, the failure of the respondents to prepare for presentation to Parliament the necessary Bill threatens a violation of Article 81(b) and 27(8). This is what has precipitated this petition which, according to the petitioner, is not premature as it is intended to avoid a violation of Articles 81(b) and 27(8). It is its case that Article 258 gives a party the right to come to court to claim that the Constitution is threatened with violation. It terms as strange the argument by the respondents that the Court should wait until the 27th of August 2015, when the violation would have occurred, to act. It contends that a party should not wait for a violation to occur before seeking redress.

27. The petitioner further submits that it has established that the respondents have failed the test of reasonableness with respect to the preparation of Bills for presentation to Parliament for implementation of Article 81(b); that inevitably, these Bills will have an impact on articles 97 and 98, which requires a minimum of 90 days for the readings before Parliament; and that the Court should make remedial interventions and issue an order of mandamus to re-energize the AG and CIC to performs their mandate.

Submissions by KEWOPA

28. KEWOPA supports the petition. It filed an affidavit sworn by Ms. Cecily Mbarire on 12th May 2015 as well as submissions of the same date. It describes itself as an organization of women Parliamentary members, elected and nominated, who are beneficiaries of affirmative action. It notes that its membership has risen over the years, from 3 in 2001, 18 in 2007 and 47 members today. It also has 18 senators as members, and it attributes the rise in its membership to affirmative action.

29. Mr. Githinji, Learned Counsel for KEWOPA, observed that there were, on the date of hearing of the petition, only 85 days left to the 27th of August 2015, and it was therefore not humanly possible to comply with the timelines for bringing a Bill before Parliament. Counsel submitted further that since the Advisory Opinion was rendered in 2012, the AG and CIC have not taken any steps to execute their mandate, and have not given an adequate explanation for the failure.

30. With regard to the value of an Advisory Opinion of the Supreme Court, KEWOPA submits that an Advisory Opinion is an order as good as any and binds the respondents, and by its opinion, the Supreme Court had sought to change the gender rule from a principle to a right. It is its submission that the drafters of the Constitution found it fit to increase the participation of women in Kenya's democratic processes, a position that the respondents do not dispute. It submits therefore that the future for enforcement of the right now reposes in paragraph 79 and 80 of the Opinion which indicates that a party can move the High Court for appropriate orders. KEWOPA asked the Court to grant the orders that the petitioner was seeking.

Submissions by CMD

31. Through its Learned Counsel, Mr. Mwenesi, the Centre for Multiparty Democracy supported the submissions made by Mr. Ongoya on behalf of the petitioners. Mr. Mwenesi submitted that the issue in this petition revolves around Article 100 which requires legislation to be put in place to ensure representation of women and other groups. It was his submission that as matters currently stand, the National Assembly and Senate are insensitive on the gender question. Learned Counsel relied on the affidavit sworn by Ms. Njeri Kabeberi on 11th May 2015 and submissions of the same date.

32. CMD agrees with the petitioner that the Advisory Opinion is to the effect that the gender rule, as read with the human rights provision in Article 27(8) and Article 81(b), should be implemented by 27th August 2015, and action for its implementation should be taken by the AG and CIC. Mr. Mwenesi observed that it was the AG who, when faced with the principle of gender equity and pushed by the National Gender and Equality Commission (hereafter **"NGEC**") prior to the 2013 general elections, went to the Supreme Court for the opinion; that the Supreme Court gave its view and noted that Kenyan women have been marginalized and should no longer be marginalized; that the Supreme Court exercised its mandate under

the Supreme Court Act to render its opinion and require that the gender equity rule be implemented within 5 years; and the respondents could not argue that the 27th of August 2015 had not yet arrived.

33. Mr. Mwenesi further submitted that while the Supreme Court talked of legislative measures, Article 10 talks of public participation, but the respondents have not yet consulted the people. It was his submission that the AG and CIC are bound by Article 10, 27, and 81. To the contention by the respondents that they have an opportunity to extend the time, which Article 259(9) provides for, they should be given a hearing if they can show that they are compliant with the constitutional mandate under Article 10, 27, and 81. It was his submission, however, that there is a threat of violation as no Bills have been brought before the Court to show compliance.

34. CMD further observed that CIC is required under section 5(6)6 of the 5th Schedule to make reports to Parliament on the progress of its mandate. Mr. Mwenesi submitted that CIC has not shown any progress on meeting the deadline on the gender equity rule, or any impediment to its implementation. He discounted the argument by CIC that it was working with the NGEC, noting that in its letter to CIC annexed to CIC's affidavit, NGEC urges the AG and CIC to move expeditiously to publish the requisite Bill, which has not been done. Counsel urged the Court to issue an order of mandamus to compel the respondents to do what they are required to do for democracy and the women of Kenya.

Submissions by the Attorney General

35. The AG opposes the petition. He relies on an affidavit sworn by Ms. Muthoni Kimani, the Senior Deputy Solicitor General in the office of The Attorney General, on 29th May 2015 and submissions of the same date. His case is that the petition is premature and speculative, and does not disclose any violation or threat of violation of the Bill of Rights. His case was presented by Learned Counsel, Mr. Kaumba.

36. According to the AG, the question before the Court is the realization of the two thirds gender principle under Article 27(8) of the Constitution. His position is that the petitioner and interested parties have misconstrued the two thirds gender principle, which is not in respect of women but is an affirmative action principle for the benefit of any gender, and that at the moment, it is women who are disadvantaged but a time may come when the men are disadvantaged.

37. The AG further submits that the petition has its foundation in Supreme Court Advisory Opinion No 2 of 2012 which his office had sought in the context of the 2013 elections, and the question before the Supreme Court was whether the principle was applicable in the 2013 elections. Mr. Kaumba submitted that the Supreme Court restated the principle at paragraph 79-81 and held that it is applicable, and in accordance with the 5th Schedule of the Constitution, the period for implementation of the gender rule was 27th August 2015. It was his submission that the 27th of August 2015 has not yet arrived, that the petition was filed on 5th May 2015 before the constitutional timeline had arrived; and that Article 261(2) provides that the timelines within which legislative measures are to be taken can be extended by Parliament for one year.

38. With respect to the binding nature of Advisory Opinions, the AG submits, while relying on paragraph 93 of **Advisory Opinion No. 2 of 2011 (supra)** that the Supreme Court is conscious that while its opinions are binding, they are not capable of implementation as other decisions of courts but are supposed to be treated as authoritative statements of the law.

39. Counsel maintained that the AG had taken steps, set out in the affidavit of Ms. Kimani, towards achieving a legislative framework on the two thirds gender rule. Such steps included the setting up of a technical working group on 3rd February 2014, which presented a report to the AG on 17th February 2015 outlining the options available towards achieving the two thirds gender principle; forwarding of a Cabinet Memorandum as evidenced by a letter dated 16th March 2015; the refined proposal by the Technical Working Group on amendments to the Constitution to entrench the gender principle submitted on 18th May 2015; as well as other initiatives by Parliament to entrench the gender principle as are detailed in the affidavit sworn by Ms. Mbarire for KEWOPA.

40. It was also the AG's submission that his office is engaged in generating consensus on the gender principle; that the process of generating consensus is entrenched in the Constitution under the principle of public participation; and it was his submission that the petitioner and interested party should support the government's initiative rather than engage the government in Court.

41. With respect to the order of mandamus that the petitioner is seeking, the AG submits that this is not a proper matter for an order of mandamus to issue. Further, it is his submission that the measures required are legislative and involve Parliament in view of Article 209 and 118 on public participation. Mr. Kaumba submitted that the question will arise of how the order of mandamus will take into account the constitutional measures such as public participation which cannot be overlooked, and he prayed that the petition should be dismissed.

Submissions by CIC

42. CIC filed grounds of opposition dated 18th May 2015, an affidavit sworn by its Chairperson, Mr. Charles Nyachae, on 19th May 2015 as well as submissions and authorities dated 3rd June 2015.

43. In her submissions on behalf of CIC, Ms. Kilonzo began by alluding to two questions that the Court had raised in the course of submissions by the AG. These were who should effect the Advisory Opinion of the Supreme Court, while the second was whether Article 261(4) is a condition precedent to the enforcement of the right under article 261(5). It was her submission that in answering these questions, the Court would be exercising jurisdiction under Article 165(3) of the Constitution, which entails the jurisdiction to answer the question whether CIC has denied, violated, or threatened any person's right or fundamental freedom and secondly, whether CIC has acted inconsistently with or in violation of the Constitution. Ms. Kilonzo submitted that if the response to these questions is in the negative, then the reliefs sought against CIC do not lie.

44. The basic argument advanced by CIC is that it is Parliament which has the responsibility to enact the legislation to effect the gender rule. Ms. Kilonzo submitted that under the e*jusdem generis* rule of interpretation, Article 261 must be read as a whole and in conjunction with the other provisions of the Constitution; that Article 261(1) requires Parliament to enact consequential legislation required by the Constitution within the effective date; while Article 261(4) provides that for the purposes of Article 261(1), the AG, in consultation with the CIC, shall prepare the relevant Bills.

45. Ms. Kilonzo submitted that Article 261(4) does not read the AG ***and*** the CIC; that it does not impose a joint obligation on the AG and CIC, and that the obligation is on the AG to prepare the Bills and consult CIC.

46. It was her further submission that section 5(6) of the Sixth Schedule places a responsibility on CIC to monitor, facilitate, and oversee and to coordinate with the AG for purposes of preparing consequential legislation to be tabled in Parliament, and that the Constitution does not place on CIC a duty that can be enforced by way of Mandamus, to prepare Bills.

47. Ms. Kilonzo contended that the obligation of the AG to prepare Bills is not a condition precedent for a person to petition Parliament to enact legislation. She submitted that under Articles 94, 95, 96, 109, 100 and the Fifth Schedule to the Constitution, as well as Article 261 read as a whole, the ultimate responsibility to enact legislation is placed on the National Assembly and Senate; and further, that there is a consequence if the legislation is not enacted – that Parliament can be dissolved if the Court directs it to enact legislation and it fails to do so.

48. It was also Ms. Kilonzo's submission that even the petitioner and interested party have power under Article 119, to prepare Bills and petition Parliament to enact legislation to implement Article 100(b) and 81(b); that there are currently two pending Bills, the **Two Thirds Gender Rule Amendment Bill and the Constitutions of Kenya (Amendment) Bill 2015** which, though it was not CIC's submission that they realize the two-third gender rule, deal with Articles 27(8), 81(b) and 100.

49. Ms. Kilonzo contended further that Article 261 provides that all consequential legislation must be effected by 27th August 2015, but that Parliament has power under Article 261(2) and 259(a) to extend the time to 27th August 2016. It was her contention that Parliament should have been made a party to this petition; that any order that the Court made affects Parliament and it would be in breach of the rules of natural justice to make such orders in its absence. According to Ms. Kilonzo, it is only Parliament which faces sanctions for failure to enact consequential legislation: that the AG will continue in office upon such failure, as will CIC till the expiry of its term, but Parliament faces the risk of dissolution.

50. Ms. Kilonzo concluded that CIC has played its part with regard to realizing the two thirds gender rule; that it has been and still is in consultation with the AG, has coordinated with the AG and facilitated and monitored the preparation of proposals for meeting the rule; that it was part of the Technical Working Group whose proposal has been placed before the Court; and it has been working with the NGEC for the last one year to come up with potential, viable formulas and have forwarded a proposal to the AG on 19th of March 2015. It had played its part under Articles 261(4), section 5 of the Sixth Schedule and Article 254 of the Constitution, and it therefore prayed that the petition be dismissed.

The Petitioner's Rejoinder

51. In his response to the submissions by the respondents, Mr. Ongoya observed that the efforts allegedly made by the respondents needed to be reasonable, but it was his submission that to the extent that any efforts have been made, those efforts have been unreasonable. Counsel referred in particular to the concluding paragraphs of the letter from NGEC dated 4th May 2015, annexed to the affidavit of Mr. Charles Nyachae, in which NGEC was asking for the process to be expedited.

52. With respect to the submission by the AG and CIC that one of their success stories was that there are two parallel Bills by the Judicial and Legal Affairs Committee of the National Assembly and the Kenya Law Reform Commission, the petitioner was unimpressed. Its Counsel, Mr. Ongoya, dismissing these efforts as classic unreasonable conduct.

53. It was also Mr. Ongoya's submission that Parliament is not a necessary party to these proceedings. He submitted that the obligation invoked as having been violated is imposed under Article 261(4), and the duty bearers under the said Article are the AG and CIC, not Parliament. Whereas Parliament has a role in the law making process, his submission was that its role does not come into play at the stage of Article 261(4). In any event, in his view, if Parliament was a necessary party, it is an integral part of the national government which under Article 156(4)(b) of the Constitution is duly represented by the AG.

Analysis and Determination

The Issues Arising

54. I have considered the respective pleadings of the parties as well as the submissions which are set out above in brief. It is apparent that there is not much dispute with regard to the factual position, the central dispute revolving around the respective obligations of the respondents, and the timing of the present petition. I have therefore, distilled the following as the issues arising for determination in this matter:

i. Whether the Advisory Opinion of the Supreme Court is binding;

ii. Whether the present petition is premature;

iii. Whether Parliament was a necessary party to these proceedings;

iv. Whether there has been a violation or threatened violation of the Constitution by the respondents;

v. Whether the orders sought by the petitioner should issue.

55. In determining the above issues, I do so while bearing in mind the uncontroverted factual situation that has led us to where we are today. In particular, I am acutely conscious of the words of the Supreme Court in its Advisory Opinion on the gender equity issue when it opined at paragraph 47 as follows:

> ***[47]"This Court is fully cognizant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned Counsel Ms. Thongori aptly referred to this phenomenon as "the socialization of patriarchy"; and its resultant diminution of women's participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of "national values and principles of governance" [Article 10]."***

56. The people of Kenya recognized the inequities and inequalities in our electoral system, the unequal power relations between men and women, and ***"the socialization of patriarchy"*** as a result of, inter alia, discriminatory practices, gender insensitive laws and policies. They sought to remedy these historical wrongs by the express provisions in the Constitution which are intended to ensure the equitable participation and representation of hitherto excluded groups, such as women. It is undisputed that in its Advisory Opinion in December 2012, the Supreme Court gave the 27th of August as, so to speak, the "future", the dawn, by which date the requisite measures should have been taken to realize the constitutional threshold set for the representation of women in elective positions in the National Assembly and Senate.

57. These measures have not yet been taken, and the petitioner, supported by the interested parties, seeks orders to compel the respondents to act in accordance with the Advisory Opinion. The respondents dismiss the petition as premature, arguing, inter alia, that there has not yet been a violation as 27th August 2015 has not yet arrived, and so the orders that the petitioner seeks should not issue.

58. In a sense, the arguments by the respondents tacitly concede an obligation to abide by the Advisory Opinion, though there was some argument advanced by Mr. Kaumba for the AG that seemed to cast doubt on this point. It is therefore necessary at the outset to deal with the question of the nature, impact and import of the Advisory Opinions of the Supreme Court.

Whether the Advisory Opinion of the Supreme Court is binding

59. It is the petitioner's case that the Opinion is binding on the Court, as well as the respondents. The petitioner relies on another Advisory Opinion of the Supreme Court in which it addressed itself to the question whether its Advisory Opinions are binding. This was in **Supreme Court Constitutional Application No. 2 of 2011 (Advisory Opinion) In the Matter of the Interim Independent Electoral Commission**, in which the Supreme Court expressed itself as follows:

> ***[93]"In our discussion of the advisory jurisdiction, we have adopted a circumscribed mandate in relation to the exercise of that jurisdiction. From such a reserved position, and in view of the pragmatic and discretionary nature of the mandate as we conceive it, we perceive that the Supreme Court's decisions in this domain may significantly touch on legal, policy, political, social and economic situations. On this account, it is inappropriate that the Supreme Court's Advisory Opinion should be sought as mere advice. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the***

shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an "idle provision", of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law.

[94] For the above reasons, we decide that an Opinion of the Supreme Court is binding as much as any other decision of the Court, as herein indicated. We agree with the Chief Justice of Nauru – another common law State that provides for the advisory jurisdiction – who thus observed in an Advisory Opinion, In the Matter of Article 55 of the Constitution Reference re Dual Nationality and other Questions (Constitutional Reference No.01/2004):

"Such an Opinion carries legal weight, so far as it goes, but it must itself be susceptible to the normal canons of interpretation in the event of a particular disputed question brought before court." (Emphasis added)

60. As the highest court in the land, it cannot be disputed that decisions of the Supreme Court have binding effect on all in the land, in light of the hierarchy of courts and the doctrine of precedence that is extant in this jurisdiction. Further, in accordance with the provisions of Article 163(7) which provides that ***"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court***", this Court is constitutionally bound by the Advisory Opinion of the Supreme Court on the question of gender representation in the national Assembly and Senate. Equally bound are the respondents. The AG initiated the matter when it sought the advisory opinion of the Supreme Court, while the CIC was an active participant in the proceedings as an interested party. Indeed, all the parties involved in the present matter participated in the matter before the Supreme Court, either as the applicants, interested parties, or as amicus curiae. It cannot therefore be seriously contended that the Supreme Court decision is not binding.

Whether the Petition is Premature

61. Having found that the Advisory Opinion is binding, the next question is whether the petitioner has approached this Court prematurely, and whether it should have waited for the 27th of August 2015 to dawn before approaching the Court.

62. At paragraphs 79 of its Opinion which I have set out above, the Supreme Court held that:

"….legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015. " (Emphasis added)

63. At paragraph 80, the Supreme Court directed parties to seek relief from the High Court under the Bill of Rights provisions when it stated as follows:

[80]"The foregoing opinion is a basis for action in accordance with the terms of Article 261(6), (7), (8) and (9) under the "Transitional and Consequential Provisions" of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions"

64. This petition has been brought, inter alia, under the provisions of Articles 22, 23, 165 and 258 of the Constitution. Under Article 22, the Constitution gives every person the right to***"…institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*** Article 258 uses similar language, giving to every person the right to***"…institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention."***

65. The petitioner is in this case apprehensive that there is a **threat** of violation of the Constitution in the alleged failure by the respondents to implement the Advisory Opinion of the Supreme Court in accordance with the responsibility placed upon them by Article 261(4). The due date as determined in the

Advisory Opinion is 27th August 2015. Should the petitioner have waited until the violation occurred before approaching the Court? The respondents think so.

66. However, this Court respectfully disagrees. In **High Court Petition No. 22 of 2015 Kenya Association of Stock Brokers and Investment Banks vs The Attorney General,** this Court cited with approval the decision of the five-judge bench in **Coalition for Reform and Democracy & Others vs Attorney General, Petition No 628 of 2014 (**the CORD case**)** and stated as follows:

> ***[124.]"… as the Court observed in High Court Petition No. 628 of 2014 Coalition for Reform and Democracy and Others vs The Attorney General, a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. The view of the Court in that matter, which I fully agree with, is that a party has a right to approach the Court for relief if there is a threat of violation or contravention of the Constitution, given the provisions of the Constitution which included a "threat" to a right or fundamental freedom as one of the conditions entitling a person to approach the High Court for relief under Article 22 and 165(3)(b) and (d)(i)."***

67. In the **CORD** case, the Court expressed itself as follows:

> ***[112.]"…we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 258 of the Constitution, that the words of the Constitution, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution.***
>
> ***[113.] We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened …….contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another…***
>
> ***[114.] The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent."***

68. I fully agree with the sentiments of the Bench in the CORD case. A party need not wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief. It appears to me that the intent behind the use of the word ***"threatened"*** in both Articles 22 and 258 was to preempt the violation of rights, or of the Constitution. If a clear threat to either is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It is therefore my finding, and I so hold, that this petition is not premature, and is properly before me.

Whether Parliament was a Necessary Party to these Proceedings;

69. CIC has argued that Parliament should have been made a party to these proceedings. Its argument, as advanced by Ms. Kilonzo, is premised on four main grounds. It argues that it is Parliament which has the ultimate responsibility to enact the legislation to effect the gender rule; that Article 261(1) requires Parliament to enact consequential legislation required by the Constitution within the effective date; that there is a consequence on Parliament if the legislation is not enacted as Parliament can be dissolved if the Court directs it to enact legislation and it fails to do so; and that any order that the Court makes would affect Parliament and it would be in breach of the rules of natural justice to make such orders in its

absence.

70. The petitioner responds, first, that the provision of the Constitution alleged to have been violated is Article 261(4), and this provision does not involve Parliament at the stage at which the petitioner alleges it has been violated. It is also its contention that in any event, the legislature is properly represented as the AG is a party, and under Article 156(4)(b), he represents the national government, of which Parliament is a part.

71. I am inclined to agree with the petitioner on this issue. Its complaint centres on the failure of the AG and CIC to act in accordance with the requirements of Article 261(4), which provides that the AG in consultation with CIC ***"…shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified***."

72. In light of the above provision, I take the view that the petitioner is correct. Parliament's role, as contemplated under Article 261(1), requires some prior action on the part of the AG and CIC. Any orders directed at the two entities, therefore in respect of the obligation under Article 261(4) cannot be binding on Parliament. From the provisions of Article 261, it is apparent that the responsibility of Parliament to enact Bills pursuant to Article 261(1) is premised on the AG and CIC originating Bills, hence the provisions of Article 261(4) that ***"For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament…***" In the circumstances, therefore, the argument by Ms. Kilonzo on this point is, in my view, untenable.

73. In any event, as provided under rule 5(b) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, ***"A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute."*** In this case, however, it is my finding, and I so hold, that the petitioner has brought the proper parties to this Court.

Whether there has been a Violation or Threatened Violation of the Constitution by the Respondents

74. The petitioner alleges a violation or threat of violation of the Constitution by the respondents for failing to act in accordance with Article 261(4) of the Constitution. It may be useful, in considering this issue, to set out in its entirety the provisions of Article 261.

> ***261.(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.***
>
> ***(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.***
>
> ***(3) The power of the National Assembly contemplated under clause (2), may be exercised—***
>
> > ***(a) only once in respect of any particular matter; and***
> >
> > ***(b) only in exceptional circumstances to be certified by the Speaker of the National Assembly.***
>
> ***(4) For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified.***

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.

(7) If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

(8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament.

(9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

75. Pursuant to the Supreme Court Advisory Opinion, the requisite legislation to entrench the two thirds gender rule to ensure that the principle that not more than two thirds of the membership of the National Assembly and Senate shall be of the same gender should have been enacted by the 27th of August 2015. This requirement, which all parties accepted and which this Court has found was binding by virtue of the fact that the Supreme Court is the highest court in the land and its decisions are accordingly binding on all, has not yet been implemented.

76. It is also worth observing that the date set by the Supreme Court accords with the constitutional provisions in the Fifth Schedule of the Constitution. Under the said Schedule, timelines are given for the enactment of various legislation. With respect to promotion of representation of marginalized groups under Article 100 for instance, the time limit is five years from the promulgation of the Constitution. Where no specific timeline is provided in respect of a matter, the Constitution provides that any other legislation required by the Constitution shall be enacted within 5 years from the date of promulgation.

77. It is evident that the intention of the people of Kenya, in overwhelmingly voting for the 2010 Constitution, was that all legislation that was required to be enacted in order to bring into being their vision of a just and democratic society should be enacted within 5 years from the date they promulgated the Constitution. They required, under Article 261(1), that Parliament should enact the said legislation within the said time period; and that in order for Parliament to do so, as provided under Article 261(4), the AG, in ***consultation with*** CIC would have prepared the requisite Bills.

78. What do we have now? As observed by KEWOPA, at the time of hearing this petition, there were about eighty five days left to the 27th of August 2015. The legislation contemplated in the Supreme Court's Advisory Opinion has yet to be enacted. The petitioner states that the respondents have failed to comply with the opinion of the Supreme Court, and a contravention of the Constitution is threatened. The respondents dispute the allegations against them.

79. Let us consider the position of CIC first. Its main contention is that it has not failed in its constitutional obligation as the main responsibility is on the AG, that the responsibility under Article 261(4) is not a joint responsibility: that the AG is required to prepare Bills, in ***"consultation with"*** CIC. It would appear, from the position taken by CIC, that it is seeking to wash its hands of the problem, fold its hands, so to speak, and say *"we cannot move unless the Attorney General does."*

80. However, given the constitutional role and mandate given to CIC under section 5(6) of the

Transitional and Consequential Provisions contained in the Sixth Schedule of the Constitution, this is not an argument that CIC can validly make.

81. CIC is established under section 5(1) of the said Schedule. Its functions are provided under section 5(6) as follows:

> ***(6) The functions of the Commission shall be to—***
>
> ***(a) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;***
>
> ***(b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution;***
>
> ***(c) report regularly to the Constitutional Implementation Oversight Committee on—***
>
> > ***(i) progress in the implementation of this Constitution; and***
> >
> > ***(ii) any impediments to its implementation; and***
>
> ***(d) work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected."*** (Emphasis added)

82. I have considered the submissions by CIC and the averments contained in the affidavit of Mr. Charles Nyachae, its Chairman. These averments are a reflection of the written and oral submissions made by Ms. Kilonzo on its behalf, the sum of which is that the CIC has not failed in its constitutional obligation as it is only Parliament which has the role to enact legislation to put into effect the two thirds gender rule. Regrettably, in light of the clear mandate of CIC under the Constitution, these arguments are unsustainable, and one gets the impression that CIC and, as I will demonstrate shortly, the AG, has dropped the ball on the gender equity issue. Their obligation was to prepare and table Bills before Parliament as soon as ***"reasonably practicable…"*** Have they done this?

83. Black's Law Dictionary, Ninth Edition, defines the word "reasonable' as ***"fair, proper or moderate in the circumstances".*** It defines ***"practicable"*** as ***"reasonably capable of being accomplished; feasible."*** With regard to the preparation of the requisite legislation in respect of the gender equity rule, the question is whether the actions of the respondents have met the test of reasonableness and practicability in terms of time.

84. The respondents assert that they have met their constitutional obligation, and have placed various documents before the Court in support of their assertion. These documents, in the case of CIC annexed to the affidavit of Mr. Nyachae, are correspondence from the AG, responding to communication from CIC, and between the AG and the NGEC on the gender equity rule. The other document is referred to as a report from the Technical Working Group, established in 2014, on what is said to be the *"Viable and Preferred Formula"* for realization of the two third gender principle.

85. I have also considered the averments on behalf of the AG by Ms. Muthoni Kimani in her affidavit sworn on 29th May 2015. In the said affidavit, Ms. Kimani advances the contention by the respondent that the petition is bad in law, premature, speculative and based on a misconstruction of the provisions of the Constitution on the gender principle and the Supreme Court in its Advisory Opinion No 2 of 2012.

86. She argues that the Supreme Court did not order a constitutional amendment but emphasized the need to take legislative measures to actualize the two third gender principle in Parliament by 27th August 2015. It is her averment that the time frame in question is yet to lapse, and even if it did, it can be extended by Parliament for a further period of one year in accordance with Article 261(2).

87. With respect to the petitioner's contention that it has not taken reasonable and practicable steps to

formulate and present a Bill to Parliament to enable it enact the necessary legislation, Ms. Kimani states that subsequent to the Advisory Opinion, the AG did, on 3rd February, 2014, constitute a Technical Working Group to develop a framework towards realization of the two thirds gender principle in political representation. According to Ms. Kimani, the Technical Working Group comprises, inter alia, the office of the Attorney General and the Department of Justice, the Ministry of Devolution and Planning (Directorate of Gender), the NGEC which is the Convener and Secretariat of the Technical Working Group, CIC, the independent Electoral and Boundaries Commission, the Office of the Registrar of Political Parties, and the Parliamentary Constitutional Implementation Oversight Committee

88. The AG states that on 7th February 2015, the Technical working Group presented its report to his office, outlining nine options for consideration based on submissions received from stakeholder consultations and expert submission. Following review thereof, a report was forwarded to the AG on 11th March 2015. Thereafter the Technical Working Group forwarded to the AG three refined options on the realization of the two third gender principle. The AG states that he has prepared a Cabinet Memorandum on the proposals made by the Technical Working Group for consideration by the Cabinet which was forwarded on 16th March 2015 to the Cabinet Secretary for Devolution and Planning. It is also his case that on 19th March 2015, the Technical Working Group submitted a subsequent refined proposal of amendments to the Constitution to entrench the two thirds gender principle, which proposals have also been forwarded to the Cabinet for its review and consideration.

89. The AG also alludes to other initiatives in Parliament to prepare and table Bills on the two thirds gender principle. Such initiatives include a constitutional amendment Bill and an omnibus amendment Bill to various legislation. It is his case that his office has been engaged in a process of generating consensus on the variant positions after which the requisite action will be taken with respect to the two thirds gender principle.

90. Clearly, there has been a lot of frenetic, but apparently not too productive, activity with regard to the realization of the two thirds gender principle in the last few months. However, such activity cannot be described as being ***"as soon as reasonably practicable"***. Indeed, it is difficult not to wonder about the apparent laxity demonstrated by all the parties involved in this matter with regard to enactment of legislation to effect the gender equity rule in compliance with the timeline set in the Supreme Court Advisory Opinion, which timeline accords with the timeline in the Fifth Schedule of the Constitution. The Advisory Opinion was rendered in December 2012, almost three years to the deadline that will be upon us in less than sixty days. The Supreme Court was emphatic about the complex and inter-agency nature of the task ahead, which would require consultation and the participation of the public, when it observed at paragraph 65 that:

> ***[65] "We take judicial notice that the passage of legislation ["legislative measures"] to redress an injustice, or to deliver public goods, is not the single execution-oriented act that can be discharged immediately upon command; it is, inherently, a process and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. Indeed, by the Constitution, the development of legislation is no longer the preserve of Parliament, or the legal draftspersons in the State Law Office; public participation in the legislative process is a constitutional imperative."***

91. One cannot describe the steps that the AG and CIC have taken as they emerge from their affidavits as reasonable and practicable, or as intended to achieve the timeline in the Advisory Opinion. There is thus an apparent failure on the part of the respondents to exercise their constitutional mandate under Article 261(4) as directed in the Advisory Opinion. The AG, who does not deny the responsibility of his office to originate Bills, takes refuge in the provisions of Article 261(2), which grant to the National Assembly the power to extend the time prescribed for taking action in terms of Article 261(1) and the Fifth Schedule. However, the provisions of Article 261(2) are clear, and it is important to set them out alongside Article 261(1):

(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter <u>within the period specified in the Fifth Schedule, commencing on the effective date.</u>

(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.

(3)The power of the National Assembly contemplated under clause (2), may be exercised—

(a) <u>only once in respect of any particular matter</u>; and

(b) <u>only in exceptional circumstances</u> to be certified by the Speaker of the National Assembly. (Emphasis added)

92. It is not the mandate of this Court in this petition to enquire generally into how far the AG and CIC have met their mandate under Article 261(4) and section 5 (6) of the Sixth Schedule, nor does it fall upon it to inquire how far there has been compliance with the constitutional timelines set out in the Fifth Schedule. It is also not the mandate of the Court to say how the two thirds gender rule should be implemented, whether by way of constitutional amendment, or by legislation.

93. However, the Court has the mandate to state that in so far as the two thirds gender rule and the binding Advisory Opinion of the Supreme Court is concerned, there is an apparent failure by the respondents, *<u>both</u>* respondents, to exercise their mandate under the Constitution.

94. The argument by the respondents that the period for enacting the requisite legislation can be extended by the National Assembly does not really ameliorate the situation. It will be the province of the Speaker, should the question of extension of time arise, to certify the special circumstances that justify the extension of time, and for the National Assembly to vote on whether to extend the time or not.

95. As matters stand, however, as submitted by the petitioner and the interested parties, and bearing in mind the demands for consultation and public participation, the threat or likelihood of violation of the Constitution with respect to the two thirds gender rule is clear. It is therefore my finding, and I so hold, that there is a threatened violation of the Constitution by the respondents with respect to their exercise of their mandate(s) under Article 261(4) and section 5(6) of the Sixth Schedule to the Constitution.

96. In closing on this issue, it is worthwhile making some remarks on the role of Parliament in the implementation of the Constitution. Ms. Kilonzo submitted at length about the role of Parliament in respect of the enactment of legislation under Article 261 of the Constitution. While its role is, as provided under Article 261(4), predicated on the acts of the respondents, it has an important and crucial oversight role, through the Parliamentary Select Committee, described in the Constitution as the **Constitutional Implementation Oversight Committee**, which is established under section 4 of the Sixth Schedule in the following terms:

4. There shall be a select committee of Parliament to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things—

(a) <u>shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—</u>

(i) <u>the preparation of the legislation required by this Constitution and any challenges in that regard;</u>

(ii) the process of establishing the new commissions;

(iii) the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;

(iv) the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and

(v) any impediments to the process of implementing this Constitution;

(b) coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and

(c) take appropriate action on the reports including addressing any problems in the implementation of this Constitution. (Emphasis added)

97. No submissions were made at the hearing hereof with respect to the role played by the **Constitutional Implementation Oversight Committee**, the Parliamentary Committee charged with the responsibility of overseeing the implementation of the Constitution. Ms Kimani does mention in her affidavit that the Parliamentary Constitutional Implementation Oversight Committee is a member of the Technical Working Group. However, given its pivotal role in the implementation of the Constitution as provided in section 4 of the Sixth Schedule, and the fact that there does not appear to be a timeline with respect to its constitutional role, one would have expected that it would play its role more convincingly in respect of the two thirds gender principle.

98. The involvement of Parliament appears to have been through the Judicial and Legal Affairs Committee of the National Assembly. The petitioner submitted that far from initiating the enabling legislation for realization of articles 27(8) and 81(b) of the Constitution as interpreted by the Supreme Court in the Advisory Opinion, however, the Chairperson of the Judicial and Legal Affairs Committee has published the Constitution of Kenya (First Amendment) Bill 2015, the net effect of which, according to the petitioner, is to restate the terms of the Supreme Court Advisory Opinion.

99. In promulgating the 2010 Constitution, the people of Kenya were optimistic that they had put in place the institutions, processes and procedures for the just and effective governance, that would implement their hopes and aspirations through the implementation of the Constitution, thus leading to the just and equitable society that they aspired to. It would appear, at least in so far as the equitable representation of women and other marginalized groups contemplated under Articles 27(8), 81(b) and 100 is concerned, that their hope may not be realized. The Constitutional Implementation Oversight Committee of Parliament appears to be somewhat moribund; CIC wishes to wash the matter off its hands, and the AG, who sought the Advisory Opinion in the first place, seems keen on waiting for the eleventh hour to act. It is rather late in the day for implementation of the rule, but not too late. Which leads me to the appropriate orders to grant in the matter.

Whether the Orders Sought by the Petitioner Should Issue.

100. The petitioner seek various orders against the respondents, including an order of mandamus directing them to prepare the relevant Bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution.

101. Article 23(3) of the Constitution grants this Court authority with respect to the Bill of Rights in the following terms:

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including —

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

102. The petitioner submits that an order of Mandamus is an order of judicial review as contemplated under Article 23(3). It relies on the decision of the Court of Appeal in **Kenya National Examination Council vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others (supra)** in which the Court stated as follows with respect to the principles to be considered in an application for orders of judicial review:

"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

??At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed…" (Emphasis added)

103. I have found that the AG has a constitutional duty under Article 261(4) of the Constitution, in consultation with CIC, to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified. Even if it were accepted, as Ms. Kilonzo submitted, that the obligation under Article 261(4) is solely on the AG, CIC cannot escape responsibility if one considers the provisions of section 5(6)(a) of the Sixth Schedule which gives one of its functions as being to ***"monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution.***" The respondents have not, in my view, discharged their mandate under the Constitution, and have not given reasonable explanations for failing to do that which they are under a constitutional duty to do.

104. I accept that the respondents have, in the last one year, set in motion some processes which appear to have been moving, except for the last 3 months, at a somewhat leisurely, one might even say, reluctant pace, towards realization of the two thirds gender rule. Nothing concrete, however, appears to have been

done between the date of the Advisory Opinion on 11th December 2012, or the date of the formation of the Technical Working Group on 3rd February 2014, towards having the requisite legislation in place.

105. In the circumstances, it is my finding, and I do hold, that the petitioner is entitled to the prayers that it seeks.

Conclusion

106. At the hearing of this petition, Counsel for the petitioner, Mr. Ongoya, made an impassioned plea to this Court to help realize the promise to women with respect to their representation in the National Assembly and Senate. He impressed on the Court the need to translate the promise made to the women of Kenya in the Constitution into reality, and to ensure that the legitimate expectation that the promise made by the people of Kenya, in exercise of their sovereign power, will become a reality.

107. Mr. Ongoya further asked how long the promise to the women of Kenya can be postponed, and whether there is a role for this Court to finally state that there is no more room for postponement of that promise.

108. The people of Kenya, in their wisdom, had foreseen the danger that various promises that they made to themselves may be postponed, or abandoned altogether. They therefore made very specific provisions with regard to their realization. As observed earlier, under the general provisions of the Fifth Schedule, **all** legislation required by the Constitution should have been enacted within 5 years of the effective date of the Constitution. In terms of the Advisory Opinion of the Supreme Court, the legislation to implement the two thirds gender rule should have been in place before 27th August 2015.

109. In her submissions, Ms. Kilonzo drew attention to the consequences on Parliament of a failure to pass the requisite legislation. Article 261 (5) provides that:

> ***(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.***
>
> ***(6) The High Court in determining a petition under clause (5) may—***
>
> ***(a) make a declaratory order on the matter; and***
>
> ***(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.***
>
> ***(7) If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.***

110. I need not belabour the binding nature of our Constitution, which at Article 2(1) is emphatic that ***"This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government"*** and at Article 3(1) ***"Every person has an obligation to respect, uphold and defend this Constitution***.'

111. The AG, in Consultation with CIC, is under a constitutional duty to prepare, for tabling before Parliament, legislation to effect the gender equity rule. Thereafter, should Parliament fail to act, then doubtless a vigilant Kenyan may invoke the provisions of Article 261(5)-(7).

112. However, the AG and CIC must first act to prepare and present the necessary Bill(s) to Parliament. They cannot pass the responsibility to others, as CIC sought to do, under the provisions of Article 119 of the Constitution, which makes provision with respect to petitions to Parliament. The constitutional obligation under Article 261(4) and the Fifth and Sixth Schedule with respect to the implementation of

the Constitution lies squarely upon them.

Disposition

113. In the circumstances, I am satisfied that the petition has merit, and I therefore issue the following declarations and orders:

> ***a. It is hereby declared that to the extent that the 1st and 2nd Respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012, they have violated their obligation under article 261(4) of the Constitution to "prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified".***
>
> ***b. It is hereby declared that the foregoing failure, refusal and or neglect by the 1st and 2nd Respondent is a threat to a violation of Articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.***
>
> ***c. An order of Mandamus be and is hereby issued directed at the 1st and 2nd Respondents directing them to, within the next Forty (40) days from the date hereof, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.***

114. In granting order (c) above and the timeline therein, I am cognizant of the fact that there have been various processes undertaken in the last year or so which ought to culminate in legislation for presentation to Parliament for consideration. Bearing in mind also the fact that the 27th of August 2015 is barely 60 days away, the timeline should allow the National Assembly, should it not be possible to consider and enact the requisite legislation, to consider the question of extension of time with respect to the two third gender principle in accordance with the provisions of Article 261(2).

115. With respect to costs, and bearing in mind the public interest nature of this matter, I direct that each party bears its own costs of the petition.

Dated Delivered and Signed at Nairobi this 26th day of June 2015

MUMBI NGUGI

JUDGE

Mrs. Judy Thongori, Mr. Ongoya & Ms. Wangechi instructed by the firm of Judy Thongori & Co. Advocates for the petitioner.

Mr. Kaumba instructed by the State Law Office for the 1st respondent

Ms. Kilonzo instructed by the firm of Kilonzo & Co. Advocates for 2nd respondent

Mr. Gitonga instructed by the firm of A.M. Wahome & Co. Advocates for the 1st interested party

Mr. Mwenesi & Mr Gitonga instructed by the firm of Gitonga Mureithi & Co. Advocates for the 2nd interested party.