REPUBLIC OF KENYA
High Court at Mombasa

Election Petition 4 & 9 of 2013

BETWEEN

GIDEON MWANGANGI WAMBUA ....PETITIONER

VERSUS

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

2. KHATIB ABDALLA MWASHETANI... 2ND RESPONDENT

3. JUMA MUSA (RETURNING OFFICER LUNGA LUNGA CONSTITUENCY)....3RD RESPONDENT

CONSOLIDATED WITH

ELECTION PETITION CAUSE NO. 9 OF 2013.

BETWEEN

HASSAN NJANYE CHARO……………………..……… PETITONER

VERSUS

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

2. JUMA MUSA…………………………...………2ND RESPONDENT

3. KHATIB ABDALLA MWASHETANI…..…...….3RD RESPONDENT

RULING

INTRODUCTION

1. This ruling arises out of application filed in Mombasa High Court Election Petition Nos. 4 and 9 of 2013. Both petitions challenge the declaration of the results of the Elections carried out in respect of

Lunga Lunga Constituency.

2. Rule 4 of the ***Elections (National Assembly and County Election Petitions) Rules, 2013*** (hereinafter referred to as the Rules), provides as follows:

(1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1)

3. Rule 5 on the other hand provides:

(1) For the purpose of furthering the overriding objective

specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—

(a) the just determination of the proceedings; and

(b) the efficient and expeditious disposal of the petition and in

any case not beyond the timelines provided in the Constitution and the Act with respect to election petitions.

4. Pursuant to the aforesaid Rules the applications the subject of this ruling were consolidated and heard in Petition No. 4 of 2013.

5. In the application dated 10th May 2013 brought by way of Chamber Summons (hereinafter referred to as the Chamber Summons) filed by the 2nd respondent, the following declarations are sought:

1 That the Provision of Section 76(a) of The Elections Act 2011, that require the filing of an election Petition to question the validity of an election, to be "filed within twenty eight days after the date of publication of the results of the election in the Gazette" are inconsistent with, and contravene the specific provisions of Article 87(2) of the Constitution

2 That the provisions of Section 76(a) conflict with the provisions of Section 77(1) of the Elections Act 2011

3 That by reason of the provisions of Article 2(4) of The Constitution, the provisions of Section 76(a) of the Elections Act aforesaid are to the extent of that inconsistency with The Constitution, VOID and Section 77 (1) of the Elections Act being the applicable provision on filing of Petitions..

4 That as a consequence of the matters stated in (a) (b) and (c) above and by reason of the further provisions of Article 2(4) of The Constitution, the Petition filed herein is invalid.

5 That consequently, this Court has no jurisdiction to entertain an invalid Petition and ought to strike it out or alternatively, dismiss the same, with costs to the 3rd Respondent.

6 That the costs of this application, as well as the Petition, be paid by the Petitioner to the 3rdRespondent.

6. In the application brought by way of Notice of Motion similarly dated 10th May 2013 (hereinafter referred to as the Notice of Motion) filed by the 1st and 3rd Respondents the said Respondents seek the

following orders:

1. That the time for filing of the 1st and 3rd Respondents' Response and Affidavits under Rules 14 and 15 and the results of the relevant election under Rule 21 of the Elections ((Parliamentary and County Elections) Petition Rules 2013 be extended up to and including the 8th May 2013 and all the documents filed in Court on that day be deemed as having been duly filed within time.

2. That the costs of this application be in the cause.

2ND RESPONDENT'S APPLICATION

7. The grounds upon which the Chamber Summons was based are that pursuant to the provisions of Article 87(2) of The ***Constitution of Kenya, 2010***, it is provided that *petitions concerning an election…….shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission*whilesection 76(a) of the ***Elections Act*** (hereinafter referred to as the Act) on the other hand provides that *petition to question the validity of an election shall be filed within twenty days after the date of publication of the results of the election in the Gazette*. It is further contended that section 77(1) of the Act repeats the wording of the Constitution almost verbatim in stating that a*petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission*. According to the applicant in the Chamber Summons there is no statutory provision (substantive or subsidiary) that bestows upon the Independent ***Electoral and Boundaries Commission*** (hereinafter referred to as the IEBC), or any other person, any obligation to publish election results of any election held in Kenya in the Gazette. To him the requirement in section 76(a) of the Act that petitions on validity of an election be filed within twenty eight days "after publication of the results of the election in the Gazette is one that cannot and has not occurred in this subject election, and which requirement is unknown in our electoral laws and further, and for the above reasons, the said Section 76(a) of the Act, insofar as it is inconsistent with the specific provisions of Article 87(2) of The Constitution, is unconstitutional and to that same extent, void since the provisions of Section 77(1) are the applicable section. He further contends that for the avoidance of doubt, the Gazette Notice published on the 13th March 2013 was not in any way declaring any election results, but was issued in compliance with the provisions of **Regulation 87(4) (b)** of the ***Elections (General) Regulations, 2012*** (hereinafter referred to as the Regulations), which provides that *upon receipt of a certificate under sub-regulation (1), the Chairperson of the Commission shall in the case of other elections (other than Presidential Election) whether or not forming part of a multiple election, Publish a notice in the Gazette, which may form part of a composite notice showing the name or names of the person or persons elected***.** Therefore, it is contended that anotice in the Gazette is not tantamount to, or an acronym for a declaration of results and to the extent that under the provisions of the Regulations provided above, a Gazette Notice showing the names of persons elected in an election cannot be equated to "declaring the results of that election.

8. According to the applicant election results are declared in accordance with Part VIII of the said Regulations which part is given the definition with the heading: **COUNTING OF VOTES AND DECLARATION OF RESULTS**" and Regulation 83 (1) (c) and (3) of Part VIII of the said Regulations, provide that *immediately after the results of the poll from all polling stations in the constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents, and observers, if present, complete Forms 34 and 35 set out in the schedule in which the returning officer shall declare, as the case may be votes cast for each candidate…..in each polling station and deliver to the commission the original of Form 34 and 35 together with Form 36 and 37 as the case may be and that the decisions of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition*. It is therefore the applicant's position that the correct person to declare the results on behalf of the Commission is provided for in the Regulations at Regulation 3 wherein it is provided at (e) that *the returning officer shall be responsible for (a) conducting elections at the constituency level; (b) receiving nomination papers in respect of candidates nominated for the post of National Assembly and Ward Representative; (c) the tallying of results from each polling station in the constituency; (d) announcing results from the constituency for purposes of the election of the President, Senator, Governor, woman representative to the National Assembly, member of National*

Assembly and county representatives; (e) the *<u>declaration</u>* *of the results tallied under paragraph (c).*

9. The Applicant contends that the Petitioner has stated, and correctly so, in paragraph 4 of the petition, that the elections, the subject matter of this petition were held on the 4th March, 2013, and the results of that election declared on the 5th/6th March 2013 and that in Paragraph 4 of his Affidavit supporting the Petition, he states:

"Your Petitioner states that the election held on the 4th of March 2013 when the following were candidates; who received votes as shown against their names when the results were declared on 5th/6th March 2013 at Shimoni Secondary School…and the Returning Officer has returned Khatib Abdallah Mwashetani as being duly elected."

10. Citing the provisions of Article 259 (5) of the Constitution it is reiterated that in calculating the time between two events for any purpose under the constitution, if time is expressed as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included. Therefore the applicant contends that by reason of the foregoing provisions of law, which are constitutional and mandatory, the last day, on which a petition arising out of the subject election should have been filed, being the 28th day on the basis of the computation outlined above, was to be the 3rd of April, 2013. The petitioner, according to the applicant, however, filed his Petition on the 10th of April, 2013 which was the 35th day from the date on which the election results of the elections the subject of this Petition were declared based on the provisions of section 76(a) of the Act yet the Constitution differentiates between the date of declaration (Art.87 (2)) and date of publication in the Kenya Gazette (Art.89 (11)) in so far as challenges to elections and to boundaries are concerned and on a plain reading of the Constitution and deliberate use of the words, the two cannot possibly have been intended to mean the same thing. The applicant further contends that the Constitution and in particular Article 87 thereof which deals with electoral disputes, read together with Article 259(5)(a) which deals with computation of time relating to an event referred to in the Constitution, do not make reference to commencement and or running of time to be reckoned from the date after the publication of results in the Gazette as a basis for the reckoning of time for purposes of filing a petition and that further to the matters stated above, Article 259 aforesaid has specifically spelt out in its marginal notes, that its purpose is, to set out a mechanism for "**CONSTRUING THIS CONSTITUTION".** According to the applicant therefore,any construction of the provisions of the Constitution that is anathema to, and outside the parameters set out in Article 259(5)(a) will, by reason of Article 2(4) thereof, be void, and anything done in pursuant thereto, invalid.

<u>THE CASE OF THE PETITIONER IN PETITION NO 4 OF 2013 IN RESPONSE TO THE 2ND RESPONDENT'S APPLICATION</u>

11. In opposition to the Chamber Summons the Petitioner in Petition No 4 of 2013 filed the following grounds of opposition:

1. The respondents/applicants are out of time by well over 21 days, and they owe the petitioners and the court an explanation.

2. The election laws have not donated power to an Election Court to extend time within which a petitioner may file a petition and consequently, the court cannot extend time for a respondent to file a response or affidavits; what is good for the goose if good for the gander.

3. The application as a whole is incompetent as it is not grounded on any evidence of the respondents, yet there is an obligation to show good cause for any delay, before interposition of court; and the respondents/applicants have opted to keep quiet in this regard.

4. The petition and all the other papers were served on 18.4.2013, which is when time started to run for purposes of filing suitable responses and supporting affidavits thereof.

5. Failure to file papers on time goes to jurisdiction and is not a procedural lapse or technicality; a

petition or a response filed and or served outside the permitted time-line is incompetent and a still born, incapable of admission by the Election Court to extend time in any manner.

6. Subsidiary legislation cannot donate power to the Election Court to extend time for an indolent respondent, yet Article 87 of the Constitution of Kenya 2010 silent on the matter; such interpretation of the law would be discriminatory with the absurd result of the law favour the respondent in an election petition process.

7. The filing of papers out of time without first obtaining leave of court is presumptuous and has occasioned grave prejudice to the petitioner(s0, and must be stopped by an order striking out the incompetent responses affidavits.

THE CASE OF THE PETITIONER IN PETITION NO 9 OF 2013 IN RESPONSE TO THE 2ND RESPONDENT'S APPLICATION

12. In response to the 2nd Respondent's case, the Petitioner in petition no. 9 of 2013, filed the following grounds of opposition:

1. There is no inconsistency or contravention of the provisions of S. 76(a) of the Election Act 2011 and Article 87(2) of the Constitution.

2. The provisions of Section 76(a) of the Election Act 2011 are not unconstitutional or void.

3. The Constitutionality or otherwise of an Act of Parliament and in particular S. 76 of the Election Act 2011 cannot be challenged and determined by an election court through a Chamber Summons application filed in an Election Petition.

4. The legal doctrine and presumption of constitutionality of an Act of Parliament and in particular S. 76(a) of the Elections Act 2011 has not been contravened by the lodgement of this Petition on 10th April 2013.

5. The objection in the Chamber Summons dated 10th May, 2013 is a futile exercise in semantics which raises no constitutional issue and is at best like a storm in a tiny tea cup.

1ST AND 3RD RESPONDENTS' APPLICATION

13. The Notice of Motion, on the other hand was supported by an affidavit sworn by **Sanjeev Khagram**, the applicants' advocate sworn on 10th May 2013. According to him, there are numerous allegations of breaches and/or wrongdoing contained in the affidavits sworn on behalf of the Petitioner in both petitions and it was necessary for each and every allegation to be answered by the relevant presiding officers in respect of the polling station in question. However, it is deposed that the Presiding Officers are not permanent employees of the IEBC but were engaged for a limited period for the purposes of the General Election from across the country hence the Commission was inundated with the task of retrieving all Forms 35 and 36's in respect of the various Counties, Constituencies or Wards for which the respective elections were being challenged and this contributed to the delay in filing the Forms 35 and 36 herein.

14. According to him, his firm was instructed in these matters on 25th April 2013 and a Notice of Appointment was filed the following day. After that, the Petition was received from the Petitioner's Advocates' offices on 24th April 2013 hence the time limited for filing the responses did not expire until 8th May 2013 hence the time should be reckoned from this date. However, if time is reckoned from the date of the advertisement on 18th April 2013 and time is reckoned from this date, it would expire on 2nd May 2013 hence the necessity to apply for extension of time.

15. It is deposed that the time required to interview and make depositions by the 20 deponents in these matters was what occasioned the delay. In his view it is in the interest of justice and for the just, expeditious and proportionate resolution of the election disputes that the application be allowed so that the respondents may present their case on merits taking into account the fact that no prejudice would be occasioned to the Petitioner. On the other hand shutting out the applicants is likely to occasion to the applicants and the electorate grave injustice. It is therefore deposed that since the failure to file the documents within time was not deliberate or contumelious, the court ought to allow the application pursuant to the provisions of Article 159(2) of the Constitution.

PETITIONER IN PETITION NO. 4 OF 2013'S CASE IN RESPONSE TO THE 1ST AND 3RD RESPONDENTS' APPLICATION

16. In opposition to this application the Petitioner in Petition No. 4 of 2013 filed the following grounds of opposition:

1. The respondents/applicants are out of time by well over 21 days, and they owe the petitioners and the court and explanation.

2. The election laws have not donated power to an Election Court to extend time within which a petitioner may file a petition and consequently, the court cannot extend time for a respondent to file a response of affidavits; what is good for the goose is good for the gander.

3. The application as a whole is incompetent as it is not grounded on any evidence of the respondents, yet there is an obligation to show good cause for any delay, before interposition of court; and the respondents/applicants have opted to keep quiet in this regard.

4. The petition and all the other papers were served on 18.4.2013, which is when time started to run for purposes of filing suitable responses and supporting affidavits thereof.

5. Failure to file papers on time goes to jurisdiction and is not a procedural lapse or technicality; a petition or a response filed and or served outside the permitted time-line is incompetent and a still born, incapable of admission by the election Court as Article 87 has not donated power to the Election Court to extend time in any manner.

6. Subsidiary legislation cannot donate power to the Election Court to extend time for an indolent respondent, yet Article 87 of the Constitution of Kenya 2010 is silent on the matter; such interpretation of the law would be discriminatory with the absurd result of the law favour the respondent in an election petition process.

7. The filing of papers out of time without first obtaining leave of court is presumptuous and has occasioned grave prejudice to the petitioner(s), and must be stopped by an order striking out the incompetent responses and affidavits.

17. There was also a replying affidavit sworn by **Gideon Mwangangi Wambua**, the Petitioner in Petition No. 4 of 2013 in which he deposed that service of his petition was done by advertisement on the 18th of April, 2013 and that the 1st and 3rd respondents have conceded that they did not collect the petition and other court papers form court or his advocate's chambers until the 24th of April 2013, which was 6 days after the date of publication of the advertisement. According to him, no reason is offered why it took the advocates a week to collect papers from his advocate hence they are to blame for loss of six (6) days. According to him, the 3rd respondent collected the petition and other papers from his advocate's office on the 22nd of April, 2013 and that the said respondents were provided with all the materials filed in this petition when they made themselves or their representatives available to take delivery of the pleadings. According to his advocate's information, no sufficient reason or reasons are disclosed in the affidavit in support of the application for abridgement of time and the papers filed out of time ought to be struck out; based on the stance taken by the IEBC that the election court has no jurisdiction to extend

time. To him, the belated filing and service of a response as well as affidavits of the 1st and 3rd respondents' witnesses is designed or intended to delay the expedited hearing and disposal of this petition hence he invites the court to reject the papers and strike them off the record, as they are not properly on the bed of file so that he can be allowed to prosecute his application.

18. According to information from his advocate, time started to run on the publication of the notice in the Standard Newspaper issue of 18th April 2013, and not on the time the respondent collected papers form his advocate's office. To him, he stands to suffer grave prejudice as the Petitioner, for the reasons that incompetent responses, papers, affidavits and objections have been placed on bed of file, outside the time permitted under the ruled of court, yet IEBC had implicitly contended here and elsewhere, that the election court has no express power to extend time for taking any steps in election proceedings. In the circumstances, and the application for leave coming as it does, after the placing of the incompetent papers on the file, the grant of leave would allow the respondents to approbate and reprobate when it suits them.

THE CASE OF THE PETITIONER IN PETITION NO 9 OF 2013 IN RESPONSE TO THE 1ST AND 3RD RESPONDENTS' APPLICATION

19. In response to the 1st and 3rd respondents' application, the Petitioner in Petition No. 9 of 2013 filed the following grounds of opposition:

1 The application is incompetent and incurably defective as the applicants have not tendered any evidence to invoke the election court's discretionary jurisdiction that can only be exercised judicially.

2 The application is not bona fide thus preventing the court to exercise its discretion in favour of the applicants.

3 The election court administers justice with due regard to Constitutional and Statutory procedure and Article 159(d) of the Constitution does not excuse the court from applying the law.

4 The power of the election court to extend time impacts on the question of jurisdiction in election law and is not merely procedural technicality.

2ND RESPONDENT'S SUBMISSIONS

20. On behalf of the 2nd respondent, **Mr Balala**, submitted that the application seeks essentially to strike out the Petition on the ground that the petition is filed in contravention for the Constitution. He reiterated that whereas the Petition was filed on 8th April, 2013 and 10th April 2013, respectively the same were filed out of time as a result of which the court lacks jurisdiction and ought to strike them out with costs to 1st Respondent. According to him, Article 87(3) of the Constitution is clear that the Petitions shall be filed within 28 days after declaration by the IEBC and a declaration by the IEBC is made after the determination of result after the tallying and upon the formal announcement at the tallying centre after which the Returning Officer publishes the results in prescribed form. That process, according to learned counsel, has to be done upon close of voting not after an indefinite period. In present Petition, the declarations were on 5th or 6th March, 2013 so that the last day was the 3rd and 4th of May 2013 and not 8th or 10th May 3013. The source of the problem, according to him, is Section 76 of the Act which seeks to change the time line prescribed for by the Constitution by stating 28 days after publication of results in the gazette. The section, it is submitted, is *ultra vires* the Constitution as it conflicts with Article 87(3) of Constitution since, it is submitted, the wording of the section are picked up from the repealed Cap 7 in disregard of the Constitution. It is submitted that the repealed Constitution at Section 44 provided for the filing of election petitions but left the details of doing so to Parliament. The New Constitution, however, provides the time for filing petition as 28 days from date of declaration hence Section 76 of the Act was therefore enacted in ignorance of Article 87 of the Constitution.

21. It is further submitted that the Act at Section 77 under marginal notes “Service of Petition” begins with 28 days after declaration in conformity with Article 87(3). It is his view that there are two conflicting provisions and relies on **Meme vs. Republic [2004] 1 EA 124** for the effect of erroneous marginal notes. Article 87 according to him is therefore the applicable provision. According to him the issue to be determined is whether the Legislature knew the difference between declaration and publication in the Gazette and that if the determination is that declaration means publication it would mean framers did not know the difference yet according to him under Article 87 of the Constitution, IEBC is not only concerned with Election but Boundaries as well. Under Article 87(11) it is, for example, provided that an application for review shall be filed within 30 days of publication of Gazette. This, according to him shows that they knew what they are talking about. Similarly, in the context of a referendum, the use of the two words, mean they cannot be the same. While referring to the decision in **Waititu vs IEBC and Others Nairobi High Court Election Petition No. 1 of 2013,** counsel submitted that that decision in equating publication with declaration was incorrect and the same being *per incurium* is not binding. Further to the extent that the said decision was not made by the Election Court, the Court had no jurisdiction to deal with the issue as that was not the issue before the Court hence the decision was at best *obiter* as the petition before the court was already within time. A declaration, it is submitted, can be made by Returning Officer as an Officer of IEBC hence declaring of an MP cannot have the same meaning as declaration of results.

22. It was submitted that section 39 of the Act provides what is to happen once election has been held and states the commission shall determine, declare and publish results of election immediately. Each word, it is submitted, is significant and that the Commission determines result by examination and tallying of results. Based on ***Blacks Law Dictionary*** it is submitted that to declare is to announce hence the Court was incorrect in finding that to declare is a final announcement by instrument since the Returning Officer is expected after the declaration to publish the results immediately after the poll and that the Commission does this though its officers. Article 86(b) of the Constitution, it is submitted, talks about prompt announcement and that is how the Constitution complies with Section 39 of the Act. This power of the Returning Officer, it is contended is borne by the Regulations and Section 2 of the Act which defines a “Returning Officer” while Regulation 3(e) provides that the Commission appoints a Returning Officer and who is responsible for tallying and declaration of results. Therefore, the results that are declared by Returning Officers are referable to the IEBC.

23. It is submitted that Regulations 83(1)(c), 84 and 84 provide that in declaring the results the Returning Officer shall declare them in form 36 and a look at form 36 it is clear that the document is headed “declaration of results”. A declaration of results is therefore not just a name since only after declaration is the certificate issued so that a declaration must precede the issuance of certificate. The gazettement which was done on 13th April, 2013 would therefore stretch the meaning declaration of Election Results and if the framers of the constitution meant declaration to be publication they would have said so. Section 2 talks about what are the election results as the declared outcome of the casting of votes. In contradistinction with the Presidential Elections, it is submitted that where a candidate has no competitor, under Regulation 21 only one person is nominated hence IEBC Gazettes the name of the person nominated and the commission declares the person elected in form 14. Form 14, it is submitted, is different from Gazettement which means there are two different things - declaration and Gazettement. In Parliamentary Election the declaration by the Returning Officer is final and this is in Regulation 87(4). According to **Mr Balala**, the 13th March 2013 is a notification of the people who have been elected since the deliberate use of different words in the same section mean they have different meaning.

24. Apart from the distinction, it is submitted that there is the issue of the time lines. For Presidential Elections, the declaration it is to be done within 7 days. However, for Parliamentary Elections there is no period provided for Gazettement hence there would be no breach of the law even if IEBC was to take 2 months before doing so as the Gazettement is just a notification to the public. It is the people of the constituency who are concerned to hear the declaration. The whole purpose of the New Constitution, according to learned counsel, is to resolve the petitions expeditiously so that we do not have to wait for 2 months. To submit that 28 days run from date of Gazettement would mean there is no predictability since it would not be possible for example to challenge the Presidential Election without Parliamentary Elections having been declared.

25. In support of his case, **Mr Balala** relied on **Austin vs. Dupre 328 So. 2d 406 [1976]** a decision of the Third Circuit of the Court of Appeal of Louisiana for the proposition that publication can be verbal as long as people are aware. He also cited **Gragg vs Dudley,** a decision of the Supreme Court of Oklahoma **as well as Youraraj Rai vs Bahadur Karki Civil Appeals Nos. 8253 and 8255 of 2004** from the Supreme Court of India to the effect that the date for declaration not publication in material. In contradistinction to the said decisions, **Mr Balala** referred the Court to **Narayan Bansi vs. Ratanlal Jankilal [1960] 62 BOMLR 236**, and **Sabbirbhai Fakroddin vs. Abdul Latif Din Mohammad and Others [1993] 95 BOMLR 556** both decision of the Bombay High Court which dealt with Municipal Elections under which it is the date of publication that is material. He concluded that in the World in the different jurisdiction there are differences as to the time when elections can be challenged. He further placed reliance on ***Halsburys Laws of England***.

1ST AND 3RD RESPONDENTS' SUBMISSIONS

26. For 1st and 3rd respondents in Petition No. 4 of 2013, it was submitted by its learned **Mr Khagram,** while associating himself with the submissions of **Mr Balala** that Form 36 talks of declaration of Results and gives the results. That, according to him form was given to each and every candidate or agent at the time of declaration on 6th March 2013 and that there is no provision for the commission to vitiate form 36 since it is only the court under the Act and Rules that can declare an election invalid. Article 138(10) of the Constitution which deals with procedure at Presidential Election provides the Chairperson is to declare the results within 7 days and deliver written notification. The Constitution, it was submitted, does not deal with Gazettement and that only the Rules deal with it. To counsel the framers would not have used the 3 words of declaration, gazettement and notification at the same time if they meant the same thing. Learned Counsel contended that the Gazette Notice itself simply talks of who was elected but does not declare the results and is therefore simply a notification. In his view, the 28 days period begins from the date in Form 36 which was availed to all the candidates and the parties so that it is not an issue of a party being unaware.

27. With the respect of Notice of Motion, it was submitted Article 87(3) service may be direct or advertisement. According to him section 76(a) of the Act provides that petition is to be served within 15 days of presentation and since section 77(2) thereof talks about service personally and in advert, it is his position that the petition has not been properly served. The Newspaper advert which is relied upon the Petitioner, according to him does not look as 10 x 10 as provided for under the Rules. Although the said advert talks about service of summons there are no summons in the Rules hence the advert could only amount to notification of filing and not service since the advert goes on to state that the Petition may be obtained for the court. It is therefore submitted that service was effected on 22nd April, 2013 and 24th April, 2013 in respect of 4th and 3rd Respondents. It is therefore his view that the purported services of summons is a nullity and he relied on **David Wakairu Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998** in which it was held that the rules promulgated by the Rules Committee cannot override express provisions of an Act of Parliament and that once a petition is not properly served on any of the respondents, the whole petition is void. In the same case, it was held by the Court of Appeal that a Court should not make an order that amounts to depriving a party of the right to defending his interests.

28. According to **Mr Khagram**, the delay, if any, was just 6 days which is not inordinate delay taking into account that what was to be filed is not formal document but a full response and affidavit. The delay, however, has been explained as attributable to the fact that Returning Officers were not employees of the Commission and scattered all over the country. The delay of 6 days was as a result of gathering the officers and taking the depositions. The court ought to take judicial notice of that there are over 200 petitions filed and getting the forms was a task hence in the circumstances the delay cannot be inordinate. Although in paragraph 3 of the replying affidavit the issue raised is why the papers were not collected until 6 days after, according to counsel the court considers the delay that is above the period stipulated and not the period within the time stipulated hence the only challenge is that contained in Paragraph 6 that there is an intention to delay. To this it is submitted that the application is made expeditiously and that whereas the bar to the filing of the Petition is in the Constitution and in Act, there is no similar provision either in the Constitution or in Act that provides time line to respond. It follows that Rule 20 is the

overruling Rule on extension of time of ensuring that no injustice is done and that to shut out a necessary party would be unjust taking into account the fact that affidavits are the evidence in chief. To counsel, his clients have done everything in their power to expedite the proceedings and if there is any delay in expediting the hearing the same would be occasioned by this application. No prejudice, it is submitted would be occasioned in having the documents regularized since Election Petitions are quasi-inquisitorial and the court conduct an inquiry without the input of the commission taking into account the fact that petitions are not like ordinary suit. In support of his case **Mr Khagram** relied on **Mburu vs. Gakuha and Others [2003] 1 EA 147** in which the court declined to strike out on the basis of unfairness to hear the Petition in absence of a party. Similarly **Muiya vs. Nyagah [2003] 2 EA 616** was cited.

29. Finally it was submitted that if the court finds that Petition survives the documents be allowed to remain on record and that if the petitioner wants to have the documents struck out he must do so by way of a formal application and lay grounds for doing so.

PETITIONER IN PETITION NO. 4 OF 2013'S SUBMISSIONS

30. On behalf of the Petition in Petition No. 4 of 2013, **Mr Kimani** submitted legislative absurdity if any demonstrated should not be allowed to tilt the scale of justice in this or any other Petition and his reason for this submission was that the applicants in the application of 10th May, 2013 attempted to demonstrate by several examples of absurd results which may ensue and these were that section 76(1)(a) and not Section 76(a) as read with Section 77(1) are irreconcilable and inconsistent with Article 87(2) of the Constitution of Kenya, 2010. Learned counsel submitted that no time lines have been changed under Section 76 of even Article 87(2) since a Petition desirous of challenging an election still has 28 days both under Article 87(2) or Section 76. In his view, contrary to popular contention, section 76(1)(a) is a re-enactment from a repealed law and what this means is the Section 76(1)(a) is not a newer section. In his view by operation of Section 23(2) of Cap 2, Section 76(1)(a) existed in the repealed Law, Cap 7 as section 20(1)(a) and though the same were repealed they were re-enacted. The effect of that is to save that provision so that it continues as good law and procedure and good beacon to indicate when reckoning of time starts. Counsel therefore submitted that section 76(1) (a) has not come in to contravene the constitution but re-enacted from repealed law.

31. According to **Mr Kimani**, the certificate issued after the results has 2 component parts. First, it is issued on provisional basis based on what the Returning officer has announced. Secondly, it is issued on condition that the recipient cannot assume the office to which elected hence the certificate is worthless until gazettement. Assumption of office depends on gazettement of returns made on election both under the old law and current law and publication marks the starting point for reckoning the time for commencement of election petitions. Counsel submitted that what our legislature has done is to re-enact our history. All instances of absurdity mentioned by the applicants according to him are predicated on erroneous assumption that by the enactment by referendum of the Constitution, Kenyans intended to change the law with respect to declaration of results without publication while the correct position is that the section re-enacted of history under Section 23 of Cap 2.

32. In his view, the submissions are erroneous because we are using a term in subsidiary legislation to explain an enactment hence putting the cart before the horse. Citing Regulation 73(1) which talks about the Returning Officer declaring the Polling Station closed and Regulation 79(1) which talks of candidate, agent and officer signing declaration of result, he submitted that the terms is used as a noun as opposed to under Regulation 79(2) where the term declaration is used as a proper noun. Forms 34 and 35 are clearly noted as declaration of Presidential and National Assembly. Similarly Regulation 83 uses the word "declare" by completing a form.

33. He therefore reiterated that the use of terms in subsidiary legislature cannot be used to nullify statutory enactment but it is the other way round. To **Mr Kimani**, the rules were promulgated in a hurry and the Rules Committee never gave thought to the use of the words declare as stated in Article 87(2) though this was understandable taking into account the time lines under which the Rules Committee was working and he invited the Court to be slow to conclude that declaration excludes gazettement since the mentioned absurdities cannot be the basis for striking out a petition.

34. **Mr Kimani** further submitted that there is want of jurisdiction, not to entertain the application, but to grant any of the orders sought. Since the summons are brought under ***Gicheru Rules,*** he was of the view that this court albeit being presided by a Judge of the High Court in a special court exercising special jurisdiction conferred by the Constitution and the ***Elections Act*** and the Regulations thereunder. In his view, the court's jurisdiction is circumscribed to the extent that even orders are set out by the law so that damages or imprisonment cannot be ordered.

35. However, ordinarily, if a party wishes to challenge constitutionality of a statutory enactment he must move the High Court and the manner of presenting the grievance is by way of a Petition. Therefore Chamber Summons is not a legal instrument since it is not an originating given the gravity of this matter and the need to hear the amicus. In learned counsel's submission, every enactment is presumed good unless proved otherwise and based on **Hamdard Dawakhana vs. Union of India [1960] AIR 554** he submitted that the principle that if you move the court in any other manner than prescribed you are abusing the process of the court. To him jurisdiction to determine this issue is bestowed upon the High Court as a court. He further submitted that there is a limitation set out by Article 165(a)(i) as read with sections 75, 79 and 80 to hear the Petition within limited time hence Chamber Summons is an incorrect manner of seeking to nullify sections of that an enactment or a declaration that Sections of enactment irreconcilable hence, the court ought to decline to entertain this application.

36. Since there is as yet pronouncement that section 87(a) is unconstitutional, it was submitted that the application is premature since it seeks to strike out a Petition filed pursuant to enactment made pursuant to a Constitution which provision has not been declared void. The cumulative effect therefore is that the application cannot be cured even by amendment.

37. He, in the alternative submitted that declaration of election result by IEBC in Article 87 are not magical but are ordinary words and should be construed on the basis of the principle in **Hamdard Dawakhana** case paragraphs 8 and 9. When considering the constitutionality, he contended that the following factors must be taken into account: One, the history of the impugned legislation. In this case the history of Section 67(2)(a) is to be traced to section 2 of Repealed Act and Section 23(2) of Cap 2 has to be resorted to. Second is the purpose and in this case the purpose was to retain the manner of publication of election results since Article 87 is silent on the manner of publication of election results. In counsel's view Kenyans knew they have in place the law dealing with the publication and that is how section 87 was re-enactment. It was the constitution fitting into the legal framework. The third factor are surrounding circumstances and conditions which must mean the circumstances of notifying people by reaching the largest number of Kenya and notifying them of the outcome, the media to be used by the State to pronounce the result, the cost and the number of people who can fit into the hall. Next, according to **Mr Kimani** is the mischief Parliament wanted to address by the enactment and to him, it was meant to address the *lacuna* in the fundamental law since the Constitution talks of any manner which is the lacuna. It was therefore submitted that by re-enacting the former provisions section 76(1)(a) is meant to explain the word declaration. The other factor in remedy and lastly the true reason for the remedy. These principles, it was submitted were applied in **Kenya Anti-corruption Commission vs. Lands Limited & 8 Others [2008] eKLR**.

38. It was learned counsel's submission that section 77(1) of the Election Act is otiose because it raises the same issue in the constitution with wrong side notes yet it was provided for in section 76. He therefore invited the court also to use the commonsense Rule in the interpretation of statutes which rule goes hand in hand with the purposive approach in interpretation of the enactment in determining whether gazettement can only mean notifying Kenyans the result of the election.

39. Article 253 of the Constitution, it was submitted incorporates IEBC as a Commission hence declaration by IEBC cannot be a pronouncement by a Returning Officer. The interpretation put forward by the applicants, it is submitted denies the Rules certainty contrary to the aspirations of people since results are not announced simultaneously so that for every tallying centre the Returning Officer announces results. Although counsel admitted that the arguments are ingenious they do not disclose any conflict nor establish inconsistency. To him merely because the words used are imprecise would be the more reason to go the purposive way. To allow the application would stifle the very principles meant to

be safeguarded.

40. It was submitted IEBC is in a fiduciary capacity in this entire process and cannot support the striking out of a petition without going against this cardinal duty since by supporting striking out it would be going against the fiduciary position as custodian of the electoral process. To support the application for striking out and the same time seek extension is to approbate and reprobate.

41. In response to the Motion, it was submitted that thought the application seeks extension the arguments are not in support of the application since the application started by stating they have never been served yet want of services is so fundamental that any proceedings taken are null and void. It was submitted that paragraph 8 of supporting affidavit admits service.

42. It was also submitted that LN No. 4/13 provides for a form to be used for notification which form alludes to service of summons hence the purported mistake was in the adoption of the wrong form. However, it was submitted that this is curable under section 72 of Cap 2. This issue however was not part of the application hence it was submitted the Petitioners were not made aware of it.

43. It was further submitted that the application is incompetent and abuse process since it offends Section 2(2) of Evidence Act. This was due to the fact that the application is based on facts which deponent cannot swear to. One of such facts was when IEMC was served since only IEBC could swear to that information. According to learned counsel, **Mr Khagram** could not swear that he had instructions in the absence of an instrument under seal. In light of numerous errors in the preamble, it was contended that there is no evidence in support the summons. Assuming that the court has provision to enlarge time we submit that the court can only do so on good reasons or admissible evidence and the delay in honouring the invitation to collect papers and file its papers is not adequately explained taking into account the fact that the 3rd Respondent who collected the documents way back has not sworn an affidavit. In a nutshell, it was submitted that the court has no jurisdiction to abridge the time to a petitioner or Respondent since secondary legislation cannot override the provisions of the law. Since timelines go to the jurisdiction without power donated by the Constitution the court ought not to extend time.

PETITIONER IN PETITION NO. 9 OF 2013'S SUBMISSIONS

44. On behalf of the Petitioner in Petition No. 9 of 2013 **Mr Asige** submitted, while adopting the submissions made by **Mr Kimani** that when looking at Article 87(2) of the Constitution, it must be read within the Constitutional Chapter where it is found - Chapter 7 which deals with representation of the people. In interpreting Article 87(2) the court must bear in mind Article 87(1) and deal with what mandated parliament to enact legislation to establish mechanism for timely settling of electoral disputes. The issue, according to learned counsel is reckoning/computation of time rather than a constitutional issue. Article 87(2) states that petitions shall be filed within 28 days after declaration of results by IEBC and this Article is the exact replica of Section 77(1) of the Election Act. Article 88 of the Constitution established IEBC which is the body to declare election results. Under Article 88(4)(e) the Commission is responsible for conducting and supervising referendum and elections of a body established by the constitution or prescribed by an Act of Parliament and these elections are prescribed by an Act of Parliament in conformity with Article 88(1). Parliament has enacted the ***Elections Act*** and has mandated IEBC to conduct and supervise the elections and enacted a law to settle electoral disputes and for timely settling of election disputes. **Mr Asige** submitted that IEBC declares election results by a mechanism prescribed by Parliament contained in ***Elections Act*** 2011 in particular sections 75 and 76 of Election Act so that the mechanism the IEBC employs is to publish names in the gazette so that Section 76(1)(a) is a mechanism towards election towards resolution of an election dispute and the time lines has been provided and one can only come to court once IEBC has declared the results a party is aggrieved with. There is no other way that IEBC can introduce a dispute mechanism process without a declaration in the Gazette. The argument that declaration is not by publication, according to counsel, is fallacious and that is why there is no conflict between Section 76 and Article 87(2) of the Constitution and that is why Section 77 is a mere replica of the Constitution. The summons, according to him, is wholly misconceived and must be dismissed.

45. IEBC is not in same position as the Returning Officer in a Parliamentary Election. It is a body corporate and the mandate is given to the Commission itself and not to a presiding officer. Under Regulation 87 the results announced by the Returning Officer are provisional and not conclusive hence the IEBC can decide whether or not they are correct. The only conclusive results, it was submitted, are those declared of the entire results. Time is therefore to be computed from date of publication in the Gazette. If the framers of the Constitution meant that declarations be by the Returning officer they would have said so. Therefore, **Mr Asige** submitted that the submissions of inconsistency and *ultra vires* are misconceived. Every Act of Parliament is presumed to be constitutional until repealed or declared to be unconstitutional and this court is not sitting as a constitutional court.

46. With respect to the Motion he submitted that a person seeking extension must give possible reasons. In Petition Number 9 of 2013 there is no evidence to support the application since both Respondents have not provided any evidence as the affidavit in support is by **Mr. Khagram** who cannot tender this evidence without an explanation why the clients cannot swear the affidavit. To learned counsel, there is no *bona fide* in this application and ought to be declined since this is a special regime based on an election law and discretion has to be exercised judicially.

REJOINDER BY THE 2ND APPLICANT

47. In his response **Mr Balala** submitted that strict timelines provided under Act and the constitution are with regard for the Petitioner while the Respondents' timelines are in the Rules with respect for case management. Counsel submitted that denial of the application for extension of time would affect his client and not the petitioners yet they are interested in knowing the truth and the people with the information are **Mr. Khagram\'s** clients. To him no prejudice will be suffered if application is allowed. On the other hand if the said application is not allowed he intimated that he would leave at appropriate time to strike out paragraphs relating to non-parties. These submissions are without prejudice to our application.

48. With respect to the Chamber Summons, he submitted that section 2 of Cap 2 is clear that it does not apply to the Constitution which is self interpretative hence resort must be had to the Constitution. While conceding that the history of the enactment has to be considered he submitted that our history was that we had a problem with timely resolution of election disputes hence section 76 is an inconsistent provision borrowed from the past. By enacting the same provision as it appears in the old constitution there nothing was, according to him, being cured in light of lack of timelines for the said gazettement. In his view the terms determine, declare and publish cannot have the same meaning.

49. With respect to the issue of who declares results, he submitted that Article 88(3) states that the Commission acts according to the Act under which the Returning Officer is the one empowered to declare the results.

50. On jurisdiction he rejected the view that the court has circumscribed jurisdiction and submitted that provision that Election Petitions can only be heard by Election Court is in the Rules. However, in the Act Election Court is defined as the Supreme Court or High Court hence, Elections Court is the High Court as defined in Article 165 of the Constitution under which the court has unlimited jurisdiction.

51. Finally, **Mr Balala** submitted that under Article 159 jurisdiction is conformity with the constitution and section 7(1) of the Sixth Schedule as read with Article 261 takes care of the existing law. Schedule 5 on the other hand places strict obligation on the legislature to make laws.

REJOINDER BY THE 1ST AND 3RD APPLICANTS

52. In his rejoinder, **Mr Khagram** submitted that in so far as Petition Number 9 of 2013 is concerned the advert appeared on 23rd April, 2013 hence it would only be out of time by one day. On jurisdiction, he submitted that the jurisdiction in the High Court to hear Election Petition is derived from Article 165 which grants the jurisdiction for the High Court. The question of gazettement which emanates from Rule

6 according to him does not change the jurisdiction of the High Court. Since Article 2 of the Constitution talks of supremacy of the Constitution, if the court found that the provision is void, there is no bar to the High Court declaring a provision inconsistent with the constitution. Further as the reference to the Gazettement is by notification in the gazette and not declaration, that shows there is a distinction between declaration and notification. A corporate body has to act through its officers in accordance with the Constitution and national values. In his view the Rules were not done in a hurried manner, otherwise there would be no distinction in the use of the words. To him Regulation 82 talks of provisional results being transmitted electronically while Section 76 only provides time line and not the manner of declaration. If the section is invalid the court must declare it so and deal with it on that basis. In both Petitions it is indicated that results were declared on the 8th March, 2013.

53. Since it was correctly submitted that IEBC has fiduciary duty to the court, **Mr Khagram** submitted that what the Petitioners are trying do is to shut out the same party. With respect to evidence, his view was that if the matter is non-contentious counsel can swear an affidavit. Since the only explanation is why the affidavit could not be filed within time emanated from him, that issue according to him is not contentious. With respect to section 72 of Cap 2, he submitted that it deals with deviations and does not apply to situations where the form does not perform what it purports to do hence the advert was just a notification to collect the Petition and service was effected when the petition was physically collected. On the issue of the seal his view was that there is no requirement that he has to exhibit the document under seal. Since the time lines provided under the Act and the Constitution are with respect to petitioner not the response rule 20, according to him, only requires the court to consider whether there is injustice hence the discretion is wide and unfettered and under the overriding objective as read with section 80 of the Act, the Court\'s position is to deal with matter without undue regard to procedural technicalities.

54. Finally the court\'s duty is to interpret the law as it is and what was intended and not the historical issues. Since the enactment in Section 76 is a new enactment while the old section 44 had no time lines, the mischief which was to be cured was the delay in determining the Petitions hence the 6 months.

55. In **Mr Khagram's** view, it is the petitioner who is delaying the Petition and with respect to the Attorney General's role, he submitted that under rule 39, it was upon the Petitioners to inform the AG yet there is no evidence of notification to AG. No prejudice has been stated if the IEBC documents are allowed on record. To the contrary it is submitted that IEBC is a necessary party as the court is exercising a quasi-inquisitorial jurisdiction. He therefore urged the Court to allow the application for extension and order that the documents on record be deemed to be properly on record.

DETERMINATIONS
PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

56. Having considered the applications on record, the documents filed both in support of and in opposition applications, the submissions of counsel and the authorities cited, this is the view I form of the matter.

57. In the circumstances of this case, it is my view that it would be prudent to deal with the Chamber Summons before dealing with the Notice of Motion. The rationale for this is that if the Chamber Summons succeeds, there would be no reason, save for academic purposes, to deal with the Motion.

58. Before dealing with the issues raised in the Summons it is important to set out the principles that guide Constitutional interpretation.

59. In **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation was constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw

back or exclusion clause, the onus was on them to justify the restriction.

60. Again in **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

61. In **Olum & Another vs. Attorney General (1) [2002] 2 EA 508** the Uganda Court of Appeal held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and the effect of the impugned statute, or section thereof and that if the purpose was not to infringe a right guaranteed by the constitution, the Court had to go further and examine the effects of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional. The Court further held that in interpreting the constitution, the constitutional interpretation principle of harmonization, which was to the effect that all the provisions of the constitution concerning an issue should be considered together, would be applied and in addition the widest construction possible, in their contexts, had to be given to the words used according to their ordinary meaning and each general word held to extend to all ancillary and subsidiary matters. Moreover, constitutional provisions were to be given a liberal construction unfettered by technicalities because though the language of the constitution did not change, changing circumstances may give rise to new and fuller import to the meaning of the words used. Similar holding was made in **Obbo and Another vs. Attorney General [2004] 1 EA 265**, in which the Supreme Court of Uganda held that no laws, rules or regulations let alone decisions of any authority which are in conflict with the provisions of the Constitution can stand in opposition to those constitutional provisions since the constitution is the supreme law of the land. The Court's view was that the Uganda Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons in Uganda. The task of expounding a Constitution is crucially different from that of construing a statute as a statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. In the same vein in **Republic vs. The Honourable the Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA NO. 1298 of 2004** it was held that the Constitution must not be construed in a narrow or pedantic manner and that construction which must be beneficial to the widest possible amplitude of its powers must be adopted, or that a broad and liberal spirit should inspire those, whose duty is to interpret the Constitution. Further in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 of 2006 (HCK) [2006] 2 KLR 356**, the High Court held that the Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future. Constitutional Theory, the Court held, has set various models of interpreting constitutional tests i.e. Historical, textual, structural, doctrinal, ethical and prudential. The Constitution formalizes the historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. Ordinarily the value content of law relates to the purpose or underlying basis of that law. Such judgment is based on the views and values of the people that make the law and those who the law regulates.

62. Similarly, in **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258** it was held that Article 137 of the Constitution confers jurisdiction to the Court, *inter alia*, in a matter where it is alleged that an Act of Parliament or any other law is inconsistent with or in contravention of the Constitution. According to the Court although the national objectives and directive principles of State policy were not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it was fairly possible to do so without violating the meaning of the words used. According to the Court in cases of great public interest, the Attorney General should be made a party and if he is left out, the Constitutional Court will join him as a Respondent of its own volition under Order 1, rule 10(2) of the Civil Procedure Rules.

63. In **Osotraco Ltd vs. Attorney General [2003] 2 EA 654**, it was held that the constitution of Uganda is the supreme law, and any law that is inconsistent with it, is void to the extent of the inconsistency vide article 2 of the Constitution. It was held in that case that section 273 of the Constitution requires existing law to be construed with such modifications, adaptations, qualifications and exceptions, as may be necessary to bring it into conformity with the Constitution. The Court's view was that under article 137(5) of the Constitution, if any question arises as to the interpretation of the Constitution in a court of law, the court may, if it is of the opinion that the question involves a substantial question of law refer the question to the constitutional court for decision in accordance with clause (1) of article 137 since it is the Constitutional Court to determine any question with regard to interpretation of the Constitution. However, where the question is simply the construing of existing law with such modifications, adaptations, qualifications and exceptions as to bring such law into conformity with the Constitution, this may be determined by the Court before which such a question arises.

64. Back home in **Ruturi & Kenya Bankers Association vs. Minister for Finance [2002] 1 KLR 84; [2001] EA 253,** the Court held that being a Court that was constitutionally given unlimited original jurisdiction, the High Court has jurisdiction to determine every issue raised in the matter. It was however held that a statute or enactment worded in a language which is difficult to follow, or is ambiguous or contradictory or impossible to apply, is not necessarily thereby rendered unconstitutional since it only gives rise to questions of interpretation by the Court while with regard to inconsistencies and repugnancy in parts of the Act, these are not things that necessarily render a statute unconstitutional since they things which are resolved by the rules of statutory interpretation in real factual situations.

65. Back to Uganda in **Ssemwogerere and Others vs. Attorney General (3) [2004] 2 EA 247,** the Supreme Court of Uganda held that the Constitutional Court's jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes altogether with the one for interpreting the Constitution and is unlimited since the Constitutionality or otherwise of an Act of Parliament must be construed vis-à-vis the Constitution and for the purposes of exercising these jurisdictions by the Constitutional Court there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes.

66. In **Ngare vs. Attorney General And Another [2004] 2 EA 217** it was held relying on **Republic vs. El Mann [1969] EA 357; Njoya & Others vs. Attorney General and Others [2004] 1 EA 194 (HCK); Njogu vs. Republic [2000] LLR 2275 (HCK)** that in interpreting the Constitution, regard must be had to the language and the wording of the Constitution so that where there is clearly no ambiguity the Court has no reason to depart therefrom since ambiguity and inconsistency cannot be the same thing. The Court while citing **Ssemogerere and Others vs. Attorney General [2004] 2 EA 276 (SCU)** held that the purpose of legislation must be looked at to see whether or not it is unconstitutional.

67. However the High Court in **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC NO. 288 of 2004 (HCK) [2006] 2 EA 117; [2006] 2 KLR 375** stated that while a liberal and not an overly legalistic approach should be taken to constitutional interpretation the charter should not be regarded as an empty vessel to be filled with whatever meaning the court might wish from to time. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. See also **Kanzika Vs. Governor, Central Bank Of Kenya & 2 Others Nairobi HCMCA No. 1759 of 2004 (HCK) [2006] 2 KLR 545**. Similarly, in **Charles Lukeyen**

Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP NO. 466 of 2006 (HCK) [2007] KLR 331 **Rawal, J** (as she then was) held that our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political, cultural, social and economic situations. Its dynamics and relevance is rooted in these values. Cut off from these factors it would become redundant and irrelevant. The Constitution is not a skeleton of dry bones without life and spirit. The least it is expected to have and which cannot be denied is the spirit of its framers. The Court should not limit the ambit of public interest or agree to confine it only to past definitions or categories since our Constitution inspires us to give public interest the widest leverage and to uphold it.

JURISDICTION

68. Since the issue of jurisdiction of this Court to grant the orders sought as opposed to entertain the Constitutionality of section 76(1)(a) of the Act has been questioned, as was stated by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**:

"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 a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

69. I therefore have to deal first with that issue first. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that 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). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court nolonger has original and unlimited jurisdiction in **all** matters as it used to have in the old Constitution. However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution, is in my considered view, is null and void.

70. There is no Court established under Article 165 of the Constitution known as "Election Court". The term "Election Court" however appears in section 2 of the Act under which the term "election court" is defined to mean the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (*a*) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (*a*) of the Constitution. Rule 6 of the Rules on the other hand provides as follows:

(1) A court shall be properly constituted, for purposes of hearing—

(a) an election petition in respect of an election to Parliament or to the office of governor, if it is composed of one High Court Judge; or

(b) an election petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate

designated by the Chief Justice under section 75 of the Act.

(2) The Chief Justice may—

(a) in consultation with the Principal Judge of the High Court, designate such judges; and

(b) designate such magistrates, as are necessary for expeditious disposal of election petitions.

(3) The Chief Justice shall publish the name of the Judge or Magistrate designated under sub-rule

(2) in the Gazette and in at least one newspaper of national circulation.

(4) A judge or a magistrate designated under sub-rule (2) may not, for the duration of the election petition, be engaged in any other court matter except a matter for which a ruling or judgment was pending and the date of which ruling or judgment is within the period before the Judge or Magistrate concludes election the petition.

71. It therefore follows that even under the Act Election Court refers to the Supreme Court and the High Court exercising their jurisdiction under the Constitution respectively. In the absence of the limitation placed upon the High Court under Article 165 of the Constitution with respect to the handling of Election Petitions save for petitions arising from Presidential Election petitions, no limitation can be placed upon the jurisdiction of any High Court judge to hear and determine Election Petitions whose jurisdiction is conferred upon the High Court to determine. In my view the Gazettement of judges to hear election petitions is meant for administrative purposes and to ensure that election petitions are determined within the time stipulated within the Constitution. Whereas the hearing of an election petition by a Judge who is not gazetted may invite disciplinary action in my view the mere fact that a Judge who hears a petition is not gazetted to do so does not deprive him or her of the jurisdiction conferred upon him or her under the Constitution. On this score I associate myself with the dissenting decision of **Ibrahim, J** (as he then was) in **Kinyanjui vs. Attorney General [2005] 2 KLR 454** in which he expressed himself as follows:

"In the absence of any other provisions under the Constitution other than section 65(2) and (3) which empowers the High Court to supervise civil and criminal proceedings before a subordinate court or Court Martial, there is only one High Court of Kenya which is constituted and manned by the Honourable Chief Justice and other judges (not less than 11) as may be prescribed by Parliament. There are no two or more High Courts and we can only have judgements, rulings, orders and other decisions given by a specific judge, or specific judges (Bench or Benches) if empanelled in accordance with the law. The High Court as an institution in an inanimate body that must be run, and activated, managed and controlled by animate organs authorised by law. There are judges who must of essence be human beings and according to the Constitution, the judges of the High court as must of necessity in law be of equal rank and standing. This is because the jurisdiction, authority and powers are conferred on the High Court as a Constitutional institution or body and not on the individual judge. It follows that when exercising and invoking the jurisdiction of the High Court under say section 60 of the Constitution or any other part or provisions of the Constitution or statute, all judges are of equal ranking and standing. Each decision under any provision of the Constitution, statute or other law have the same effect and force of law as it is not the personality, age, excellence or seniority in being appointed to the Bench or the number of judges sitting in a particular case that gives the decision the force of law but the jurisdiction of the High Court given under section 60 which establishes it in the first place. Section 60 is the mother of the High Court of Kenya.......It follows that it does not matter in what "type" of High Court, a judge is sitting when hearing a particular case, be it a (Constitutional Court" under section 84, a "civil" or "criminal court" under section 60 or specific statutes (other law), or even an "Election Court" under section 44. It is the jurisdiction of the court as an institution under the Constitution or any other law that is paramount and not the attributes of the judge or judges constituting such a Court or type or nature of proceedings or case at hand at any given time. There is only one High Court under the Constitution with specific jurisdiction conferred on it by section 60(1) of the Constitution. There is no "other or another Court of co-ordinate jurisdiction". There are no two, three or more High Courts. There is only "a High Court" as singularly created and established by the said provision."

72. The above position was affirmed by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** where the Court expressed itself thus:

"The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judicature" and section 60 of the Constitution establishes the High Court with "unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and

powers as may be conferred on it by the Constitution or any other law". Although the Constitution stipulates that the jurisdiction of the High court in criminal and civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers...Section 64 of the Constitution establishes the Court of Appeal with such "…jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law". On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other Court other than the High Court...Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrate's Courts and Kadhis' Courts, and also Court Martial. Each of these courts exercises such jurisdiction and powers as "may be conferred on it by law"...There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division which is not an independent Court by merely a division of the High Court. The wording of section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court but talks about the High Court...With regard to the protective provisions section 84 of the Constitution, it does not in any of its sub-sections talk about the Constitutional Court but instead talks about an application being made to the High Court...The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court...Any single Judge of the High Court in this Country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision, emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision, is at best a nullity. Jurisdiction is everything and without it, a court has no power to make one more step...courts must follow the law as it is currently...The appellant by filing the Originating Summons which was referred to the Chief Justice and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither Constitutional nor Statutory authority to support that approach. Therefore, neither the Chief Justice, nor Nyamu J. had the jurisdiction to entertain the appellant's application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no Constitutional or Statutory right of appeal or review was available. This matter had been concluded a long time back and attempts to revive it can only have one outcome – failure".

73. Article 165(3)(d)(i) of the Constitution confers upon the High Court the power to determine the question whether any law is inconsistent with or in contravention of this Constitution. That provision has no distinction between the High Court in the exercise of its jurisdiction in election disputes and in other cases. It follows that this Court is properly entitled to hear and determine the Constitutionality of a provision of an Act of Parliament.

74. It was however argued that Election Petitions are special proceedings which are neither criminal nor civil hence the powers of the Election Court are circumscribed and must be exercised within the circumscribed jurisdiction. It is not just election petitions which are neither criminal nor civil. Judicial review applications it is trite also fall within the same category yet it cannot be successfully argued that only a special court established for the purpose of hearing and determining judicial review applications can hear such matter. Conversely it cannot be successfully argued that a Court in exercise of its judicial review jurisdiction cannot deal with constitutional issues arising in the course of such proceedings.

PROCEDURE

75. It is however, one thing to contend that the Court has no jurisdiction and another to say that the

procedure invoked by the supplicant for the orders in question is incorrect. It is trite law that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. That position has been repeated several time with the *locus classicus* being the case of **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426.** Therefore where a party sets out to challenge the constitutionality of an enactment ignores the procedure set out from doing so, notwithstanding the fact the Court has jurisdiction to determine the matter, the court may properly decline to grant the orders sought since to do so would amount to abetting abuse of the process of the Court. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

76. However, where the issue of constitutionality of an enactment arises in the course of the proceedings, it is my view that the court is properly entitled to hear and determine the issue. I am supported on this view by the decision of the Constitutional Court of Uganda in **Nagoli vs. Attorney General and Another [2007] 1 EA 252 (CCU)** in which the Court held:

"Not all matters of constitutional interpretation can and must only be done in the constitutional court. Courts of law have the power to apply to apply the laws of this country in the determination of disputes and those laws include the Constitution. Every competent court exercising its jurisdiction can interpret the Constitution if it arises from a suit or matter before it. That is only subject to the conditions stated in article 137(5)(a) and (b) of the Constitution. The mandatory provision of article 137(1) is confined to petitions brought or to be brought under article 137(3) of the Constitution. It does not apply to references under article 137(5) where the trial court exercises a discretion to make a reference or not."

77. It is clear that the matter before the Court is substantially an election petition and the issue of the Constitutionality of section 76(1)(a) of the Act has only arisen with respect to the competency of the petition. Accordingly, it is an issue which has arisen in the course of these proceedings and the Court is therefore properly seized of the matter.

THE ROLE OF THE ATTORNEY GENERAL

78. Rule 37 of the Rules provide that the Attorney-General or the Director of Public Prosecutions or a person appointed by the Attorney-General or Director of Public Prosecutions, as the case may be, may attend the trial of an election. I associate myself with the decision in **Olum & Another vs. Attorney General (2)** (supra) that the Attorney General should be made a party and if he is left out, the Court will join him as a Respondent of its own volition. However, rule 37 is not expressed in mandatory terms and the decision whether or not to invite the Attorney General to participate in an Election Petition whether or not the Constitutionality of an enactment is raised is an exercise of the Court's judicial discretion and the absence of the Attorney General does not necessary deprive the Court of the jurisdiction to pronounce on the issue.

CONSTITUTIONALITY OF SECTION 76(1)(a) OF THE ELECTIONS ACT

79. I now wish to deal with what in my view is the crucial bone of contention in the Chamber Summons and that is whether or not section 76(1)(a) of the Act is inconsistent with Article 87(2) of the Constitution. In determining this issue I am aware of the decisions in **Waititu vs IEBC and Others Nairobi High Court Election Petition No. 1 of 2013** and **Josiah Taraiya Kipelian Ole Kores vs. Dr. David Ole Nkedienye & Others Nairobi High Court Election Petition No. 6 of 2013**. In both decisions, the courts have variously expressed their views on the constitutionality of section 76(1) of the Act. However, those decisions are merely persuasive since they are decisions are decisions of a Court of concurrent jurisdiction and they are not necessarily binding on this court. In stating this I am well aware that the same are entitled to be treated with respect.

80. Article 87 of the Constitution provides:

(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

81. Since the foregoing Article does not define what amounts to declaration of results and since Article deals with electoral disputes, it must follow that for the Court to determine what amounts to declaration of the election results the court is enjoined by Article 87(1) to resort to legislation enacted for the purpose of timely settlement of electoral disputes. That legislation is no doubt the ***Elections Act, 2011***. Section 76(1)(a) of the Act which deals with "presentation of petitions" provides that a petition to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation. Section 77(1) of the Act on the other hand simply reproduces the provisions of Article 87(2) aforesaid. It is therefore unhelpful to the Court in determining how declaration of results is to be made. The said provision is in itself with respect misplaced as it appears under the subheading "service of petition". However, if the said provision offered any insight with respect to the mode of declaration of results the fact that the side notes are misleading would have been of no consequence pursuant to the decision in **Meme vs. Republic** (supra) where it was held that while marginal notes should be considered in interpreting Kenyan statutes, where there was a clear error in the marginal note, the principle *de minimis non curat lex* would be applied to cure the error.

82. In the absence of the meaning of the word "declaration" **Mumbi Ngugi, J Waititu vs IEBC and Others** in (supra) and **Mabeya, J** in **Josiah Taraiya Kipelian Ole Kores vs. Dr. David Ole Nkedienye & Others** (supra) relied as they were entitled to on 9th Edn. of ***Black's Law Dictionary*** at page 467 in which the word is defined to mean "a formal statement, proclamation or announcement esp. one embodied in an instrument" and found that the Gazette Notice by the IEBC is the instrument that contains the formal declaration of results of an election. Of course the definition in ***Black's Law Dictionary*** would only apply where the meaning of the word cannot be found in our legislation. In this case it is submitted that that finding was erroneous since from our own enactments, the word "declaration" cannot be taken to be synonymous with gazettement. According to the applicants where the Constitution intends to provide for Gazettement, it does so expressly such as under Article 89(11) where it is provided that "an application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the *Gazette"*. The applicants also rely on Article 86(c) under which it is provided that at every election, the Independent Electoral and Boundaries Commission shall ensure that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer". Again under section 39(1) it is provided that the Commission shall determine, declare and publish the results of an election immediately after close of polling. The foregoing provisions as read with Regulations 83, 84 and 85 under which the declaration is to be made by the Returning Officer in form 36, according to the applicants is an indication that the declaration of the results is to be done by the Returning Officer at the tallying centre.

83. In determining the issue herein it is clear from the authorities that the court must be guided by inter alia the principles which I now intend to analyse with respect to the Chamber Summons filed herein.

84. There is a rebuttable presumption that legislation is constitutional and that the onus of rebutting the presumption rest on those who challenge that legislation's status. It therefore follows that the starting point is that section 76(1)(a) of the Act is constitutional.

85. Fundamental rights provisions have to be interpreted in a broad and liberal manner. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such provision, the approach of the Court should be dynamic, progressive and liberal or flexible keeping in view ideals of the people socio-economic and political-cultural values so as to extend the benefit of the same to the maximum possible. Here Article

38(2) provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors. Clearly, therefore the right to free and fair elections is one of the rights which must be interpreted in a broad and liberal manner.

86. In order to determine the constitutionality of a statute, the Court has to consider the purpose and the effect of the impugned statute, or section thereof and if the purpose is not to infringe a right guaranteed by the constitution, the Court has to go further and examine the effects of its implementation and if either the purpose or the effect of its implementation infringes a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional. The question here is therefore whether section 76(1)(a) of the Act infringes upon a right guaranteed by the Constitution. I do not understand the applicants to contend that the requirement for gazettement infringes upon their rights guaranteed under the Constitution.

87. In interpreting the constitution, the constitutional interpretation principle of harmonization, which is to the effect that all the provisions of the constitution concerning an issue should be considered together, is to be applied. In addition the widest construction possible, in their contexts, has to be given to the words used according to their ordinary meaning and each general word held to extend to all ancillary and subsidiary matters. Moreover, constitutional provisions are to be given a liberal construction unfettered by technicalities because though the language of the constitution did not change, changing circumstances may give rise to new and fuller import to the meaning of the words used. Article 87(2) of the Constitution talks about “declaration”. However, the duty imposed on the Returning Officer under Article 86(c) is to “openly and accurately collate and promptly announce” the results. Here the word “declare” is omitted. From the reading of Articles 87(2) and 86(c) one cannot therefore state with certainty that the Returning Officer is the one upon whom the duty to “declare” results is placed as opposed to announcement of the results. One has to therefore peruse the other instruments such as the Act, the Rules and the Regulations to find out what exactly is the role of the Returning Officer with respect to declaration of results. The Act itself in so far as it has two provisions on the exact point in time from which the reckoning of time for presentation the petition starts to run cannot by any stretch of imagination be said to offer a solution to this *lacuna*. Reliance has, however, been placed on section 39 of the Act which provides that (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling. (2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed. The court was urged to make a determination on what encompasses the words “determine”, “declare” and “publish”. The word “determination” is defined by 9th Edn. of ***Black’s Law Dictionary*** at page 514 to mean “ a final decision by a court or administrative agency. “Declaration” as already stated above is defined in the same book as “a formal statement, proclamation or announcement esp. one embodied in an instrument” while “publication” is defined at page 1348 therein as “generally, the act of declaring or announcing to the public”. From the above definitions it is clear that publication is in effect a form of “declaration” save to cases where the same is a term of art such as in the tort of defamation and the definitions of both words seems to narrow down on the act of announcement. “Determination” in my view would refer to the decision without necessarily the act of announcement. However, it is noteworthy that the Act requires these three activities to be carried out immediately at the ***close of polling***. Polling is normally undertaken at the polling station so that if the results are determined, declared and published immediately, those would only be the results of the polling station and cannot constitute the results of the particular constituency. In fact Regulation 73(1) of the Regulations imposes the task of declaring the polling station closed on the presiding officer. Accordingly the declaration of results as contemplated in Article 87(2) of the Constitution cannot be equated to the determination, declaration and publication that takes place at the close of the polling under section 39 of the Act since time cannot be expected to start running for the presentation of the petition until after all the results from the polling stations in a constituency have been declared. On the other hand if the submission made on behalf of the applicants that the declaration under Article 87(2) of the Constitution is to be done by the Returning Officer immediately after tallying, that would defeat the apparent mandatory requirement on the IEBC to announce both the final and provisional results as provided in section 39(3). The applicants have however contended that the provisional results to be announced are those transmitted electronically. It must however be remembered that the electronic transmission of results is done from the polling station

by the presiding officer pursuant to Regulation 82 of the Regulations and not from the tallying centre. Section 39(3) of the Act however, provides that the provisional results to be announced are in respect of which the tallying process has been completed. It is clear that instead of clarifying the meaning of the term "declaration" section 39 of the Act with due respect compounds and complicates the matters even further. In **Ayub Juma Mwakesi vs. Mwakwere Chirau Ali Mombasa HCEP No. 1 of 2008Ibrahim, J** (as he then was) held while dealing with the role of the Returning Officer vis-à-vis the defunct Electoral Commission that while the Returning Officer was mandated to carry out the election, he did that under the general direction and supervision of the Electoral Commission of Kenya. The court was of the view that the office of a Returning Officer was an organ within the Commission and while the Returning Officer discharged his duties independently he did so in consultation, co-ordination and under the direction of the Commission. Accordingly, the acts of the Returning Officer in my view cannot be treated as being conducted in isolation to that of the IEBC. What for example would happen if the Returning Officer was for any reason unable to announce the results? Would the will of the people be disregarded where it was clear that the results were available and could be declared by the Commission? With due respect to make such a determination would negate the main object of an election petition which is an inquiry as to whether the results reflect the true expression of the will of the voters.

88. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. In this respect it is recognised that the Constitution is linked to our history, customs, tradition, ideals, values and on political, cultural, social and economic situations and that its dynamics and relevance is rooted in these values. The least it is expected to have and which cannot be denied is the spirit of its framers and hence the Court should not limit the ambit of public interest or agree to confine it only to past definitions or categories. Here it is argued that one of the aspirations of the people of Kenya in enacting the Constitution was to ensure there was certainty in election disputes resolutions. That contention in my view cannot be faulted. However, one other aspect in the enactment of the current Electoral regime was a move towards resolution of electoral disputes on substance rather than on technicalities. Taking into account the realisation that in the past Presidential Election disputes were almost impossible to determine on merits due to the rigid rules relating to service which rules were taken advantage of in other election petitions by the respondents, the framers of the constitution saw the necessity of simplifying the rules to allow for flexibility. Accordingly, it would be wrong in my view to construe public interest in electoral dispute resolution mechanisms with respect only to past definitions or categories.

89. In the absence of a clear picture emerging from both the Constitution and the Act with respect what constitutes "declaration" the law is that the purpose of legislation must be looked at to see whether or not it is unconstitutional. In my view the insertion of gazettement in section 76(1)(a) of the Act was meant to give certainty to reckoning of time. That being the position and pursuant to my finding that one of the intention of the framers of the Constitution was to give certainty to electoral dispute resolution mechanisms I am unable to find that by merely requiring that the results be gazetted section 76(1)(a) is unconstitutional on that score. In fact I doubt if this Summons would have been taken if the gazettement had been done on the very day that the results were announced by the Returning Officer.

90. The Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons in Kenya. The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. Therefore it would not be correct in my view to interpret the provisions of the Constitution with reference to rules and regulations if to do so would lead to rigid interpretation rather the liberal approach which is expected in Constitutional interpretation. I am therefore reluctant to subject the meaning of the word "declaration" as used in Article 87(2) of the Constitution to the provisions of the Rules and Regulations. As was held by the

Constitutional Court of Uganda in **Baku and Another vs. Attorney General [2005] 2 EA 5,** "the significance of having fair hearing in election petitions cannot be overemphasised. The resolution of electoral disputes not only affects the perception of the population on the independence of the judiciary but also on the fairness of the electoral process in the country." Similarly, in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA NO. 890 of 2004** it was held that the concept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament is not acceptable since the Constitution is not an Act of Parliament. It exists separately in the statutes. It is supreme law and its provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e. restrictive way – Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document. On this score, it was held in **Meme vs. Republic** (supra) that the Court should be slow to unsettle those public policy choices that have been incorporated in legislation enacted by Parliament by virtue of its constitutional competencies.

91. In determining constitutionality both purpose and the effect are relevant. This court is enjoined to exercise judicial power in conformity with law and with the values, norms and aspirations of the people, and while the norms and aspirations of the people must be taken into consideration when interpreting the Constitution, the language and the spirit of the Constitution must not thereby be compromised.

92. It is however argued that if declaration is construed to mean the same thing as gazettement, since there is no timeline provided under the Act for gazettement of the results, IEBC would not be bound to gazette the results immediately and may even take as long as two months a scenario which would lead to uncertainty and absurdity. That electoral disputes are required to be determined timely cannot be in doubt and any provision which tends to bring uncertainty as to the period within which the said disputes are to be determined must be frowned upon. However, in line with the authorities cited above a statute or enactment worded in a language which is difficult to follow, or is ambiguous or contradictory or impossible to apply, is not necessarily thereby rendered unconstitutional since it only gives rise to questions of interpretation by the Court and with regard to inconsistencies and repugnancy in parts of the Act; these are not things that necessarily render a statute unconstitutional since they are things which are resolved by the rules of statutory interpretation in real factual situations.

93. Therefore considering the relevant provisions of the Constitution and the ***Elections Act*** and considering the purpose of the impugned section of the Act and not ignoring the effect of declaring the said provisions unconstitutional I am unable to accede to the Chamber Summons dated 10th May 2013. This court is enjoined to interpret the constitution by giving its provisions a liberal construction unfettered by technicalities because changing circumstances may give rise to new and fuller import to the meaning of the words used. Section 76(1)(a) of the Act has introduced new circumstances based on the explicit words therein which circumstances have influenced parties in their decisions to challenge the results of the elections in this country. This court is duty bound to interpret Article 87(2) of the Constitution taking into account such changed circumstances in order to give new and fuller import to the meaning of the word "declaration" as used in Article 87(2) of the Constitution. Following that course, it is my view and I so hold that section 76(1)(a) was a mechanism by which the Legislature was fulfilling its mandate as enjoined by Article 87(1) of the Constitution. Whereas the said provision may in light of the other provisions appear worded in a language which is difficult to follow, or is ambiguous or contradictory or impossible to apply, it is not necessarily thereby rendered unconstitutional since it only gives rise to questions of interpretation by the Court.

94. I however agree with the submissions made by the applicants that section 76(1)(a) left as it is may be a source of mischief, uncertainty and absurdity. What is the Court expected to do when confronted with such circumstances? The Court is of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it uncertain and insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs.**

Minister of Home Affairs and Others (CCT10/99) [1999] ZACC in which the said Court the expressed itself *inter alia* as follows:

"The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief. In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples."

95. In **Roodal vs. State of Trinidad and Tobago [2004] UKPC 78,** the majority in the Privy Council cited with approval the South African case of**State vs. Manamela [2000] (3) SA 1** in which it was held:

"Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential".

96. As was recognised by this Court in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR:**

"The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises… We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights."

97. In the result while I decline to grant the orders sought in Chamber Summons dated 10th May 2013, I hereby direct the Attorney General to initiate the process of legislative amendment to the ***Elections Act***, 2011 with a view to providing a reasonable timeline within which the gazettement of results and not just the names of the winners of the election under section 76(1)(a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission . If such amendment is not undertaken within the next 60 days the said section will be deemed to contain a requirement that the said Commission is to gazette the results of the elections under section 76(1)(a) of the ***Elections Act*** within 7 days of the announcement of the results by the Returning Officer.

EXTENSION OF TIME

98. With respect to the Notice of Motion seeking abridgement of time, it is true that neither the Constitution nor the ***Elections Act*** provide the timelines within which the responses to the petition are to be filed. The period for doing so is however provided under Rule l4 of the Rules. Rule 20 of the said Rules however provides that:

Where any matter is to be done within such time as provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done with such conditions as it may consider fit even though the period initially provided or granted may have expired.

99. Therefore as the period for filing responses to the petition is provided for in the Rules, I hold that

the Court has jurisdiction to enlarge the time for doing so.

100. In determining the application I agree with **Mr. Khagram** that the period which an applicant for extension of time is obliged to explain is the period of the delay subsequent to the last day when the step in the proceedings ought to have been taken. In this respect the Court of Appeal in **Jackson Mutuku Ndetei vs. A O Bayusuf & Sons Ltd. Civil Application No. Nai. 231 of 2002** expressed itself as follows:

"Although it is true that a party who decides to wait until the very last day or a few days before presenting a record of appeal runs the risk that time may expire for him before complying with the directions of a registrar, an intending Appellant is given sixty days within which to lodge a record of appeal and the only day that is to be explained is the delay falling outside the sixty days and it does not matter that an appeal is lodged on the very last day because the law allows sixty days and there must have been a valid reason for giving that period of time".

101. On the issue of failure to exhibit the resolution under seal authorising the swearing of the affidavit, I had an occasion to deal with a similar objection in **Nairobi HCCC (Commercial & Admiralty Division) No. 122 of 2011** between **Mavuno Industries & Others vs. Keroche Industries Limited** in which I expressed myself as follows:

"As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in *Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR* and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."

102. It must however be mentioned that the jurisdiction conferred upon the High Court by the Constitution to hear and determine election petitions is a special jurisdiction as the ***Elections Act*** and the rules made thereunder form a complete legal regime with its elaborate procedure concerning the filing, serving, hearing and determination of the election petitions and therefore the provisions of other law and the ***Civil Procedure Act*** and Rules made thereunder do not apply to election petitions save where expressly incorporated. See**David Wakairu Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998.**

103. It is contended that as the affidavit in support of the application is sworn by the advocate, the averments therein do not constitute reasons upon which the application for enlargement of time can be granted the same being an exercise of discretion. The law is not that an advocate is not allowed to swear an affidavit in all situations. The law as I understand it is that what an advocate is not allowed to do is to swear an affidavit on contentious matters of fact. As was held by **Ochieng, J** in **Ahmednasir Abdikadir and Company Advocates vs. National Bank of Kenya Limited (2) [2006] 2 EA 6:**

"Rule 9 of the Advocates Practice Rules does not give rise to an automatic bar to affidavits being sworn by advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rules allow advocates to swear affidavits on "formal or non-contentious matter of fact, in any matter".

104. In this matter, however, I agree with the respondents that the applicants' advocates ought not to have sworn the affidavit in support of the application since the matters deposed to were clearly contentious

matters of fact.

105. However, under rule 20 of the Rules, the discretion to enlarge time is very wide and is only subject to ensuring that justice is done. In this case, all the parties appreciate the role of the IEBC in these proceedings. The delay in filing the response and affidavits in my view is not inordinate and no prejudice has been alleged that will be occasioned to the respondents if the application is allowed. I am also cognisant of the fact that the applicants have applied for extension of time before the respondents took up the issue of the filing of the responses out of time. As was held by **Ibrahim, J** (as he then was) in **Ayub Juma Mwakesi vs. Mwakwere Chirau Ali** (supra) held:

"In the court's view the petitioner has acquired some proprietary and vested rights in respect of the records of the court i.e. the proceedings. The evidence has legitimately come on record before there could be any legal bar. All the parties are aware of the evidence and all the voters who may be in support of the petition are aware of the contents. The petitioner, his witnesses and possibly his supporters have acquired some legitimate expectations in respect of the evidence already lawfully and legally on record. It would be a grave miscarriage of justice for the Petitioner's rights acquired in respect of the evidence to be taken away after working so hard with outlay of legal and other expansion to ensure that his petition reached where it did. The court would be allowing a monstrous travesty of justice if it expunged the evidence legitimately laid before it... The evidence is on the record and while it may not be used as against the Returning Officer now not being a party, the Election Court's eye cannot be shut to the record. The Election Court has power and discretion to look at all the evidence broadly when investigating whether the 1st respondent was validly elected..... It is in the interest of justice and fairness in this election petition for the court to look at the totality of the evidence including the evidence against the 1st respondent and the 3rd respondent. This court as an election court is now under a duty to broadly look at and consider all the evidence without making any value judgement against the Returning Officer or investigating his culpability or otherwise. The court can look at the evidence and ask itself whether the election was free and fair."

106. Similarly in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998**, the Court of Appeal held that documents irregularly filed before application is made for striking them out ought not to be ignored.

107. As was held in **Touring Cars (K) Ltd & Anor vs. Ashok Kumar N. Mankanji Civil Application No. 78 OF 1998,** prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one.

108. Accordingly, I find that the justice of this case will be served by allowing the Notice of Motion dated 10th May 2013 which I hereby allow as prayed.

109. Before I conclude this ruling, I must express our gratitude to counsel for thorough research and very eloquent submissions made in the prosecution and opposition of both applications. If I have not referred to all the authorities referred to me by counsel, it is not due to disrespect or out of lack of the appreciation for counsels' industry.

ORDER

110. Consequently it is hereby ordered:

1. **That the Chamber Summons dated 10th May 2013 be and is hereby dismissed.**

2. **That the Notice of Motion dated 10th May 2013 herein is hereby allowed.**

3. **The Hon. Attorney General is directed to initiate the process of legislative amendment to the *Elections Act, 2011* with a view to providing a reasonable timeline within which the gazettement of**

results under section 76(1)(a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission. If such amendment is not undertaken within the next 60 days the said section will be deemed to contain a requirement that the said Commission is to gazette the results of the elections under section 76(1)(a) of the *Elections Act* within 7 days of the announcement of the results by the Returning Officer.

4 The costs of these applications will be in the cause.

5 This ruling is to be served by the Deputy Registrar of this Court on the Hon. Attorney General for implementation.

Dated at Mombasa this 23rd day of May 2013

G V ODUNGA
JUDGE

Delivered in the presence of

Mr S M Kimani instructed by Stephen Macharia Kimani for the Petitioner in Petition No. 4 of 2013.

Mr Asige instructed by Asige Keverenge & Anyanzwa Advocates for the Petitioner in Petition No. 9 of 2013.

Mr Abed for Mr Balala instructed by Balala & Abed Advocates for the 2nd Respondent.

Mr Nyamodi for Mr Khagram instructed by A B Patel & Patel for the 1st and 2nd Respondents.