REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CONSTITUTIONAL & HUMAN RIGHTS DIVISION)

PETITION NO. 288 OF 2015

OKIYA OMTATAH OKOITI ……..……1ST PETITIONER

NYAKINA WYCLIFFE GISEBE……..2ND PETITIONER

VERSUS

ATTORNEY GENERAL ……..……RESPONDENT

AND

THE SENATE ……..……...1ST INTERESTED PARTY

THE NATIONAL ASSEMBLY…….2ND INTERESTED PARTY

RULING

1. The 1st Petitioner, Okiya Omtatah Okoiti and the 2nd Petitioner Nyakina Wycliffe Gisebe filed a petition in this Court on 13th July, 2015 in which they seek the following declarations and orders:

> **"a) A Declaration be and is hereby issued that by dint of Article 2(3) a court of law has NO capacity to issue orders whose implementation requires amendments to the Constitution.**

b. **A Declaration be and is hereby issued that an item that was removed from the various drafts of the Constitution by the sovereign people during the review process CANNOT be reintroduced in the ratified and promulgated Constitution through the judicial process.**
c. **A Declaration be and is hereby issued that being required to interpret the Constitution as it is, the Courts of law DO NOT have capacity to arrive at decisions whose implementation requires an amendment of the Constitution.**
d. **A Declaration be and is hereby issued that Advisory Opinions of the Supreme Court DO NOT have the force of law and are binding (sic) on this Court and, by extension, on the general public.**
e. **A Declaration be and is hereby issued that the Supreme Court's Advisory Opinion No. 2 of 2012 is NOT a legitimate basis for initiating amendments to the Constitution of Kenya.**
f. **A Declaration be and is hereby issued that the principle of the one-third-to-two thirds gender representation in the Constitution DOES NOT apply to all public bodies, including the Presidency, the Governorships, the National Assembly, and the Senate; it applies only to those bodies that the Constitution itself directly applies the principles to.**

g. **A declaration be and is hereby issued that the National Assembly and the Senate elected at the next general elections in conformity with Articles 97 and 98 of the Constitution will <u>NOT</u> be unconstitutional if its membership does not embody the principle of the one-third-to-two-thirds gender representation.**
h. **The Honourable Court be pleased to issue and issues a mandatory order setting aside the Supreme Court's Advisory Opinion No. 2 of 2012 to the extent that its implementation requires the Constitution to be amended.**
i. **The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant in the interests of justice in the circumstances of this Petition.**
j. **The Honourable Court be pleased to issue an order ordering the Respondent to bear the costs of this Petition for being the party directly responsible, through actions and/or omissions, for the violations of the Constitution and the law which necessitated the Petitioners to seek remedy in the Honourable Court."**

2. The petition was filed together with a notice of motion application in which the petitioners pray for, among other orders, a certification that the matter raises a substantial question of law thus requiring the appointment of an uneven number of judges by the Chief Justice and a suspension of the Supreme Court's Advisory Opinion No. 2 of 2012 and the orders of Mumbi Ngugi, J issued on 26th June, 2015 in High Court Petition No. 182 of 2015.
3. The Attorney General who is the Respondent opposed the petition through grounds of opposition dated 30th July, 2015 as follows:

Jurisdiction is the power of a court over the nature of a case and the type of remedy demanded.

The Petitioners posit that this Honourable Court has the jurisdiction to enter a valid, enforceable judgment on the instant claim.

Jurisdiction may be broken down into two categories: personal jurisdiction and subject matter jurisdiction.

> **Personal jurisdiction is the constitutional requirement that a defendant have certain minimum contacts with the forum in which the court sits so that the court may exercise power over the defendant.**
>
> **Subject-matter jurisdiction is the requirement that the court have power to hear the specific kind of claim that is brought to that court.**
>
> **While the parties may waive personal jurisdiction and submit to the authority of the court, the parties may not waive subject-matter jurisdiction. In fact, the court may dismiss the case *sua sponte*—or, on its own—for lack of subject-matter jurisdiction.**

The requirement that a court have subject-matter jurisdiction means that the court can only assume power over a claim that the laws of the jurisdiction authorize it to hear.

> **Under Article 165 of the Constitution, the High Court is a court of general jurisdiction (i.e. unlimited original jurisdiction in criminal and civil matters). That is, the High Court has power to hear virtually any claim arising under the law, except those falling under the exclusive jurisdiction of the Supreme Court under the Constitution or falling within the jurisdiction of the courts contemplated in Article 162 (2).**
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> **In the circumstances herein, the High Court would only lack jurisdiction if the parties were:**

i. **Seeking an Advisory Opinion, or anything else which is reserved exclusively for the Supreme Court;**
ii. **Raising matters reserved for the Environment and Land Court, or the Employment and**

Labour Relations Court;

iii. **If Justice Mumbi had not recused herself from the matter herein.**

This Court has original and unlimited jurisdiction to hear any Constitutional question as it is clothed with jurisdiction under Article 165. This jurisdiction should be read holistically. These are proceedings for the protection of Constitution from judicial excesses, and the enforcement of rights and fundamental freedoms under the Constitution, and of compliance with constitutional values and principles, standards, and procedures.

The Petitioners re-emphasise that there has been no judgment by this Honourable Court or by another court having jurisdiction, on the merits of the Petition herein. Hence, the Respondent cannot oust the jurisdiction of this Court by pleading *Res judicata,* which is a plea that goes to the root of a claim. For *Res judicata* to hold, the Respondent would have to demonstrate, but he has not because they cannot, that there were proceedings prior between the same parties over the same subject matter.

Finally, this Court should take judicial notice of the fact that this matter was filed before the Hon. Lady Justice Mumbi Ngugi who made the Orders of this Court on June 26, 2015, in *Nairobi Constitutional Petition No. 182 of 2015, Centre for Rights Education & Awareness vs. The Hon. Attorney General and Another* (hereinafter, the CREAW case), directing the Respondent and the Commission for the Implementation of the Constitution *"… to, within 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."*

(Please refer to Paragraph 132(c) of the Judgement.)

Not only is this Court not bound by the decisions of Hon. Lady Justice Ngugi, but also the learned judge declined the opportunity to hear and determine the matter."

7. From the submissions filed by the parties, the Respondent's case is that Article 81(b) of the Constitution provides that not more than two thirds of the members of elective public bodies shall be of the same gender. Under Article 100 of the Kenyan Constitution, Parliament is commanded to enact legislation to the representation in Parliament of: women, persons with disability, youth, ethnic and other minorities and marginalized groups. Under Article 261 as read together with Schedule 5 of the Constitution, this legislation is supposed to be in place within five years after the promulgation of the Constitution. Guided by the said constitutional provisions the Respondent filed a request for an advisory opinion on 10th October, 2012 and sought the legal guidance of the Supreme Court to help in the implementation of this principle in Advisory Opinion No. 2 of 2012.

8. It is the Respondent's case that this petition is an abuse of the court process since in the majority decision rendered by the Supreme Court in Advisory Opinion No. 2 of 2012 it was held that the legislation on implementation of the gender principle in elective offices should be in place as at 27th August, 2015. At paragraph19 of its decision, the Supreme Court recognizes that advisory opinions are important for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. At Paragraph 20, the Court observed that the issues raised were matters of *county government.* Further, that if the gender composition of both the National Assembly and Senate touched on the constitutionality of these organs then that would be an issue bearing an impact on county government.

9. According to the Respondent, the Supreme Court has rendered itself in this matter and the State in compliance with that opinion and the judgement of the High Court in Petition No. 182 of 2015 has put in place mechanisms to enact legislation on the implementation of the two-thirds gender principle. It is the Respondent's case that this Court lacks the jurisdiction to suspend the

implementation of the Supreme Court's Advisory Opinion but can only be invited to test the constitutionality of any statute enacted by Parliament in compliance with the Court's directive.

10.In support of the argument that this Court has no jurisdiction in this matter, the Respondent cited that decision in ***The Owners of Motor Vessel "Lillian S." v Caltex Oil Kenya Ltd [1989] KLR 1*** *in which it was held that a Court cannot take any further step the moment it holds that it has no jurisdiction. Also cited in support of the Respondent's case is the statement of Ojwang, J (as he then was)* in ***Boniface Waweru v Mary Njeri &Another H. C. Misc. Application No. 639 of 2005*** (unreported) that:

> ***"Jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question."***

11.This Court was also referred to the decision of the Supreme Court in the matter of the ***Interim Independent Electoral Commission [2011] eKLR***, where it was stated that:

> ***"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by Statute Law, and by Principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989].***
>
> ***[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient court is to apply the same with any limitations embodied therein … in the case of the Supreme Court, the Court of Appeal and High Court, these respective jurisdictions are donated by the Constitution."***

12. The Respondent asserted that there is need for the courts to be guided by precedent. It is the Respondent's position that the place of precedence in legal decisions was explained in the decision of Sir Charles Newbold, P in **Dodhia v National & Grindlays Bank Limited and Another [1970] EA 195,** where he pronounced himself thus:

> **"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of** *stare decisis* **would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was no longer the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for the court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity."**

13. The principle of *stare decisis* was expounded in the same case by Duffus, V.P. who stated that:

> **"The adherence to the principle of judicial precedent or** *stare decisis* **is of utmost**

importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."

14.Other decisions cited by the Respondent in support of the imperative by this Court to adhere to judicial precedent is **Republic v Business Premises Rent Tribunal & another ex parte Albert Kigera Karume [2015] eKLR, Rift Valley Sports Club v Patrick James Ocholla [2005] eKLR** and **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others [2013] eKLR.**

15. In **Jasbir Singh Rai & 3 others** (supra) the Supreme Court observed that:

"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

16. Based on the principle of *stare decisis*, the Respondent therefore submits that by virtue of the Supreme Court being at the apex in the hierarchy of the Kenyan court system its decision is binding on this Court in so far as similar matters are concerned. It is the Respondent's case that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction. The principles enunciated in that decision would apply to matters that had not been placed before that court and to parties who were not before the court, so long as the latter matters turn on similar facts and points of law.

17. According to the Respondent, the circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are limited to (a) where there are conflicting previous decisions of the court; or (b), the previous decision is inconsistent with a decision of another court binding on the court; or (c) the previous decision was given *per incuriam.* Further, that this Court and the Court of Appeal are by virtue of Article 167(7) of the Constitution bound by the decisions of the Supreme Court.

18. It is the Respondent's view that the binding nature of the decision of the Supreme Court is not predicated on this Court's concurrence therewith but is based on the requirements of certainty, uniformity and predictability of judicial decisions**.** In support of this statement, the Respondent cited the statement of a five judge bench of the Court of Appeal in **Mwai Kibaki v Daniel Toroitich Arap Moi, Civil Appeal Nos. 172 & 173 of 1999; [2008] 2 KLR (EP) 351; [2000] 1 EA 115** to the effect that:

"The High Court, while it has the right and indeed the duty to *critically examine* the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that *obiter dictum* if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules."

19. Still on the importance of following the decisions of a higher court, the Respondent cited the decision of the Court of Appeal in **National Bank of Kenya Ltd v Wilson Ndolo Ayah Civil Appeal No. 119 of 2002; [2009] KLR 762** where it was held:

> **"It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."**

20. The Respondent concluded his arguments by urging this Court to dismiss the petition for want of jurisdiction. The Respondent also prayed for costs.

21. On their part, the petitioners hold the strong view that this Court has jurisdiction to entertain these proceedings. They commenced their opposition to the Respondent's grounds of opposition by giving a background to this matter. They stated they are before this Court to stop the political pressure by gender lobbyists out to impose gender quotas in the National Assembly and the Senate using unconstitutional means and riding on illegal orders to amend the Constitution, issued by sympathetic and biased judges. Their case is that the Judiciary of the Republic of Kenya gets its authority from the people of Kenya. It will exercise this authority via courts and tribunals, to interpret and apply the law of the Republic. It will do so independently without subject or control of anyone, any lobby, or any authority except the Constitution and other laws.

22. The petitioners' assertion is that the plain text of Articles 27(8) and 81(b) of the Constitution does not make it mandatory to apply the gender principle to all public offices. Article 27(8) provides that **"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."** On its part, Article 81(b) states that **"not more than two-thirds of the members of elective public bodies shall be of the same gender."** The petitioners submit that nowhere in the cited constitutional provisions is there reference to 'all public bodies' neither is there reference to 'each and every public body'.

23. It is the petitioners' case that the Constitution prescribes the composition of the National Assembly under Article 97 and the Senate through Article 98, and deliberately excludes the broad gender principle. The petitioners contend that in this regard, Articles 97 and 98 must be amended before applying the principle of gender representation in the National Assembly and the Senate.

24. The petitioners argue that during the review process, the gender principle was applied to Parliament in earlier drafts but in order to get broad consensus, it was deliberately removed from the final draft that was ratified by Kenyans on August 4, 2010 and promulgated on August 27, 2010.

25. The petitioners assert that in an intriguing twist of events in 2012, the Respondent asked the Supreme Court to make an Advisory Opinion based on the wrong assumption that Articles 27(8) and 81(b) of the Constitution imposed the gender principle on Parliament. The Attorney General asked the Supreme Court to determine whether the gender quotas were to be attained in the 4th March, 2013 general election or progressively at a later date.

26. According to the petitioners, the 1st Petitioner applied to be joined in the matter as a friend of the court but on 8th November, 2012, the Supreme Court rejected his application stating that he had nothing to offer in the matter. The Court instead made his advocate *amicus curiae*.

27. It is the petitioners' argument that in the opinion delivered on 11th December, 2012 in Advisory Opinion No. 2 of 2012, the Supreme Court rightly observed that it would require the amendment of Articles 97 and 98 to apply gender quotas to Parliament. It is the petitioners' assertion that despite this finding the Supreme Court, acting as part of the gender lobby, threw all caution to the wind and wrongly latched onto Article 100 as requiring the amendment of Articles 97 and 98 within the

timelines set in the Fifth Schedule to the Constitution. The petitioners aver that the Supreme Court then proceeded to directly violate Articles 2(3) and 3(2) of the Constitution when it directed the Attorney General to put in place a legal framework by 27th August, 2015 for the application of the principle of gender representation in the National Assembly and the Senate.

28. The petitioners contend that Supreme Court, or any court of law for that matter, has no capacity to directly or indirectly order the amendment of the Constitution. It is their position that the Supreme Court ought to have dropped its tools the moment it realized that it would require amendments to Article 97 and 98 of the Constitution to apply gender quotas to Parliament. The petitioners hold the firm view that no court of law can order the amendment of the Constitution, let alone the reintroduction into the Constitution of provisions that were deliberately dropped during the review process.

29. The petitioners assert that this Court (Mumbi Ngugi, J) made matters worse on 26th June, 2015 by ordering the Respondent to comply with the Advisory Opinion of the Supreme Court within forty days. The petitioners state that as compelled by the courts, the Respondent has since published the Bill to amend the Constitution. In the petitioners' opinion, the actions of the two courts constitute a frontal attack on Article 2(3) of the Constitution which provides that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organ. Further that the decision of the Court is also a direct attack on Article 3(2), which states that any attempt to establish a government otherwise than in compliance with the Constitution is unlawful.

30.The petitioners assert that the decisions of the courts is a frontal attack on Articles 255, 256, and 257 which do not provide for amendment to the Constitution through litigation. They contend that the Constitution can only and must only be done through Parliament (Article 256) or by popular initiative (Article 257).

31. The petitioners aver that Articles 1(3)(c), 2(3), 2(4), 3(1), 22, 23, 159, 165(3), and 258(1) vests this Court with the requisite jurisdiction and obligation to hear and determine both their notice of motion and petition.

32. Turning to the question of the jurisdiction of this Court to hear their application and petition, the petitioners contend that the issue was casually raised by the Respondent without stating any grounds.

33. Nevertheless, the petitioners have crystallised the issues for the determination of the Court on the question of jurisdiction as:

a. *Whether the High Court's general original jurisdiction is subject to limitation in this matter;*
b. *Whether Article 163(6) of the Constitution ousts the jurisdiction of the High Court; and*
c. *Whether the orders issued by the High Court (Mumbi Ngugi, J) on 26th June, 2015 oust the jurisdiction of this Court.*

34. On Whether the High Court's general jurisdiction is subject to limitation in this matter, the petitioners submit that the High Court, being the Court obliged to investigate the facts on a case by case basis to determine whether they reach the threshold for its intervention has jurisdiction in any disputed matter, irrespective of whether or not the Supreme Court has rendered an advisory opinion pursuant to Article 163(6) of the Constitution. They proceed to state that in any case, the Supreme Court's advisory jurisdiction is ousted by the High Court's original jurisdiction where there is a dispute on any issue, except as directed in Article 165(5).

35. The petitioners assert that the only matters reserved for the exclusive jurisdiction of the Supreme Court fall within the ambit of Article 163(3). In their view, the phrase that **"[t]he Supreme Court may give an advisory opinion…"** clearly demonstrates that matters brought to the Court by way of constitutional references, are not reserved for the exclusive jurisdiction of the Supreme Court, hence, Article 163(6) cannot in any way be construed as an ouster clause under Article 165(5)(a).

Consequently, they assert that Article 163(6) is not part of Kenya's administration of justice.

36.The petitioners postulate that any attempt to make the Supreme Court's advisory jurisdiction in Article 163(6) part of Kenya's administration of justice, where its opinions carry the same weight as the Court's decisions while exercising its appellate or original jurisdictions, will *lead to serious and substantial repercussions on the Judiciary* by morphing the Supreme Court into an oracle, complete with the caprice and attendant uncertainties that will strangulate this Court and the Court of Appeal from discharging their crucial mandates.

37. The petitioners argue that the limitations built into Article 163(6), denying the Supreme Court the exclusive jurisdiction that would allow it to make binding advisory opinions, are the direct expression of the will of the people in exercise of their constituent power under **Article 1,** and the same remain unaffected by the status of the Supreme Court as the apex Court. They proceed to submit that similarly, the original jurisdiction of this Court in **Article 165(3),** which can only be ousted as provided in Article 165(5), is the expression of the will of the people in exercise of their constituent power under **Article 1.**

38. The petitioners' contention is that a holistic interpretation of the various provisions of the Constitution leads to the conclusion that **Article 165(3)** is in fact superior to 163(6). The Petitioners are categorical that the advisory jurisdiction of the Supreme Court is inferior under the Constitution, thus, this Court has jurisdiction to review advisory opinions. The petitioners are of the view that the Supreme Court's advisory jurisdiction is automatically ousted where the High Court is seized of a matter, or where a matter involves a dispute which requires to be resolved by the application of the law.

39.They conclude that in matters that fall under Article 163(6), the High Court is clearly vested with higher jurisdiction than the Supreme Court by dint of Article 165(3)(d)(iii), which gives it jurisdiction to "**hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government."**

40. The petitioners assert that courts exist to adjudicate disputes and that reality informs the vesting of the authority to interpret the Constitution in the superior courts more so the High Court as the Court of first instance. For that reason they urge this Court to find that it has jurisdiction to handle this matter.

41. On another point, the p*etitioners submit that proceedings commenced under Articles 22 and 258 cannot be limited by the Supreme Court's advisory jurisdiction in Article 163(6). Further that u*nder Article 23 of the Constitution, the High Court has the obligation to enforce the fundamental rights of all persons. It is the petitioners' position that this petition concerns the violation of the rights, and of the spirit, values and principles enshrined in and guaranteed by the Constitution and this Court has an obligation to conduct effective and thorough investigations of the allegations made by the petitioners and to provide a remedy.

42. Moving to the key question as to *whether Article 163(6) of the Constitution ousts the jurisdiction of the High Court, the petitioners submit that the question to be answered is whether the said Article is an ouster clause. The petitioners told this Court that in interpreting Article 163(6) it should adopt an interpretation that gives effect to the rights and freedoms under the Bill of Rights, particularly Articles 19, 20, 21(1), 23(1), 25(c), 27(1 & 2), 48, and 50(1).*

43. The petitioners contend that Article 163(6) which vests standing only in the national government, any State organ, or any county government, and limits the Supreme Court's advisory jurisdiction to matters concerning county government, and gives the Supreme Court the discretion to deny a request for an opinion, cannot be construed as *an ouster clause against the jurisdiction of the High Court. They posit that the* national government, State organs, and county governments are

duty bearers not rights holders. *They urge this Court* to draw the distinction between the State (as a duty bearer) and themselves (as rights holders) as their petition seeks enforcement of rights and fundamental freedoms. In support of their contention that the State is a duty bearer and not a rights holder the petitioners cited the decision of the Court of Appeal in the case of **Thomas P. G. Cholmondely vs. Republic [2008] eKLR.**

44. The petitioners urged this *Court to reject the application of Article 163(6) as an ouster clause. It is their position that the Court should adopt an interpretation in favour of the enjoyment of rights by interpreting the Constitution as a whole, protecting the standing vested on the petitioners by Articles 22 and 258, harmonizing the provisions of Article 23 with Articles 165 and, above all, giving a purposive interpretation of the Constitution as demanded by Article 259 of the Constitution. Therefore, the petitioners submit that, even in the face of Article 163(6), this Court has jurisdiction to exercise any of the constitutional mandate conferred upon it by the people of Kenya under Article 165(3).*

45. It is the petitioners' opinion that even if **Article 163(6) is an ouster clause, there are** *strong and compelling reasons that would make this Court have jurisdiction to hear and determine this case.* **According to the petitioners those reasons are the violations of the Constitution and the denial by the Supreme Court of the 1st Petitioner's right to access to justice and the right to a hearing as guaranteed by Articles 48 and 50(1) of the Constitution respectively.**

46. In support of their proposition, the petitioners cited the case of **Austin v Attorney General, Case No. 1982 of 2003** in which Judge William Chandler of the High Court of Barbados addressed constitutional ouster clauses as follows:

> ***"In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali, CJ, in his reasoning recognized that an ouster clause may be usurped if there are 'strong and compelling reasons'. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy 'strong and compelling reasons' and that where such breaches are alleged an ouster may be ignored. There is sufficient authority to support this."***

47. The petitioners invited this Court to be persuaded by the decision in **Harrikisson v Attorney General of Trinidad and Tobago, Civil Appeal No. 59 of 175**, wherein Hyatali, CJ established the principle for bypassing constitutional ouster clauses by stating:

> ***"I am firmly of the opinion that a Court would be acting improperly if a perfectly clear ouster provision in the constitution of a country is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons."***

48. The petitioners also referred the Court to the Pakistani case of **Khan v Musharaf & others [2008] 4LRC 157 in which** the Supreme Court opined on the same issue that:

> ***"That Superior Courts of Pakistan have laid down that they retain the power of judicial review despite the ouster of jurisdiction which come either from within the Constitution or by virtue of martial orders or by legislation … Thus visualized, the purported ouster in the proclamation and the provisional Constitutional Order No. 1 of 1999 of the jurisdiction of the Superior Courts is an exercise in futility and the power of judicial review remains intact."***

49.The petitioners also relied on the decision of the Supreme Court of India in the case of **Kesava Nandabharati v State of Kerala & another AIR [1973] S.C. 1461** to urge that an ouster clause, no matter where placed, is wholly ineffective against the infringement of constitutional or natural justice rights.

50. According to the petitioners, there are only five instances in which the Constitution has ousted the general jurisdiction of the High Court, namely:

a. Contesting the validity or legality of the Constitution-Article 2(3);
b. The removal of the President-Article 165(3)(c);
c. Matters reserved for the exclusive jurisdiction of the Supreme Court-Article 165(5)(a);
d. Disputes relating to employment and labour relations and those relating to the environment and the use, occupation and title to land-Article 165(5)(b); and
e. Supervision of superior courts under Kenya's administration of justice (which excludes the optional advisory opinions that may be rendered by the Supreme Court)-Article 163(6).

51. The petitioners urge this Court to resist a finding that advisory opinions of the Supreme Court are binding, as to do so would be to invite the Supreme Court to overthrow the Constitution.

52. On the final issue as to *whether the orders issued by Mumbi Ngugi, J on 26th June, 2015 ousts the jurisdiction of this Court, the petitioners submit that ideally and for reasons of consistency this matter ought to have been* **heard and determined by the Hon. Lady Justice Mumbi Ngugi given that she gave the impugned orders in Nairobi Constitutional Petition No. 182 of 2015, Centre for Rights Education & Awareness (CREAW) v the Hon. Attorney General and Another,** but the learned Judge recused herself when the matter was placed before her.

53. It is the petitioners' case that this Court is not bound by the decisions of the learned Judge, and in the special circumstances of this case, has the jurisdiction to arrive at an independent decision based on the merits of the case. Further, that this petition raises substantive matters that were not part of the proceedings in the case heard by the learned Judge.

54. In conclusion the petitioners point out that an advisory opinion is optional and the Supreme Court is not allowed to be the determinant of the true limits of its advisory jurisdiction. They opine that advisory opinions must conform to constitutional limitations. The petitioners hold the view that advisory jurisdiction is not limited to the Supreme Court. It is part of the advisory machinery, including the office of the Attorney General, the Kenya Law Reform Commission, and the Commission for the Implementation of the Constitution, designed to assist the national government, any State organ, or any county government in the discharge of its duties with respect to any matter concerning county government, which is a new governance structure in Kenya. However, when disputes arise in matters concerning county governments, Article 165(3)(d)(iii) kicks in and the High Court is enjoined to hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.

55. Finally, the petitioners assert that in the very unlikely event that this Court finds that it lacks jurisdiction to hear and determine this matter simply because the instant petition challenges an advisory opinion of the Supreme Court then, by dint of Article 159(2)(d) as read with Articles 259(1), 1, 2, 3, 4(2), 10, 22, 48, 50(1) and 258, it should not dismiss the case but place the file before the Honourable Chief Justice for appropriate action.

56. Having stated at length the adverse positions taken by the parties in this matter, I need to state at the outset that the only question for determination at this stage is whether this Court has constitutional and or statutory permission to proceed with this matter. If I conclude that I do not have jurisdiction then I will state so and that will be the end of the matter. On the other hand, if I find that I have jurisdiction to hear this matter, I will proceed to give the parties directions on the way forward.

57. Jurisdiction is what gives a Court the authority to inquire into a matter before it. Where a Court comes to the conclusion that it has no jurisdiction to deal with a matter, the only option open to the Court is the one prescribed by Nyarangi, JA in **Owners of Motor Vessel "Lillian S" v Caltex Oil**

(Kenya) Ltd, [1989] KLR 1. In that case the learned Judge stated that:

> **"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction."**

58.The source of a court's jurisdiction was highlighted by the Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** when it stated that:

> "**A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

59. The constitutional origin of this Court's jurisdiction and its limits is found in Article 165 of the Constitution which states:

> **"165. (1) There is established the High Court…..**
>
> **(2)……..**
>
> **(3) Subject to clause (5), the High Court shall have—**
>
> **(*a*) unlimited original jurisdiction in criminal and civil matters;**
>
> **(*b*) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
>
> **(*c*) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under**
>
> **Article 144;**
>
> **(*d*) jurisdiction to hear any question respecting the interpretation of this 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;**

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article191; and

(*e*) any other jurisdiction, original or appellate, conferred on it by legislation.

(4)……..

(5) The High Court shall not have jurisdiction in respect of matters—

(*a*) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(*b*) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7)……"

60. The boundaries of the jurisdiction of the Supreme Court are drawn by Article 163(3) of the Constitution as follows:

"163 (3) The Supreme Court shall have—

(*a*) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and

(*b*) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from —

(i) the Court of Appeal; and

(ii) any other court or tribunal as prescribed by national legislation."

61. Article 163(6), however, introduces another aspect of the Supreme Court's jurisdiction in the following terms:

"163 (6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

62. This is the jurisdiction that was exercised by the Supreme Court in, **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion No. 2 of 2012 [2012] eKLR.**

63. The petitioners are of the view that the Supreme Court did not have jurisdiction to entertain the question or it ought not to have handled the issue even if it had jurisdiction.

64. The petitioners correctly submit that Article 163(6) of the Constitution does not oust this Court's jurisdiction. What the provision does is simply to mandate the Supreme Court to give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government. The petitioners are also correct that the

exercise of the advisory jurisdiction by the Supreme Court is discretionary. It is the Court, and not anybody else, based on established guidelines, which decides whether or not to give an advisory opinion.

65. In the case of **In the Matter of the Interim Independent Electoral Commission, Supreme Court Constitutional Application No. 2 of 2011,** the Supreme Court set the guidelines for the exercise of the advisory jurisdiction as follows:

> **"[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.**
>
> **(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.**
>
> **(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.**
>
> **(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court.**
>
> **However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.**
>
> **(iv)Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process."**

66. In **Advisory Opinion No. 2 of 2012,** the Attorney General had placed two questions before the Court namely:

> **"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?**
>
> **B. Whether an unsuccessful candidate in the first round of Presidential election under Article 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?"**

67. Before proceeding to conclude that the matter was one in which it could give an opinion, the Court cautioned itself as follows:

> **"[17] In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory**

Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing "rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth."

[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of the Constitution, in particular, a principle such as the separation of powers, by assuming the role of general advisor to Government."

68. Thereafter the Court stated the importance of advisory opinions and why it believed the issues that had been referred to it needed the Court's wisdom. This is what the Court said:

"[19] The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory- Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution.

[20] We have no doubt that the issues upon which an opinion has been sought, are indeed matters of county government. The gender composition of both the National Assembly and Senate, if it could touch on the constitutionality of these organs, is an issue bearing impact on county government….

[22] By the same token, we hold the opinion that the two questions referred to this Court by the Attorney-General are of such a nature as to bring the reference within the ambit of matters that qualify for this Court's Advisory Opinion."

69. The petitioners seem to hold the view that the interpretation of the Constitution is the sole responsibility of the High Court. That is not so as was clearly stated at paragraph 25 of Advisory Opinions No. 2 of 2012 as follows:

" [25] It is clear to us that this Court, while rendering Advisory Opinion, will almost invariably engage in the exercise of constitutional interpretation, and it is not precluded from such an exercise. It does not follow, therefore, that the Court will decline a proper request for an Advisory Opinion, merely because rendering such opinion will entail constitutional interpretation. The basic requirement for an application for an opinion is that it should, as contemplated by Article 163(6) of the Constitution, be seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest."

70. On the gender-equity question, the majority in the said matter went ahead and advised as follows:

"[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. We have also benefited in developing this line of reasoning, from the learned submission of Mr. Amollo for CAJ.

[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] 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.

[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.

[81] In the course of arriving at this Opinion we noted certain elements in the submission by counsel, in respect of which we will make a number of observations. Our remarks in this regard inclusively cover the related issues identified earlier, as meriting this Court's attention.

[82] It was contended that the progressive mode in the implementation of the gender-equity rule would run into conflict with the constitutional principle of the separation of powers: as the Courts would be straying into business falling to the Executive or Legislative Branch. It was being urged that the judicial approach must stand in favour of the accrued-right principle, and it should be held that there had been a breach of Article 81(b) of the Constitution. We are not, however, in agreement with this contention, as the provision in Article 27 (6) for the State to "take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups," presupposes open-ended schemes of decision-making and programming, which can only be effected over a span of time. By accommodating such prolonged time-spans of action by the Legislative and Executive Branches, the Judiciary by no means negates the principle of the separation of powers.

[83] The ultimate question was whether, if the Courts were to take the position that a breach of the Constitution would be entailed if the general elections of March 2013 did not yield the stated gender proportions in the membership of the National Assembly and Senate, it was conceivable that the relevant organs would in their membership, be held to offend the Constitution. We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution."

71. I have reproduced the opinion of the Supreme Court at length in order to answer the question as to whether this Court has jurisdiction to delve into the matter again. At the preliminary stages of this ruling I reproduced the prayers the petitioners seek through these proceedings. It is also important to reproduce some of the statements contained in their petition. They state:

"10. The current clamour to apply the principle of the one-third-to-two-thirds gender representation in the National Assembly and the Senate is unreasonable for being detached from reality, and for being totally immune to rational argument, and constitutes a major threat to the Constitution of Kenya 2010.

12. The Respondent is leading various gender lobbyists, who are reading the Constitution not as it is, but as it ought to be from their mistaken perspective,, to pile immense pressure on Parliament to implement the one-third-to-two-thirds gender representation principle in the National Assembly and the Senate before the 27th day of August 2015.

14. The 27th August 2015 deadline is a threat to the Constitution since, by requiring that the Constitution be amended following an Advisory Opinion of the Supreme Court, Article 2(3) of the Constitution, which forbids courts of law and other State organ from challenging the validity or legality of the Constitution, is violated.

16. Contrary to the above, on the 11th day of December 2012, the Supreme Court of Kenya delivered its Advisory Opinion No 2 of 2012, in which, via a majority opinion at paragraphs 79 and 80, it set the 27th August 2015 deadline for the Hon. Attorney General and the Commission for the Implementation of the Constitution to enact required legislation "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. Failure to which the High Court would be duly moved to issue appropriate orders and directions, in accordance with the terms of the "Transitional and Consequential Provisions" in Article 261(6),(7) (8) and (9) of the Constitution.

17. The Petitioners aver that the Advisory Opinion of the Supreme Court, which technically required Parliament to amend the constitution by 27th August 2015, was an arrogant attack on Article 2(3) which categorically bars any such action by the Courts of law. For the avoidance of doubt, Article 2(3) states:

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

18. Notwithstanding the above, on 26th June 2015, moved by some one-third–two-thirds gender lobbyists, the High Court made matters worse when it gave Respondent and Commission for Implementation of the Constitution 40 days within which to prepare the necessary laws that will provide the legal framework for the application of the principle of the one-third-to-two-thirds gender representation in the National Assembly and the Senate as opined by the Supreme Court on 11th December 2012.

19. The two unfortunate resolutions of the two Courts in utter contempt of Article 2(3) cited above are a direct consequence of the Respondent misinterpreting Articles 27(8) and Article 81(b) to mean that <u>each and every elective public body</u> is (or <u>all elective public bodies</u> are) subject to the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

72. The cited statements in the petition and the declarations and orders sought by the petitioners all point to the fact that the petitioners through these proceedings seek to upend the decisions of the Supreme Court and the High Court (Mumbi Ngugi, J). The petitioners allege that they have approached this Court on the strength of its original jurisdiction. The truth of the matter is that this Court has no jurisdiction whether original, appellate or supervisory over the matters that have had the insight of the Supreme Court or any other superior court. Article 165(6) of the Constitution is clear on this.

73. It can be argued that since Article 165(3)(d)(ii) of the Constitution empowers this Court to determine questions whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution, then the decisions of the Supreme Court are within the reach of this Court. That would however be a constitutional heresy as the same Constitution at Article 165(5)(a) forbids this Court from having jurisdiction in matters reserved for the exclusive jurisdiction of the Supreme Court. By virtue of Article 163(6) of the Constitution, advisory jurisdiction falls in the province of the Supreme Court. Once the Supreme Court formed the opinion that the gender-equity question was a matter befitting determination through an advisory opinion, the power of this Court to address that question was taken away. Any attempt by this Court to circumvent the decision of the Supreme Court is an affront to the Constitution. The same reasoning applies to decision of my sister Mumbi Ngugi, J. Any attempt to delve into the issues that were addressed in her judgement will go against Article 165(6) of the Constitution.

74. The petitioners urged this Court that should it reach the conclusion that it has no jurisdiction then this matter should be placed before the Chief Justice for directions. I am not aware of any legal provision that allows me to act as requested by the petitioners and their request fails.

75. In conclusion, I concur with the Respondent's argument that this Court lacks jurisdiction to hear this matter. The petitioners' petition and notice of motion dated 13th July, 2015 are therefore dismissed. I make no order as to costs.

Dated, signed and delivered at Nairobi this 17th day of August, 2015

W. KORIR,

JUDGE OF THE HIGH COURT