REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 496 OF 2013

BETWEEN

COMMISSION FOR THE IMPLEMENTATIONOF THE CONSTITUTION.....PETITIONER

AND

THE NATIONAL ASSEMBLY OF KENYA…….....….....1ST RESPONDENT

THE SENATE OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner, the **Commission for the Implementation of the Constitution,** (CIC) is one of the Independent Constitutional Commissions under Chapter Fifteen of the Constitution. It is established under **Section 5** of the **Sixth Schedule** to the **Constitution** and administered through the provisions of the Commission for the Implementation of the **Constitution Act, 2010.** Its functions includes i*nter alia* monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement the Constitution; coordinating with the Attorney General and Kenya Law Reform Commission in preparing for tabling in Parliament required legislation to implement the Constitution and work with each of the Constitutional Commissions to ensure that the letter and spirit of the Constitution is respected.

2. The Petitioner has filed this Petition challenging the constitutionality of Kenya Gazette Supplement No. 100 (National Assembly Bills No. 15) by which the National Assembly published The Constitutional (Amendment) Bill 2013, which has sought to amend **Article 260** of the Constitution in respect of the definition of "State Office" and its principal objective is to amend **Article 260** of the **Constitution** in order to remove the Offices of the Members of Parliament, Members of County Assemblies, Judges and Magistrates from the list of designated State Offices.

3. In its Petition dated 11th October 2013, the Petitioner seeks the following orders;

> ***"(a) A perpetual conservatory order restraining the Parliament of Kenya from reading, debating and enacting the Constitution of Kenya (Amendment) Bill, 2013.***
>
> ***(b) A declaration that the Constitution of Kenya (Amendment) Bill, 2013 is null and void as it affronts the basic structures of the Constitution fixed by Articles 127, 172, 230, 248 and 255.***
>
> ***(c) A declaration that The Constitution of Kenya (Amendment) Bill, 2013 is null and void as it contravenes Articles 255, 256(1) (c) and (2) of the Constitution in respect to the amendment of the Constitution by the initiative of the Parliament of Kenya.***
>
> ***(d) A declaration that the Constitution of Kenya (Amendment) Bill, 2013, is null and void as it is ultra vires the powers or authority to amend the Constitution delegated by the people to the Parliament of Kenya under Articles 94, 255 and 256 of the Constitution.***
>
> ***(e) An order of certiorari to remove into the High Court and quash the Constitution of Kenya (Amendment) Bill 2013.***

(f) An order of prohibition prohibiting the Parliament of Kenya from proceeding with reading, debating and enactment of the Constitution of Kenya (Amendment) Bill, 2013.

(g) Costs of, and incidental to , the Petition.

(h) Such other orders as this Honourable Court shall deem just"

Petitioner's case

4. Mr. Oraro presented the Petitioner's case. He submitted that the proposed amendments to **Article 260** undermine the basic structure of the Constitution by reinstating the self-indulgent reward of renumeration and benefits of members of Parliament which was rejected by the people by voting for the new Constitution. That the Bill is unconstitutional and offends the basic structure of the Constitution particularly **Articles 127, 172, 230, 248** and **255.**

5. It was his position that Parliament is required under **Article 94(4)** of the Constitution to protect the Constitution and promote democratic governance of the Country but has instead undertaken to subterfuge and undermine it so as to enable members of Parliament set and review their own renumeration and benefits in contravention of the letter and spirit of the Constitution, the national values of public participation, transparency, accountability and fidelity to the rule of law.

6. He contends that the Constitution at **Article 230** has established the Salaries and Renumeration Commission, (SRC) whose power and function is to set and regularly review the renumeration and benefits of all State Officers and also advise the National and County Governments on the renumeration and benefits of all other public officers. He claims that SRC was established in order to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles so as to promote constitutionalism. That although the constitution has established specific commissions for the various state organs such as the Parliamentary Service Commission, the Judicial Service Commission and the National Police Service Commission, none of the said Commissions have been granted the power and or function to set or review the salaries or renumeration of a state officer or a public officer under its docket.

7. That the Amendment proposed will curtail the powers and functions of SRC by withdrawing the power granted to it under the Constitution to set and regularly review the renumeration and benefits of members of Parliament, Judges and Magistrates, Members of County Assemblies, Governor or Deputy Governor of a County or other members of the Executive Committee of a County Government.

8. Mr. Oraro claims that the Amendment relates to the independence of a Commission to which Chapter Fifteen applies and by dint of **Article 255(1)** the Bill should only be enacted in accordance with **Articles 256 or 257**, and approved by a referendum contrary to the proposal made by the 1st Respondent through a Constitutional Amendment Bill. That the 1st and 2nd Respondents have also failed to facilitate public discussion of the Bill in accordance with the provisions of **Article 10(2)(1)** of the Constitution.

9. He thus claimed that if the Bill is enacted, it shall undermine and subvert the sovereignty of the people at the national and county levels by removing the design for delegation of the sovereignty of the people to holders of state offices in the three (3) co-ordinate organs of the state as provided for under **Article 1** of the Constitution. Such an action will also subvert the threshold of leadership and integrity required for a 'state officer' and 'state organ' under **Chapter 6** of the **Constitution** and destroy the entire rubric on which the Constitution is founded. That the prayers elsewhere set out should therefore be granted for the above reasons.

The 1st and 2nd Respondent's Case

10. The 1st Respondent, **The National Assembly of the Republic of Kenya** and the 2nd Respondent, **The Senate of the Republic of Kenya** in opposing the Petition filed grounds of opposition dated 18th October 2013 and also a replying affidavit sworn by Abenayo Wasike Makokha, on 25th October 2013 and written submissions dated 23rd October 2013.

11. In their grounds of opposition, they state that this court has no jurisdiction under **Articles 94, 95** and **117** of the Constitution or any other law to issue the orders sought by the Petitioner, as this court cannot issue orders restraining the National Assembly, the Senate or Members of Parliament from discussing, deliberating and or debating on any matter presented to Parliament in accordance with the Constitution or any other relevant statute. In any event, that the jurisdiction of the High Court is limited to considering whether the 1st and 2nd Respondent have complied with all the constitutional requirements and standing orders and interpret whether enacted legislation is inconsistent with the Constitution. That the questions raised by this Petition can only be addressed in accordance with **Articles 118, 119 and 256** of the Constitution and that the Petition was an affront to the constitutional doctrine of separation of powers and an encroachment on the Legislative mandate of Parliament. That in any event, the decision to refer the Bill to a referendum will be made by the President and not by Parliament as argued by the Petitioner.

12. In his affidavit, Abenayo Wasike Makokha, the Clerk to the Departmental Committee on Justice and Legal Affairs of the 1st Respondent explained that the 1st Respondent has already published the Bill and that the act of publication is the first step of public participation within the legislative process. That following the publication, the Chairman of the Kenya National Assembly Departmental Committee on Justice and Legal Affairs, Mr. Chepkonga, proceeded and tabled the Bill before the National Assembly on 1st August 2013 where the Bill was read for the first time. That in accordance with **Article 118(1)(b)** of the Constitution and **Standing Order 127(3**) of the National Assembly Standing Orders, the Bill was published in both the "Daily Nation" Newspaper and the "East African Standard" Newspaper of Thursday 15th August 2013 requesting the public to present their views, submissions and memoranda for consideration by the Departmental Committee on Justice and Legal Affairs. Subsequently, the Committee received memoranda from the Kenya National Audit Office, Kenya National Commission on Human Rights, SRC, and the National Council of Churches of Kenya. He alleged that the Committee has been holding meetings since then to deliberate on the Memoranda it had received.

13. Mr. Mwendwa presented the 1st and 2nd Respondent's case. He claimed that, having complied with all the mandatory requirements of the

Constitution and its standing orders, this Petition raises no justiciable issue and is therefore incompetent and misconceived both in law and fact. He submitted that the Petitioner has also failed to demonstrate any constitutional provision which has been violated and it was his contention that the legislative authority of the people at the national level is vested in and exercised by Parliament in accordance with **Articles 94, 109 and 118** of the **Constitution** and that special restrictions on the legislative powers of Parliament are found under **Article 255** of the Constitution which restrictions cannot apply in the present case.

14. He submitted that the question of determining the nature of a Bill and the procedural requirements for a Bill to to be enacted into law and whether it should go to the referendum are matters of interpretation by relevant institutions through which the Bill passes before it becomes law. That those institutions have the special jurisdiction to ensure that the resultant Act is constitutional and legally valid, in accordance with **Article 256(1)** of the Constitution. He thus claimed that the Bill is currently undergoing public debate and that the Petitioners have a constitutional mandate to appear before the Departmental Committee and make their submissions on it. He also contends that this Courts lacks the jurisdiction to entertain this Petition as it is premature and speculative of the outcome of the Bill. He referred the Court to the case of ***Republic v Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others, Misc Civil Application No. 747 of 2006***, ***Regina v Secretary of State for Trade & Others ex parte Anderson Strathclyde PLC*** on the doctrine of separation of powers and the cases of ***Republic v Judicial Commission of Inquiry into the Goldenberg Affair, HC Misc Applic. No. 102 of 2006***, ***Kiraitu Murungi & 6 Others v Hon. Musalia Mudavadi & Another, HCCC No. 1542 of 1997*** and ***Raila Odinga v Francis Ole Kaparo and the Clerk of the National Assembly HCCC No. 394 of 1993*** in support of his arguments including on the subject of Parliamentary privilege.

15. It was also Mr. Mwendwa's submission that the provisions of the Leadership and Integrity Act No, 19 of 2012, shall continue to apply to Members of Parliament, County Assembly and the Judiciary even if they are not designated as State Officers by dint of the provisions of **Article 80(c)** and **Section 52** of the **Leadership and Integrity Act.**

16. As for the proposed amendments, Mr. Mwendwa submitted that they do not require a referendum and can be done solely by Parliament since the Constitution at **Article 260(q)** has anticipated the creation of more state offices by parliament. That Parliament is the state organ that the Constitution anticipates shall organise public offices into state offices and public offices, respectively and thus the proposed amendment does not undermine nor offend the basic structure of the Constitution nor subvert the sovereignty of the people and the Constitutional threshold of leadership and integrity required of a state officer and state organ in any way.

17. He therefore alleged that the orders that the Petitioner has sought cannot be issued by this Court as the Court has no powers to do so and urged me to dismiss the Petition with costs.

3rd Respondent's case

18. The 3rd Respondent, the Attorney General, opposed the Petition and filed grounds of opposition dated 22nd October 2013. He also filed written submissions dated the same day. In his grounds of opposition, he argues that the Petition is incompetent for want of any evidentiary materials in proof of breach of any constitutional provision so as to warrant this Court's intervention. That the Petition is juridically incompetent based on the constitutional principle of separation of powers among the various arms of government and that the Petition is bad in law and amounts to an abuse of the Court's process.

19. In his submissions Mr. Kaumba further submitted that the determination of the nature of the Bill and the procedural aspects required for it to be passed and whether it should go to a referendum is a matter of interpretation to which the relevant institution through which the Bill passes before it becomes law has a special jurisdiction to check and also to ensure its constitutional and legal validity. He then claimed that should the Bill be passed, then its constitutionality can be raised in a Court of competent jurisdiction and he relied on the cases of: ***FIDA K and Others v Attorney General, Petition No. 102 of 2011*** and the Supreme Court case of ***Re Matter of Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011*** which set the principles to consider while interpreting the Constitution.

20. It was also Mr. Kaumba's argument that according to the provisions of **Article 256(1)** of the Constitution, a referendum is an additional step to the normal parliamentary procedure for debating a constitutional amendment Bill and that the Bill is yet to crystallize and any cause of action regarding it will only arise when Parliament has already enacted the Bill into law without taking into consideration the special procedures required for enactment. He relied on the case of ***Paul Kiplagat and 2 Others v IEBC and 2 Others (2011) e KLR*** where it was held that the court can only interrogate and determine the actions and omissions of a Minister on tangible and valid complaints and evidence.

21. It was also his submission that this court should only invoke its jurisdiction when there is a tangible matter and not only on hypothetical or abstract situations. He relied on the case of ***John Harun Mwau & 7 Others v Attorney General (supra)*** in support of that proposition.

22. It was the further submission of the 3rd Respondent that **Article 94** of the **Constitution** has provided that the legislative mandate of the State is left to Parliament and this Court should respect the doctrine of separation of powers and he relied on the case of ***National Conservative Forum v Attorney General Petition No. 438 of 2013*** where it was held that due to the doctrine of separation of powers, the Judiciary can only intervene in very limited circumstances. He thus urged me to dismiss the Petition for being premature.

Interested Party Case

23. Mr. Nyamodi for the Interested Party, the SRC, supported the Petition and adopted Mr. Oraro's submissions. He added that this court has jurisdiction to interfere with the legislative process of Parliament when the said process is being exercised in an unconstitutional manner. That it also has jurisdiction to interfere with the legislative process so as to enforce its constitutional obligations under **Articles 118** and **256** of the Constitution.

24. He submitted that while Parliament is empowered to consider and pass amendments to the Constitution pursuant to the provisions of **Article 94(3)** of the **Constitution**, the amendments have to be effected under **Article 256** of the **Constitution.** That when Parliament performs its functions in a manner that is inconsistent with the Constitution, then this Court has the jurisdiction to examine the offending deed of Parliament and in the appropriate circumstances, intervene, so as to ensure that in the discharge of its constitutional mandate,

Parliament has not violated the constitution. He submitted that this Court's jurisdiction to defend the constitution where it is alleged that Parliament has contravened or has threatened its contravention has been decided in the case of ***Peter O. Ngoge v Francis Ole Kaparo & Others (2007) e KLR*** where the Court stated that it is not the function of the Court to interfere with the internal arrangements of Parliament unless it can be shown that they violate the constitution. He also relied on the case of ***Musila Makola v Interim Clerk of Machakos County & 4 Others Machakos Election Petition No.5 of 2013*** where it was held that no state organ is above the Constitution and every person has the obligation to respect, uphold and defend it. That the Constitutional Court of South Africa in - ***Doctors for Life International v The Speaker of the National Assembly and 11 Others, (supra)*** also held that when Parliament is exercising its legislative authority, it must act in accordance with and within the limits of the Constitution. That the Court can intervene in the procedures of Parliament in order to prevent the violation of the Constitution and rule of law but the Court also observed that the Court's intervention will occur in exceptional cases such as where an aggrieved person cannot be afforded a substantial relief once the process is complete because the underlying conduct would have achieved its object.

25. He thus submitted that once the proposed amendments have been effected, the same cannot be challenged in any Court for being unconstitutional since the effect of enacting it is that it becomes part of the Constitution and under **Article 2(3**) of the **Constitution** it is not subject to challenge. He claimed that the proposed amendments are unique and are not like those of a legislative Bill which can be challenged once enacted and which can be declared unconstitutional.

26. As to the principle of separation of powers, it was Mr. Nyamodi's submission that the interference by the Court in the legislative process is not an affront to that doctrine but rather an affirmation of the doctrine which is aimed at establishing checks and balances in the exercise of sovereign power vested in each of the arms of government; the executive, legislature, judiciary and Constitutional Commissions. He referred the Court to the case of **Re The Matter of the Interim Independent Electoral Commission (supra)** *and* **Doctors for Life Case (supra)** in support of that proposition.

27. On the issue of parliamentary privilege, Mr Nyamodi submitted that it cannot be pleaded when Parliament is violating the Constitution. That under **Section 12** of the **National Assembly (Powers and Privileges) Act**, parliamentary privilege merely recognizes that certain proceedings of Parliament may be privileged but it leaves it to Parliament to determine what is privileged and to establish the privilege. That since the **National Assembly (Powers and Privileges) Act**, was in existence before the promulgation of the Constitution, it must be construed with the adaptations, alterations and qualifications necessary in order to bring it into conformity with the constitution as is provided for under **Section 7(1)** of the **6th Schedule to the Constitution.** It was his submission that the issue of Parliamentary privilege only extends to the internal arrangements of Parliament and the supremacy of the Constitution and the sovereign right of the people of Kenya to participate in governance and legislative process, are not internal arrangements of Parliament as they go to the root of the supremacy of the constitution, sovereignty of the people and sanctity of the Bill of Rights.

28. It was Mr. Nyamodi's further submission that Parliament has infringed the constitution in three ways, thus the need for this court to exercise its jurisdiction under **Article 165(3)(d)(ii**);firstly, the **Constitution Amendment Bill 2013** seeks to alter the basic structure of the Constitution. Secondly, in considering the Bill, Parliament is exercising its limited power to amend the Constitution in a manner that exceeds its limited ability to amend it. Thirdly, Parliament has failed to discharge the obligation placed on it by **Article 256(2)** of the **Constitution** to ensure public participation in the legislative process.

29. On the issue of the alteration to the basic architecture of the constitution, he submitted that the amendment will also have the effect of reducing the integrity threshold for State Officers under Chapter 6 of the Constitution.

30. In the end, he claimed that the Bill in seeking to alter the basic structure of the Constitution as envisioned and acceded to by the sovereign people of Kenya, aims to create a dysfunctional, contradictory and self-defeating constitutional system of governance that undermines the aspirations of the sovereign people, and Kenya's very statehood.

31. On the second ground, limitation of the legislative powers of Parliament to amend the Constitution, he submitted that Parliament has a limited legislative power, as delegated by the people of Kenya through the Constitution, and that this power is subordinate to the Constitution and ultimately the sovereignty of the people of Kenya. That under **Article 1(2)** the legislative power of Parliament to amend the Constitution is subject to the direct sovereign will of the people of Kenya and that **Article 94(5)** directs Parliament on how to amend the Constitution. That Parliament has no absolute power in amending the Constitution where the said amendments materially alters the structure of the Constitution and he referred the Court to the Indian Supreme Court case of ***Kesavananda Bharati v State of Kerala AIR (1973) SC 1461*** in that regard.

32. The third ground as stated by Mr. Nyamodi was that Parliament has failed to comply with the provisions of **Article 256(2)** of the Constitution. This Article provides that parliament shall publicize any Bill to amend the Constitution, and facilitate public discussion about the Bill. He thus submitted that this provision was a limitation on Parliament's power to legislate to the extent that the Constitution requires direct exercise of the sovereign power of the people in constitutional amendments by way of extensive dialogue especially where the amendments go to the core of the foundation of the Constitution. He submitted that it was not enough for Parliament to publish the Bill in the "Daily Nation" of 15th August 2013, but that it must engage in public debate or public hearings as envisaged under **Article 256(2)** of the Constitution. That **Article 118** also enjoins Parliament to seek public input and opinions in all enactments including that of statutes but **Article 256(2)** enjoins Parliament to fulfill a higher threshold of engagement by engaging the public in a dialogue regarding any proposed amendments it seeks to pass. He claimed that there was no evidence on record to demonstrate that Parliament has discharged its obligation as placed upon it by **Article 256(2**) and contends that after the 1st reading, the Bill is subjected to a 90 day period within which public participation ends and thereafter there is a second reading, and after this it can be fast-tracked and passed by Parliament in one day, thus locking out public debate and discussions on the Bill. He therefore claimed that the Petition is not premature since according to the Standing Orders there is no other avenue for Parliament to facilitate public discussions of the proposed constitutional amendment.

Amicus Curiae submissions

33. The Amicus Curiae, **Katiba Institute,** filed submissions dated 29th October 2013. Mr. Waikwa appearing together with Mr. Lempaa highlighted those submissions.

34. It was the submission of Mr. Waikwa that this court has jurisdiction to hear the matter and claimed that **Article 258** of the Constitution applies to all litigation relating to the Constitution and that every person has the standing to initiate proceedings where he claims that there is a threat to the violation of the constitution. He thus submitted that the Constitution having allowed every person the opportunity to do so on account of threat of violation, indicates that the proceedings may be characterized as premature for normal litigation. However, he claimed that both **Article 1** on the sovereignty of the people, **Article 2** on the supremacy of the Constitution and **Article 10** on the principle of the rule of law underlines the need to ensure that whatever action is taken is within the Constitution.

35. It was his submission that the architecture and design of the Constitution demonstrated that the drafters of the Constitution intended that the principle of separation of powers would be observed in the three arms of government. That the separation of power principle is not absolute, as it is subjected to the Constitution and he referred the Court to the case of ***Van Rooyen and Others v The State and Others (2002) ZACC 8 (PARA 34)*** and the Case of ***Glenister v President of the Republic of South Africa and Others (CCT 48/10) (2011) ZACC 6,*** where the Courts set limitations to the separation of power doctrine.

36. With regard to the issue of circumstances or the test to be used by the Court to justify an intervention in any legislative process, he submitted that the Court will only interfere in a legislative process in exceptional circumstances and urged the Court to adopt the reasoning of the South African Constitutional Court in ***Doctors for Life*** and ***Glensiter cases.*** He further submitted that the exceptional circumstances in the instant case is that once the Bill has been passed and assented to by the President, it will logically form part of the Constitutional and cannot be challenged as **Article 2(3)** has prohibited any challenges to any provisions of the Constitution, thus causing irreversible harm.

37. The Amicus contended that from the Committee of Experts' Final Report the current amendments proposed in the Bill form part of the architecture and design of a constitutional democracy by ensuring that people do not set their own salaries and protects renumeration of the members of the institutions that safeguard the Constitution. That while passing the Constitution, the instant issues were never characterised as contentious issues such as land, Kadhi's Courts and abortion. That the the people accepted without contention the other provisions including the issue of State offices and submits that the proposed amendments are totally opposed to the spirit of the Constitution and amount to a betrayal of the people of Kenya.

38. It was the further submission of Mr. Waikwa that Constitutions should be difficult to amend because if it was easy to amend them, like an ordinary statute, the concept of incompatibility with the Constitution would be meaningless and also that of the supremacy of the Constitution. He claims that this Court should not have difficulties in understanding the importance of making it difficult to amend the Constitution given the history of the Country with regard to amending the Independence Constitution which was amended at the instance of the ruling party thus removing the safeguards for democracy and accountability and at the end, enhanced the call for a new Constitution as was recorded by the Constitution of Kenya Review Commission.(CKRC) in its final report.

39. It was indeed his submission that the nature of the proposed amendment is unclear and would be difficult to phrase into a question in any referendum.

40. It was his further submission that what is proposed is unconstitutional for it goes against the basic structure of the Constitution as contained in **Articles 127, 172, 230, 248** and **255**. He argues that an analysis of the implications and true nature of what is proposed shows that it is a great assault to the whole structure of the integrity and leadership provisions in the Constitution and that there is a real question of what would be left of Chapter 6 if a majority of the current "State officers" are removed from most of the provisions of the Constitution. This is because the Bill would ensure that State officers as they are today would have freed themselves from much of what was supposed to ensure their integrity and accountability.

41. He submitted that the instant case does not involve anything radical such as a wholly new Constitution and it falls within the definition of an unreasonable amendment.

42. He however submitted that some of the aspects of the Constitution are unamendable even by use of constitutional procedure and he relied on the Bangladesh Supreme Court case of ***Khondker Delwar Hossain v Bangladesh Italian Marble Works, Civil Petition for Leave to Appeal Nos. 1044 and 1045 of 2009*** and ***Kesavananda Case*** where it was held that an amendment does not necessarily destroy the old Constitution but may have the same retained in an amended form.

43. The Amicus further submitted that it is legitimate for a Country with a written Constitution to inquire into whether even an amended Constitution has been properly passed and that is why a Constitutional amendment must always be distinguished from other legislation. In any case, he submitted that the time to involve the public has passed and there is already in that regard a clear violation of **Article 256(2)** and that submissions of a memorandum does not amount to public participation. He relied on the **Doctors for Life** case to argue that the legislature has the onus of ensuring that public participation is greater when the issue at hand is the amendment of the Constitution. That public participation requires public education and certainly full information and submitted that there is actual violation of the Constitution and not merely possible threat as Parliament has subverted public participation in the process. He thus urged me to declare the Constitutional Amendment Bill and its attendant legislative process a violation of the Constitution hence invalid.

Determination

44. Having set out the parties submissions as above, I am of the view that there are three issues for determination; first whether this Court has jurisdiction to determine this Petition at this stage of the Parliamentary proceedings. Secondly, whether there has been a threat of violation of the Constitution through the Constitution (Amendment) Bill and lastly if in the affirmative, what reliefs can be granted to the Petitioner.

Jurisdiction.

45. It was the position of the Respondents that this Court has no jurisdiction to determine the issues raised in this Petition and in particular they submitted that the Petition was an affront to the constitutional doctrine of separation of powers and an encroachment to the legislative mandate of Parliament. On their part, the Petitioner, the Interested Party and the *Amicus Curiae* submitted that this Court has jurisdiction to

question the constitutionality of acts of Parliament and also determine whether any actions by Parliament amount to threatened violation of the Constitution.

46. Jurisdiction is indeed the first issue a court should deal with, because without it, the entire process becomes a nullity. In ***The Owners of Motor Vessel "Lillian S". v Caltex Oil Kenya Ltd [1989] KLR 1*** at page 14 Nyarangi J stated:

> ***"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and 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."***

This was further expounded by Ojwang J. (as he then was) in ***Boniface Waweru v Mary Njeri and Another Misc. Application No. 639 of 2005*** when he stated that;

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

I agree and I shall be guided by that sound and important finding. In determining whether this Court has jurisdiction to determine this Petition, I will start by looking at the jurisdiction of this Court to interpret the constitution *viz a viz* the principle of separation of powers, which according to the Respondents limits the jurisdiction of this court to determine this matter.

Jurisdiction to interpret the Constitution

47. **Article 165** establishes the High Court. **Article 165 (3) (d)** grants this Court jurisdiction to hear any question regarding the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution. This Article provides thus;

> ***"(3) Subject to clause (5), the High Court shall have—***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and....."***

The provisions above are clear and require no more than a literal interpretation. I must therefore agree with Mr. Nyamodi and Mr. Waikwa that this Court has jurisdiction to defend the Constitution and to inquire into the legality of any act done or said to be done pursuant to it. There is now a string of authorities from this Court, on the jurisdiction of the Court to interpret the Constitution - See for example; ***John Harun Mwau & 3 Others v Attorney General and Others (2012) e KLR***, ***Center for Rights Education and Awareness & Others v Attorney General, (supra)***, ***International Center for Policy and Conflict & 5 Others v Attorney General Petition No. 552 of 2012, Jeanne W Gacheche & 6 Others v Judges and Magistrates Vetting Board and others, Nairobi Judicial Review No. 295 of 2011.***

48. However, because of the submissions made by the Respondents that this court cannot issue orders restraining the National Assembly from discussing, deliberating and or debating on any matters due to the doctrine of separation of powers, that is not the end of the matter. I must therefore at this stage determine whether this Court can intervene in the legislative mandate of the 1st and 2nd Respondents.

Separation of powers

49. The Respondents have advanced the doctrine of separation of power as a ground for arguing that this Court has no jurisdiction to determine the instant Petition. However, to my mind, this doctrine does not take away this Court's powers to inquire whether there is or was a constitutional violation. I say so for reasons to be seen shortly.

50. A quick perusal of the Constitution would reveal that separation of power is an integral principle in it. For instance, **Chapter 8** is devoted to the **Legislature, Chapter 9** to the **Executive** and **Chapter 10** to the **Judiciary.** I agree with the Respondents that **Article 1** thereof stipulates that the sovereign power belongs to the people of Kenya and that they may exercise that power directly or through democratically elected representatives. **Article 1(3)** has then provided for the organs that may exercise the sovereign power on behalf of the people and these are; Parliament and the legislative assemblies in the County Governments, the National Executive and executive structures of County Governments, the Judiciary and Independent tribunals. Mulwa J in ***R v Kenya Roads Board ex Parte John Harun Mwau (supra)*** brought out the broad constitutional principle of separation of powers in the following words;

> ***"Once a constitution is written it is supreme. I am concerned beyond paradventure that when the makers of our constitution decided to put it in writing and by its provisions thereof created the three arms of government namely the executive, the legislature and the judiciary , they intended that the constitution shall be supreme and all those organs created under the constitution are subordinate and subject to the constitution."***

I agree.

51. The Supreme Court has also summarized the essence of the doctrine of separation of power in ***Re The Matter of the Interim Independent Electoral Commission (supra***) as follows;

> ***"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."***

Of the Independent Commissions, the Supreme Court went on to state as follows;

> ***"The Constitution established the several independent Commissions, alongside the judicial branch, entrusting to them special governance mandate of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are supposed to serve as 'peoples' watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour, this indeed is the purpose of the 'independence clause".***

Following the above it means that the doctrine of separation of powers enables the traditional three arms of government as well as Independent Commissions to function freely without any direction, or control by any other person. The Supreme Court also recognised that Independent Commissions and other arms of government are subject to the Constitution as the supreme law of the land and the rule of law. It stated as follows;

> ***"These Commissions or independent offices, must, however operate within the terms of the Constitution and the law: the Independence clause does not accord them carte blanche to act or conduct themselves on whim, their independence is by design, configured to the execution of their mandate and performance of their functions as prescribed in the Constitution and the law - Re The Matter of the Interim Independent Electoral Commission (supra)"***

52. I am totally guided and the issue as I understand it, is whether, given the doctrine of separation of power, this Court can interfere with the legislative drafting process of the 1st and 2nd Respondents. As a starting point, The Court of Appeal in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012*** stated as follows;

> ***"It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a per-commitment in our constitutional edifice. However, separation of power does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function."***

In ***Peter Ngoge v Francis Ole Kaparo & 4 Others (supra)*** the Court stated as follows;

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

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

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

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

54. I must also recall that one of the concerns the concern of the Respondents is that this Court cannot interfere with the legislative process of the 1st and 2nd Respondents and I agree that the 1st and 2nd Respondents have the sole function under the Constitution to legislate at the national level. In answer to them, across the Pacific, the Australian Court in the case of ***Cormack v Cope(1974) 131 CLR 432***, held that it

was not the mere introduction of a Bill that affects rights but rather the making of law that does so. That before a law has been enacted it would be extremely unusual to be able to demonstrate harm.

55. However, the South African Constitutional Court has had on a number of occasions to deal with this issue and has held that the court will only interfere with a legislative process in "exceptional circumstances". In the **Glenister case (supra)** the Court adopted the Privy Council holding in ***Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong and Another (1970) 1 LR 1264*** where Council held that a court in Hong Kong may interfere with the legislature's legislative process only if there is ***"no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object"***.

In the ***Doctors for Life case (supra)***, the South African Constitutional Court acknowledged that there are no express constitutional provisions that preclude a Court from intervening in parliamentary proceedings before Parliament has concluded its deliberations on a Bill. Ngcobo J noted that the question whether the court had this power raised two important, and potentially conflicting constitutional principles. He stated;

> ***"On the one hand, it raises the question of the competence of this court to interfere with the autonomy of Parliament to regulate its internal proceedings and, on the other, it raises the question of the duty of this court to enforce the constitution, in particular, to ensure that the law-making process conforms to the constitution."***

I have pondered deeply on that conflict and agree with Ngcobo J that a Court can intervene in parliamentary proceedings for the simple reason that the Constitution requires the Courts to ensure that all organs of government act within the law. To my mind therefore, Langa CJ was right in the ***Doctors for Life Case (supra)*** when he held that it would be appropriate for a court to intervene in the legislative process before the process is complete in the following circumstances;

> ***"Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the courts in our constitutional order; while duty bound to safeguard the constitution, they are also required not to encroach on the powers of the executive and legislature".***

Similarly the Court of Appeal of Trinidad and Tobago in ***Trinidad and Tobago Civil Rights Association v The Attorney General of Trinidad and Tobago (2005) TTHC 66, HCA No. S 1070 of 2005*** agreed with the views expressed in prior Privy Council decisions that courts should as far as possible avoid interfering with the pre-enactment legislative processes but also added that the test to be formulated is whether it has been shown that, if a Bill is enacted, an applicant will not be able to access relief because the Bill's objects would have been achieved. It also held that if the Bill in question were enacted, the Courts would have the power to declare it void if it offended the Constitution.

56. In applying the above principles to this case, I am alive to the fact that **Article 2(3)** of the Constitution is clear that the Constitution is not subject to challenge before any Court and indeed this phenomena was well captured by Chandrachud, Chief Justice of India in ***Kesavananda Bharati v State of Kerala (supra***) when he stated as follows;

> ***"The conferment of right to destroy the identity of the constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations of the amending power".***

57. Without saying more, it is obvious that there is ample authority to make the firm finding that even with the doctrine of separation of powers being alive and well in our Constitution, this Court can, in appropriate cases, properly intrude into the legislative sphere of Parliament and intervene in the circumstances set out by Langa CJ in the **Doctors for Life** case, above.

Whether the proposed amendment is in violation of the Constitution

58. It is was the Petitioner's contention that the 1st and 2nd Respondents have violated the Constitution in considering the Constitution of Kenya (Amendment) Bill, since it has in essence violated the principle of inviolability of the architecture and design of the Constitution and has failed to discharge its obligations under **Article 256(2)** of the **Constitution.**

Violation of the Design and Architecture of the Constitution

59. The Constitution of Kenya Amendment Bill seeks to amend **Article 260(d)(e)** and **(h)** of the **Constitution** by removing from the Constitution the definition of "State Officers", the following; Members of Parliament (National Assembly and Senators), Members of County Assemblies, and Judges and Magistrates.

60. In that regard, it is not in dispute that Parliament has the powers to amend the Constitution in accordance with **Article 256** of the **Constitution**. This Article provides;

> ***"(1) A Bill to amend this Constitution—***
>
> ***(a) may be introduced in either House of Parliament;***
>
> ***(b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;***

(c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House; and

(d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two-thirds of all the members of that House.

(2) Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill.

(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—

(a) the Bill, for assent and publication; and

(b) a certificate that the Bill has been passed by Parliament in accordance with this Article.

(4) Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

(5) If a Bill to amend this Constitution proposes an amendment relating to a matter mentioned in Article 255 (1)—

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255 (2), the President shall assent to the Bill and cause it to be published".

Article 255 then provides as follows;

"(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

(a) the supremacy of this Constitution;

(b) the territory of Kenya;

(c) the sovereignty of the people;

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

(e) the Bill of Rights;

(f) the term of office of the President;

(g) the independence of the Judiciary and the commissions and

independent offices to which Chapter Fifteen applies;

(h) the functions of Parliament;

(i) the objects, principles and structure of devolved government;

or

(j) the provisions of this Chapter.

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

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

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

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

(a) by Parliament, in accordance with Article 256; or

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

As can be seen from the provisions of **Article 255 (3)**, any amendment not related to the matters mentioned in **Article 255(1)** shall be enacted by Parliament or by popular initiative. However amendments to all the matters mentioned in **Articles 255(1)** have to be by way of a referendum. As can also be seen as an amendment to **Article 260** at face value is not a matter that is subject to the referendum, but can solely be done by Parliament and after public participation. I will revert to the issue of public participation shortly.

61. As expressed elsewhere above, the Petitioners and Interested Party are aggrieved by the steps taken to amend **Article 260(d)(e) and (h**) arguing that the amendments will change the architecture and design of the Constitution, in so far as Constitutional democracy is involved and thus violate the sovereign will of the people and in essence violate the Constitution.

62. To my mind the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the judiciary is tasked with the responsibility of ensuring constitutional integrity and the Executive, the tasks of its implementation while Independent Commissions serve as the "peoples watchdog" in a constitutional democracy. The basic structure of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency, deriving from certain unalterable constitutional values and principles. **Richard Albert,** in his Article, ***"Non-constitutional Amendments"*** **Canadian Journal of law and Jurisprudence 22, (2009) 5,** states as follows with regard to constitutional amendments;

> ***"Whereas the textual model of constitutional amendments demands only that a constitutional amendment meet the procedural requirements enshrined in the constitutional text, the substantive model requires not only that a constitutional amendment meet those constitutional textual procedures but it also imposes an additional hurdle that a successful constitutional amendment must clear; conformity with the existing constitution. The vision of constitutionalism contemplates the possibility of an unconstitutional amendment. The substantive model of constitutional amendment authorizes a designated branch of the government, commonly known as the judiciary to invalidate a constitutional amendment that runs counter to the spirit of the constitution even if that amendment meets all of the procedural conditions that the constitutional text requires political actors to satisfy in order to consummate a constitutional amendment....the substantive model instead sets the constitution itself as the limiting reagent for subsequent constitutional revision"***

True to Richard Albert's sentiments, the concept of substantive constitutional amendment has been experienced in three constitutional States; India, Germany and South Africa. Before I proceed to examine the concept of substantive amendments in those Countries, I must pause here to make three observations; Firstly, the constitutional texts of those States do not expressly authorize their respective Courts to strike down constitutional amendments. Secondly, the Judiciaries in those States have taken broad steps to assert themselves within the constitutional order. Finally, the Courts in each of these States have invoked the structure and or spirit of the Constitution as a higher law above other laws.

63. I say so because in the Indian situation and looking at the landmark case of ***Kesavanamda Bharati v State of Kerala (supra)*** the High Court framed the issue before it in no uncertain terms; *are there any limitations on the parliamentary power to amend the constitution*? The Supreme Court answered in the affirmative, declaring that it is beyond the powers of Parliament to alter what most of the Justices identified as the basic structure of the constitutional text. The Chief Justice in his judgment defended the proposition that the Indian Constitution possesses a basic structure held together by six principles; (I) The supremacy of the Constitution, (2) republicanism, (3) democratic government (4)secularism, (5) the separation of powers and (6) federalism.

64. The settled law from the Indian Supreme Court is therefore that the basic structure of the Constitution, whatever its content, is inviolable and immune to the legislative or amendment process. That is why in ***Aruna Roy v Union of India (2002) 3 LR1 643 at para 20***, the Court stated that;

"the basic structure of the Constitution is unchangeable and only such amendments to the constitution are allowed which do not affect its basic structure and rob its essential character".

65. In South Africa, like our Constitution, the first sections of the South African constitution underscore the values upon which it is founded, namely; human dignity, human rights, equality, rule of law and democratic government. **Section 1** makes mention of another value; the supremacy of the Constitution. In the case of ***Premier of Kwa Zulu Natal v President of the Republic of South Africa (1996) (1)(SA) 769***, the Court dealt with the issue whether a constitutional amendment could possibly violate the spirit of the constitution. The Court stated that;

> ***"There is a procedure which is prescribed for amendments to the constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable."***

The Court could have stopped there, but it did not. It proceeded to add, with detailed reference to the Indian Constitutional experience, that the Court could conceivably invalidate a constitutional amendment if it was departing from the Constitution. It stated as follows;

> ***"It may perhaps be that a purported amendment to the constitution, following the formal procedures prescribed by the constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the constitution, might not qualify as an amendment at all."***

Earlier, in ***Certification of the Constitution of the Republic of South Africa (1994) (4) SA 744*** the Court proclaimed the South African Constitution unconstitutional and it detailed precisely how the proposed constitution had failed to comply with some of the per-determined liberal democratic constitutional principles such as constitutional supremacy. The Court invited the legislature to revise the founding charter. The Constitutional Assembly did just that, and the new charter received judicial assent.

66. Richard Albert, writes as follows with regard to the invalidation of the South African draft constitution by the Courts;

"South African constitutional values and principles are binding not only on the legislative actors but equally on the judiciary. The court must uphold them even if it requires such unconventional action as invalidating a popular constitutional text that commends the support of a unanimous legislative assembly. Exceptional though it may seem, the ruling striking down the South African draft constitution is now a precedent that rests atop the South African constitutional pyramid. This is fully in line with the transformation of the South Africa state from oppression to liberty. Indeed, the South African constitutional revolution was consummated according to the very idea that popular will does not confer legitimacy, that democratic decision making is subordinate to constitutional norms, and that procedure must trump substance."

67. In the Federal Republic of Germany, the German Basic Law text (Constitution) at **Part VII, Article 91(1) and (2**) declares quite plainly that the Basic Law may be freely amended by any law that enjoys the support of two-thirds of the members in each chamber of Parliament. However, history has established that amending the Basic Law is not as easy as simply passing a law with super majority. It has established that all laws must conform to the Basic Law and since Parliament is the one which passes the law, it means that all constitutional amendments must conform to the constitutional order. T**he Basic Law, Part II, Art. 20(1)** has therefore expressly stated that the following principles may not be assailed by any constitutional amendments; democracy, federalism, human dignity and human rights and constitutional supremacy.

68. The German case law bears the above position and in two noteworthy cases, ***The Article 117 3 BverfGE 225(1953)*** and ***Klass 30 BverfGE 1 (1970),*** the Constitutional Court took the position that a constitutional amendment could in fact be unconstitutional if it undermined the principle of supremacy. Of that German concept of unconstitutional amendments, *Donald P. Kommers in "German Constitutionalism" A prolegomena (1991) Emory L.J 837* wrote thus;

"Reading of the Klass case conveys one of the governing principles of German constitutionalism: That the judiciary will declare unconstitutional any constitutional amendment that violates the core values of the Basic Law, or fails to conform to its spirit".

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

"(1) …

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

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

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

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

(d) sustainable development."

70. In interpreting the Constitution therefore, this Court is also bound by the provisions of **Article 259** which requires that the Constitution is to be interpreted in a a manner that promotes its purpose, values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance. **Article 259(3)** thus states that;

"every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking....."

71. Secondly, I have done so as to demonstrate that where the basic structure or the design and architecture of our constitution is under threat, this Court can genuinely intervene and protect the Constitution. Mr. Nyamodi stated in his submissions that the following questions will clearly demonstrate that the spirit of the constitution would not allow an amendment of **Article 260** and remove Members of Parliament (National Assembly and Senators), Members of County Assemblies, and Judges and Magistrates from the list of state officers;

"The amendment will have the effect of reducing the integrity threshold for State Officers under Chapter 6 of the Constitution, and other Sections of the Constitution, as enumerated below;

a) MPs, County Assembly members, and Judges and Magistrates will not be subject to the requirement for State Officers under Article 73(1)(a), to exercise their authority as a public trust.

b) The said State Officers will, if excluded from the requirement to serve rather than rule, under Article 73(1)(b), rule over the citizens of Kenya, and derogate their sovereignty.

c) The selection of Judges and Magistrates to serve in the judiciary will be excluded from the criteria of personal integrity, competence and integrity, as provided under Article 73(2)(a).

d) The amendment removes the Article 73(2)(b)requirement of objectivity and impartiality in decision making among those officers, and also removes application to them, the requirement that their decisions should not be influenced by nepotism, favouritism, and other improper motives or corrupt practices.

e) In addition, the amendment removes the requirement under Article 73(2)(c)(ii) of selfless service and honesty, in execution of public interest, and the requirement of a declaration of any public interest that may conflict with the public duties of Parliamentarians, County Assembly members, and Judges and Magistrates. In addition, the amendment removes the said officers from the requirement of accountability, discipline and commitment to service, under Articles 73(2)(c), (d) and (e).

f) The amendment removes the Article 74 requirement for State Officer to take an oath or affirmation of office, before assuming a State Office, acting in a State Office, or performing any functions of a State Office.

g) The amendment would preclude the officers from the Article 75(1)(a), (b) and (c) requirements that they are to avoid compromising any public or official interest in favour of a personal interest, or entertain conflicts between personal interests and public of official duties, and conduct that would demean the State Office held.

h) The amendment would preclude the Judges and Magistrates from the provisions of Article 75(2) and (3), which make provision for the application of disciplinary proceedings, dismissal or remove all from office, and disqualification from holding State Office, as a result of breaching Articles 75, 76, 77 and 78 of the Constitution.

i) The amendment will preclude the Parliamentarians, County Assembly members, Judges and Magistrates from Article 76, and allow them to maintain bank accounts outside Kenya, accept loans in circumstances that compromise the integrity of a State Officer, and accept gifts given to them in their official state capacity, as their own personal property.

j) The amendment will preclude the said officers from Article 77(1) restrictions on double employment of State Officers, and allow Parliamentarians, and Judges and Magistrates to be gainfully employed alongside their state duties.

k) The amendment will preclude the said State officers from Article 77(2), and thereby allow Judges to hold offices in political parties.

l) The amendment will preclude the said state officers from Article 77(3), and thereby allow retired Judges and Magistrates to hold, in contravention of the said Article, more than two remunerative positions in State organs or State-owned organs.

m) The amendment will preclude Parliamentarians, County Assembly members and Magistrates from Article 78, and allow them to serve in these positions, while holding the citizenship of, and allegiance to, another Country.

n) The amendment will preclude Parliamentarians, County Assembly members, and Judges and Magistrates, from Article 80, and the Leadership and Integrity Act, made pursuant to Article 80, thereby rendering useless the substratum of the said provisions.

o) Noting the definition of a State organ under Article 260, and the reference to the same in Articles 6(3) and 94(6); the amendment would imply State organs whose membership has no State officers. It would be an abnormality if the National Assembly and the Senate, as State organs, were to be composed of non-State officers.

p) Article 94(4) of the Constitution states that Parliament shall protect the Constitution and promote the democratic governance of the Republic. By amending the Constitution to invite to set their won salaries, the MPs will be abrogating the constitutional duty.

q) The amendment having precluded Parliamentarians from the ethics provisions under Chapter 7, compromises the provisions of Article 99(1), which provides on the qualification and disqualification of persons for election as members of Parliament, which require a person to satisfy educational. Moral and ethical requirements prescribed by the Constitution.

r) The amendment would, in removing the said State officers from the designation as State officers,m allow Parliamentarians, County Assembly members, Judges, and Magistrates, to use allocated funds in an unaccountable manner in setting their own salaries.

s) The amendment would remove the said officers from the ambitof application of Article 210, which provides that all State officers must pay tax, and that no law shall exclude them from that obligation.

t) The amendment would allow Parliamentarians, County Assembly members, and Judges and Magistrates to set their own salaries, by removing them from the jurisdiction of the Salaries and Remuneration Commission under Article 230(4) of the Constitution. This would make the Salaries and Remuneration Commission redundant, as the amendment would claw back the constitutional objective for which the people of Kenya enacted the Constitution.

u) In terms of Chapter 15 of the Constitution, the amendment in essence removes Parliamentarians, County Assembly

members and Judges and Magistrates from the oversight of a number of Constitutional Commissions, including the Commission on Administrative justice, the Ethics and Anti-corruption Commission, and the Salaries and Remuneration Commission."

72. In framing the above questions, the point being made is that an individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A Constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a Constitution reflects certain overarching principles and fundamental decisions to which individuals provisions are subordinate. This I would dare say is the gist of the now famous generally accepted principle that while interpreting the Constitution various provisions of the Constitution must be read together in order to get a proper meaning of each of them. This principle was stated as follows in ***Tinyefuza v Attorney General, Constitutional Appeal No, 1 of 1997***;

"The entire constitution has to be read as an integrated whole and no one particular provision destroying the other, but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written constitution."

73. One must also remember our peculiar history, and the reason why it was necessary to limit the power of Parliament to amend the Constitution or rather make it extremely difficult to do so. I am also alive to the fact that the Independence Constitution was amended very soon after its promulgation and many times thereafter. Successive safeguards for democracy and accountability were thereafter casually removed. The call for a new Constitution was key to the demands for a return of a true constitutional democracy since nothing good was left of our Independence Constitution due to its piecemeal amendments. That history is well and briefly told in the Constitution of Kenya Review Commission's (CKRC) Final Report where it stated thus;

"***It was generally felt by Kenyans that the current provisions for amending the constitution was too simple and had, therefore been used to consolidate power in the executive."***

74. In the Kenyan arena now and in decades to come, it is important to be conscious of our history and aspirations for a future based on constitutional supremacy. I therefore agree with the sentiments of Mohamed A.J in ***S v Acheson (1991) 2 SA 805 (NM)*** when he expressed himself as follows;

"The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror' reflecting the national 'soul', the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion".

I agree and will deal with the issue of public participation before giving a firm answer to the issue I set out to address elsewhere above; whether the amendment as proposed is an attack on the basic structure of the Constitution.

Public participation

75. Public participation as submitted by the *Amicus* and the Interested Party is a crucial element in the legislative process as can be seen from the provisions of **Articles 256(2, 118(b)** of the **Constitution**. These Articles provide as follows;

"256 (1) ...

(2) Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill.".

"118 (1) (a) …

(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees."

76. In their responses, the Respondents indicated that the proposed amendment Bill was publicised in daily newspapers of the widest circulation and that the relevant Parliamentary Committee has already received a number of memoranda on the subject, including from the Interested party. I presume that all the attendant risks of passing the Bill which I have deliberately reproduced above were also put to that Committee by the Interested Party, the SRC and the Bill is yet to be read for the second time nor has it been debated by that Committee. In **Article 256**, a detailed procedure has been set out including the following important constitutional safeguards;

i) There are 90 days between the first and second readings to facilitate public participation.

ii) In the second and third readings, not less than two thirds of all members of the House must support it for it to pass.

iii) The President shall assent to it within Thirty days of its being passed by Parliament.

iv) If the matter is one that falls within **Article 255(1)** of the **Constitution**, then a referendum would be called.

At the beginning of this judgment, I stated clearly what the role of the Petitioner is. It has not been explained why in its mandate as a 'watchdog' it failed to point out all the anomalies and risks it sees in the proposed amendment. It has also not been explained why it cannot

advise the relevant institutions of governance including the Respondents of the risks of what they may end up doing.

By the time the present Petition was filed and heard, there was still time for it to do so and yet that opportunity was not taken.

The above notwithstanding, I have agonised over the matter and to my mind, although this Court can stop Parliament on its tracks at this stage of the legislative process, there is one question that has lingered in my mind; since the Bill is incomplete and its language yet to be settled, what then am I being asked to strike down? Had the Petitioner waited until the same is passed and within the Thirty days before Presidential assent, this Court would have had something tangible to work with. I am reluctant to pass a judgment on the hypothetical issues framed by Mr. Nyamodi and which I have reproduced above.

I say so because the Bill may not receive the two-thirds majority required for it to pass and even if it does, there is time before it is assented to, for the Petitioner or any other Kenyan to seek that it should not be allowed to go beyond Parliament, if it is obvious that its contents will ultimately be destructive to the structure of the Constitution. As it is, the Petition is premature despite all I have said above.

It is obvious that I am restraining myself and in defering to Parliament *(in the specific circumstances of this case)*, I am reminded of the words of Ackerman J. in the case of **National Coalition for Gay and Lesbian Equality & 13 Others vs Minister for Home Affairs and 2 Others, Case CCT10/99** where he stated as follows;

> ***"The other consideration a Court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the defence it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such defence must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reasons, to the legislature."***

77. Having so said, the final orders I shall shortly make will include certain directions to relevant parties to ensure that the important issue raised by the Interested Party are not lost.

Conclusion

78. In view of what I have stated above, I will decline to grant the order sought but will instead order as follows;

> ***(i) Let this judgment be brought to the immediate attention of the Attorney-General for necessary action.***
>
> ***(ii) Copies thereof shall also be delivered to the Clerks of the National Assembly and Senate respectively for necessary action.***
>
> ***(iii) The Petition is ordered to be dismissed but the Petitioner is at liberty to apply later in the legislative process should it be minded to do so.***

79. I must commend the advocates appearing in this Petition, Mr. Oraro, Mr. Mwendwa, Mr. Nyamodi and Mr. Waikwa for their well articulated arguments, industry and commitment to finalising this Petition in a short time. I am also grateful to my Research Assistant Ms. Carolene Kituku for her dedication and in-depth research in all the issues forming the subject of this Judgment.

80. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of :

Irene – Court clerk

Mr. Ngugi for Petitioner

Miss Irari for Respondents

Mr. Lempaa for Amicus Curiae

Miss Omuko for Interested Parte

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Judgment to be given to the Parties immediately.

ISAAC LENAOLA

JUDGE

18/12/2013