REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISC CIVIL APPLI 305 OF 2004

IN THE MATTER OF: IL CHAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

BETWEEN

RANGAL LEMEIGURAN & OTHERS ……. APPLICANTS

AND

ATTORNEY GENERAL & OTHERS …….....……RESPONDENTS

J U D G E M E N T

This judgement relates to an application by way of an Originating Summons dated and filed on 12th March, 2004 under the provisions of rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice and Procedure Rules 2001, (Legal Notice No. 133 of 2001) which requires that such application be brought by way of an Originating Summons under Order XXXVI of the Civil Procedure Rules. This application is also premised upon the provisions of Section 84 (1), 1 and 1A and Section 33 of the Constitution of Kenya, and all other enabling powers and provisions of law.

The Application is brought by the four Applicants, against the Attorney-General (on behalf of the Government of Kenya as its principal legal adviser), the Electoral Commission of Kenya (as the body charged with the creation and distribution of Constituencies under the Constitution. The Application is spent so far as the third Respondent the Constitution of Kenya Review Commission is concerned as that body has now wound up its activities, and is for all practical purposes disbanded. The four Applicants claim for the following declarations:-

A. A declaration that the fundamental right of representation in the National Assembly of the Republic under the provisions of Section 1A of the Constitution of Kenya, has been effectively denied to the Il Chamus Community;

B. ***A declaration that the fundamental right of expression protected by section 79 of the Constitution of Kenya has been, is being and is likely to be contravened in relation to the Applicants and the 1L Chamus Community;***

C. ***A declaration that entitlement to the –***

fundamental rights protected by Section 70, of the Constitution of Kenya has been, is being and is likely to be contravened in relation to the Applicants and the IL Chamus community;

D. ***A declaration that the fundamental right of the unhindered enjoyment of the freedom of conscience protected by Section 78 of the Constitution of Kenya, is being and is likely to be contravened in relation to the Applicants and the IL Chamus community;***

E. ***A declaration that the IL Chamus community of the Republic of Kenya is disenfranchised in the election of any of its members to the National Assembly;***

F. ***A declaration that the constitutional machinery for the representation and protection of minorities, including the IL Chamus community, to wit the provisions of Section 33 of the Constitution of Kenya, has not been implemented as by the Constitution required;***

G. ***A declaration that the statistical chance of an IL Chamus candidate being successful as a Member of Parliament in the present Baringo Central Constituency is in practice so minimal as to effectively prevent any such membership of Parliament by such candidate for the foreseeable future,*** *(as it has been prevented in the past forty years).*

H**.** ***A declaration that in the particular circumstances that have prevailed and will prevail, the IL Chamus Community constitutes a special interest for the mandatory provisions of Section 33, of the Constitution of Kenya;***

I. ***A declaration that the IL Chamus community ought to be appointed as a Nominated Member of the National Assembly to represent the special interest of the IL Chamus community under the mandatory provisions of Section 33 of the Constitution of Kenya;***

J. A declaration that the political parties nominating persons to be appointed as Nominated Members under Section 33, of the Constitution of Kenya, ought to nominate a person from the IL Chamus community while taking into account the principle of gender equality;

K. ***A declaration that the principle of the representation of special interests has not been, or not sufficiently been, taken into account in the appointment of Nominated Members under Section 33 of the Constitution of Kenya to the Eighth Parliament to the detriment of the IL Chamus community;***

L. A direction that the Electoral Commission of Kenya at its next Bondary Review do take into adequate account requirements set out in Section 42 of the Constitution of Kenya, in particular the need to ensure adequate representation of sparsely populated rural areas population trends, and community of interest in respect of Baringo Central Constituency so as to prevent the present electoral marginalization of the IL Chamus from continuing;

M. A direction that the Electoral Commission of Kenya in complying with its duties under Section 33 (5) of the Constitution of Kenya ensure observance also of the primary principle of the representation of special interests which Section 33 (1); Constitution of Kenya mandatorily provides for;

N. A declaration that the Electoral Commission of Kenya in the performance of its duties under Section 33(5), Constitution of Kenya, in respect of the Eighth Parliament has failed to ensure any or any adequate observance of the primary principle of the representation of special interests which Section 33 (1), Constitution of Kenya mandatorily provides for;

Further or in the Alternative

O. A declaration that the present Baringo Central Constituency be divided by the next Boundary Commission into two separate constituencies taking into adequate account the appropriate demographic and numerical considerations and all powers set out in Section 42, Constitution of Kenya so as to prevent the present electoral marginalisation of the IL Chamus from continuing;

P. ***A declaration that the present Baringo Constituency be divided by the next Boundary Commission into two separate Constituencies taking into account adequate account the requirements set out in Section 42, Constitution of Kenya in particular the need to ensure adequate representation of sparsely-populated rural areas, population trends, and community of interest so as to prevent the present electoral marginalization of the IL Chamus from continuing;***

And

Q. A declaration that the provision of fair representation of all communities constituting the people of the Republic and in particular of the IL Chamus be taken into account by the Constitution of Kenya Review Commission;

R. A direction that all the orders in this application be taken into account by the Constitution of Kenya Review Commission and the Electoral Commission of Kenya in the fulfillment of their respective duties;

S. The Court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 & 83 (inclusive) of the Constitution of Kenya in relation to the Applicants.

The Application is grounded upon the Supporting Affidavit of **RANGAL LEMEIGURAN** the first Applicant herein, made and sworn on behalf of himself and on behalf of the other three Applicants on their authority, on 17th March, 2004. The Affidavit is comprised of eighty three (83) paragraphs, and because of its centrality in the submissions of Pheroze Nowrojee, learned Counsel for the Applicants we have divided it into the form of said Counsel's submissions-

(1) the IL Chamus – the people.

(2) History and settlement in Baringo District;

(3) the land occupied by the IL Chamus,

(4) the geography and area occupied by the IL Chamus,

(5) the absence and or inadequacy of representation;

(6) the need for separate representation;

(7) special interest, paragraphs 35-39, 41-43

(8) IL Chamus a distinct indigenous community (paragraphs 48-53, 55 – 57.),

(9) IL Chamus are neglected paragraphs 60-68.

(10) Economic marginalization, (paragraphs 63-65-66, 68, 70-71, 74,

(11) Consequences of marginalization – paragraph 25-76, 78, 81,

(12) Course of the application 82, & 83.

B. THE ILCHAMUS – THE PEOPLE (Paragraphs 1-7)

The Applicants are all members of the IL Chamus community, that lives principally around the shores of Lake Baringo in Rift Valley Province within the Republic. The IL Chamus are also known as Njemps, a corruption of the name during the colonial period. They are a distinct and small community numbering about 25,000-30,000 persons and regard themselves as one of the indigenous peoples of the Republic. They are also one of the branches of the Maasai peoples that settled around the shores of Lake Baringo about two centuries ago.

In a study of the community ***IL Chamus – Njemps*** by Rolf Gloor Contensdivil, Switzerland, Schach – Verlag AG, 1986/the author at page 7 – writes-

"Some tribes of the Maasai –clan-" IL Kerois" were most likely pushed away into the region south of Lake Baringo at the turn of the 18th to the 19th Century. Fighting with other Maasai groups, they lost their cattle. Therefore they were forced to settle in fertile grounds and to earn their living by farming."

Later on tribes of the Samburu clan IL Mae came into the District of Baringo for similar reasons and other clans followed……..

….At the end of the 19th Century clans from the tribes of Turkana, Pokot and Tugen married and adapted the traditions of the country. Even today it still happens that the IL Chamus integrate clans of other groups into their tribe.

Since the first merger of the tribe at Lake Baringo attacks have been organized by the Maasai again and again. But the people here have always been on their guard and put up resistance. That is why the Maasai gave the name IL CHAMUS which means "people who can see into the future." Later on the Europeans changed it to Njemps and the name which is used today, namely NJEMPS.

Mr. Pheroze learned Counsel for the Applicants, concluded from the above historical background that the correct name of the community is IL CHAMUS, not Njemps, and that they are a distinct community with their own history and language.

C. THE LAND OCCUPIED BY THE IL CHAMUS (PARAGRAPH 8)

The **IL CHAMUS** occupying the area around Lake Baringo for electoral purposes fall within Baringo Central Constituency and within the said Constituency the main wards occupied by the IL Chamus are – Salabani Makutani, Ng'ambo, ***IL Chamus*** and part of Marigat.

Apart from the above wards the remainder of Baringo Central Constituency and its wards are occupied almost totally by members of the Tugen community. A map annexed as Exhibit RLI, showed the three Baringo District constituencies (Central, East and North) for the National Assembly, including also the said wards.

The total number of Registered voters in Baringo Central is 48,949, out of which the number of registered voters in the five wards mainly occupied by the IL Chamus total 7252 made up as follows-

Name of Ward	**Total Registered Voters**
Salabani	1515
Makutani	1640
Ng'ambo	1170

IL Chamus 1294

Marigat (part) 1633

Subtotal **7252**

The above figures were clearly identifiable from the ***Registered Voters per Polling Station*** of Baringo Central as currently published by the Electoral Commission of Kenya (and marked Exhibit RL2, and also the List of Wards in the Constituency. Extracts from the 1999 Population and Housing Census published by the Ministry of Planning, 2001, in relation to the said areas also showed –

(a) **Marigat – Division**

A total population of 26,923, with an almost equal number of males 13,285, and females 13,638, and 6,356 households, an area of 685 sq.Km, and a diversity of 39 persons per Sq. Km. This includes also IL Chamus Ward**;**

(b) Makutani Division

With a total population of 7,520 comprised of 3,584 males, 3936 females, 1,534 households, an area of 526.9 sq km, and a diversity of 14 persons per sq. km.

(c) Ng'ambo Divisions

With total population of 4,947 comprised of 1954 males, 2093 females, 777 – households, an area of 557 Sq km, and population of 73 persons per Sq Km.

(d) SALABANI DIVISION

With a total population of 3,718 comprised of 1802 males, 1916 females with 875 households, an area of 80.2 Sq. Km and a population diversity of 46 persons per Sq. Km.

(e) IL Chamus Electoral Ward

This is included within Marigat Division with a total of 1,294 registered voters among the IL Chamus population.

(F) THE GEOGRAPHY AND TOTAL AREA OCCUPIED BY THE IL CHAMUS

According to the Report to the Electoral Commission of Kenya (ECK), made on 19th December, 1995, the IL Chamus occupy a vast area of land. The land is said to be 150x100 Kms horizontally (width) and vertically (length) respectively. It borders Samburu District in **Amonya**, Laikipia, District and Nyahururu, and is in large, predominantly occupied by the IL Chamus. It is a vast land even worth being a District but the Applicants request for a constituency first, because the Applicants say, the IL Chamus people need representation in the ***house of commons.*** It does not mean that "***we are no longer part of Baringo District but we need at least our human rights and fairness.***

E. ABSENCE AND/OR INADEQUACY OF REPRESENTATION (Paras 15-19)

The deponent Rangal Lemieguran depones that since the creation of the Constituency (Baringo Central), over forty years ago in 1963, no person from the IL Chamus community has been elected as Member of Parliament from among them, and that no person would be elected given the voting patterns in rural areas both in Baringo District, and nationally. Further because of the make up of the Constituency, and the statistics shown and the current constituency boundaries, it is not statistically likely that the IL Chamus candidate will be elected in the next forty years.

In the circumstances, the deponent avers that the fundamental rights of representation in the National Assembly of the Republic under the provisions of Section 1 and 1A of the Constitution of Kenya, has been effectively denied in the past and is being presently denied to the Applicants and the IL Chamus community, and it is likely that the said right will continue to be contravened for the foreseeable future unless the circumstances are changed. The Applicants also aver that although in theory it is not impossible for an IL Chamus candidate to be elected to Parliament in the circumstances as presently structured, in practice and in reality the likelihood is so infinitesimal as to amount to an effective denial of the right of representation; that the statistical chance of an IL Chamus candidate being successful as a Member of Parliament in the present Baringo Central Constituency is in practice so minimal as to effectively prevent any such membership of Parliament by any such candidate for the foreseeable future, ***(as it has been prevented in the past forty years).***

F.THE CONSEQUENCES OF DENIAL OF, AND THE NEED FOR SEPARATE REPRESENTATION

The Applicants also aver that the denial of an effective choice is also a contravention of the fundamental right of expression protected by Section 79 of the Constitution of Kenya which has been, is being and is likely to be contravened in relation to the Applicant and other Applicants and the IL Chamus community, that all the circumstances and their resultant denial of an effective choice is also a contravention of the fundamental right of the unhindered enjoyment of the freedom of conscience protected by Section 78 of the Constitution of Kenya, which has been, is being and is likely to be contravened in relation to the Applicant and the ***IL Chamus*** community.

The Applicants also aver that as a consequence thereof, the entitlement of the Applicants and the IL Chamus community to the fundamental rights, freedom of expression, and freedom of conscience protected under Section 70 of the Constitution of Kenya has resulted, having been, being and likely to be contravened in relation to the Applicant and the IL Chamus community; that as a result the Applicants believe, the IL Chamus community of the Republic is at present and for the foreseeable future disenfranchised of any of its members to the National Assembly, unless changes are made.

The Applicant also aver that numerous efforts have been made in the past ten years by the Applicant and the IL Chamus community itself by petitions, representations, memoranda and submissions to the then President of the Republic, the Electoral Commission of Kenya and the defunct Constitution of Kenya Review Commission seeking representation, change of boundary and other equitable considerations, without ever getting any written response to any of these and no remedial measures have ever been taken in the past forty years. Such petitions and representations which have never been responded to include-

(1) A memorandum by Maa Community to the Constitution of Kenya Review commission, which highlighted the historical injustices against the Maasai as a people, such as the Maasai Agreements of 1904 and 1911 under which the Maasai were made to cede over 16,000 Sq. Kms including 11,500 Sq. Kms of what became the White Highlands.

(2) At the Lancaster House Conference leading to agreement of Kenya's Independence, the three Maasai representatives declined to sign the Conferences document because the British declined to recognize the historical injustice committed against the Maasai people, and the agreements of 1904 and 1911 were never abrogated. Their attempts to safeguard their rights under Regional or "Majimbo**" government ended in failure with the dissolution of** KADU **in 1964, (**KADU **– Kenya African Democratic Union was the political party which sought to safeguard the rights of minorities through regional form of government as opposed to centralist form under KANU).**

(3) that boundaries in Rift Valley be redrawn to create three regions, including one comprised of MAA speaking groups of Narok, Kajiado, Transmara Laikipia Samburu and Marigat Division of Baringo.

G.OF THE CRITERIA FOR ADEQUATE REPRESENTATION (Paragraphs 27-30)

The Applicants aver that the last Parliamentary Constituency Boundaries by the Electoral Commission of Kenya was in 1997 and despite representation prior thereto, the electoral Commission of Kenya did not revise the boundaries of Baringo Central Constituency, nor alter its boundaries so as to take into account the several criteria contained in Section 33 (3) & (4) of the Constitution in their application to the IL Chamus community, and for those reasons and the law, there be a declaration that the present Baringo Central Constituency be divided into two separate constituencies taking into account the appropriate demographic and numerical considerations and all powers set out in Section 42 of the Constitution of Kenya, so as to prevent the electoral maginalization of the IL Chamus from continuing.

Similarly the Applicants pleaded that declaration that in so dividing the present constituency, the electoral Commission of Kenya would take into account the requirements set out in Section 42 aforesaid in particular the need to ensure adequate representation of sparsely populated rural areas, population trends and the community of interest so as to prevent the present electoral marginalization of the IL Chamus from continuing.

H.OF SPECIAL INTEREST GROUPS AND NOMINATED MEMBERS TO THE NATIONAL ASSEMBLY *(Paragraphs 31-47)*

The Applicants say that in addition to the election of Members of the National Assembly, the Constitution also provides for nomination of twelve members under S. 33 (2) of the Constitution of Kenya which says-

"Subject to this Section, there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests."

The Applicants aver and plead that the IL Chamus is a minority community and has been without representation in Parliament since Independent Kenya. It is one of the few indigenous communities in Kenya, as recognized in international law with attendant rights and protections. The number of the community is very small in the context of the total population of 30 odd million in the Republic.

By virtue of this fact alone and other facts set out in the Affidavit, the Applicants believe that the IL Chamus community constitutes a ***"special interest***" for purposes of Section 33 of the Constitution of Kenya, and qualifies for representation in the National Assembly as such special interest. The Applicants also aver and plead that despite this, no Nominated Member has been appointed in the National Assembly since 1963 to represent the special interest that the Applicants and the IL Chamus are.

The Applicants also aver that the constitutional machinery for the representation and protection of indigenous minorities, including the IL Chamus, that is to say, Section 33 of the Constitution of Kenya has not been implemented in the past forty years as by the Constitution, envisaged, and despite the mandatory nature of that provision of the Constitution.

For those reasons, the Applicants aver and contend under advice of their Counsel that it is necessary that a person from the IL Chamus community ought to be appointed as a Nominated Member of the National Assembly to represent the special interest of the IL Chamus community under the mandatory provisions of Section 33 of the Constitution of the Republic, and as political parties are involved in nominating of persons to be appointed as Nominated members under the said Section 33 of the Constitution, ought to nominate a person from the IL Chamus community while taking into account the principle of gender equality; and that there be a declaration to this effect.

The Applicants also seek a declaration that the principle of the representation of special interests has not been, or not sufficiently been, taken into account in the appointment of Nominated Members under Section 33 of the Constitution of Kenya, to the current Eighth Parliament to the detriment of the IL Chamus community.

Further the deponent urged, that he has followed the appointment of Nominated Members over the General Elections since the establishment of the Electoral Commission of Kenya and observes by the lists

of those nominated, that the primary principle of the representation of special interests, which S. 33 (1) of the Constitution of Kenya mandatorily provides for has been ignored or overlooked and not been complied with. By virtue of all the foregoing the Applicants seek-

(i) a direction by this court to the Electoral Commission of Kenya that in complying with its duties under Section 33 (5) of the Constitution of Kenya it ensure observance also with the primary principle of the representation of special interests which Section 33 (1) of the Constitution of Kenya mandatorily provides.

(ii)a declaration that the Electoral Commission of Kenya in the performance of its functions under Section 33 (5) Constitution of Kenya in respect of the current Eighth Parliament has failed to ensure any or any adequate observance of the primary principles of the representation of special interests which section 33 (1) of the Constitution of Kenya mandatorily provides for, is necessary to protect the fundamental rights of the Applicant the other Applicants, and the Il Chamus community.

(iii) a declaration that in any future Review of the Constitution of Kenya that provision of far representation of all communities constituting the people of the Republic and in particular of the IL Chamus be taken into account by whatever body undertaking the review of the Constitution;

(iv) a direction be given to the Electoral Commission of Kenya that all the orders, declarations and directions made by this Court be taken into account by such body charged with the review of the Constitution of the Republic;

The Applicants urge that such declarations and directions under Section 84 (2) of the Constitution of Kenya will prevent future problems and ethnic apathy, that IL Chamus community, needs to have a voice of its own in Parliament so as to protect its interests in the future, that land pressures on the dominant communities around it will predictably impact both upon the present usable land areas as well as upon the economic activity and way of life of the IL Chamus; that the IL Chamus being an indigenous community is entitled to safeguard its own cultural values, its traditions and its social patterns, and that the territorial identity of the IL Chamus as an indigenous people is critical to its flourishing and its survival.

H. <u>OF THE PROTECTION AND RIGHTS OF INDIGENOUS PEOPLES</u>

The Applicants also pleaded that the protection and rights of indigenous peoples are the subject of national and international concern and debate all over the globe, resulting in the drafting of the ***Declaration of the Rights of Indigenous Peoples.*** These other instruments include-

(i) International Covenant on Civil and Political Rights (1966).

(ii) Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (Adopted by the UN General Assembly Resolution 47/135 of 18th December, 1992).

(iii) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June, 1990.

(iv) Framework Convention for the Protection of National Minorities (1995),

(v) International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169 (1989).

The primary theme and thread of all these instruments, the majority of which Kenya has taken part in discussion and formulation by virtue of being a Member of the United Nations, is that every citizen shall have the right and opportunity without any distinction or restriction to take part in the conduct of public affairs, directly or indirectly or through their chosen representatives (I.C.C.PR), that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life

(UN Declaration on Person belonging to National or Ethnic, Religious and Linguistic Minorities etc (1992), the right ofpersons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities, and the participating states have the duty to protect and create conditions for the promotion of the ethnic, cultural linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, ***appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the state concerned*** (*Copenhagen meeting of the Conference in the Human Dimensions 1990)*

The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries ***(supra***) is to the same effect, Article 61 (b) thereof requires governments in applying this convention to establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making, in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.

The Applicants plead that without a prominent voice of its own from a national platform the community will not be able to protect its rights, social or cultural, that by the lack of such a voice in Parliament, the IL Chamus community has suffered much obvious and non-obvious marginalization, and prejudice in matters political, social and economic.

OF POLITICAL SUFFERING

The Applicants also plead that politically the community has suffered as the division of boundaries was done discriminatorily. Baringo District has three different communities the Pokot, the IL Chamus and the Tugen, and three constituencies, the boundaries whereof have been so drawn that the **Pokot** are adequately represented through Baringo East and the ***Tugen*** through Baringo Central and Baringo North. The IL Chamus have no such representation through any of the said constituencies.

The Applicants plead that since Uhuru (***Independence)*** the Baringo Central Constituency has been represented by only one Member, former President Daniel Arap Moi, who the Applicant depones on Oath rarely visited the IL Chamus community and that it was difficult to see him, and operated through a small clique of persons who not being IL Chamus, never considered the interests or the plight of the IL Chamus. The effect of this lack of interest marginalized the community in the constituency, and consequently nationally.

Consequently therefore, the interests, of the IL Chamus community have never been articulated in Parliament so as to capture the attention of the necessary institutions of government and parastatals and to obtain the application of the machinery for solutions and resources. The deponent also avers that the current Member of Parliament for Baringo Central Constituency has not visited the areas inhabited by the IL Chamus, and thus perpetuating the said marginalization and prejudice.

All this is best reflected in the fact that at the time of filing the Originating Summons herein, the subject of this Judgement, no member of the IL Chamus community has ever been appointed to a senior post since Independence and that the senior-most position held by a person from the IL Chamus is a District Officer (D.O.).

The deponent avers that he, the other Applicants herein and other members of the IL Chamus community would want to stand for Parliament, within the Constituency, but that with the current constituency boundaries it would be an exercise in futility.

J.OF SOCIAL CONSEQUENCES

The Applicants say that the absence of such adequate and effective representation, has lead to very adverse social consequences. The Upper part of Baringo Central Constituency, where the current and last Member of Parliament come from is equipped with better schools, health facilities and roads. It has

electricity and telephone access. The IL Chamus area has only one secondary School. While the situation with regard to primary schools has deteriorated over the past fifteen years.

Instead, there has been cattle rustling in the District and that the IL Chamus have borne the brunt of this rustling by Pokot from the East, and Tugen from the East, and Tugen from both west and north, that whenever security forces are deployed in the District, it is the IL Chamus who have been beaten and maimed, their women raped and people displaced, and that no concern has been voiced by their Member of Parliament on such occasions.

There is therefore, the Applicants plead a clear of sense of alienation from the Member of Parliament and from the Institution of representation to Parliament.

K.OF ECONOMIC AND SOCIAL <u>ALIENATION</u>

The Applicant avers, and the Applicants plead that the land grabbing of Ole Kokwa Island and Parmalok Island has taken place knowing that IL Chamus have no voice capable of effectively protesting or bringing remedy to these wrongs, and that as a result of the land grabbing 200 persons were displaced, that is a significant proportion of a small population, and that there was no protest on behalf of the IL Chamus from their Member of Parliament either in or outside Parliament.

The Applicants plead that during droughts in the past years, the IL Chamus have been unfavorably discriminated against when relief food has been distributed, and have been left out at other critical times.

As a consequence therefore and due to lack of outside information, and of general information and due to isolation from the national and even district political mainstream, the community sees itself as occupying a very dark corner of the nation and in comparison with the democratic gains and openness that other parts of the country now have as a foundation to build on, the community sees itself as neglected and improperly being handicapped in the task of undertaking its own development.

The Applicants also plead that the Perkera Irrigation Scheme an old scheme set up during the colonial period for the benefit of the pastoralist communities including the IL Chamus no longer benefits the IL Chamus people though situated within their area. Now the majority of the tenants within the Scheme are members of the Tugen community. The valuable horticultural production taking place and experience being accumulated is to the exclusion of the IL Chamus, and it is not to their economic benefit.

Similar economic alienation is experienced by the Applicants and the IL Chamus community with regard to allocation of commercial and residential plots in both Marigat and Kampi yo Samaki Market Centres, and that they have no voice politically to speak up on important platforms and to important bodies and persons to contain this end. Their attempt at any economic activity within the constituency is greatly hampered by lack of effective representation.

L. <u>OF ENVIRONMENTAL DEGRADATION</u>

The Applicants also aver that there is serious deforestation, going on in the upper part of Central Baringo which is the source of the Perkera and Molo Rivers, which are the source of water in the places inhabited by the community and the unchallenged deforestation has seriously affected the volume of water available to the community from the said rivers.

Lake Baringo has been itself affected by siltation. This directly affects the volume of fish and has a direct and negative impact on the economic well-being of the IL Chamus community, and threatens its very livelihood.

M. <u>CONCLUSION OF SUBMISSION OF IL CHAMUS AND APPLICANTS CASE</u>

The Applicants say in conclusion of both the Affidavit of the First Applicant ***RANGAL LEMEIGURAN*** on behalf of the other three (3) Applicants, and the submissions of Pheroze Nowrojee,

learned Counsel for the Applicants, and the IL Chamus community, that these deep-seated political, social and economic problems are the result of continuous neglect over a forty years period that is premised on the absence of accountability in representation to a community that cannot affect the polls, and to which a member of Parliament from an overwhelming majority owes no allegiance to speak up, or to fight for any resources, or to bring any betterment.

The Applicant, also plead that neither re-election nor popularity are dependent upon any effective representation of the community's interest or protection of its rights.

The Applicants further plead in conclusion that their situation would be worsened in the event that oil or other mineral wealth is found to be present within the areas of the IL Chamus community, representation is even more necessary to prevent the exclusion of the community from proper benefits and from needless and exploitative development and/or irreversible destruction of their values traditions and social patterns.

N. IL CHAMUS ARE NOT THE LEAST IN NUMERICAL STREGNTH OR AREA FOR GRANT OF A CONSTITUENCY

Using the 2nd ***RESPONDENT'S*** own List of Authorities dated 13th November, and filed on 14th November, 2006, **ANNEXTURE 3** entitled ***Electoral Commission of Kenya Parliamentary Constituencies Population (1999 Census***) in Descending Order, Embakasi Constituency No. 8 with a population of 434,884 and area of 208 Sq. has the largest population in the 210 constituencies while Lamu East Constituency No. 210 has the least population of 16,794, and covering an area of 1,663 Sq. Kms. In between these extremes are for instance Kuria Constituency No. 80 with a population of 151,857 and an area of 581 Sq. Km, Ijara Constituency No. 205 with a population of 41,811, and an area of 6,198 Sq. Kms. North Horr, Constituency No. 204, with a population of 43,057, and an area of 38,953 Sq. Kms.

The IL Chamus population according to 1999 census is over 27,500 people and the votes for the 1997 election were over 10,000 people. They are certainly occupying more area than the constituencies of Kilome at 630 Sq. Km, Mbita at 416 Sq. Km, Tetu at 419 Sq. km, Kangema at 289 Sq. km, Kipipiri at 644 Sq. km, Gwasi at 640 Sq. km, Funyula at 264 Sq. km, Siakago at 777 Sq. Km, Keiyo North at 541 Sq. Kms. The area occupied by the Applicants and the IL Chamus community is well over approximately 1,500 Sq. Kms.

For these reasons, and on the basis that Section 42 (3) of the Constitution of Kenya, the Commission is required to depart from the principle of the equal numbers of inhabitants in all constituencies, to the extent that it considers it expedient in order to take account of-

(a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;

(b) population trends;

(c) the means of communication;

(d) geographical features

(e)community of interest; and

(f) the boundaries of existing administrative areas.

The Applicants plead that to ensure an equitable and beneficial future the IL Chamus need to be able to mobilize among other legislators for support for their interests and reciprocal assistance, that without such participation at the highest level there is real danger that the IL Chamus rights and interests will continue to be contravened without remedy. The IL Chamus community, the Applicants plead is deeply

concerned, and is anxious to ensure that its proper place within the institutions of the Republic is obtained and ensured continuously.

The Applicants therefore pray that this court in exercise of its jurisdiction under Section 84 of the Constitution do issue the necessary declarations and directions prayed for herein.

In support of its case, the Applicants relied on inter alia –

(1) ***KENYA – Report of the Constituencies Delimitation Commission, (presented to Parliament by the Secretary of State for the Colonies by Command of Her Majesty, January, 1963; which set out the basis of the delimitation of Constituencies boundaries, incorporating the current provisions of Section 42 (3) of the Constitution.***

(2) The Kenya Population Census 1989, vol. 1 showing at page 633 the Tribes by sex in Baringo District and setting out the Kalenjin at 143,226, or 83.79% of the District's population, while the Njempts at 11,569 or 3.32% of the population and therefore a clear distinct group from either the Masai shown at 324 or 0.09% of the population.

(3) Numerous clips and Newspaper cuttings attached to the Supporting Affidavit of Thomas Letangule Advocate one of the Counsel for the Applicants, sworn on and filed on 31-01-2005.

(4) Draft Declaration on the Rights of Indigenous Peoples, United Nations Commission.

(5) On Human Rights – Sub-Commission on Prevention of Discrimination and Protection of Minorities 45th Session. *Article 25…*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations. Such rights are not akin to self determination and cession.

(6) Indigenous People-Challenges facing the International Community U.N. Department of Public Information – 1997. On Indigenous People and Issues.

Poverty – ***Poverty tends to have a disproportionately severe effect on indigenous people. They tend to be among the poorest of the poor, the most vulnerable and the most deprived of the groups of society.***

7. ***Draft United Nations Declaration of the Rights of Indigenous Peoples. General 13-24 2004.***

That around the world, indigenous peoples face widespread discrimination impoverishment and ill – health. Indigenous people are routinely excluded from decisions vital to their well-being and to the survival of their unique ways of life. Unjust and illegal dispossession of their lands and resources have often severely undermined the health and livelihoods of Indigenous peoples and eroded the foundation of their distinctive cultures."

8. ***Convention No. 169. Convention concerning Indigenous and Tribal People*** **in** *Independent Countries*

Articles 1, 2, 6 place certain obligations on governments parties to the convention and Article 7 (1) …… requires governments to allow indigenous peoples to participate in the foundation, implementation and evaluation of plans and programmes for national and requirement development which may affect them directly, and protection from abuse of their rights" *(Article 2).*

Measures to give effect to the convention are to be taken in a flexible manner having regard to the conditions of each country.

(9) *NJOYA & OTHERS –VS- ATTORNEY- GENERAL & OTHERS [2004] 194* ***per currian Ringera J.***) the fundamental, ***principles according to which the Constitution must be interpreted are constitutionalism*** *(limited government under the rule of law),* ***equality of all citizens, the doctrine of separation of powers and the enjoyment of fundamental rights, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it; I would also include the thread that runs throughout the Constitution, the equality of all citizens, the principle of non-discrimination. It is the eye or prism through which issues concerning the Constitution should be seen, read and acted upon.***

10. REYNOLDS –VS- SIMMS (377 US 533, 12 L Ed] at 506 (cited in the Njoya Case), writing for the majority, Chief Justice Warren, said of the equality of citizens at 527-528.

"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities of economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and in unimpaired fashion is a bedrock of our political system. Weighing the votes of the citizens differently, by any method or means, merely because of where they happen to reside hardly seems justifiable. One must be aware that the Constitution forbids "***sophisticated as well as simple-minded modes of discrimination."***

Then again at page 529 – Warren Chief Justice wrote –

"Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect, a majority of the State's Legislators. To conclude differently and to sanction minority control of state legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights and might otherwise be thought to result."

The essence of Chief Justice Warren decision was as we understand it is that equality of citizenship calls for equality of the votes, to accord some votes greater weight than others for any reason, is discriminatory and offensive to the character of representative democracy, while there must be minority protection it should not lead to minority control of legislative bodies and thereby deny the majority of their rights and to underweight any citizen's vote is to degrade his citizenship.

Further commenting on the ***REYNOLDS –VS- SEEMS*** (supra) decision Ringera said Pages 215-216 (of the NJOYA Case-

"……The concepts of equality of before the law, citizens rights in a democratic state and of the fundamental norm of non-discrimination all call for equal weight for equal votes and the dictates that minorities should not be turned into majorities in a decision making bodies of the State.

……that cannot however be the only consideration in a democratic society. The other considerations is that minorities of whatever tribe and shade are entitled to protection. And in the context of Constitution making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and accordingly, the voice of a all should be heard."

Furthermore in a multi-ethnic society such as ours which is still struggling towards a sense of common nationality and unity of purpose, it is important that all tribes should participate in the process-making so that they can all own the constitution which will be the glue binding them together. It should also be borne in mind that justice is the foundation of peace. If in the making of a new Constitution some minorities feel that they have been denied political justice they will resent the Constitution and may, if they could, thwart it by resort to arms.

Other factors which should not be ignored are the terrain and size of the various political units. Representation must be effective and it cannot be so if the representative has either too vast a territory to traverse or too many people to attend to, what is called for a society such a ours is a balance between

majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process.

Lady Justice Kasango was of the same view in the Njoya Case at page 235.

Mr. Ndubi was of the view that the issue of discrimination was a question of equity and equality, that to propose that the (then) selection of National Constitutional Conference delegates on the basis of one person one vote would itself promote inequity, yet equality was a value of justice, that to do justice there is need of equity between the powerful and the not powerful. If the process was to be based on numbers it would not bring equity to the citizens of Kenya. The Court is inclined to accept these submissions of Mr. Ndubi.

Lady Justice Kasango went on to observe that even though on the face value there was discrimination on the number of delegates representing each province as argued by the Applicants' Advocates, said at page 235.

…..We are of the firm view that the number of population per province cannot be the only criterion for deciding the number of delegates to represent each province.

And again-

….. Kenya is a multiracial society, and when one considers that the Constitution is a permanent document it is necessary to ensure that those with less population in their province are not denied a say in the input of that document. If the criterion was numbers of population alone it would mean that the province with less population would be disadvantaged. What criterion should we use?

"As a nation we should remember that constitution making is not a fight where one would try to get a large number on his side in order to win. However as a nation involved in the most important task touching all our lives, we use a process that will lead to a well written constitution that will ensure good governance. The Constitution of our nation ought to be broad, balanced and representative of the views of Kenyans. *This representation cannot be based on numbers of population alone.*

In his judgment, Hon. Mr. Justice Kubo, although over all dissenting from the views held by Lady Justice Kasango, and Hon. Mr. Justice Ringera) observed that Section 3 of the Constitution of Kenya Review Act, (***Cap 3A Laws of Kenya***) giving the objects and purposes of the review was instructive. They included promoting and facilitating cooperation to ensure economic development, peace, and stability, to strengthen national integrity; ensuring the full participation of people in the management of public affairs; etc. And noting that Sections 5(b) which enjoined "the organs of the review process was conducted so as to ensure that the review process accommodates the diversity of the Kenyan people including the socio-economic status, race, ethnicity, gender, religious, faith, age, occupation, learning, persons with disabilities and the disadvantaged."

Hon. Justice Kubo – said at page 256.

"… The concept is not new. Section 42 (3) of the Constitution dealing with Constituencies provided for their boundaries to take into account not just population density but also population trends, means of communication, geographical features, community of interest and the boundaries of existing administrative areas and the periodical review of boundaries.

The diversity of Kenya is a reality and cannot be ignored. The majoritarian principle espoused by the Applicants as the only factor to inform boundary setting process…. cannot be the sole criterion in constituting districts or public bodies. It has to be balanced with other principles, for example..."

(9) <u>ZOLA AND ANOTHER –VS- RALLI BROTHERS LIMITED & ANOTHER [1969] E.A. 691-</u>

For the proposition that- any defendant or respondent who takes a passive attitude to an

application and fails to answer it fully or at all do so at their own peril and they only have themselves to thank if their reticence results in the court taking an adverse view of their side of the case"

That was the case of the Applicants and essentially also the submissions of their Counsel, Mr. Pheroze Nowrojee. It now remains for us to consider the Respondents' case.

THE RESPONDENTS' CASE

A. The Attorney-General's Case.

In this case, the Attorney-General, the First Respondent failed to file any Affidavit, Instead, the First Respondent's response consisted merely of the Memorandum of Appearance dated 19th March, 2004, and filed on 1st April, 2004. Thereafter the First Respondent failed to file any Affidavit so that so far as the First Respondent is concerned, there is no contest to the various contentions set out in the First Applicant's (Lemeiguran's) Affidavit. The First Applicant's response otherwise consisted in the List Authorities dated and filed on 10th May, 2006. Those authorities were-

(1) The Constitution of Kenya,

(2) Kisya Investments Ltd. –Vs- Attorney-General (HCCC No. 2832 of 1990)

(3) William K. Chelashaw –Vs- Republic (Nairobi Misc. Criminal Appeal No. 93 of 2003.

(4) Paul Imison –Vs- Attorney-General (Nairobi H.C. Misc. Application No. 1604 of 2003).

We will refer to those cases as necessary in the latter passages of this judgment.

B. THE CASE OF THE ELECTORAL COMMISSION OF KENYA

The case of the Electoral Commission of Kenya, the Second Respondent was more robust. It comprised of –

(1) ***A Notice of Preliminary Objection dated 25th June, 2004, and filed on 28-06-2004 on the grounds that-the Application is bad in law,***

(ii) application lacks merit in law and facts,

(iii) the application is frivolous, vexatious and an abuse of the court process.

(2) The Replying Affidavit of Gabriel Mukele, the Vice- Chairman of the Second Respondent (ECK) sworn and filed on 11th August, 2004 ***(the Mukele Affidavit).***

(3) Further Affidavit of Samuel Mutua Kivuitu was sworn and filed on 3rd October, 2006.

So far as the ***Mukele Affidavit*** is concerned, the material paragraphs were Nos. 4, 5, 6 & 7, thereof:-

(5) That in reply to paragraphs 4 of the Affidavit of ***the First Applicant, I deny that IL Chamus are a distinct community and that it numbers between 25 and 30,000 members and put the Applicants to strict proof thereof.***

(6) That in reply to paragraphs 5, 6 and 7 of the said Affidavit. I state that the IL Chamus are a Masai Clan in Kenya. There are thousands of clans in Kenya. Representations cannot be based on clans.

(7) In reply to paragraphs 8,9,10 and of the said Affidavit, although the number of registered voters in Baringo Central Constituency is about 48,000, the voters are not registered on the basis of the

communities, if any. The Applicants are put to strict proof that their community occupies certain wards exclusively and that the said community registered in those particular wards exclusively."

The Further Affidavit on behalf of the ECK was sworn and filed on 3rd October, 2006 by the ECK's Chairman, Samuel Mutua Kivuitu, and so far as is material to this judgement, the Chairman says on oath at paragraphs, 11, 12 & 13 of his Affidavit as follows-

(1) ***That Section 42 (3) of the Constitution confers to the ECK a broad discretion when creating or reviewing Parliamentary constituencies and it does in fact take into account tribal or clan welfare as part of the community of interest but it has to be careful not to ignore population criterion and ill-effects of over stressing tribal or clan interests which are generally emotional,*** *(paragraph 13)***.**

(2) ***That by 1999 population census the population of Baringo Central was assessed 199,152 and it covers an area of approximately 2,426 Sq. Kms (****paragraph 10).*

(3) That according to information obtained and provided by the ECK's District Election Coordinator for Baringo District the total number of IL Chamus is 16,012 living with Samburu's and Maasai's in five administrative locations **(paragraph 12).**

(4) That the said ECK's District Election Coordinator for Baringo District has informed me that the IL Chamus share the same language with the Maasai (**paragraph 12).**

Mr. Onsando and Ogonyi, learned Counsel for the Electoral Commission of Kenya, relied upon the said Affidavits of Mr. Gabriel Mukele, the learned Vice-Chairman of the Commission, and the Further Affidavit of Samuel Mutua Kivuitu the learned Chairman of the said Commission.

In his submissions to us Mr. Onsado firstly sought to clear the apparent contradiction between the averments in the Chairman's and his Vice-Chairman's respective Affidavits as to the identity of the IL Chamus where the latter averred in paragraph 14 of his Affidavit that "***ethnic or tribal and indigenous community consideration are not part of the special interest criteria used by the Second Respondent*** in determining boundary issues, whereas the Chairman in paragraph 13 (supra) says- that under Section 42 (3) of the Constitution the Commission in reviewing Parliamentary constituencies does in fact take into account tribal or clan welfare as part of community interest while not ignoring population criterion and the ill-effects of over-stressing tribal or clan interests.

As Mr. Onsando learned Counsel for the Commission stated that this was merely a preliminary point, it is perhaps in order of us to pronounce on the conflict between the averments of the Commission and Vice-Chairman, and say that the question of clan, tribe and being a minority and an indigenous community is an important element in the definition of special interests. For even in the tribe there are specialties only a particular clan may have the attribute of being rain-makers and yet another to administer curses and oaths. They are aspects which define one community from another and indeed even one clan from another. It is the particular social-economic organization, language and custom which defines one community as being distinct from the other. To say otherwise would be to ignore the reality of the face of Kenya, as the Vice-Chairman, appears to suggest in paragraph 14 of his Affidavit.

Having disposed of that issue, Mr. Onsando made a four pronged submission to the Applicant's case vis-

(1) **LOCUS STANDI**

Mr. Onsando's submissions was that vis-à-vis Section 84 of the Constitution, and the authority of the ***NJOYA*** Case (***supra***), the Applicants had no ***locus standi.***

(2) **The role of the Electoral Commission of Kenya**

in relation to the determination of boundaries and creation of constituencies;

(3) **The role of the Electoral Commission in respect of the Applicants;**

(4) The (relevance) of the authorities presented to the Court vis-à-vis the law on creation of constituencies;

OF LOCUS STANDI

Mr. Onsando noted that he had raised the issue of **locus standi** inthe Notice of Preliminary Objection dated

25th June, 2005, and filed on 28-06-2005 and which matter had not been considered and ruled upon. It must however be restated as it was observed in the Njoya case at page 216, that although those cases were decided at the time when few Kenyans were brave enough to fight for democratic space, the language of Section 84(1) of the Constitution admits of no representative action except for a detained person, every other complainant of an alleged contravention of fundamental rights must relate the contravention of such right to himself as a person, indeed the entire ***Chapter V*** of the Constitution is headed – "***Protection of Fundamental Rights and Freedoms of the Individual."***

There is however nothing in our view to prevent an individual or a group of individuals with a common grievance, alleging in one suit that their individual fundamental rights and freedoms under Section 70 & 83 inclusive of the Constitution have been infringed in relation to each one of them, and to them collectively. In this case the Applicants are also not restricted to a person, to seek a declaration that each and every one of them, and their community represent or constitute a special interest in terms of Section 33 of the Constitution. Hence it would be a violation of the right to self expression under Section 79 of the Constitution if either Applicant were denied a right to be heard whether individually or in turns, or chose to express themselves through one representative. The Applicants individually like a corporation have locus standi to bring this application.

OF THE ROLE OF ELECTORAL COMMISSION OF KENYA UNDER SECTION 42 (2) OF THE CONSTITUTION

To understand the role of the Electoral Commission of Kenya, it is essential to state that the Commission is a creature of the Constitution of Kenya under Section 41. It is comprised of a Chairman and not less than four and not more than twenty-one members appointed by the President. The Commission itself elects a Vice-Chairman. In the exercise of its functions under the Constitution the Commission is not subject to the direction of any other person or authority subject only as Parliament may provide for the orderly and effective conduct of operations and business of the Commission and for the powers of the Commission to appoint staff and establish committees and regulate their procedure. Any decision of the Commission is required to be made with concurrence of a majority of all its members. That is provided for in Section 41 (4) (10) and (11) proviso of the Constitution.

Section 42(1) of the Constitution provides that Kenya shall be divided into such number of constituencies having such boundaries and names as may be prescribed by order made by the Electoral Commission. Under Section 43 (2) Kenya is currently divided into a minimum of 188 constituencies, and the maximum of 210. Section 42 (3) provides-

(3) All constituencies shall contain a nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable but the Commission may depart from this principle to the extent that it considers expedient in order to take account of –

(a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;

(b) population trends;

(c) the means of communications;

(d) geographical features,

(e) community of interest, and

(f) the boundaries of existing administrative areas; and, for the purpose of this subsection, the number of inhabitants of any part of Kenya shall be ascertained by reference to the latest census of the population held in pursuance of any law"

Section 42 (4) empowers the Commission at intervals of not less than eight years and not less than ten years and whenever directed by Parliament, to review the number, the boundaries and the names of the constituencies into which Kenya is divided, and may, by order, alter the number, the boundaries or the names, subject to and in accordance with this section, to the extent that it considers desirable in the light of the review.

Under Section 42 (5) it is provided that whenever the census of the population has been held in pursuance of any law, or whenever a variation has been made in the boundary of an existing administrative area, the Commission may carry out a review and make alterations to the extent which it considers desirable in consequence of that census or variation.

The other functions of the Commission are set out in Section 42A – registration of voters and maintenance and revision of the register of voters, directing and supervising Presidential, National Assembly and local government elections, promoting free and fair elections, promoting voter education through-out Kenya and such other functions as may be prescribed by law.

The other important and constitutional functions of the Electoral Commission of Kenya re set out in Section 33 of the Constitution, and are as follows-

33 (1) ***Subject to this section there shall be twelve nominated members of the National Assembly appointed by the President following a general election,*** *to represent special interests.*

(2) ***The persons to be appointed shall be persons who, if they had been nominated for a Parliamentary election, would be qualified to be elected as members of the National Assembly.***

(3) ***The person to be nominated shall be nominated by the Parliamentary parties according to the proportion of every parliamentary party in National Assembly, taking into account the principle of gender equality .***

(4) ***The proportion under subsection (3) shall be determined by the Electoral Commission after every general election and shall be*** *signified by the Chairman of the Commission to the leaders of the concerned Parliamentary parties****, the President and the Speaker.***

(5) The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission ***who shall ensure observance of the principle of gender equality in the nominations,***

Unless and until Parliament defines other roles for the Commission, the Commission is bound and mandated to carry out its functions in accordance with the provisions of Sections 41 (10), 42(3) and 42(A), and Section 33 (4) and (5) without the direction of any person or authority (Section 4 1 (9) of the Constitution.

So how does the Commission go about ensuring that there are an equal number of inhabitants in every constituency?

According to submissions of Onsando, and by letter dated 18th November, 2004, the Electoral Commission of Kenya engaged all registered political parties (and not merely parliamentary parties as would be required under Section 33 of the Constitution), on the review of parliamentary constituencies

under Section 42 (3).

That letter was an excellent effort by the Second Respondent to define the criteria for both the creation and distribution of additional constituencies in terms of Section 42 (2) of the Constitution. According to the Commissions proposals to the registered political parties inclusive of parliamentary parties, the most equitable way of achieving an equal number of inhabitants in every constituency is to ascertain the total population at the end of review of boundaries every ten years, following a population census over the same period of time and to divide the total population by the number of available or prescribed constituencies, and thereby establishing the optimum number of inhabitants in every constituency.

Similarly to obtain the optimum area to be occupied by each constituency, the total area of the country is taken and divided by the total population at the end of the circle of review and population census after every said ten years.

For instance applying the population of Kenya 28,656,607 after population census carried out in 1999, the increase over the population of 21,448,774 in 1989, when the number of Members of Parliament was 188, the percentage increase would be 34% which if multiplied by the same number of members of Parliament would work at 34% x188/= 64.92, or 64 new or additional members of Parliament. In our case since the number of constituencies was increased by 42 in 1996, that is before the ten year cycle, and unless Parliament decided otherwise, the number of new constituencies would be 64, less by 22 already created. It would thus mean that only 42 new constituencies would be created.

To distribute such new Constituencies, the Commission again, quite sensibly we agree with Mr. Onsando's submission applied the average population divided by the number of current constituencies, so that the current constituency ***quotient*** would be the population divided by the number of constituencies to find or establish the average number of inhabitants in every Constituency – i.e 28,886,607÷ 210 = 137,555 inhabitants per constituency.

If Parliament were to enact a law increasing the total numbers of member of Parliament by 42, the total number of members would increase to 252, which number if applied to divide the population per the last census (of 1999) of 28,686,607 would be 28,886.607:- 252 = 114,630 inhabitants per Constituency.

If this formular were applied, only a few City and major municipalities would qualify in terms of population to have an equal number of inhabitants per Constituency, and perhaps with this group would fall a few other peri – urban centres, mostly around the City of Nairobi, Nakuru, Kisumu, Mombasa, and Eldoret. These areas would take the majority of the new seats. This would clearly be inequitable. So other criteria would be need to be applied.

The deviation away from the population would take into account both the area of the country, divided by the number of constituencies 210 (without the increase (i.e 581,677 Sq. Kms:- 210= 2,770 Sq. Kms, per each Constituency, or if the number of Constituencies were increased if approved by Parliament to 252 = 2,304 Sq. Kms per Constituency. Either way, only constituencies with large areas and sparse populations would qualify in terms of an average area for every constituency, but would fall below the national optimal average of population per constituency, and so would the urban Constituency in terms of average area of a Constituency. So what is the solution? The solution lies in the deviation from the population principle to the equally important, and not in any way subordinate or implied but express constitutional principles permitting the Commission under Section 42 (3) ***to depart*** from the principle of equality of numbers in every Constituency to the extent that it considers expedient in order to take account of-

(a) ***density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas,***

(b) ***population trends,***

(c) means of communication

(d) geographical features;

(e) community of interest, and

(f) boundaries of existing administrative areas by reference to the latest population census.

In the case in point, the IL Chamus community occupy an area of approximately 1500 Sq. kms out of the total area of 2,426 Sq. Kms occupied by Baringo Central Constituency, or just over one half of the Constituency, the area is semi-arid, it is prone to banditry, and because of aridity, the population is semi-nomadic, pastoralist.

In terms therefore of the national average area of every Constituency, of 2,770 Sq. Kms, only 48 Constituencies attain that average, and 162 of the 210 Constituencies are well below that average.

For instance taking Baringo Central with a population of 119,233, but with an area of 2,436 Sq. Kms. is less than the national average. Ijara, Constituency No. 33 bordering the Tana River, a National Reserve and Boni National Reserves an area of over 6348 Sq. Kms, is not only large but also sparsely populated in the middle of a Wildlife sanctuary.

Saboti Constituency No. 115 with a population of 269,000 but an area of 741 well below the national average, Kuria Constituency No. 200 which borders Tanzania to the South of the country with an area of 581 Sq. Kms, but a population of 151,887, has its own a Constituency because it is a distinct community in the midst of the large Luo-Suba populations and Maasai Mara District with large areas.

With this kind of diversity we cannot say that the Electoral Commission of Kenya has acted unreasonably in the past or has faired badly either. More so because of the absence of other criteria balancing the requirements of section 42 (3) of the Constitution.

The suggestion by the Commission in its letter of 18th November, 2004 to the Political Parties for the basis of increase of constituencies is a good beginning for the creation and distribution of new constituencies if created, between the urban and rural areas of the Republic.

The driving force to behind this formular for creation and distribution of new constituencies is still skewed in favour of numerical strength. This obsession with numbers is neither realistic nor feasible because the arid and semi-arid areas with their sparse population will always be part of the Republic. On the numbers alone, it is clear that only about 48 out of the 210 current constituencies meet the minimum area of 2,770Sq. Kms per constituency. Equally the few constituencies which meet the mean average of 113,396 inhabitants per constituency would not meet the requirement of the average of area of representation.

The Electoral Commission has therefore to give effect to the provisions of Section 42 (3) of the Constitution, a broader interpretation than merely numbers, whether of inhabitants or areas they occupy. Because of better infrastructure, roads, education, and health facilities, the urban populations will always increase more rapidly than rural areas, more so those like where the Applicants hail from where similar facilities are yet to be so developed, and life is itself precarious. For that reason the case for the applicants to be considered for effective and adequate representation becomes even more urgent. The issue is neither population numbers, nor as Mr. Onsando, learned Counsel for the Second Respondent submitted and indeed the Commission's Vice-Chairman suggested, clanism or tribalism.

To suggest any of these epithets and attach them to the Applicants is to totally to misapprehend the concept of Republicanism as is enshrined in Section 1 of the Constitution of Kenya. It is also to totally misapprehend the constitutional duty and obligation imposed upon the Commission under Section 42 (3) of the Constitution in the review of Constituencies to depart from the equality of numbers, and objectively consider the other criteria, in Section 42 (3) (a) – (e) as stated above.

To say and rely on numbers merely is also to fail and misapprehend the Applicants' case and the role

of the Commission, and of the parliamentary political parties under Section 33 of the Constitution.

It is Applicant's case that the Applicants themselves and their community the IL Chamus are a distinct and separate community from their surrounding neighbours and compatriots the Tugen and Pokot in Baringo District. They speak the "***Maa***" language like the Samburu to their North and Laikipia Maasai to their East, but they are not either a clan or Maasai tribe. The Applicants and their community are the "***IL Chamus"*** according to their perhaps close cousins the Maasai, the ***people who see far to the future.***" They say that they are an indigenous and a minority protected under the various instruments in international law. From the point of view of an indigenous and a minority people the Applicants claim that their quest for representation as "***a special interest***" group is a matter of consideration both under Section 1A and Section 33 of the Constitution by parliamentary political parties.

In Canada, unlike Kenya which has scattered minorities like the ***Eskimos*** and other indigenous peoples of North America, referred to as the ***Red Indians,*** there is ***Electoral Boundaries Readjustment Act, 1985.***

This Act echoes what the provisions of Section 42(3) of our Constitution provides, equality of inhabitants in every constituency, in accordance with the number of seats allocated to each province of Canada, and no constituency is permitted by law to have a population smaller than 75% of the allocated figure or greater than 125%. The Electoral Commissions of the provinces are permitted to vary the size of the Constituencies within the range on the basis of "***a special geographic considerations, and density of population in various regions of the province and the accessibility, size and shape of such regions variations are allowed if*** "***any special community or diversity of interests of the inhabitants of various regions."*** appears to warrant them.

The Commission itself observes that a look at the guidelines under the Electoral Boundaries Act ***(of Canada***) makes it clear that " ***readjustment exercise is not simply a mathematical computation but, rather, a delicate balancing act that must take into account human interests as well as geographic characteristics."***

So in fixing electoral districts or in our case, constituency boundaries, the Commission must take into account the community of interest or community of identity in or the historical pattern of an electoral district (***constituency)*** and a manageable geographic size of electoral constituencies on sparsely populated rural and indeed in our case in northern and north western districts of Kenya.

To accommodate those human and geographic factors, the Commission is constitutionally mandated to deviate from the average population figure when setting their boundaries. In Canada, while generally restricted to a quotient of 25% or less, a commission may exceed this but ***"in circumstances viewed by the Commission as being extraordinary"***

So What are the issues here? Firstly, the Applicants plead that they , as a distinct indigenous and minority group in a district dominated by the populous ***Tugen*** and ***Pokot***on either side, whose language, culture, and customs are different from theirs, are a special interest group in terms of Section 33 of the Constitution.

Secondly, the Applicants have urged that in considering the creation of boundaries under Section 42 (3) of the Constitution the majoritarian or population principle is not the only, or indeed the dominant criterion for the creation or distribution of new constituencies. The other criteria, the density of population, and in particular the need to ensure ***adequate*** representation of urban and sparsely populated rural areas; population trends, the means of communication, geographic features community of interest and the boundaries of existing administrative areas are equally important. These are the same criteria which the first Commission on Delimitation of Constituency Boundaries, used in 1963 on the eve of Kenya's Independence from Britain. Population alone though the principal criterion cannot have more weight than the other criteria combined. The other criterio are all co-equal, one dovetails into the other. Like we stated elsewhere in the course of this judgement, to say otherwise would be to fly into the face of Kenya. The rural Constituencies speak for themselves, and so do urban constituencies.

What then is our answer to the Applicants case? We set out in the subsequent passages of this judgement our view of the requirements of Section 33 and Section 42 (3) of the Constitution, in relation to minorities and indigenous people, and special interests, the role and obligations of the Electoral Commission of Kenya, the concept of Republicanism and democray as is envisaged in Section 1 of the Constitution, the mandate of the Commission and the role of parliamentary parties as is envisaged in Section 1A in conjunction with Section 33 and 42 of the Constitution. Thereafter we will draw our conclusions, and final recommendations.

OF MINORITIES AND INDIGENEOUS PEOPLE

On the basis of the evidence presented to this court which included books and articles written on the ILchamus we find their description by the ECK as a sub-clan of the Maasai extremely casual and unfortunate. Their description by the ECK as a sub-tribe goes against historical evidence and even the ECK census records. We find that the evidence they have presented to this court sufficiently points to a unique cohesive homogenous and a cultural distinct minority which is also quite conspicuous by any standards. The literature presented to us demonstrates exceptional solidarity in preserving their culture. In addition they proudly have all the attributes of the internationally recognized indigenous peoples.

To reinforce the above, we adopt the definition of minority proposed by the UN Special Rapporteur Fransesco Capotorti in the context of Article 27 of the International Covenant on Civil and Political Rights (CCPR) in the following words:

"A group numerically inferior to the rest of the population of a state, and in a non-dominant position whose members – being nationals of the state – posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions religions and language."

An equally eloquent definition is that of Jubs Deschenes also recommended to the UN in 1985, (Doc E/CN 4/Sub 2/1985/31)as follows:

"A group of citizens of a State, constituting a numerical minority and in a non dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."

We find that the ILChamus do qualify as indigenous people under both definitions. We must however add that the above definitions are deficient in one aspect, and that is confining the definition to citizens. Minorities under modern and forward looking jurisprudence should include non-citizens as well. In this we believe we have the support of the UN General (RC) Covenant No 23 at the 50th session 1994 paragraph 5.1 which clearly states that Article 27 should not be confined to citizens only. Para 5.2 of the Human Rights General Comment No. 23 referred to above has added what we consider most relevant to the matter before us in these words:

"the existence of an ethnic religious or linguistic minority in a given State party does not depend upon a decision by the State party but requires to be established by objective criteria".

On the contrary in this case the ECK has come up with a sub-clan description of the applicants without any credible evidence to support their argument and as stated above they have taken a position that has no historical or any factual basis on the ground. In fact the ECK was so casual on the issue as to rely on a fax description by an electoral officer! Yet they should under the Constitution and in order to discharge their Constitutional mandate have come up with an objective criteria. There is nothing to demonstrate or show that the ECK did consider the applicants minority status. Instead they said that the applicants were advocating tribalism.

Surely, a constitutional classification should not be seen in tribal lens but such a classification should

be undertaken and aimed at the furtherance of the rights of minorities to exist, to be treated without discrimination to the preservation of their cultural identity and to their participation in public life. All these rights and values may not be expressly provided under sections 33 and 42 of the Constitution but they are rights and values recognized by our Constitution. For example S1A makes Kenya a democratic and multiparty democracy. The above rights and values are in our view covered by the section. Similarly the principle of non discrimination has the pride of place in Section 82 of the Constitution, the right of association and assembly under s 80 the rights of expression under s 79, the right of conscience under s 78. In interpreting the rights and freedoms, the Constitution should be read as a whole and it is not right for the ECK to have lamented that their scope only extends to s 33 and 42 of the Constitution only. We would like to declare and hold that constitutional rights and especially human rights and freedoms are interdependent and indivisible and their interplay has to be fully reflected in the electoral process and in every field allocated power by the Constitution. The Constitution job holders have a Constitutional mandate to embrace their responsibilities with the above in view while discharging their mandate.

The Minorities and indigenous people include the following.

- ***Religious minorities***
- ***Ethnic minorities***
- ***Linguistic minorities***
- ***Indigenous peoples***

The indigenous peoples contrary to ECK's counsel contention that all the 42 Kenyan tribes are indigenous is contrasted with the indigenous ones having a strong attachment to their culture as opposed to the homogenous ones who have adopted to change with very little attachment to the old ways. The other distinguishing trait is that the indigenous ones are generally minorities.

MINORITIES AND SPECIAL INTEREST

Section 33(1) of the Kenya Constitution states: "there shall be twelve nominated members of the National Assembly appointed by the President following a general election to represent special interests.

Although the Constitution does not define special interests contemplated by section 33(1) they includes those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all – in a democracy. In other words the special interests mean those interests which the normal electioneering process has failed to capture and represent. Thus a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on their own make any difference to the outcome of the election has obviously a special interest in the minority. It is a democratic principle that the minorities should be fully embraced to enable them to become a majority. It is also a vital interest in terms of democracy to protect their rights so that they are never ever overwhelmed by the majority. The minorities empowerment to participate fully in the entire democratic process and the organs of a democratic society achieves even greater integration in terms of vision, programmes and goals whereas on the contrary denying them participation leads to isolation.

Recognition of the indigenous peoples right is expressed in unequivocal terms in International Instruments.

ILO 169 Indigenous Tribal Peoples Convention Articles 3 and 7 provides:

Arts 3

"Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental

freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples."

Art 7

"The peoples concerned shall have the right to decide their priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control to the extent possible, over their economic development. In addition, they shall participate in the formulation implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

And the African Charter on Human and Peoples Rights Articles 19 and 22 declare:

Article 19

"All peoples shall be equal they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

Article 22

"(1) ***All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind***

(2) States shall have the duty, individually or collectively to ensure the exercise of the right to development."

Counsel for the ECK Mr Osando has strongly argued that the case for the applicants is that of tribalising the electoral process. We do not agree. At this time and age even members of the majority communities who are concerned about democracy, long term equity, stability and peace readily accept, that the advancement of all these values largely depend on how the governmental system handles the rights of minorities. It is an issue of justice because the aforesaid values constitute the foundation of justice. All civilized systems of governance must perpetually open all doors to justice.

The other reason why we were alarmed when the ECK sees the issue from tribal lens is that while the majoritarian view must be given top priority even in the allocation of constituencies (as the population is the major criterion) an enlightened society such as ours must recognize the difference and diversities of our nation and therefore encourage integration or mutual accommodation between minority and majority. One would have expected the ECK to have appreciated that it has a Constitutional role in the electoral process to consider the minority interests and indigenous peoples participation without undermining the common values and loyalties that are essential to a cohesive society and a solid nationhood. The cornerstone of nationhood is the ability to achieve cohesiveness in diversity. Fair treatment of minorities is essential to social peace and stability. Special measures to accommodate minorities provide cultural diversity from within, thereby enriching the wider society. The diversity in turn challenges the dominant ideas and values of society. We take the view that this nation is a rainbow democracy of 42 colours and the argument that special recognition of the minority will open the floodgates of minorities is in our view misplaced. The nomination for example of 15 members of Parliament from the minorities can only enrich our democracy and give strength to our diversity by providing the necessary linkages. Any floodgates would be floodgates of inclusion not exclusion. In any event as indicated elsewhere by the Human Rights Committee each case of a minority would have to satisfy an objective criteria and this counters the floodgate argument.

It is in the light of the above that we hold that minorities such as the ILChamus have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. This holding has the backing of the African Charter and other instruments and also SIA of the Constitution especially taking into account that ours is a one Chamber Parliament. We further hold that for a political system to be truly democratic, it

has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Only then would a state or Nation such as ours, truly claim to have passed the democratic audit test as set out elsewhere in this judgment. We find and hold that this is the spirit of section IA of the Constitution. This is what will bring out as eloquently as possible the values and principles contemplated and captured by s 1A of our constitution.

With due respect in this matter we have formed the view that the ECK has not fully grasped its Constitutional role. ECK has viewed the ILChamus claim to representation as a tribal or clan claim. It is not and the Constitution does support their claim. Their claim stems on special interest as a minority under s 33 of the Constitution and as embraced by the community of interest criterion under Section 42 and also and as that of an indigenous and distinct community and on the additional ground of inadequate representation. In a democracy such as ours, representation must of necessity be a major instrument for participation that should enable the voice of a minority group to be heard in official bodies. Participation is the lifeline of democracy.

In our view the process of electing representatives has a mobilising effect on a minority and if the election is properly conducted and they fully believe in it, it reinforces or strengthens their identity and corporate character. To illustrate this point had the ECK come up with proper Constitutional criteria on nomination that identifies the minorities as one of the special interests and availed it to the political parties the political parties would have by now have taken interest in the issue of minorities and they could have nominated from amongst the minorities including the IL Chamus. The reverse process would also have taken root, i.e. the minorities could have seen the party system as an effective tool of representation and the minorities could have identified with a party or parties. The absence of clear constitutional criteria guidelines has greatly contributed to lack of understanding by those who have the power to nominate disregarding or overlooking special interests. The ECK itself appears to have taken a very narrow view of its role both under s33 and s 42 of the Constitution and we are compelled to so declare pursuant to the powers conferred on this Court under s 123 of the Constitution. During the hearing for example the ECK has not demonstrated clarity of thought as regards its role. On the other hand the applicants were able to demonstrate that in the history of nominations under s 33 it is only the blind who were in one of the terms of Parliament represented. No doubt each age will have its fair share of minorities and special interest groups but in our time they include the blind, the deaf, the physically disabled and the youth in addition to the groups identified earlier. We hold that the ECK has a responsibility of identifying all the categories and to ensure that the lists reach the political parties and other organs with the power to appoint under s 33. In our view the current position of letting the parties nominate a candidate of their choice who does not satisfy the constitutional criterion is in our view challengeable and patently unconstitutional. The criteria guidelines would have created incentives for political parties to reach out in terms of appeal to all communities including minorities. Similarly where the ECK deliberately demarcates the constituencies or curves them in a manner that creates a voiceless minority vote – a larger Parliamentary Constituency is also equally unconstitutional. Similarly ignoring the criterion of community of interest when undertaking its task and only taking it into account some of the communities in a particular District or Constituency is equally unconstitutional.

Representation is a clear constitutional recognition of a positive right of the minority – to participate in the State's political process and to influence State policies. The Draft UN Declaration on the Rights of Indigenous Peoples No 169 has said it all in the following words:

"Recognising the aspiration of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identity languages and religions within the framework of the States in which they live."

We would now wish to turn to the position as handled by others including the relevant case law. Here at home we start with that great judgment of Ringera J in the ***NJOYA CASE***. Perhaps we should take the earliest opportunity to respectfully declare that we do not agree with the Judge on his definition of the word "***person***" in the Constitution. Instead we endorse the definition in terms of s 123 of the Constitution which gives standing to corporate and unincorporated associations in respect of the enforcement of some fundamental rights and freedoms and we did demonstrate this departure from **NJOYA** in our earlier

ruling on ***locus standi*** – or standing in this matter. The second aspect where we part ways with the Ringera judgment is on his view on combination of constitutional and judicial review applications. As the main application in the case was a constitutional application in our view even judicial review issues ought to have been ventilated under the umbrella of the constitutional application which should never be fettered under s 84. In addition and by way of analogy there is an expressed although somewhat limited judicial review jurisdiction, both in civil and criminal matters over subordinate courts under s 65(2) of the Constitution. Having observed as above we wish to endorse the illuminating statement, in the Ringera judgment in the ***NJOYA CASE*** appearing at page 206 (letters f to g)

"And what are those values and principles. I would rank Constitutionalism as the most important. The concept of Constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other; none is supreme; the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution – the equality of all citizens, the principle of non- discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those to my mind are the values and the principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."

In adopting or taking a broad and purposeful approach to the Interpretation of the Constitution Justice Ringera did give section 1, 1A and s3 of the Constitution wider meaning than the brevity of the words used namely sovereignty and democracy. In these sections of the Constitution he located the constituent power of the people in these memorable words at page 210:

"In a democracy and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory."

Again at page 214 the learned Judge made the following finding:

"the principle of equality of citizens which is implied in a multi party democratic state (and Kenya is proclaimed as such in Article 1A of the Constitution was not honoured and accordingly the representation of provinces and districts was blatantly discriminatory.

It is also apt for us to reproduce here Justice Ringera's endorsement and our approval of the following holdings and observations of Chief Justice Warren in the United States Case of **REYTONS v SIMMS [377 US 53312 LEd) at pages 506 and 509:**

P506

"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government: and our legislature are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. Weighting the votes of citizens differently, by any method or means merely because of where they happen to reside hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simple minded modes of discrimination."

P 529

"Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of the States legislators. To conclude differently and to sanction minority control of state legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result."

We fully endorse the observation in the **NJOYA *Case*** that to underweigh any citizens vote is to

degrade his citizenship and that minorities of whatever hue and shade are entitled to protection and that representation must be effective. And that what is called for in our society is a balance between the majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process. Naturally the predominant principle of application should be majoritariasm but it is equally correct that accommodating minorities does not entail reversing the democratic equation by having minority dominance in representative forums. Indeed, the ILChamus are not asking for dominance but for effective representation.

In other words the ILChamus seek adequate representation. This cannot be a threat to any of the cherished values of any democracy. On the contrary it adds value and gives true meaning to the democratic ideals.

In our view the ECK in its narrow interpretation has failed to explain or to grasp the true meaning of concepts such as community of interest and adequate representation. As a result they have failed to give proper weight to these factors in determining whether or not to give them a Constituency. It has strongly argued that the ECK has in the past curved constituencies in the District on the basis of community of interest and the population criterion and left the ILChamus, this, in our view violates the principle of equality since the same criteria should have been uniformly applied. The ECK did not counter this in its reply.

The Constitution does not define or fetter the power of ECK to depart from the population criterion and it has set out the criteria for departure. The criteria of adequate representation and the community of interest would in our view justify reasonable departure from the population criterion since the size of the contested area is above average for the area in question. We hold that the narrow view taken by the ECK does not create and enhance the democratic space in terms of adequate and effective representation and we further hold that this spirit is evident in S1A, Sections 33 and 42 of the Constitution. We have endeavoured we hope to inject both flesh and spirit to the sections, in the interpretation we have embraced in this judgment. In our view any representation that does not fully articulate the community of interest corporate character and distinct character of ILChamus, would be inadequate. Their needs and aspirations to be represented taking into account that ours is a one Chamber Parliament. Effective or adequate representation is that which minimizes or eliminates their marginalization in the spirit of Sections 1A and 42 of the Constitution.

CONSTITUTIONAL INTERPRETATION

In this country the preferred method of the interpretation of the constitution is the generous and purposeful approach. However the application of this approach to the concrete situations that come before Constitutional courts is not an easy task. If the courts do not find the task that easy, it seems evident in this case that some of the constitutional organs and Constitutional job holders hardly go beyond the letter of the Constitution. The task before us is based on the contention that the Electoral Commission of Kenya (ECK) has failed to properly discharge its Constitutional responsibilities by misinterpreting or failing to properly understand its Constitutional role under S1A s 33 and s 42 of the Kenya Constitution as they affect the applicants as representatives of the ILChamus who constitute a minority group, and/or are a community of interests and are a special interest as an indigenous people. It is alleged that the ECK has given too much weight to the equality of population criterion in the establishment of electoral Constituencies in the District at the expense of the other constitutional factors and as regards nomination of members of Parliament to represent special interests the ECK has failed to grasp its role, in terms of ensuring that parties who nominate under Section 33 do use the Constitutional criterion of special interest. As a guide we shall use the principle of Constitutional interpretation in these cases:-

(1) *THE STATE v T. MAKWANYANE AND MACHUNU* ***Chaskalson p CCT (S. AFRICA)***

3/94

"Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If

public opinion were to be the decision there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the Constitutionality of capital punishment cannot be referred to a referendum in which the majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

(2) *BOYCE & ANOR v R (BARBADOS)* ***[2004] UKPC 32 07 July 2004 PC Lord Hoffmann.***

"28.

Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedoms from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts what limits on free speech are acceptable, what counts as a fair trial what is a cruel punishment – had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.

The Judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges in giving body and substance to fundamental rights will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to-date. On the contrary, they are applying the language of these provisions of the constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed in their Constitutional context invite and require periodic reexamination of its application to contemporary life"

(3) REYES v THE QUEEN [2002] 2 AC 235 Lord

Binghan of Cornhill ---

"Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to Constitutional provisions protecting human rights. The Court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society."

If we may add our own – the dry bones approach to the interpretation is to be tolerated only where it is evidently and crystal clear that the framers intended to retain the frames only. Otherwise it is the task of the court in each generation to give flesh and spirit to the bones. Section 1A on democracy has flesh and spirit.

Ours is an endeavor to give fresh and to breathe in a positive spirit into this democratic provision of our Country's Constitution.

DEMOCRACY AND ITS MEANING

We have carefully studied the affidavits sworn by Gabriel Mukele, the Vice-Chairman of ECK and Mr S.M. Kivuitu, Chairman of ECK in opposition to the Originating Summons. In this regard, we have taken the contents of the affidavits as ECK's answer to the points raised by the Applicants and a written explanation of how they have interpreted their Constitutional role. We have also taken into account the letter dated 18th November, 2004 written to the political parties by ECK at a meeting convened for the purpose of discussing the increase of Constituencies in the country. The letter is a revelation of the factors the ECK has considered important for the purpose of undertaking its Constitutional task or duties. Thus it has highlighted in the letter the overriding consideration of achieving population equality in the constituencies and it has come up with the population quotient of 136603 people and the average size of a constituency as 2770 sq kilometers 162 constituencies are below the average population and 115 Constituencies are below the average size. The ECK has also mentioned the other constitutional factors that are set out in s 42. It has also quite rightly touched on the practice in other countries and in particular Canada. However in both the affidavits and that important letter there is no mention of Section 33 concerning the nomination of members on the stated constitutional criterion of special interest nor has the ECK defined what special interest means. Even as regard s 33 the ECK seems to take the view that its role is to ensure gender equality only otherwise it has to rubberstamp the nominee of the parliamentary political parties by automatically forwarding their names to the President for appointment.

However since the challenge to the ECK is based on the meaning of democracy and the role of minorities whether or not the ECK has acted in breach of the equal protection provision in the Constitution namely s 70, whether it has violated the applicants rights under s 80, (Freedom of conscience) s 79, (***Freedom of Expression***), whether it has properly considered what adequate and effective representation means; and whether its practice in the past is an acceptable democratic practice as envisaged in s 1A of the Constitution, we consider it important to define what democracy entails under s 1A of the Constitution.

Writing on ***Political Legitimacy and the State, R Barker*** (1990) pp 141-143 has observed:

"It is difficult to determine in any precise way the contribution of elections to the maintenance of legitimacy. By comparing the history of Northern Ireland with that of the rest of the United Kingdom it is clear that the mere fact of elections is not sufficient. If the result is never in any doubt, so that it is not "the people" but always and only a section and that the same section of them which confers consent on governance, then those who feel themselves permanently excluded will also feel no great obligations to the regime. No legitimacy without representation."

While the ECK appears to properly recognize the principle of population equality in the s 42 of Constitution we find that it has not properly appreciated the other factors which necessitate departure from the principle. Our Constitution does in our view go beyond the "***rightness***" of the majority and does specifically recognize the minorities and the need to protect them by for example using the nomination tool under s 33.

To underline the importance of striking a proper balance under Section 33 and 42 a definition of the terms used is critical and for this reason we set out the definitions as under:

Community of Interest

"Common grievance that must be shared by all class members to maintain the class action. Usually a group of similarly placed persons."

Special Interest group

"An organization that is to influence legislation or government policy in favour of a particular interest or issue especially lobbying – also termed special interest!

The meaning of adequate representation will appear in the text of this judgment.

David Beetham in "***Key Principles and Indices for a Democratic Audit in Defining and Measuring Democracy 1994 Ed. Pp 25-30 –*** set out principles and indices of democracy as under:

"Democracy is a political concept, concerning the collectively binding decisions about the rules and policies of a group, association or society. It claims what such decision making should be, and it is realized to the extent that such decision-making actually is, subject to the control of all members of collectivity considered as equals. That is to say, democracy embraces the related principles of popular control and political equality. In small-scale and simple associations people can control collective decision-making directly, through equal rights to vote on law and policy in person. In large and complex associations they typically do so indirectly, for example through appointing representatives to act for them where popular control usually takes the form over decision makers rather than over decision making itself; and typically it requires a complex set of institutions and practices to make the principle effective. Similarly political equality, rather than being realized in an equal say in decision making directly, is realized to the extent that there exists an equality of votes between electors an equal right to stand for public office, an equality in conditions for making ones voice heard and in treatment at the hands of legislators and so on."

These two principles of popular control and political equality form the guiding thread of a democratic audit ... they also provide a standard against which the level of democracy can be assessed."

Bethan has therefore identified several segments for democratic audit as;

- ***Free and fair elections;***
- ***How far each vote is equal in value;***
- ***How far there is equality of opportunity to stand for public office regardless of which section of society a person comes from;***
- ***Open and accountable government;***
- ***Whether individuals or groups are systematically excluded from access to, or influence upon government or redress from it; under civil and political rights or liberties and whether these are effectively guaranteed to all sections of society under a democratic society; the degree of equal opportunity for self organization; access to the media; redress from powerful corporations.***

One may ask why would the applicants want or seek representation by one of their own. What is Parliament? ***Dicey, An Introduction to the Study of the Law of the Constitution 10th*** Edition 1959 to 83 states:

"A Parliament duly elected on the extended franchise represented the most authoritative expression of the will of the nation, and the exercise of public power was channeled through such a Parliament. Parliament also controlled the executive."

In our view ECK's role as regards its Constitutional mandate under s 33 and 42 respectively must be discharged with full realization that both sections deal with constitutional rights as opposed to other rights where there is a discretion. As regards constitutional rights in public authority or a constitutional job holder must have a compelling reason to override it or to decline to enforce it according to the mandate. In this regard we endorse fully Justice Law's observation in the case of ***CHESTER FIELD PLC v SECRETARY OF STATE***(1998) JPC 568 at 578 – 80 where he said:

"In many areas of public discretion, the force to be given to all and any factors which a decision-maker must confront is neutral in the eye of the law; he may make of each what he will, and the law will not interfere because the weight he attributes to any of them is for him and not the court. But where a constitutional right is involved, the law presumes it to carry substantial force. Only another interest,, a public interest, of greater force may override it."

In the case of ***R v LORD SAVILLE*** *ex parte A and others [1999]* 4 ALL ER 860 Lord Woolf (MR) restated the same principle as follows:

"Even the broadest is constrained by the need for there to be countervailing circumstances justifying interference with human rights..."

Thus in a democracy such as Kenya the ECK in making its past decisions under both S 33 and 42 should not have sheltered itself behind any discretionary power or lament that it had no powers to scrutinize or ensure that the nominations under Section 33 meet the criterion of special interest or give give due weight to the consideration of community of interest and adequate representation under s 42. There is no mention at all of special interest or community of interest in the two affidavits or the letter to the parties.

In our view Sections 33 and 42 should be read together with Section 1A of the Constitution and Chapter 5 on the fundamental rights and freedoms.

A multiparty democratic state practices tolerance, fair play and values civil liberties. It has the hallmarks of broadmindness and pluralism. However apart from demonstrating that it has as far as is practicable stuck to the principle of the equality of population under Section 42, it has not shown how it has dealt with the other factors set out in the Section in the establishment of constituencies including the one where the applicants hail from. The concept of democracy is not a static one it must accommodate and embrace the minorities, social outcasts and the down-trodden of each age. It must constantly devise strategies and processes to improve the status of minorities and to protect minority interests and others who cannot effectively have a voice in the competition of the majority in the electoral process and other democratic processes in a democracy. The minorities shall always have a room in democracies and their room should never be shut or emptied just as the concepts of justice and equity shall never be spent.

S.E. Finer in, ***Comparative Government (1970) pp. 63-66*** has expressed the same theme this way:

"But even majority rule is seriously qualified in the liberal democracy ... But being a liberal democracy also implies that the minorities must be given a chance to become a majority; and that means, therefore, that they must be given a chance, status and a means to covert the majority. In order to make this possible, certain guarantees and machinery would have to be established."

In our view the machinery envisaged is like what needs to be done for the minorities under s 33 and 42 of the Constitution. Sir Stephen Sedley in the ***Making and Remaking of the British Constitution (London 1997)*** at page 5 takes the concept of democracy to an even higher plane in this eloquent statement:

"A democracy is more than a state in which power resides in the hands of a majority of elected representatives: it is a state in which individuals and minorities have an assurance of certain basic protections from the majoritarian interest and in which independent courts of law hold the responsibility for interpreting, applying and importantly – supplementing the law laid down by Parliament in the interests of every individual, not merely the represented majority."

In the context of Kenya, we as a Constitutional court have a responsibility in interpreting the Constitution in a manner that protects and enhances the rights of the minorities and other disadvantaged groups and individuals. We believe the ECK as a creature of the Constitution had the same responsibility. The (ECK) cannot fold its hands and say it is a rubber stamp in the nominations under Section 33 – No, it is entitled to define special interests and also issue guidelines to the political and parliamentary parties on the criterion of nomination and also decline to forward to the President any

nominees who do not satisfy the constitutional criterion under Section 33. Similarly it can issue guidelines on how it has in the past complied with the provision of Section 42 as regards minorities and others and what weight it has attached to each of the factors. What meaning has it for example attached to the factor or criterion of community of interest? What considerations led to the establishment of the Constituencies in the former unsplit Baringo District. What informed ECK decision in accommodating the other homogeneous communities in Baringo? Did this method of separate accommodation of the communities dilute the voting power of the ILChamus? Did the past alignment of boundaries reduce their voice? Did it occur to the ECK that a minority in any District in Kenya could still participate in elections as a 5 year ritual and without their votes having any value? What does effective or adequate representation mean under the Constitution?

The above questions do not appear to have informed the decision making by the ECK and this explains why this court must intervene.

ECK'S CONSTITUTIONAL MANDATE

From the letter addressed to the political parties we are certain that the ECK has systematically addressed correctly the principle of equal population in all created constituencies as is practically possible as stipulated although in real life it is difficult to attain mathematical precision. In terms of the explanation of this principle the case of ***WESBERRY v SANDERS 376 USA ed 481***is unrivaled. At page 483 the principle is described as under:

"The fact that it is not possible to draw congressional districts with mathematical precision is no excuse for ignoring the Federal Constitutions plain objective of making equal representation for equal number of people the fundamental goal for the House of Representatives."

In this case the Georgia Districting statute was held by the majority judgment of the Supreme Court to have been invalid as the Fifth Congressional District had a population of 823,680 qualified voters as contrasted with the 394,312 population of the average Georgia congressional District. One of the other districts had slightly over 200,000 qualified voters.

In the case the same principle based on population is stated in different words as follows:

"We do not believe that the Framers of the Constitution intended to permit the same vote diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than another would not only run counter to our fundamental ideas of democratic government. It would cast aside the principle of a House of Representatives elected "by the people" a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution particularly that part relating to the adoption of Art 1 and 2 reveals that those who framed the Constitution meant that, no matter what the mechanics of an election whether state made or by districts it was population which was to be the basis of the House of Representatives."

We believe this is the same principle which is set out in s 42 of the Constitution and as stated herein we salute ECK fidelity to the principle.

However as expressed elsewhere where ECK has misdirected itself on its Constitutional mandate is failure to grasp or to correctly interpret or to properly give proper weighting as regards the other criteria in s 42 which allow departure from the population principle. Because of our uniqueness as a multiethnic and multiparty democracy our position as set out in s 42 allows departure from the population criteria unlike the American position where there are two Houses. The ECK's contention has been that they have discharged their Constitutional responsibility under the section over the years and that their discretion on the departure criteria under Section 42 cannot be challenged in Court. However our finding on this is that whether or not the ECK has adopted the concerned criteria in departing from the population principle or refusal to depart is in our view a justiciable issue under the Constitution and it is not an insulated discretionary power beyond challenge in a Constitutional court because ECK's error could adversely

affect the democratic process of representation. On this point of challenge we endorse the observation made in the ***WESBERRY v SANDERS***at page 486:

"Nothing in the language of Article I gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of the Court to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since the decision in Marbury v Madison 1 Cranch 137 2 Led"

The hallmarks of democracy under section 1A are pluralism, tolerance and broadmindedness. The Section contemplates an open and democratic society based on freedom and equality.

The principle of population equality and the weight of votes can be violated in several ways:

(1) weighting the votes of residents of one part of the country more heavily than those of residents in another part of the country or;

(2) accomplishing the same vote diluting through the devise of constituencies containing widely varied numbers of inhabitants;

(3) refusing as in this case to depart from the population principle even in the face of the existence of a distinct minority that has a substantive community of interest while doing the same in other neighbouring constituencies – in other words failing to determine on the basis of equality and thereby violating the non-discrimination principle;

(4) Failing to consider what adequate representation entails under the Constitution in relation to distinct minorities;

(5) Failing to fully appreciate that in relation to a minority the principle of population equality is hollow because it requires that as nearly as practicable one man's vote in an election must be worth as much as another's. It cannot have the same value when a distinct minority is tucked away in some administrative divisions *vis a vis* ***other divisions with dominant communities who dilute the minority vote proportionally and thereby converting the minority vote to an election ritual that is not adequate or effective because it cannot make any difference to the minority representation and cannot confer on them adequate and effective representation. The Departure criteria under Section 42 is meant to give value and weight to among others minority interest;***

(6) Failing to consider equal protection provisions of the Constitution as impacting on sections 42 including the democratic provision 1A of the Constitution;

(7) Failing to recognize that although the principle of equal weight for each vote is automatically achieved by a direct election of a representative in each constituency to a single Parliament (as contrasted with a two chamber House of Representatives] such an election might lead to domination and denial of representation to minority interests. In a Constituency for example with dominant communities the apportionment of Constituencies on the basis of these dominant communities has the potential of leaving the minority interest in that constituency not adequately represented because such an apportionment does, in our view result in an arbitrary impairment of votes because it is inherently discriminatory – see REYNOD v SIMS 12L ed 506

We are also firm in adding that one reason why we found that the applicants on behalf of the IIchamus had standing is because the right to an effective vote is too important in a free society such a Kenya to be stripped of judicial protection. To affirm this position we would like to borrow from the immortal words of James Wilson of Pennysylvania recorded in the ***WESBERRY v SANDERS*** ***and also the WORDS OF Madison*** in the words of Madison in the same judgment as under:

Wilson

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights even the most basic are illusionary if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

Madison

"Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States."

The Constitution of Kenya provides for electoral equity and justice under the equal provision of the Constitution, the democratic provision clause section 1A of the Constitution and as regards minority interests more eloquently under both s 33 and 42. In our view failure to properly apply all these provisions undermines the electoral and representative justice and the Constitution itself. As this Court has in one or two past decisions held, constitutional rights are in some respects interdependent and indivisible and the violation of one could lead to the automatic violation of others. In the case of human rights the violation of one has a replica effect on the others due to the interdependency and indivisibility. It is the grasp of these constitutional principles which is sadly lacking in the affidavits filed on behalf of the ECK.

There is a duty on the part of ECK to protect minority interests – the principle of one man one vote notwithstanding. In the case of Kenya the protection is expressly provided and the method of achieving it also stipulated. Unlike America the protection does not have to necessarily depend on a judgment of a Constitutional court but there was nothing to stop ECK when in doubt to seek this court's declaration on any point nor is there an obstacle in any Kenyan challenging anything undemocratic under S1A of the Constitution.

FAIR AND EFFECTIVE REPRESENTATION

Under Section 42 our finding is that the ECK has properly demonstrated that it has complied with the population criterion but it has not probed into the qualitative dimension of the other factors justifying departure in the section for example the criterion of community of interests and adequate representation. To demonstrate the importance of proving that the ECK ought to have done more than coming up with a population criterion only we wish to adopt Chief Justice Warren holding in the case of **REYNOLDS v SIMS 377** US 533 565-66 (1964) where he stated

"achieving --- fair and effective representation for all citizens is ... the basic aim of legislative apportionment."

In the context of Kenya in a multi-ethnic society the term "***representation"*** imports or means more than the mere right to cast a vote that will be weighed as heavily as the other votes cast in the election. Thus in drawing boundaries plans minority groups should not be submerged. In addition gerrymandering the drawing of constituency lines so as to dilute the voting power of a minority or other groups is not permissible because the effect of this is to dilute the voting power of a minority by their votes being confined or restricted in one or three ineffective administrative divisions. They cannot have an impact on the choice of a constituency representative. Our Constitution prohibits this in s 42 and further endevours to achieve electoral equity by providing for nominations of minority interests under s 33 of the Constitution. The ECK argument that it has in the past done all that it could do, did not impress us at all. Under s 42 it ought to have struck the balance by properly evaluating the departure criteria expressly set out. Under Section 33 the ECK is not a rubber stamp it had the Constitutional duty to vet the nominees from the parliamentary parties to ensure that each and every nominee answers the description of special interests or that he or she represents special interest including gender. To demonstrate the lack or the misuse of the nomination provision under the very nose of the ECK the applicants have exhibited a newspaper cutting where one of the election candidates in a general election was promised a nomination

under Section 33 if she stood down for another candidate. The candidate was subsequently nominated. The ECK did not deny this.

VOTE DILUTION

In our view the voting power of a minority cannot be ignored under Section IA and Section 42 of the Constitution in apportioning constituencies and ignoring it, is in our view unconstitutional as offending equal protection provision of the Democratic provision of the Constitution and also being discriminatory. Thus in the case of ***GOMILLION v LIGHTFOOT***364 US 339 (1960) the Alabama law contested had redrawn the boundaries of the City of Tuskegee so as to exclude almost all of the city's black population from the City limits. Justice Frankfurther, writing for the Court declared the law unconstitutional using these words:

"When a legislature thus singles out a readily isolated segment of a racial minority for special discrimatory treatment, it violates the Fifth Amendment."

CONCLUSION

The principle of representation for special interest is not merely that persons be nominated by Parliamentary parties but that, the person nominated do represent special interests. It is not that parliamentary parties nominate those who belong to their parties or philosophy of thought, their nominee must represent special interests whether the blind, trade unions, industry, or religious groups.

ILChamus we are told means "***people who see far***" perhaps the words were prophetic because they have sought from a constitutional court, constitutional justice for themselves and implicitly for others in the future. They appear to have looked to the distant future as to what special interests, minority interests, community of interest and adequate representation mean under the Constitution in their quest to firmly define their destiny in the nationhood of Kenya. As a result they have in a humble style, greatly helped in opening up the channels of electoral and constitutional justice including testing and making this court undertake a democratic audit implied by s 1A of the Constitution.

In this task we must add they have in their determined and humble way lived not only for themselves but also for the others by giving meaning to concepts which have no doubt enriched the jurisprudence of this great nation. We salute their enlightened corporate effort.

In conclusion we hold that s 33, and 42 of the constitution must be read together with all the other related provisions in the constitution and in particular Section 1A of the Constitution in order to correctly address the Constitutional objectives values and principles which the framers intended and contemplated.

In the result we grant relief as follows:

(1) ***A declaration that the constitutional machinery for the representation and protection of minorities including the ILChamus community to wit the provision of Section 33 of the Constitution of Kenya has not in the past been implemented as by the Constitution required and the ECK should relook at the provision and as mandated by the Constitution implement the provision as interpreted***.

(2) ***A declaration that in the particular circumstances described to the court the ILChamus community along with others constitutes a special interest as contemplated by the mandatory purposes of Section 33 of the Constitution of Kenya;***

(3) A declaration that parliamentary parties nominating persons to be appointed as Nominated Members under Section 33 of the Constitution of Kenya, should note the meaning of special interest as defined and in exercise of their constitutional mandate in future nominate on the basis of the criterion of special interests. Subject to the usual party enrolment requirements it is hereby declared that minority groups and all the other minority interests including the ILChamus do constitute such a special interest for the purpose of nomination;

(4) A declaration that the ECK is constitutionally empowered to vet the party nominations to ensure compliance with the special interest criterion and gender equality before transmitting the names for appointment by the President;

(5) A direction that the Electoral Commission of Kenya at its next Boundary Review do take into account all the requirements set out in Section 42, of the Constitution of Kenya and in particular the need to ensure adequate representation of sparsely – populated rural areas, population trends, and community of interest, including those of minorities especially the ILChamus of Baringo Central Constituency. In the event of any future constituencies being created by an Act of Parliament or any other review being undertaken the ILChamus claim be processed by the ECK with the defined criteria herein in view. In this regard we declare that reasonable departures from the population and size quotients are constitutionally valid whether below or above provided the apportionment is based on the criteria set out in Section 42 and the democratic provision of Section 1A of the Constitution.

(6) We make no order as to costs the ECK having correctly addressed the population criterion and the size.

DATED and delivered at Nairobi this 18th day of December, 2006.

……
J.G. NYAMU

JUDGE
……..
M.J. ANYARA EMUKULE
JUDGE