



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Judicial Review 2 of 2012

IN THE MATTER OF ARTICLES 2, 3, 50, AND 259 SECTIONS 28,

31 (1) AND 33 OF THE SIXTH SCHEDULE TO THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ACT

REPUBLICAPPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

EX-PARTE: REUBEN OMBIMA ANJEYO

JUDGMENT

A: INTRODUCTION

1. Two historical events took place in Kenya that have a bearing on this matter. Firstly the investigations and recommendations by the **Kriegler Committee** after the 2007 elections and secondly the promulgation of the Constitution in 2010 by the people of this country, following years of agitation. The Kriegler committee recommended the disbandment of the Electoral Commission of Kenya (**ECK**) so as to pave way for the creation of an Independent commission with a professional secretariat to be headed by professional.

This led to the amendment of the old Constitution and the creation of an Interim independent Electoral Commission (IIEC). Upon coming of the new constitution the **IIEC** was r he Independent Electoral and Boundaries Commission (IEBC). On the other hand the new constitution promulgated on the 27th of

August 2010 ushered in a new dawn setting new principles and values and new structures of governance. The new Constitution is people centered, it has given much say to the Ordinary mwananchi, as the citizens now, have more say and can participate in the governance of this country. It no doubt opened up a bigger democratic space. Due to the process and Involvement of the people in its formulation, the new Constitution is seen and indeed is an embodiment of the wishes and aspiration of people of this country. It has broadened rights and duties of the citizens. And as institutions and individuals apply and Implement various Articles, we are likely to see conflict and disagreement. During this transitional period the court have been called upon to interpret various Articles and Sections of the Constitution and to enforce various rights and Obligations. The courts Mandate to interpret, uphold and Constitution. It is in this regard that this matter involving the electoral body and a citizen found its way to court.

B: PLEADINGS

2. Having obtained leave to institute Judicial Review Proceedings on the 10th of January, 2012 the *ex-parte* applicant **REUBEN OMBIMA ANJEYO** filed a Notice of Motion dated the 31st January 2012, wherein he described himself as a citizen of the Republic of Kenya, entitled to all and singular the rights and benefits of a citizen, *and* obliged by Article 3 of the Constitution and defend the Constitution as is any other citizen including those holding Constitutional offices.

3. The respondent is the Independent Electoral **and Boundaries Commission (I.E.B.C.)** which he describes as a public and a Constitutional Institution established under Article 88 of the Constitution of Kenya 2010;

4. In the said Notice of Motion brought pursuant to the leave aforementioned and under Order 53 rule 3 of the Civil procedure Rules, the *ex-parte* applicant sought for the following orders:

(a) Certiorari removing and bringing into the High Court The decision of the Independent Electoral and Boundaries Commission (IEBC) from declaring the Office of the Commission Secretary/Chief Executive Officer vacant and calling for/inviting applications for the positions of the Commission Secretary/Chief Executive Officer contained in a paid up advertisement published in the Standard Newspaper; of Wednesday, December 21, 2011 for purposes of being Wednesday.

(b) Prohibition, prohibiting the Independent Electoral and Boundaries Commission declaring the office of the Commission Secretary/Chief Executive Officer vacant an for/inviting applications for Commission secretary/Chief and/or in any way interfering the

term of the current Secretary/Chief Officer of the Commission.

(c) Costs of the application.

5. The application was supported by the statement of facts and affidavits i.e. a supporting affidavit and a verifying affidavit filed together with the Chamber Summons seeking leave and on grounds on the face of the Notice of Motion that:

(a) The actions of the Independent Electoral and Boundaries Commission are unconstitutional and based on the wrong principles of Constitution.

(b) The Intended unconstitutional declaration of the Office of the of Executive Officer Vacant a or making Invitations for applicants for alleged vacancy smirks of bad faith is against the spirit of the trite principle of Institutional memory.

(c) The decision of the Independent Electoral and boundaries commission is ***ultra Vires the*** provisions of the Constitutional and the relevant provisions of Independent Electoral and Boundaries Commission Act No.9 of 2011.

(d) To allow the said decision to stand in the face of the law will amount to countenancing an illegality.

(e)The entire process leading to making of the said decision was marred with irregularities, impropriety it was skewed and loisided.

6. The respondent objected to affidavit sworn by **Mohamud Mohammed Jabane** 24th February, 2011 and the annexures thereof. The nature of the objection may be summarized as follows: that the I.E.B.C. Act and the **constitution** 2010 expressly provides for the Appointment of a Secretary to the **I.E.B.C**; that **James**

Oswago was the 4th of January, 2010 appointed as the Electoral Officer to the defunct commission; that the said post was neither Constitutional nor statutory but contractual; and this matter therefore ought not to attract public law remedy, as the said **James Oswago**'s relationship with the respondent is based on an employment contract and any breach thereof would invoke a remedy in private law; further that in its meeting of 23rd of November, 2011 the respondent appointed **James Oswego** an acting Secretary for a period of 3 months pending recruitment of a secretary.

B SUBMISSIONS

Exparte applicant's Submissions

7. The ex-parte applicant filed his submissions on the 1st of February 2012. It was submitted on his behalf that, at the filing of this suit Mr. **James Oswago** occupied the post of Secretary to the respondent; at the time of advertising for the alleged on of a secretary, he was an acting Secretary both the contractual period of service in the letter of a dated the 4th January, 2011 and the minutes of 23rd November 2011 were both still in force; that the Chief Executive Officer/ current secretary held a public office, constitutionally created under the provisions of Section 41(11) of the former Constitution (9th edition)

8. It was further submitted that Section 31 of the Transitional and Consequential Provisions as set out in the Sixth Schedule is pad of the Constitution and the same is therefore Supreme as against the **I.E.B.C.** Act; and that said Section 31(1) above mentioned, protects and preserves Constitutional and public offices created or which existed under Ole old Constitution.

9. It was also argued that the current secret electoral officer was employed under and his office was therefore, preserved and protected by Section 31 above; the **I.E.B.C.** Act cannot therefore apply retrospectively so as to affect rights and privileges of the current secretary. The Constitution must be read as an integral whole to be interpreted in a manner that promotes its purpose, values and principles.

10. The *ex-parte* applicant raised the following as issues for Consideration:

(i) Did the current office holder Secretary/Chief Executive Officer of the hold a

Constitutional office or a public office as at the time of institution of this suit.

(ii) Was the term of service created by the letter of 4th January, 2011 and the minute of 23rd November, 2011 terminated or in any other way extinguished?

(iii) Is the office of the current secretary/chief executive protected by dint of the provisions of section 31 of the transitional and Consequential provisions under schedule six of the Constitution of Kenya 2010?

(iv) Did the I.E.B.C. exercise its powers donated by section 31(3) of the Transitional and Consequential provisions under schedule six of the constitution 2010?

(v) Are the actions of the I.E.B.C. in declaring a vacancy in the office of the Secretary/Chief Executive Officer in furtherance of Constitutionalism the spirit and the letter of, and In particular but not limited to

the parameters set In Article 259 of the Constitution?

11. The court was referred to the following authorities in support of the *ex-parte* applicant's case; **1. Kereche Industries Limited versus Kenya Revenue Authority & 5 others [2007] eKLR. 2. Central for Rights Education and Awareness (Crew) & 7 others versus Attorney-General [2011] Eklr. 3. Timyfuze verses Attorney-General, Constitutional Appeal No. 1 of 1997 (Ug)**

Respondent's submissions

12. The respondent on its part relied on its submissions dated 24th

February, 2012 the same may be summarized as follows; the office of the Secretary/Chief Executive officer was not established under Section 41 of the former Constitution or any other legislation; that the said **James Oswego** was

appointed on contractual basis as the Chief Electoral Officer of the **IEEC** (now defunct), The defunct Commission was replaced by the Independent Electoral and Boundaries Commission (**IEBC**) by dint of Article 88 of the Constitution 2010 and Parliament thereafter enacted the **IEBC** Act, 2011 to operationalize **IEBC**.

The Constitution 2010 and the **IEBC** Act both provide for the appointment of a Commission Secretary/Chief Executive Officer, which the old Constitution did not.

13. The **IEBC** in its on the 23rd of November, 2011 resolved to appoint the **James Oswego** as acting Commission Secretary/Chief Executive Officer for a period of 3 months under similar terms of service as he enjoyed In his capacity as the Chief Electoral Officer by virtue of his letter of appointment dated 4th January 2010, pending the recruitment of a substantive Commission Secretary under Article 250(12) of the Constitution and Section 10 of the **IEBC** Act and further that in a meeting held on the 17th December, 2011 the **IEBC** resolved to advertise the position of Secretary/Executive Officer and the advertisement was done on the 21st day of December, 2011.

14. The respondent further submitted that it relied on Article 250(12) of the Constitution and Section 10 of the **I.E.B.C.** Act in undertaking the proposed recruitment. It further argued that Section 31(1) of the Transitional and Consequential provision in the sixth schedule of the constitution 2010 saves only offices established under the former Constitution which of the office Chief Electoral Officer is not; that the position of Chief Electoral Officer is contractual, and has no Constitutional or statutory underpinning; and any right to be enjoyed by the said officer will not be a public law right but a private right. The respondent contended that its relationship with **James Oswago** was contractual as between master and servant and that, the same falls under the purview of private law as opposed to public law; and in this regard judicial review remedy or orders are not available. The respondent referred the court to the following authorities; **1. Republic versus East Berkshire Health Authority Ex-parte Walsh [1984] 3 All ER 2. Republic versus The We Chancellor Jomo Kenyatta University of Agriculture & Technology Ex-parte Dr. Cecilia Mwathl & Moses Muchlana [2008] KLR.,**

3. Republic versus Mol Teaching & Referral Hospital Board Ex-parte Joseph Ochenge Ogano 2010 Eklr, 4. Consulate Khan & 241 others versus Director Kenya Tripanomiasis Research Institute, Kenya Revenue Authority versus Menginya Salim Murgani, Civil Appeal No. 108 of 2010 Eklr

15. As *ex-parte* applicant, the respondent argued that he has no *locus standi* in the matter between the said Mr. Oswago and **I.E.B.C.** since he was not privy to the contract between the two. In this regard the respondent relied on the case of **Agricultural Finance Corporation versus Lengatla Limited [1985] KLR 765.**

C ISSUES FOR CONSIDERATION

16. Having considered the pleadings. Submissions by the parties and authorities cited, I am of the view that the issues for and authorities cited, I am of the view that the issues for determination are as follows:

1. Whether the ex-parte applicant has any locus standi to bring this matter to court?
2. Whether this court has jurisdiction to hear this matter in the form it has been brought to court? And is the matter before court a private law matter or does it fall under the arena of public law?
3. What is the import of Section 31 (1) & (2) of the Transitional and Consequential provisions of the Sixth Schedule to the Constitution 2010 as read with Article 250 of the Constitution 2010, other provisions of the Constitution and section 10 of the I.E.B.C. Act?
4. Was the office of the Chief Electoral Officer saved by or protected by Section 31(1) of the Transitional and Consequential provisions of the Sixth Schedule of the Constitution 2010?
5. Was the decision by IEBC to declare vacant the post of Secretary/Chief Electoral Officer, unconstitutional and illegal?
6. Do the judicial review remedies of Certiorari and prohibition lie in the circumstances of this case?

D. ANALYSIS FINDINGS AND CONCLUSION

17. Does the *ex-parte* applicant have any *locus standi* or interest in this matter?

The ex-parte applicant has brought these proceedings as against, a public body I.E.B.C citing infringement of the constitution and the **IEBC Act**. He cited infringement of several Articles and sections of the Constitution namely;

Articles 2, 12(1), 22, and 259 of the constitution and sections 28, 30(1) and 33 of the Transitional and Consequential provisions (of the 6th schedule) and section 9(2) and 31 of the **I.E.B.C.** Act, in bringing this action the ex-parte applicant invoked Articles 3,23,47,48,50 and 257 of the Constitution.

18. on the other hand I.E.B.C. stated that the issues raised in this matter are of a private nature related to a contract of employment between itself and one **James Oswago**, its acting Commission Secretary; the issues do not invoke public law remedy and any breach of the contract would attract private law remedy; the Ex-parte applicant is a third party in the matter between the two and he has no interest and therefore has no *locus standi*.

19. **Article 88(1)** of the constitution establishes the **I.E.B.C. Articles 88 (3)**, mandates it to exercise its powers and perform its functions in accordance with the constitution and other National Laws. The independent Electoral and Boundaries Commission Act, 2011 (No.9) (**IEBC Act**) in its preamble provides that it is an Act of Parliament to make provision for the appointment and effective operation of the independent Electoral and Boundaries Commission established by **Article 88** of the Constitution and connected purposes.

20. **Articles 2 (1) & (2), & 3(1)** of the Constitution declares and obligates every person to respect, uphold and defend the Constitution. They provide as follows;

“2(1) This Constitution is the Supreme law for the Republic and binds all persons and all state Organs at both levels of government;”

“2(2) No person may claim or exercise state authority except as authorized under this constitution.”

“3(1) Every person has an obligation to respect, uphold and defend this Constitution.”

21. **Article 22 (1) & (2)** gives the right to every person to institute court proceedings claiming where a

right or fundamental freedom in the bill of right has been denied, violated or infringed or is threatened. The same provides as follows;

“Article 22(1) every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatening.”

One can bring a suit in the public interest as stipulated in **Article 22 (2) (c)**:

“22 (2) (c) – person acting in the public interest or;”

22. Under **Article 23** the High Court is mandated to uphold and enforce rights. The remedies that may be granted are also provided. The same provides that;

“23 (1). The High Court has jurisdiction, in accordance with Article 165 to hear and determine-, applications for redress of a denial, violation or infringement of, or threat to a tight or fundamental of freedom in the bill of rights.

(2)

(3) In any proceedings brought under Article 22, a court may a rent appropriate relief
.....

- a.
- b.
- c.
- d.
- e.
- f. An order of Judicial Review.”

23. In **Priscilla Nyokabi Kanyua versus Attorney-General & Another Constitutional Petition NO.7 OF 2010**, the court was of the view that a broader and purposeful approach be given to *locus standi*, to any one acting in good faith with minimal interest in a matter, of public interest, to seek judicial intervention to ensure the sanctity of the Constitution.

24. The Constitution 2010 has public Interest cases to be instituted by citizens for the benefit of the larger public. The above quoted case of **Priscilla Nyokabi** (supra) has also set out the view taken by the courts in recent times, which view I equally subscribe to. This matted involve a public institution key to the electoral system, it also contains alleged infringement of the constitution, and the IEBC Act. No doubt the ex-parte applicant cannot be denied his day in court, as the highest law in the land allows him to do so.

The courts are bound by the Constitution and have taken a purposive approach in matters of public nature, the *ex-parte* applicant I therefore hold has the *locus standi* to institute this suit and is properly before this court.

25. The next Issue to consider is whether this matter falls under the purview of public law.

The respondent argues that the said **James Oswago** is neither a Constitutional **office holder nor** was his office a creation of statute. The ex-parte applicant on the other hand argues that the said James Oswago was appointed under section 41(11) of the old Constitution and the said office was saved by dint of section 33 of the Transitional and consequential provisions and for the remainder of his contractual

period. It is not in dispute that on the 4th of January 2010 **James Oswego** was appointed as the Chief Electoral Officer by the predecessor to the respondent; it is also not in dispute that he was made an acting secretary by the respondent in its meeting held on the 23rd of November, 2011.

26. The *ex parte* applicant argued that this is a matter that Involves public Interest but this position was vehemently opposed. I am inclined to agree with the *ex-parte* applicant's position that the complaint is of public nature and would therefore attract public law remedy. The courts have held before that where the servant holds an office of great public service, the public may be interested in the same and as such the remedy of judicial view may be applicable.

In *Kadamas versus Municipality of Kisumu* [1985]

K.L.R. the Court of Appeal held inter-alias:

“1.

2.

1. The remedy of Judicial Review is only available where an issue of a public law nature is involved. Judicial Review is not available where the issue is on an “ordinary” relationship of master and servant with no element of “public Law in it”.

2. The public may have no interest in a relationship between a master and servant in an “ordinary” case but where the servant hold an office of great public service, the public is interested, and as such the remedy of juridical Review may be applied.

3.

4.

5. In deciding whether or not to grant an order of prohibition it is irrelevant to the court that there are or were other remedies available to the applicant.”

27. In *Republic versus East Berkshire Health Authority Ex-parte Walsh* [1984] 3 WKL 818. A case that involved an employee of the **East Berkshire Health Authority** whose service had been terminated by the District Nursing Officer and where the officer took 2 parallel steps on industrial dispute and a judicial review proceedings seeking for an order of certiorari, in a preliminary objection citing the judicial review as incompetent. **Sir John Donaldson**, although accepting that there was no “public law” element in an “ordinary” relationship of master and servant. Held as follows:

“The public may have no interest in the relationship between servant and master in an “ordinary” case but where the servant holds office in a great public service the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is the exercise of my discretion I conclude that the remedy of certiorari is appropriate, it can properly go against the respondent authority.”

28. The employ of one **James Oswago** in my view is of public importance, whichever way one considers it. Whether as a Chief Electoral Officer, an acting Chief Executive Officer/Commission Secretary. He is not only the head of the Secretariat of **IEBC** as stipulated in the letter of 4th January, 2010 but also in the acting capacity. He is also the accounting officer of the **I.E.B.C.** a constitutional commission. His job as described in the appointment letter is of high public interest, which for all intends and purposes brings this matter into the realm of public law as opposed to a simple contractual matter between a master and servant.

29. Was the decision by the **IEBC** to declare the office of the commission Secretary/Chief Executive Officer vacant and to advertise the same illegal and against the provision of the Constitution 2010.

Judicial review remedies are concerned with decisions made by a person or body, make a decision. It is not concerned with the merits of the decision making or action taken. All administrative decisions and actions of public bodies are subject to judicial review for;- illegality, irrationality or procedural impropriety.

The ex-parte applicant argues that the chief electoral officer held a Constitutional office by virtue of section 41 of the old Constitutional. The respondent on the other hand argues that it was neither a constitutional nor a statutory office.

30. in order to decide this particular issue it may be relevant to consider the letter of appointment of the said **James Oswago** dated 4th January, 2010, the **IEBC** resolution of the 23rd November 2011, and the relevant provisions of the old Constitution. The letter stated as follows:-

“4th January, 2010.

Mr. James Humphrey Obanda Oswago

P.O. Box 62662-0200

NAIROBI

-
Dear Sir,

RE: OFFER OF APPOINTMENT AS CHIEF ELECTORAL OFFICER

-
Following your application, interview and subsequent discussion we are pleased to offer you employment with the interim independent electoral commission (hereinafter referred to as “(Commission) on the terms set out in this letter.

1. Appointment and Terms of employment you will be engaged in the capacity of Chief Electoral officer for a term of five (5 years) renewable only once at the instance of the commission
.....

2. Commence date

The commencement date of this offer shall be 4th January, 2010.

3.

4.

5. Duties and Responsibilities you will keep the working hours as fixed by the commission and will adhere to its Staff Rules and Regulations and practice as amended from time to time subject to the Terms and Conditions of this Agreement and to such directions as may be given to you from time to time by the Commission and/or those authorized to do so, the key tasks of your position as set out in the role description and annual performance targets as my be amended from time to time and staff rules shall from part of this Agreement. You are under a contractual obligation to familiarize yourself with the Commission Staff Rules and Regulations as they are part of your Agreement.

In your position as CEO, you will

(i) Lead the development of the Commission’s Strategic Plan, annual work plans and other

operational documents;

- (ii) Be accountable to the commission for execution of all programmes and plans in line with the Commission's constitutional and legal mandate;
- (iii) Oversee and ensure prudent financial management, adequate budgetary allocations, establishment of strict approval and adherence to approve budgetary allocations;
- (iv) Supervise the planning and execution of key electoral events;
- (v) Administer the co-ordination and efficient management of the Secretariat which includes managing the process of change and review and implementation of the strategic and operational plans;
- (vi) Be the Commission's Accounting Officer, safeguard the Commission's assets including prudent management of the Commission's financial resource;
- (vii) Direct the implementation of transparent and prudent procurement and operation processes and ensure Integrity of the Commissioner's affairs;
- (viii) Ensure that the Secretariat is adequately resourced by competent personnel and facilitate affective and efficient management of the Commission;
- (ix) Cultivate a performance oriented culture of professionalism, integrity, accountability and ensure a motivated and competent secretariat;
- (x) As the Secretary to the Commission, ensure safe custody of all commission policy, strategic and management documents to facilitate decision making and Institutional memory;
- (xi) Develop accountability structures and ensure all divisions delivery on their performance Indicators;
- (xii) Review division reports and prepare periodic reports and the Annual Commission Report;
- (xiii) Make certain that legal compliance Including audit of all operations, financial and information systems and records are effected;
- (xiv) In consultation with the Chairperson and the commissioners, oversee the Commission's public affairs and corporate communications;
- (xv) oversee and provide direction on strategic partnerships and collaborative effects including development partner relations, technical assistance, collaborations and international co-operation;
- (xvi) Any other duty as may be assigned from time to time to you by those authorized to do so.

The IEBC resolutions of the 23rd of November, 2011 were as follows:-

"The Commission resolves to appoint Mr. James Oswego as the Acting Secretary of the I.E.B.C. For a period of 3 months with effect from the 8th of November, 2011 pending recruitment of the substantive secretary In accordance with the Constitution and the I.E.B.C. Act.

6. The Commission resolves to advertise the position of two (2) Deputy Commission Secretaries. Chief Executive Office together with other vacancies in the commission.

7. The commission resolved to take over all the permanent and pension able staff of the I.E.B.C. all officers would however be subjected to vetting in line with the Constitution.

Section 41 of the old Constitution stated as follows:-

“There shall be an Interim Independent Electoral Commission which shall consist of a chairman and not more than eight other members.”

Section 41A of the old Constitution provided as follow:-

“The Interim Independent Electoral commission shall be responsible for the –

- (a)
- (b) Establishment of an efficient and affective secretariat
- (c)

In considering this question Iam persuaded by the respondent\'s position that the office of the Chief Electoral Officer is/was neither Constitutional nor statutory. It was and remains a contractual position created between the two by the letter of 4th of January 2011 and governed as such by the terms on the contract. The position of acting secretary is temporary is seen in the resolution.

31. Chapter 15 of the Constitution 2010 deals with Commissions and Independent offices. **Article 250** generally provides that all Commissions shall have a secretary who shall be appointed by the Commission and be its Chief Executive Officer.

Article 252 gives the gene Commission to recruit its own secretary. Be **I.E.B.C. Act in Section 10** provides that the Commission shall through an open transparent an recruitment process appoint a suitable qualified person to be the secretary to the commission.

32. Section 10 (6) states that the secretary shall in the performance of his functions and duties be responsible *and* answerable and report to the Commission.

Section 10 (7). Gives the following as functions for the secretary:

- (a) The Chief Executive Officer of the commission;
- (b) Head of the secretariat;
- (c) Account officer of the commission;
- (d) Custodian of all commissions records;
- (e) Responsible for-
 - (i) Executing decisions of the commission;
 - (ii) Assignment of duties and supervision of all employees of the commissions;
 - (iii) Facilitating, co-coordinating and ensuring execution of commission’s mandate;
 - (iv) Ensuring staff compliance with public ethics and values;
 - (v) The performance of other duties as may be assigned by the law and the commission.

33. The some of the above functions were captured in **Mr. James Oswago’s** letter of appointment of the

4th of January, 2010. That in itself does not automatically make him the Company Secretary of the Commission as envisaged in the Constitution 2010.

Section 31(1) of the Transitional and Consequential provisions of the sixth schedule saved his office and in the following terms:

“31 (1) unless this schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired, if any, of the term of the person”.

In the event of any doubt section 31(1) as read with 31(2) fortifies the thinking of this court.

“31(2) subject to Sub-section 7 and Section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this constitution, shall continue to hold or act in that office as if appointed to that position under this constitution.”

34. It must be appreciated that the Sixth Schedule of the Transitional and Consequential Provision is an integral part of the Constitution. It has to be read alongside other Articles in order to get the full meaning, intent and purport of the Constitution. In this regard I do associate myself with opinion/finding of the court in Petition No. 14 of 2011 between **centre for rights Education and Awareness & 7 Others versus Attorney General** in a ruling of Musinga J. Where he said in part

”In interpreting the Constitution, the letter and spirit of the Supreme law must be respected. Various provisions of the constitution must be read together in order to get a proper interpretation.

Musinga J. Quoted with approval the Ugandan case of **Timyefuza versus Attorney- General, Constitutional Appeal No. 1 1997** where the court held:

“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. This is the rule of paramountcy of the written Constitution.”

I must of necessity refer to a case by the United State Supreme Court **decision Smith Dakola versus North Carolina 192 U.S. [1940]** where the court stated:

“it is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that the provisions leading upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.”

In a recent decision of the High court **Dennis Mugambi Mongare versus the Attorney General & 3 Others Petition No. 146 of 2011**. The court stated in part:

“The transitional provision contained in the Sixth schedule are intended to assist in the transition into the new order, but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving in to the new order. Those transitional provisions are as much part of the Constitution and as much an expression of the sovereign will of the people as the main body of the Constitution.”

In **Nakusa versus Tororei & 2 Others Election Petition No. 4 of 2004** it was stated that in interpreting the Constitution the court must uphold and give effect to the letter and spirit of the Constitution always ensuring the interpretation is in tandem with the aspirations of the citizenry and modern trends. The society is not static.

In Njoya & others versus the Attorney & 3 Others HCMISC.APP. NO.82 of 2004 Ringera J.

adopted the view that the Constitution is a living document with a soul and consciousness and an embodiment of certain values and principles and must be construed broadly, liberally and purposeful to give effect to those values and principles.

35. After considering the provisions of the Constitution and the quoted authorities, I am of the considered view that the I.E.B.C. cannot be faulted for its intentions of wanting to appointing a secretary through an open and competitive process. This is in line with the principle and values being set by the new Constitution and the **IEBC Act**.

Indeed a whole Chapter, chapter 6 of the Constitution deals with the issues of integrity and leadership as is expected of public officers.

Which makes it necessary, for those who intend to hold important public Office to be put under test and scrutiny to see if they meet the threshold set under the new Constitution.

36. However having stated as above, it is important to note that the Constitution also espouses the principle of fairness and justice to all. In its resolution of the 10th December, 2011 the **I.E.B.C.**

In total disregard to the terms of contract between itself and the said James Oswago, without any complaint against him, without giving him an notice or even consulting him, having sent him out of the meeting, the respondent terminated his contract and made a decision to appoint him as an acting Secretary for 3 months on the same terms as he enjoyed as the Chief Electoral Officer, as it advertised for a job with similar terms and duties.

In the case of **Associated Provincial Picture Houses Limited versus Wednesbury corp [1948]** the court of Appeal in England held that a court can interfere with a decision that was

“So unreasonable that no authority could even have come to it.”

37. The said case has been applied and adopted with approval locally and applicable in the situation of this case. There was in my view a failure by the respondent to observe fairness and basic rules of natural justice in their decision. There is no indication that the said Mr. James Oswago was consulted and his views sought or that he was given an opportunity, to make representation. Neither was his contract terminated in line with its terms. To that extend I find that the decision by the respondent was arrived at irrationally and unreasonably. To that extend the decision is hereby quashed and returned to the respondent in order for the respondent to apply the basic rules of natural justice, to act within the confines of the contract and the law.

38. The second prayer was for prohibition, seeking to prohibit the IEBC from declaring the office of the Commission Secretary/Chief Executive Officer vacant and for inviting applications for the said position and in any way interfering with the unexpired term of Mr. James Oswago as the current Commission secretary/Chief executive officer. As stated earlier in this judgment the office of the Commission Secretary is a creature of the current Constitution. The holder is to be engaged in the manner stipulated in the Constitution and the IEBC Act. The respondent did not bar the said James Oswago from applying and going through the competitive process. Indeed Mr. Oswago himself has not complained and did not enjoin himself to this suit probably because he may have applied for the advertised post and does not want to rub his employer the wrong way. For this reason I therefore decline to grant this prayer.

I must at this juncture thank the ex-parte applicant for his interest in the affairs of the public and his bid to uphold and protect the Constitution. During this transitional period, it is important for the state and other public bodies to be kept in check in order to allow the rule of law and constitutionalism take root. I also thank all the lawyers in this matter for the efforts they put. I will lastly direct that each party meet their own costs.

Dated and delivered this 18th day of May 2012

**ALI-ARONI
JUDGE**