REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO.82 OF 2004 (OS)
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTION 84 OF THE CONSTITUTION

AND

IN THE MATTER OF CONSTITUTIONAL REVIEW UNDER SECTION 3 AND 123 (8) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA REVIEW ACT CHAPTER 3A OF THE LAWS OF KENYA

BETWEEN

REV. DR. TIMOTHY M. NJOYA

KEPTA OMBATI

JOSEPH WAMBUGU GAITA

SOPHIE O. OCHIENG ……...…….. APPLICANTS

MUCHEMI GITAHI

NDUNG'U WAINAINA

VERSUS

THE HON. ATTORNEY – GENERAL……...……..1ST RESPONDENT

THE CONSTITUTION OF KENYA

REVIEW COMMISSION……..…….2ND RESPONDENT

KIRIRO WA NGUGI……..……3RD RESPONDENT

KOITAMET OLE KINA……..……...4TH RESPONDENT

MUSLIM CONSULTATIVE COUNCIL …….. 1ST INTERESTED PARTY

CHAMBERS OF JUSTICE ……..…….. 2ND INTERESTED PARTY

LAW SOCIETY OF KENYA ……..…… AMICUS CURIAE

JUDGMENT

Introduction

The above application came before this court (Ringera, J., Kubo, J, and Kasango, Ag. J.) by way of Originating Summons.

The background to the application is well set out in that ruling the judgment of brother Ringera, J and I find no need to repeat it here.

This is an important case without a precedent in our jurisdiction as, to the best of my knowledge, the question of how the making of a **new** Constitution should be undertaken has not come before the Kenyan courts for judicial adjudication before. I, therefore, consider it to be in the interests of the development of our jurisprudence to address the issues before this court in a fair amount of detail.

Perhaps I should also record that initially there were eight applicants in this application. However, at the start of the hearing of the application on 16.02.04, Munir M. Mazrui, who was second applicant, applied to be struck out of the application. The court allowed his application and struck him out of the proceedings and from then on the application was prosecuted by the seven applicants named above.

There were also applications by Kiriro Wa Ngugi and Koitamet Ole Kina, delegates at the Naitonal Constitutional Conference, to be joined as parties to the proceedings. The court allowed those applications and Kiriro Wa Ngugi and Koitamet Ole Kina were joined as Third and Fourth Respondents, respectively.

Additionally, there were applications by the Muslim Consultative Council and the Chambers of Justice to be joined in the proceedings as interested parties. The court allowed the said applications and the Muslim Consultative Council and the Chambers of Justice were joined as First and Second Interested Parties, respectively.

Finally, the Law Society of Kenya applied to participate in the proceedings as amicus curiae (a friend of the court). The court allowed the application and the Law Society of Kenya appeared ***amicus curiae***.

Also deserving to be recorded here is the fact that the application originally contained 19 prayers. There was a preliminary objection by the 2nd Respondent to the application being entertained by the court. This court upheld the preliminary objection in part and refused the bulk of the applicants' prayers at the preliminary stage. As a result, only substantive prayers 1, 3, 7, 9, 12, 14 and 17 survived to be heard and determined on merit. These are the prayers subject matter of this judgment.

Prayers 1, 3 and 12 have a thematic link as in essence they raise the issue of **constituent power or right** of the people including the applicants to be involved in constitution making. I shall address the three prayers together. Prayers 7 and 14 also have a thematic link in that their basic complaint is that the applicants have been discriminated against and denied their right of involvement in the constitution

making process. I shall likewise deal with these two prayers together. As regards prayer 9, the applicants contend in it that section 28 (3) and (4) of the Constitution of Kenya Review Act (Cap. 3A) is inconsistent with section 47 of the Constitution of Kenya and, therefore, null and void. I shall address this prayer separately. By prayer 17, the applicants in effect seek an injunction for the National Constitutional Conference, which at the time of the application was being held at the Bomas of Kenya in Nairobi, to be stopped for six months. I shall also deal with this prayer separately.

The last prayer in the application, i.e, prayer 19, is contingent upon the applicants' application succeeding. Naturally, a decision on this prayer will largely depend on the outcome of the application.

The ensuing paragraphs are devoted to examination of the surviving prayers, either in combination or singly, as indicated above.

Prayers 1, 3 and 12

Under prayers 1, 3 and 12 the applicants sought the following orders:-

> 1. THAT a declaration be and is hereby issued declaring that section 26 (7) and 27 (1) (b) of the Constitution of Kenya Review Act transgresses, dilutes and vitiates the **constituent power of the people** of Kenya including the Applicants to adopt a new constitution which is embodied in section 3 of the Constitution of Kenya Review Act.
>
> 3. THAT a declaration be and is hereby issued declaring that subsection (5), (6) and (7) of section 27 are unconstitutional to the extent that they convert the Applicants' right to have a **referendum** as one of the organs of reviewing the Kenya Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference.
>
> 12. THAT a declaration be and is hereby issued declaring that the constitution gives every person in Kenya an equal right to review the constitution which rights (sic) embodies the right to participate in writing and ratifying the constitution through **a constituent assembly or national referendum.**

Representation of the parties to these proceedings was as follows: The Applicants were represented by Mr. Kibe Mungai assisted by Mr. Kinoti Mbobua; the First Respondent was represented by Miss Muthoni Kimani assisted by Miss Wanjiku Mbiyu; the Second Respondent was represented by Mr. George Oraro assisted by Mr. John Ougo; the Third and Fourth Respondents appeared in person; the First and Second Interested Parties were represented by Mr. Ababu Namwamba assisted by Miss Eunice Kagure Nyutu; while the Law Society of Kenya, which participated as amicus curiae, was represented by Mr. Haroun Ndubi assisted by Mark Oloo.

Learned Counsel for the applicants made lengthy submissions and referred to many court decisions and other types of literature on constitutionalism from Kenya and outside Kenya. The 2nd respondent also cited a number of authorities. All authorities referred to by them were of persuasive authority but not binding on this court. They were of great assistance to the court in clarifying various issues arising from the application. I did not find it feasible or necessary to make specific reference to each and every one of them. I have, however, borne them in mind in writing this judgment.

As observed earlier, applicants' counsel's submissions were lengthy. I shall here attempt to make only a summary of them in so far as prayers 1, 3 and 12 are concerned as follows:-

Prayer 1

a) That whereas the concept of **constituent power** is not defined anywhere in the current constitution ("the constitution") or anywhere else in Kenya Laws, such power is always vested in the people through a **constituent assembly or referendum**. In support of this submission, he referred to the Indian case of **Kesavananda vs State of Kerala**, AIR 1973 Supreme Court 1461 (V 60 C 333) and also to **Presidentialism in Commonwealth Africa** by B.O. Nwabueze.

b) That constituent power is a primordial power, i.e. it pre-exists a constitution and it has to be exercised through a constituent assembly and/or a referendum.

c) That a referendum is an additional organ which does not substitute a constituent assembly and that the constituent assembly precedes the referendum.

d) That the applicants conceded that a constituent assembly may have unelected persons as its members for the basic reason that constitution making is a complex affair. For that reason people who understand public affairs may be required to lend their expertise to the process. Further, that in every modern society there are interest groups and minorities who may not be able to secure representation by way of election and yet they must be facilitated to present their views. However, he contended that it is an essential feature of a constituent assembly that the bulk of its members must have the mandate of the people to make a constitution and that the constituent assembly is so described because it exercises sovereign power.

e) That the National Constitutional Conference (NCC) fails the test of a constituent assembly firstly because it did not have a single member with a direct mandate from the people to make a constitution; and secondly because at the end of its deliberations NCC will have to submit a Draft Bill to Parliament, which means the NCC is not a **sovereign** assembly: He emphasized that in his view sovereignty is a residual power vested in the people and submitted that in Kenya it is located in sections 1, 1A and 3 of the Constitution and that the legislative power vested in Parliament under sections 30 and 47 is limited to mere amendments and not making or adopting a new Constitution.

f) That the current Constitution is traceable to the British Kenya Independence Act and that in countries which sought to legitimize such constitutions there was recourse to the people but Kenya never did this. For that reason applicants' counsel submitted that Kenya's Constitution is not home-grown.

g) Applicant's counsel added that amendments to the Constitution received by way of the British Kenya Independence Order in Council 1963, including the first amendment in 1964 declaring Kenya a Republic, were done by Kenya's elected leaders in the name of the people without the people being consulted. Counsel referred to an extract appearing at pages 1258 – 1278 in Volume 2 of the affidavit of Patrick Loch Otieno Lumumba, Secretary to the Constitution of Kenya Review Commission (CKRC). This is an extract of chapter 3 of a book entitled **Public Law and Political Change in Kenya – A Study of the Legal Framework of Government from Colonial Times to the Present**, authored by Y.P. Ghai and J.P.W.B. McAuslan and published in 1970 (Y.P. Ghai happens to be now the Chairman of the CKRC). In applicants' counsel's view, the upshot of that chapter is that the clamour for constitutional review sprang from discontent with the present constitution which he (applicants' counsel) contended has been amended several times, beyond recognition, by Parliament in accordance with its powers under section 47 of the constitution. Counsel submitted that the said discontent is the very reason for the long statement in the Constitution of Kenya Review Act (Cap 3A) and that the stated object of the Act properly captures the desire of Kenyans to be involved in constitutional review. He conceded that Cap 3A is a good attempt to provide a legal mechanism for Kenyans to exercise their constituent power but complained that it is not properly anchored in the constitution. For the record, the long title to the Act states:

"An Act of Parliament to facilitate the comprehensive review of the constitution by the people of Kenya, and for connected purposes."

Applicants' counsel contended that the Act erred in vesting responsibility on Parliament to enact a new constitution as parliament does not have such power and that, therefore, sections 26 (7) and 27 (1) (b) of Cap 3A transgress, dilute and vitiate the constituent power of the Kenyan people.

h) Applicants' counsel acknowledged that the most important work of the review process at the NCC was to come up with a Draft Constitution and that this task was fully discharged. He observed that under section 27 (1) (b) the NCC was to discuss, debate, amend and adopt CKRC Report and Draft Bill. However, he noted that details of the decision – making process at the NCC was governed by the Constitution of Kenya Review (National Constitutional Conference) (Procedure)

Regulations, 2003 which in his view did not give delegates sufficient scope to discuss the CKRC Report and Draft Bill adequately. In this connection, he referred to regulations 18 – 21 and rules 16 – 20 in the second schedule to the regulations. He read out regulations 20 and 21 with particular emphasis on regulation 20 (3) which provides:

"20. (3) At the consideration stage, the debate at the conference shall be confined to the Commission's Report and Draft Bill only."

He criticized the regulation as being restrictive by confining debate only to CKRC's Report and Draft Bill. He also castigated rule 19 in the second schedule which provides:

"19. Any amendment to the Draft Bill shall be within the scope of the subject matter of the Bill."

Counsel contended that this is yet a further curtailment of meaningful debate at the NCC. All the foregoing, applicants' counsel submitted, dilutes and vitiates the people's constituent power.

Applicants' counsel urged the court to issue the declaration sought in prayer 1.

Prayer 3

Under this prayer applicants' counsel made the following submissions:-

a) That subsections (5), (6) and (7) of section 27 of cap 3A are unconstitutional in that they make the people's right to a referendum contingent upon absence of consensus at the NCC while section 4 (1) (d) makes referendum one of the organs of the constitutional review process.

b) That the only way section 4 (1) (d) can hold a genuine promise of a referendum is if the subsections provide for a mandatory referendum.

c) That under section 4 (1) (d) the NCC is one of the organs of review just as referendum also is and that one organ of review (referendum) can't depend on the wish of another (NCC).

d) That subsections (5) and (6) in reality make it absolutely impossible to have a 2/3 majority at NCC in order to get a referendum.

e) That before August, 2002 amendment of Cap 3A, the voting majority was 2/3 of all NCC members but the amendment reduced the majority to 2/3 of members present and voting. I his view the effect of this new voting majority requirement is to diminish the legitimacy of the Draft Bill to come out of the NCC process, especially as, in the applicants' contention, the NCC is already not sufficiently representative of Kenyans even if all the 629 delegates are present.

f) That the referendum is a cardinal rule for constitutional amendment and also for constitution making. In this regard he referred to the **Blackwell Encyclopaedia of Political Science** which defines "referendum" as a device of direct democracy by which the electorate can pronounce upon some public measure put to it by a government, or, in the case of sovereignty, by an international organization. According to that dictionary, a referendum is sometimes called a plebiscite.

g) After referring to the above dictionary, applicants' counsel made the following points:-

i. That where questions of sovereignty are to be decided, a referendum is an important constitutional device for legitimizing a constitutional process.

ii. That it is a practice in virtually every modern democracy to make use of a referendum for important public decisions.

He said that in Kenya's Independence Constitution there was a provision for contingent referendum

in the sense that the Senate and the House of Representatives could not pass a constitutional amendment save via a referendum. He submitted that if a referendum is important for a constitutional amendment, it is even more important for purposes of adopting a new constitution.

Applicants' counsel urged the court to find that the order sought in prayer 3 should issue.

Prayer 12

Applicants' counsel pointed out that he had dealt with much of this prayer while addressing earlier prayers. He submitted by way of emphasis:-

a) That the applicants contend they have equal right with every other Kenyan to review and ratify the constitution **through a constituent assembly and/or referendum.**

b) That in his view a constituent assembly representing the citizens is mandatory; that its purpose is to discuss constitutional proposals and adopt a new Constitution; and that it may also ratify the Constitution if the debate at that assembly is not acrimonious. He added a rider that if the debate at such assembly is acrimonious, a referendum is a must. He said that in the applicants' view the deliberations at the NCC were acrimonious, which necessitates a referendum. In this regard he referred to **Presidentialism in CommonWealth Africa** (chapter 13) by B.O Nwabueze to make the following points:-

i. That legitimacy of a new constitution depends on popular consultations on and approval of constitutional proposals.

ii. That the debating of those proposals should take place in a representative constituent assembly specifically convened for the purpose.

iii. That the existing Constitution does not give parliament mandate to debate and enact a new Constitution since its mandate is to govern in accordance with the existing Constitution

iv. That as long as Kenya is a democracy, the referendum is a critical organ for making and adopting a constitution and must be held as mandatory for the purpose.

Applicants' counsel urged the court to grant prayer 12.

Learned counsel for the 2nd Respondent took the lead and responded to the applicants' submissions first. He said he strenuously opposed the applicants' application in its entirety. In this regard he pointed out that the 2nd respondent had filed a replying affidavit on 16.02.04 through its secretary, Patrick Loch Otieno Lumumba and he relied on that affidavit.

By way of introduction the 2nd respondent's counsel submitted that it is a cardinal principle of interpretation of any statutory instrument including a constitution that words used therein must be given their natural and ordinary meaning in order to determine the intention of the legislature.

For this proposition he relied principally on **Republic vs EI Mann** [1969] EA 357. That was an appeal to a 3 – judge bench of the High Court of Kenya (Mwendwa, C.J., Farrel and Chanan Singh, J.J., as they then were) from the criminal proceedings of a subordinate court under the then Exchange Control Act (Cap113). The facts are not relevant here. The short point which arose for the determination of that court was whether the then section 21 (7) of the Constitution providing that "No person who is tried for a criminal offence shall be compelled to give evidence at his trial" should be given a liberal or an extended construction. The court said it had "reached a clear and definite conclusion based on what appears to us to be the clear words of the subsection and requiring little or no authority in its support."

The High Court in the El Mann appeal noted that counsel for both sides were in substantial agreement as to the principles of construction to be applied and each of them referred to the same passage in Craies on Statute Law (6th Edn.) which read as follows: "The cardinal rule for the construction of Acts of

Parliament is that they should be construed according to the intention expressed in the Acts themselves. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, (emphasis added) has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view."

Their Lordships noted that the passage came from Lord Blackburn in **Direct United States Cable Co. vs The Anglo – American Telegraph Co**., 2 A.C. 394 decided in 1877 and that the passage continued:

"In Barnes vs Jarvis, [1953] I WLR 649 Lord Godard, C.J. said: 'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.' If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law-giver. Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.'"

It was noted by the court in the EI mann appeal that the opposing sides cited the same passage as a basis for their respective cases but laid different emphasis. Counsel for EI Mann invited the court to apply a more liberal construction to a constitution than should be adopted in relation to an ordinary enactment of the legislature while counsel for the Republic contended that the same canons of construction should apply to a constitution as to any other enactment of the legislature. The court adopted the dictum of Das, J. in the Indian case of **Keshava Menon vs State of Bombay**, [1951] SCR 228 as follows:

"An argument founded on what is claimed to be the spirit of the constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a court of law has to gather the spirit of the constitution from the language of the constitution. What one may believe or think to be the spirit of the constitution cannot prevail if the language of the constitution does not support that view."

Their Lordships said they did not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect they were satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. The court added that it is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words.

Counsel for the 2nd respondent in the present case invited this court to follow the EI Mann doctrine in interpreting the subject provisions of the constitution of Kenya as the words used therein are in counsel's opinion clear and unambiguous. He disagreed with applicants' counsel's contention that in sections 1,1A, 3 and 47 of the constitution lies the constitution power of Kenyans. The 2nd respondents' counsel submitted that in a constitutional application like the present, the starting point is the existing constitution. That every submission from the parties must be founded squarely on the constitution as it is the benchmark. If a statutory provision offends the constitution, the court is duty bound to declare it unconstitutional; and it is incumbent upon any person claiming unconstitutionality of a statutory provision to identify clearly the constitutional provision contravened as well as the offending statutory provision. He submitted that there is no room for implications and inferences where the words of the constitution are precise and unambiguous. He said he would deal with prayers 1, 3 and 12 together; prayers 7 and 14 together; prayer 9 separately; and prayer 17 also separately.

Prayer 1

The 2nd respondent's Counsel pointed out that the gist of this prayer is that section 26 (7) and 27 (1) (b) of Cap 3A vitiates the constituent power of the people of Kenya including the applicants to adopt a new constitution and that the said power is embodied in section 3 of the same cap 3A. He noted that section 26 (7) simply provides for the CKRC to compile its report together with a summary of its recommendations and on the basis thereof to draft a Bill to alter the constitution. That section 27 (1) (b) simply provides that after the CKRC complies its report and prepares a Draft Bill and publishes the Bill,

the CKRC should convene the NCC for discussion, debate, amendment and adoption of the CKRC Report and Draft Bill. In counsel's view, the notion of constituent power does not come into these subsections at all and that to read such notion into them is to indulge in speculation and inference which has no room in interpreting the said subsections. Counsel also wondered whether in referring to section 3 of cap 3A, the applicants might have intended to refer to section 3 of the Constitution. He noted that section 3 of the Constitution is a declaration of the supremacy of the Constitution and that the clear words of the section simply reiterate the universal and acclaimed supremacy of the constitution. He submitted that even if the applicants intended to refer to section 3 of the constitution the section has nothing to do with what is contemplated in sections 26 (7) and 27(1) (b) as urged in prayer 1.

The 2nd respondent's counsel urged the court to find that "this fanciful notion" of constituent power of the people cannot and should not be read into the clear words of section 3 of the constitution.

Prayers 3 and 12

These prayers revolve around referendum and constituent assembly as organs contended by the applicants to be critical for legitimization of a new constitution. The 2nd respondents' counsel noted the applicants' counsel's submission that for a constitution to be legitimate, it must be a product of a constituent assembly and that it must also be subjected to a referendum which the applicants maintained is the ultimate mark of a people-accepted constitution. The 2nd respondent's counsel acknowledged that the concepts of constituent assembly and referendum are good philosophical concepts worthy of being aspired to but hastened to add that that is not what is before the court, i.e. that all the 30 million Kenyans should make the constitution. He submitted that what is before the court is whether failure to subject the product of the NCC held at the Bomas of Kenya to a constituent assembly and referendum as perceived by the applicants is unconstitutional. In counsel's view, to be able to determine this question, the court has to look at the existing constitution. He submitted that there is no section of the constitution providing for a constituent assembly or that the Bomas product must go through a referendum. So if that product is not subjected to a constituent assembly or referendum, there is nothing unconstitutional about it. He emphasized that the duty of the court is to declare the law as it stands today and that unlike the Indian situation alluded to via applicants' counsel's reference to the Kesavananda case, there is no reference in the Kenyan Constitution to constituent assembly, or referendum. He urged that since constituent power of the people and referendum are not rights protected by the constitution, failing to practise them does not render the Bomas constitutional review process unconstitutional.

Regarding the applicants' argument that constituent power resides in sections 1 and 1A of the constitution, the 2nd respondent's counsel submitted that the reference in section 1 to Kenya as a sovereign Republic simply means that Kenya will not be subject to control by any outside body and will be responsible for its own government. Similarly that the reference in section 1A to Kenya being a multi-party democratic state simply means that Kenya will have more than one political parties. He urged that we should not read our own wishes into these provisions.

As to the applicants' argument that a constitution can acquire legitimacy only if it is a product of a constituent assembly, the 2nd respondent's counsel noted that the current Constitution is not the product of the pre-condition of a constituent assembly, yet its legitimacy is not in doubt. He added that it is a product of negotiations between people who said they were representatives of the people of Kenya and the British and that the said people's representatives were not elected for the purpose of a constituent assembly. So, if a constitution can only be legitimate if a product of a constituent assembly, then even the existing constitution would be illegitimate, yet even the applicants are not challenging the legitimacy of the present constitution. The flip side, argued the 2nd respondent's counsel, is that if the court finds that the constituent power of the people is embodied in the constitution, the court should find that such power can and is often exercised by representation. He cited the 1964 amendment to Kenya's Independence constitution declaring Kenya a Republic as the best example of the exercise of such power by representation.

The 2nd respondent's counsel cited Ghana as another such example where Parliament converted itself into a constituent assembly and enacted the country's constitution. He argued that the authority to do so

reposed in the Ghana Parliament, not because of the name "constituent assembly" but because the parliamentarians were representatives of the people; and the constitution was legitimate as the people had spoken through their representatives and the constitution was accepted without any referendum.

The 2nd respondent's counsel also cited the 1966 Uganda Constitution as a further example of a constitution which did not come into being through what he termed as "the fanciful notion" floated by the applicants but through a revoluntion, yet the court found it legitimate: see **Uganda vs Commissioner of Prisons, Ex-parte Matovu** [1966] EA 514.

On the Bomas process, the 2nd respondent submitted that it allowed the people of Kenya to exercise the so-called constituent power both directly and by representation. That the 2nd respondent provided Kenyans with the opportunity to express their view on the constitution they wished to have. In this regard he referred to paragraphs 4, 5 and 6 in voluime 1 of Lumumba's affidavit to the effect that the 2nd respondent organized constituency constitutional forums in the Republic and facilitated other forums at which all persons who were so minded gave their views on the review process. Also that the 2nd respondent facilitated numerous forums for civic education to stimulate public discussion and awareness on constitutional issues; conducted studies and evaluations of other constitutions and other constitutional systems which could inform the people on the review process; and that people who wished to express their views had the opportunity to do so. That thereafter the 2nd respondent went through the meticulous process of collecting and collating the peoples views and in preparing a Bill to go to parliament which, in the 2nd respondent's view, is the ultimate source of exercise of constituent power by representation. The 2nd respondent's counsel submitted that Parliament has such power and that the applicants had acknowledged this when they noted that the Independence constitution had been amended thirty-eight times by Parliament "beyond recognition".

The 2nd respondent's counsel also drew attention to the 1969 amendment to the Kenya Constitution vide Act No.5 of 1969 (page 996 of volume 2 in Lumumba;s affidavit),: that the amendment passed through Parliament by way of subsidiary legislation; that there was no constituent assembly or referendum; yet the constitution was drastically changed by Parliament in exercise of constituent power by representation; and that this was legitimate exercise of such power.

Responding to applicant's counsel's contention that the power reposed in Parliament under section 47 of the constitution is limited to mere amendment not repeal of the constitution and replacing it, the 2nd respondent's counsel referred to the definition provisions in sections 47 (6) (b) and 123 (9) (b). In 2nd respondent's view, the word "re-enactment" in the definition of "alter" in section 47 (6) (b) as read with section 123 (9) (b) which provides that words in the singular shall include the plural mean that the constitution in its entirety can be reenacted by parliament and that re-enactment means a new constitution can come in lieu of the existing constitution. In 2nd respondent's counsel's view, the words of sections 47 (6) (b) and 123 (9) (b) are precise, clear and unambiguous and they empower Parliament to re-enact the entire constitution and replace it with another. Counsel invited this court not to follow the Indian case of Kesavananda heavily relied on by applicant's counsel as the limitation doctrine enunciated in that case is not embodied in the Kenya Constitution. The 2nd respondents' counsel invited the court to follow the Singapore case of **Teo Soh Lung vs Minister for Home Affairs** [1990] LRC 490 in which the Kesavanda doctrine was considered and departed from. The gist of Lung's case is that if makers of the constitution intended to limit power to amend the constitution or change and replace it with another, parliament would have said so. The 2nd respondent's counsel submitted that the Kenya Constitution has not so provided and there is no limitation on Parliament's power to change or replace the constitution.

The 2nd respondent's counsel drew attention to sections 30 and 47 of the constitution and submitted that legislative power is vested in Parliament thereunder and not in anyone else. That Parliament has power in law to provide a mechanism on how a Bill to amend or change the constitution may be prepared; that this is what it has done by enacting cap 3A and that there is nothing unconstitutional in parliament so providing. Counsel asked the court to take judicial notice of the fact that Kenyans have agitated for a long time for a comprehensive review of the constitution; that Parliament has responded to the agitation through cap 3A; and that this was a legitimate exercise of parliament's legislative power under section 30 of the constitution.

In conclusion of this part relating to prayers 2 and 3, the 2nd respondent's counsel alluded to the Blackwell Encyclopaedia of Political Science referred to by applicants' counsel and noted from it that five major democracies, i,e. India, Israel, Japan, the Netherlands and the USA had not used a referendum. He posed: If major democracies have not subjected their constitutions to referendum, are their constitutions illegitimate? He answered the question in the negative. In answer to the applicants' complaint that cap 3A only provides for a contingent referendum and that their right under section 4 to a referendum is diluted by making it contingent under the section 27 (5), (6) and (7), the 2nd respondent's counsel submitted that there is no such right under the constitution and as such the provision of a contingent right to a referendum in the said section 27 (5), (6) and (7) of cap 3A cannot be unconstitutional. There is no right to a referendum, contingent or mandatory, under the current constitution, argued the 2nd respondent's counsel, and therefore no such perceived right is capable of being violated. Neither is there a right for every Kenyan to write the constitution.

The 2nd respondent's counsel urged that the court should not grant the orders sought in prayers 1, 3 and 12.

Learned counsel for the 1st respondent associated associated herself with the submissions of the 2nd respondents' counsel on prayers 1,3 amd 12.

The 3rd respondent, a delegate at Bomas, endorsed the legalistic approach adopted by the lawyers. He noted that the applicants accepted that the consultative process ushered in by cap 3A in developing a new constitution is a good attempt. He urged in essence that there can be no perfect system and that the good attempt should be allowed to continue to its logical conclusion. Regarding prayer 3, in which the applicants complain that their right to a referendum has been reduced to a hollow right, the 3rd respondent pointed out that a delegate at Bomas can abandon a hard stance on an issue and go along with other delgates or he can persuade other delegates to have a particular issue referred to a referendum. He too urged that prayers 1, 3 and 12 should not be granted.

Learned counsel for the 1st and 2nd interested parties said he relied on the affidavits of Abdulrahman Mirimo Wandati and Eunice kagure Nyutu. In the view of counsel for the 1st and 2nd interested parties, only one premise must inform the court's judgment in this matter, i.e. the law as it is. He asked the court to uphold the EI Mann doctrine of interpretation. He acknowledged that sovereighty remains with the people but that it is not exercisable in a vacuum. It is exercised through state organs, e.g. Parliament. Not every Kenyan can pertake of constitution making. He noted that there is no express constitutional provision for exercise of sovereign power by the people in constitution making and that you cannot be denied that which does not belong to you. Exercise of sovereign power of constitution making through Parliament may not be the best but it is the law. Ideals expressed by applicants can't inform this court in its judgment. There are many paths to constitution making and each country chooses its own. Kenya has at the moment chosen the Parliamentary path. It was open to Parliament to provide a mechanism for the people's involvement in assisting it with its legislative mandate, hence the enactment of cap 3A. He submitted that prayers 1,3 and 12 cannot stand. However, he commended the applicants for giving the court an opportunity for laying to rest the ghost of uncertainty about section 47 of the constitution. He submitted that this section gives Parliament unlimited power to amend the constitution and re-enact it. The legal framework Kenya has may not be perfect but it is the law and it should prevail. He urged that prayers 1, 3 and 12 should not be granted.

In reply, applicants' counsel reiterated his earlier submissions and responded mainly to the 2nd respondent's counsel's submissions. He agreed that whatever Judgment the court gives in this application, it will be a watershed in Kenya's jurisprudence. He invited the court to depart from the EI Mann doctrine of interpretation and follow the interpretation in the case of a later constitutional court in **High Court Criminal Application No.39 of 2000, Crispus Karanja Njogu vs Attorney – General (unreported).**

The constitutional issue which arose in the karanja case was whether the Attorney-General or his agents are vested with absolute powers under section 26(3) of the constitution and section 82 of the Criminal procedure Code (Cap 75) to enter a Nole Prosequi. The constitutional court (Oguk, Etyang and Rawal, J.J.) considered the EI Mann case and stated, inter alia, as follows:

"We do not accept the proposition that a constitution ought to be read and interpretated in the same way as an Act of Parliament. The constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. When an Act of Parliament is in any way inconsistent with the constitution, the Act of Parliamen t, to the extent of the inconsistency, becomes void. It gives way to the constitution. It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspi rations of the people. The court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it; that a constitution is a living piece of legislation. It is a living document."

Applicants' counsel reiterated that the constitution has to be interpreted sui generis (of its own kind; unique; in a class by itself). He also invited this court not to follow Lung's case which in his view was based on a restricted interpretation. Applicants' counsel reiterated his submission that prayers 1, 3 and 12 be granted.

The Law Society of Kenya, as amicus curiae, had the last word. Learned counsel for the Society re-echoed the view that this is a very important case in the history of Kenya as critical issues of constitutionalism are before the court. That the court's decision, whichever way it goes, will be very important. He saw the broad issues for the court's determination as follows:-

a) Constituent power of the people.

b) Where constituent power is located.

c) Whether constituent power needs to be reduced into written text.

d) How constituent power manifests itself in the law.

e) Relatedly, the concept of referendum and whether it is the only way for constituent power to be manifested.

f) Question of representative democracy (captured in the context of discrimination, i.e. inequality vis-à-vis equity).

g) Meaning of injunction in a matter like this.

As regards constituent power, council for the Law Society of Kenya reiterated his submission during the preliminary objection, i.e that constituent power is collective power of the people to express their will. It pre-exists any written law or constitution. It exists whether or not the people or authorities recognize or acknowledge it. The struggle for Kenya's independence was a manifestation of the people's constituent power. It did not matter that the English law being amended to remove dominion status was superfluous. The people's constituent power had been exercised by the people's struggle. The amendment was acknowledging the sovereignty of Kenya.

Constituent power need not be written or textualised. When looking at the supremacy of the constitution, the court should bear in mind that the constitution as a document is a writing of the will of the people, i.e. their constituent authority. The constitution itself is fundamentally subject to the will of the people, i.e. the constituent authority.

A constitution cannot in its body contain a death wish clause. It would be vulnerable once such clause is inserted. That is why makers of the current constitution provided for alteration or amendment in section 47 (6) (b). In Law Society's counsel's view, alteration includes total replacement of the constitution and that section 47 (6) (b) was written in this manner to prevent abuse from time to time. You can replace the constitution at once over a period of time. The section is written in a manner which seems limited to avoid abuse. It would be dangerous if it was express. The political and legal processes leading to cap 3A are a continued expression of the constituent power of the people.

Cap 3A was enacted to provide a consultative mechanism for alteration of the constitution. Applicants are asking for replacement of the constitution by a mechanism they have not proposed. The reference to referendum is only intended to check if the people's wishes have been textualised as they proposed. This is not a constitution making process.

Applicants have also proposed another process, i.e., constituent assembly, which they say is more democratic. A constituent assembly is just one method. Both the constituent assembly and referendum are important and attractive processes but they are not the only ones. There may be need for legislation to provide for them if that route is chosen. If the court issues the orders sought in this regard, it would be proposing legislation and thereby enter into the realm legislation which is outside the court's jurisdiction. The court in the Michuki case resisted the temptation to get involved in the realm of legislation on district boundaries.

If the court in the present case grant the orders sought, it would be entering into the realm of supervision of Parliament. Despite any weakness section 27 of cap 3A may have, the Act is nevertheless a good law that would lead to a good constitution. You can't have a perfect constitution at any one time, however foresighted you are. Counsel for the Law Society of Kenya associated himself with the submissions of counsel for the 1st and 2nd interested parties on this and rested his submissions on constituent power, constituent assembly and referendum.

Consideration of Prayers 1, 3 and 12

Having broadly analysed the affidavit evidence and submissions from the various parties to the proceedings before this court regarding prayers 1, 3 and 12, I now give consideration to the issues for the determination of the court as follows:-

Constituent power

I am persuaded that this is a residual collective power of Kenyans as a sovereign people. The mode of operation of our society is such that a practice has developed and gained acceptance hitherto whereby this power has been exercised through representation by various organs via mechanisms designed for each specific purpose. It is not expressly provided for in the constitution of Kenya or any other Kenyan law but it is an inherent power. I find the following definition of sovereignty in A Dictionary of Law (5th Edn.) edited by Elizabeth A. Martin a fair summary of what sovereignty is about:

> ***"Sovereignty, n.Supreme authority in a state. In any state sovereignty is vested in the institution, person or body having the ultimate authority to impose law on everyone else in the state and the power to alter any pre -existing law. How and by w hom the authority is exercised varies according to the political nature of the state. In many countries the executive, legislative, and judicial powers of sovereignty are exercised by different bodies. One of these bodies may in fact retain sovereignty by having ultimate control over the others. But in some countries, such as the USA, the powers are carefully balanced by the constitution …."***

Constituent assembly

I find this to be one of various alternative modes of exercising constituent power. It is not provided for in our constitution or in ordinary law. In the context of constitution making, if Kenyans desire to have it as their mode of constitution making, I am of the considered view that it has to be expressly provided for. It cannot be inferred as the question will immediately arise as to why it should be impliedly given preference over other available alternatives.

Referendum

There is no provision for referendum in our constitution. The constitution of Kenya Review Act (cap 3A) does, however, provide for it for purposes of resolving particular issues in the consultative constitutional review and development process at the National Constitutional Conference (NCC) held at

the Boma of Kenya. Cap 3A does not, however, define the term. Jowitts Dictionary of English Law defines the term as follows:

> ***"Referendum [Fr. Plebiscite], a direct vote of electors upon a particular matter."***

I find this definition appropriate.

Applicants contend that it is a mandatory constitutional right. It is not. This process, important though it must be, is one of the several alternative ways of legitimizing a constitution. I put it in the same category as constituent assembly. If Kenyans want referendum as a mandatory right, it has, in my respectful view, to be provided for expressly. The court is ill-equipped to determine if this is the wish of Kenyans. The issue is predominantly a political one and calls for a political solution. If the court were to make a pronouncement on it in this application, it would be venturing into the legislative process, which is not its field of operation.

Sections 26(7) and 27(1) (b) vis -a-vis section 3 cap 3A

It has not come out clearly how sections 26 (7) and 27 (1) (b) of cap 3A have transgressed, diluted and vitiated the applicant's or any known Kenyans' constituent power to adopt a new constitution under section 3 of the Act. Affidavit evidence before this court is to the effect that various fora were availed for the people's participation countrywide in making constitutional proposals. That these were collected and collated by the Constitution of Kenya Review Commission (CKRC) which compiled a report and draft Bill which it presented to the NCC for discussion, debate, amendment and adoption. The affidavit of the Commission Secretary depones at paragraph 25 as follows:

> ***"25. That, contrary to the allegation of the first applicant, the draft Bill very accu rately and faithfully reflects the views of the people of Kenya and the applicants are merely expressing their personal concerns which ought to be addressed through delegates at the National Constitutional Conference."***

The court was told by the 3rd respondent, Kiriro Wa Ngugi, a delegate at the NCC, that some of the applicants, notably the first applicant (Rev. Dr. Timothy M. Njoya) and the 2nd applicant (Kepta Ombati), participated in the conference as observers and that the 2nd applicant addressed the conference. The CKRC Commission Secretary's affidavit (pages 1183 – 1185 in volume 2) confirms that the 2nd applicant indeed made an address at the NCC. I am unable to see how their constituent power has been transgressed, diluted and vitiated.

I find that the applicants have not made out a case to support prayer 1. ***Accordingly, I would refuse to grant the order sought in prayer 1.***

Section 27 (5), (6) and (7) of Cap.3A vis -à-vis the Constitution

Applicants contend that section 27 (5), (6) and (7) cap 3A are unconstitutional to the extent that they convert their right to have a referendum as one of the organs of reviewing the constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the NCC. I have already addressed under the subheading "Referendum" above the question of what a referendum is about and concluded that it is not a mandatory right under cap 3A and that it is not provided for in the constitution. It was also my conclusion that if Kenyans want referendum as a mandatory right, it has to be provided for expressly by law. That conclusion covers prayer 3.

Under prayer 12, the applicants seek a declaration that the constitution gives every Kenyan an equal right to review the constitution which right embodies the right to participate in writing and ratifying the constitution through a constituent assembly or national referendum. I have already addressed under the subheading "constituent assembly" above the question of what a constituent assembly is; that it is not provided for either in our constitution or ordinary law; and that it cannot be impliedly given preferential treatment over other available modes of constitution making. That conclusion covers both prayers 3 and

In the analysis part of this judgment I, inter alia, made reference to the cases of **Republic vs EI Mann [1969] EA 537 and Crispus Karanja Njogu vs Attorney-General,** High Court Criminal Application No. 39 of 2000. I would at this juncture like to say something about the EI Mann doctrine of interpretation vis-à-vis the Crispus Karanja doctrine of interpretation. In my view they are not mutually exclusive. As I see it, EI Mann did not lay down a rule carved in stone that a statute and a constitution have to be interpreted in exactly the same way. The crux of EI Mann, in my construction, lies in the following part of the quotation from Craies on Statute Law at page 359:

> ***"'The tribunal that has to construe an Act of a legislature, or indeed any other document , has to determine th e intention as expressed by the words used."***

This has to be read with the following part of the quotation from Keshava Menon vs State of Bombay at page 360:

> ***":but a court of law has to gather the spirit of the constitution from the language of the consti tution."***

If El Mann is given the interpretation indicated in the expressions cited above, its approach to interpretation of legal instruments, including the constitution, is shorn of distinction from Crispus Karanja. And that is my interpretation of EI Mann.

The upshot is that I do not find any unconstitutionality in section 27 (5), (6) and (7) of cap 3A as alleged in prayer 3. Accordingly, I would refuse to grant the order sought in prayer 3.

With regard to prayer 12, I find that all Kenyans including the applicants were given an opportunity to participate in making constitutional proposals. There were various fora for this and it was open to the applicants to use them. As far as the National Constitutional Conference is concerned, it was open to the applicants to participate through relevant delegates if they could not personally participate at the conference. In the case of the 1st and 2nd applicants, the court was told they in fact participated as observers. In my respectful view, the requirements of the law were complied with. In the event that the product of the Bomas process is found not to reflect the views of Kenyans, that would be a factual issue warranting to be referred to the people for determination. This could be done under the provisions of cap 3A relating to referendum or through other legal mechanism to be designed for the purpose.

In my respectful view, the applicants have not made out a case to support prayer 12 either. **Accordingly, I would refuse to grant the order sought in prayer 12**.

Prayers 7 and 14

Under these prayers the applicants seek the following orders:-

> 7. That a declaration be and is hereby issued declaring that section 27 (2) (c) and (d) infringes the applicants' rights not to be discriminated against and their right to equal protection of the law embodied in sections 1A, 70, 78, 79, 80 and 82 of the Constitution.
>
> 14. THAT a declaration be and is hereby issued declaring that Article 21 of the Universal Declaration of Human Rights (UDHR) 1948, which is embodied and implied in section 82 of the Constitution bars the respondents from constituting the Constitutional Conference in a discriminatory manner.

The two prayers revolve around discrimination. Applicants urge that diversity of opinion is a right respected and protected by law. They complained that section 27 (2) (c) and (d) are discriminative of themselves because:-

a) They don't set out criteria for equal treatment of all Kenyan districts, irrespective of their population.

b) They require the same treatment of all registered parties irrespective of size of membership at the time the section was enacted.

That section 27 (2) (c) and (d) are discriminative in their effect because:-

a) A district with very many people and a district with very few people send equal numbers of delegates.

b) Registered political parties, irrespective of their s Strength, ended up sending one representative each.

That in view of the above, all Kenyans are not equal before the law under Cap 3A but some are more equal than others. For instance, Coast Province has about 300,000 people more than Nairobi, yet Coast has 43 delegates more than Nairobi. Another example is that the population of Nyanza is about twice that of Nairobi, yet Nyanza has six times as many delegates as Nairobi. Applicants' counsel submitted that in a democracy this type of inequality offends the entire Constitution and fundamental principle of democracy and such inequality cannot be allowed to stand.

Applicants' counsel also drew attention to representation at the NCC. He noted that all delegates are about 630; that MPs and District Delegates are 432 of the NCC membership. He submitted that the composition of more than the 2/3 at NCC of the two categories of delegates is utterly discriminatory and blatantly unconstitutional.

Applicants' counsel referred to the USA case of B.A. Reynolds vs M.O. Sims [377 US 533] decided in 1964 and made the following points:-

a) The nature of representative democracy is that all persons must be treated equally in all representative bodies, whether in parliament or at the National Constitutional Conference, and that as long as those bodies are representative, all persons should be treated equally.

b) The right to franchise is very important and preservative of all rights and all other rights depend on this.

Applicants' counsel added that in a sovereign state the right to make a new Constitution is more important than the right to vote. That even Parliament is Constituted in a discriminatory manner and that this is bad enough and it is worse for the NCC also to be constituted in a discriminatory manner. He also submitted that the NCC is making a new Constitution which will be equally binding on all Kenyans. That our current Constitution requires that its composition must be based on equal treatment of all citizens, which is not being observed. That the right to equal representation is related to the right to citizenship and that if citizens of one part of the country are more represented than others, the disfavoured citizens will be less of citizens to the extent of their discrimination. That a citizen of Nairobi is three times less a citizen than his Nyanza counterpart.

Applicants' counsel submitted that the discrimination alluded to by the applicants is not constitutionally permissible. He alluded to an argument by counsel for the 2nd respondent that the composition at the NCC is a matter for parliament and made the counter-argument that in Reynold's case the judges decided that denial of constitutionally protected rights demands judicial protection. He submitted that the applicants have been denied the constitutional right to protection. He noted that in High Court Miscellaneous Application No.975 of 2001, **Hon. John Michuki & Another vs. Attorney – General & 2 others**, Reynolds' case was cited with approval.

Applicants' counsel urged the court to declare Cap 3A unconstitutional to the extent that it provides in section 27 (2) (c) and (d) for unequal representation at the NCC and grant prayer 7.

Regarding prayer 14, applicant's counsel said it was similar to prayer 7 and that his arguments relating to prayer 7 also applied to prayer 14. He added, however, that prayer 14 makes reference to article 21 of the Universal Declaration of Human Rights (UDHR) and submitted that human rights are common heritage of all humanity.

That historically chapter v of the Constitution of Kenya is traceable to the UDHR and that he referred to it because if the applicants' application is upheld, then the infringements the applicants complain of will be deemed to be against Kenyan law and international law. He urged the court to grant prayer 14.

Counsel for the 2nd respondent noted that the Constitution of Kenya Review Commission (CKRC) is established by an Act of Parliament to facilitate a comprehensive review of the Constitution. By its nature as a Commission, all that will result from its work are recommendations to be made before Parliament on what in the opinion of CKRC is the view of Kenyans on the constitutional order they wish to have. Parliament will be at liberty to consider them and if they find them suitable they can enact them under the provisions of section 47 of the Constitution. If Parliament considers them unsuitable, Parliament can reject them in their entirety. Therefore CKRC's recommendations cannot affect anyone's rights.

Regarding section 1A of the Constitution, counsel for 2nd respondent reiterated earlier submissions that the reference to Kenya as a multi-party democratic state means Kenya will have more than one political parties. He added that the section does not protect any right of an individual but conceded that the other sections cited as the basis for prayer 7 do make provision for protection of fundamental rights and freedoms of the individual. He noted that the applicants relied on the parts which protect individual right of conscience and drew attention to the proviso to section 70 which makes individual rights subject to the rights of others and to the public interest.

The 2nd respondent's counsel referred to **Githunguri vs Republic** [1986] KLR 1 in support of his submission that where the public interest requires, the rights of an individual can be put aside. He also referred to **Adar & 7 others vs Attorney-General & Another** (unreported) in support of his submission that for the applicants to succeed in prayers 7 and 14, they must demonstrate violation of a right personal to themselves and that in his view they had not so demonstrated. Counsel added that it is not enough to allege, as the applicants have done, infringement without particularising details of the infringement – generalizations will not do. Their failure to particularize their rights allegedly infringed takes the applicants outside the purview of Chapter V of the Constitution. In this regard the 2nd respondents referred to **Nganga vs Republic** [1985] KLR 121 in which the judge denied the application because the applicant had not brought himself within the subject "discrimination" and that failure to do so meant discrimination was proved. Counsel also referred to High Court Miscellaneous Application No.666 of 1990, **Kenneth Njindo Stanley Matiba vs The Attorney – General** (unreported) in the same regard and reiterated that what comes out of the NCC deliberations at Bomas cannot affect anybody's rights and the applicants have no protection of the law in relation thereto. He submitted that the applicants' freedom of conscience had not been curtailed and they were at liberty to express their conscience in any way they please. The same goes for their freedom of expression.

Regarding applicants' complaint about curtailment of their freedom of assembly, the 2nd respondents' counsel submitted that they had not demonstrated any curtailment either. On the contrary, the CKRC facilitated everybody's freedom of assembly including that of the applicants. In this regard, counsel for the 2nd respondent referred to Volume 2 of the CKRC Secretary's affidavit which shows at pages 1183 – 1185 that the 2nd applicant, Kepta Ombati even addressed the NCC at Bomas.

Responding to the Michuki case referred to by applicants' counsel, the 2nd respondents' counsel observed that Hon. Michuki sought an order that the creation of districts was unconstitutional and that the court argued that such order would be devastating to this country. Counsel for the 2nd respondent urged this court to adopt a similar view. He noted that the court was being asked to stop the NCC when it was nearing conclusion and take judicial notice of the political emotions expressed on this issue and be alive to the devastating effect stoppage of the NCC can have to this country. He submitted that the political future of Kenya is in the court's hands and the matter required delicate balancing of rights of individuals and those of the public interest. He concluded that even if the court finds that the applicants have been

discriminated against in some way, the public interest should take precedence.

Counsel for the 2nd respondent urged the court not to grant the orders sought under prayers 7 and 14.

Counsel for the 1st respondent basically associated herself with the submissions of the counsel for the 2nd respondent. She emphasized that particulars of the personal discrimination complained of should have been brought up by the applicants in their affidavits and that the applicants had not done so. She noted that the only attempt by them to give particulars of discrimination was by the 2nd applicant's further affidavit giving population figures.

These were also figures about inequality of representation at the NCC but that the figures fell short of the required standard. She observed that representation is done in different ways. For instance, you may be a resident of Nairobi but you are also a member of a religious group or a political party. Your representation would then be through any of those fora. She urged the court not to rely on the "so-called" population figures.

Regarding the USA case of Reynolds, counsel for the 1st respondent said it is distinguishable in that it related to elections while here we are dealing with proposals at the NCC which will result in a draft Bill. She said Reynolds' case should be viewed in the light of the prevailing situation in the USA in 1963 when racialism was the order of the day and that Kenya's situation today is very different. She urged the court not to apply the reasoning in Reynolds' case to this case.

The 3rd respondent basically associated himself with the position taken by counsel for the 2nd respondent. He drew attention to the diversity of Kenyans in terms of gender, equity, etc. which had to be balanced in constituting public bodies. He wondered what criteria the applicants used in complaining about mode of computing representation of districts and political parties at the NCC but at the same time kept quiet about their respective bodies e.g. religious organizations. He asked whether this was because they belonged to that segment and posed: How can applicants come to court and complain about discrimination when the law has provided for their representation.

For his part, counsel for 1st and 2nd interested parties criticized the applicants for ignoring the overall effect of Cap 3A, which is to provide a broadway for popular participation in the constitutional review process. He noted that all and sundry were afforded an opportunity to participate in the process and challenged the truth of the applicants' complaint of discrimination against themselves. He observed that there is no perfect legislation and that to expect such is to negate human existence. He endorsed the concession by the applicants' counsel that Cap 3A is a good attempt and noted that there is no precedence to guide the process provided for under Cap 3A. He added that there were several levels of participation in the constitutional review process and that the applicants had the option to choose any. Further, he noted that Cap 3A did not purport to reinvent the wheel but proceeded on the basis of existing units of representation at the time it came into being and could not have upset 40 years of representative tradition. He urged the court not to grant prayers 7 and 14.

Applicants' counsel reiterated his earlier submissions and reemphasized various aspects thereof.

The contribution of counsel for the Law society of Kenya regarding prayers 7 and 14 related to the Michuki case. In his view, the rationale for the judges not granting the orders sought in that case was that they resisted the temptation to get involved in the realm of legislation on district boundaries. He said he saw the devastation alluded to by the court in the Michuki case, i.e. that the court would be entering into the supervision of Parliament.

Consideration of prayers 7 and 14

I have duly considered the applicants' prayers 7 and 14 and the submissions made by the various parties to these proceedings plus submissions of the Law Society of Kenya. The facts have been analysed well and the law relating thereto has largely been ably expounded by counsel for the various parties. I shall, therefore, cover the issues for determination broadly.

The issue of democracy came up in discussion of section 1A of the Constitution. The concept is not defined in the Constitution. A useful leaf may be borrowed from Black's Law Dictionary (7 Edn.) edited by Bryan A. Garner where the following definition is given:

> ***"democracy , n. Government by the people, either directl y or through representatives."***

Applicants' counsel submitted that section 27 (2) (c) and (d) is discriminatory, inter alia, because it does not set out criteria for equal treatment of all Kenyan districts and that each was to be represented at the NCC by the same number of delegates regardless of population. Political parties were also to be represented by the same number of delegates regardless of their strength. Counsel observed that the NCC was making a new Constitution which will be binding on all Kenyans; that the Constitution requires that the composition of the NCC be based on equal treatment of all citizens; and that equality was not being observed.

I pause here to observe that section 27 (2) (c) provides that each district was to be represented at the NCC by three representatives while section 27 (2) (d) provides that each political party was to be represented at the NCC by one representative. On the face of it this appears discriminatory and the applicants urge this court to find that section 82 of the Constitution has been violated. Section 82 of the Constitution defines the term discriminatory as follows:-

> '82. (3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.'

I do not see how the applicants as individuals fall within the above definition of discrimination.

Applicants' counsel criticized the court in the Michuki case for shying away from declaring district boundaries as unconstitutional and urged this court to show greater courage. In this regard, it must be borne in mind that Cap 3A did not mandate any of the organs it established to get involved in district boundary demarcation or review. Section 3 of Cap 3A giving the objects and purposes of the review is instructive. They include promoting and facilitating regional 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 section 5 enjoins the organs through which the review process was to be conducted to see to it that the process was made to:

> ***"5. (b) ensure that the review process accommodates the diversity of the Kenyan people including socio - economic status, race, ethnity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged ".***

The concept is not new. Section 42 (3) of the Constitution dealing with constituencies provides 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. The section also provides for 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 the boundary setting process, etc. cannot be the sole criterion in constituting districts or public bodies. It has to be balanced with other principles, e.g. equity.

There was a counter-argument to the applicants' application to the effect that the final product of the NCC (Bomas) process would be a Bill to go to Parliament and that Parliament was at liberty to accept or reject such Bill. For that reason, it was submitted that the Bill may not necessarily be binding and that, therefore, the applicants were jumping the gun in talking of such Bill violating their rights. This point is not without merit.

In view of the foregoing, I find that the applicants have not proved any discrimination against them personally as our law requires and that their prayers 7 and 14 must fail. **Accordingly, I would refuse to grant the orders sought in prayers 7 and 14. Prayer 9**

Under this prayer the applicants seek the following order:-

> 8. THAT a declaration be and is hereby issued declaring that section 28 (3) and (4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution and therefore null and void.

Applicants' counsel submitted that the power vested in Parliament is a limited power and does not include:-

> a) Power for Parliament to make, adopt or enact a new Constitution.
>
> b) Power for Parliament to abrogate or repeal the existing Constitution.

In applicants' counsel's view, Parliament has two roles:-

> a) To make ordinary legislation under section 30 of the Constitution.
>
> b) Only to amend the Constitution under section 47 of the said Constitution.

He submitted that the power to make the Constitution belongs to the people in exercise of their constituent power and that Parliament has no power outside the Constitution.

The purport of section 28 (3) and (4), contended applicants' counsel, is to invest Parliament with power to enact a new Constitution. He submitted that this is unconstitutional because the Constitution itself does not give Parliament that power. Counsel recalled that the deficiencies the applicants have complained about before this court about the constitutional review process is a matter the applicants have taken issue with previously and said so. He reiterated his reliance on the Indian case of Kasavananda case he had alluded to earlier to the effect that the Indian Parliament had no power vide its amendment power under article 368 to make a new constitution. In applicants' counsel's view, the power vested in the Kenyan Parliament by section 47 of the Constitution does not include changing the basic structure of the constitution, let alone replacing it. He added that article 368 of the Indian Constitution is equivalent to section 47 of the Constitution of Kenya.

Applicants' counsel urged the court to declare section 28 (3) and (4) unconstitutional and, therefore, null and void.

Counsel for the 2nd respondent submitted that the contention by the applicants' counsel that section 47 of the Constitution simply allows Parliament to amend the Constitution but not to repeal or replace it is erroneous. In his view, that contention is based on a wrong interpretation of the meaning of supremacy of the Constitution under section 3 thereof. He contended that the supremacy of the Constitution under section 3 is expressly made subject to section 47.

He argued that the makers of the Constitution recognized that from time to time the need may arise for the Constitution to be revisited, by amendment or repeal. That is why everything is subject to section 47. He drew attention to the definition of "alter" in section 47 (6) (b) and submitted that the word "re-enactment" used there means that the Constitution in its entirety can be re-enacted by Parliament and that re-enactment means a new Constitution can come in lieu of the existing Constitution. In this connection he referred to section 123 (9) (b) of the Constitution which provides that words in the singular shall include the plural while words in plural shall include the singular. He submitted that section 47 (6) (b) and 123 (9) (b) are clear and unambiquous and that there are no limitations on what Parliament can do. He invited the court not to follow the Indian case of Kasavananda but follow the Singapore case of **Teo Soh Lung vs Minister for Home affairs & others [1990] LRC 490**.

Counsel for the 2nd respondent urged the court not to grant prayer 9.

Counsel for the 1st respondent invited the court to look at the Constitution as it is and not to read into it or imply any matters not provided for there. She saw no inconsistency of section 28 (3) and (4) of Cap 3A with section 47 of the Constitution. She observed that section 28 (3) and (4) merely provides a time frame for the Attorney- General to publish the Bill from Bomas and wondered how the subsections can be termed as inconsistent with section 47 of the Constitution which does not deal with procedures prior to a Bill getting to Parliament. She posed: Would failure of the Attorney-General to comply with section 28 (3) and (4) contravene section 47 of the Constitution? She answered the question in the negative and submitted that no inconsistency exists to warrant granting of the order sought under prayer 9.

The 3rd respondent said the Bomas process was preparing a Bill for consideration by Parliament under section 47 of the Constitution. That is the intention. He wondered how an intention can be unconstitutional. In his view, there is limitation on Parliament to make law but it is not imposed by the constitution but by the constituent authority of the people.

Counsel for the 1st and 2nd interested parties submitted that section 47 of the Constitution authorises Parliament to alter the Constitution. That section 28 (3) and (4) of Cap 3A relates to the ordinary process of legislation. He noted that there was nothing new in the consultative process ushered in by Cap 3A as a similar process had been used in the development of a children Bill which led to the new Children Act, No.8 of 2001 which came into force on 01.03.02. He also made reference to the mass movement which led in 1991 to the repeal of section 2 A of the Constitution. He submitted that the court can't find for the applicants in prayer 9.

In reply, applicants' counsel reiterated his earlier submissions on prayer 9. With regard to the Singapore case of Lung, he drew attention to article 9 of the Constitution of the Republic of Singapore which provides as follows:

> ***"9. Subject to this article, the Interpretation Act shall apply for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to any written law wit hin the meaning of the Act."***

He submitted that this article requires the Singapore Constitution to be interpreted like an ordinary statute and that such interpretation is narrow and inappropriate in Kenya. He also submitted that this court should depart from the EI Mann doctrine of interpreting the Constitution which in his view is also narrow and that instead the court should follow the liberal interpretation in the Crispus Karanja case. In answer to the argument by counsel for the 1st and 2nd interested parties that there had been other consultative processes leading to enactments before, he said that the applicants' problem with Cap 3A is not the outside consultations but that Cap 3A does not comply with the Constitution. He submitted that Parliament does not have power even to amend the Constitution to provide that it can make a new Constitution. Applicants' counsel reiterated his prayer that the court grants prayer 9.

Counsel for the Law Society of Kenya expressed the view that the definition of "alteration" in section 47 (6) (b) of the Constitution includes total replacement. He reiterated that the section was written like this to prevent abuse; that you can replace the Constitution at once or over a period of time; and that section 47 (6) (b) was written in the present form because it would be dangerous to make an express provision for replacement.

Consideration of prayer 9

I have given due consideration to the interpretation issue raised by prayer 9. The matter is not without difficulty.

Black's Law Dictionary (6th Edn. 1990) defines the words alter and alteration, inter alia, as follows:

> **"Alter. To make a change in; to modify; to vary in some degree; to change some of the**

elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish."

"Alteration . Variation; changing; making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity …"

Among the terms used in section 47 (6) (b) of the Constitution to define "alteration" is the word re-enactment.

Black's Law Dictionary (7th Edn.1999) defines enact and enactment as follows:

"enact, vb. 1. To make into law by authoritative act …."

"enactment , n. 1. The action or process of making into law …."

Another term used in section 47 (6) (b) in defining "alteration" is the word repeal. The above Dictionary defines it as follows:

"repeal , n. Abrogation of an existing Law by legislative act."

The applicants contended, among other things, that Parliament cannot under section 47 abrogate the existing Constitution and replace it with a new one. As can be seen above, the dictionary definitions are giving somewhat conflicting signals as to what the term "alteration" means. Where do we go from there?

The full text of section 47 (6) (b) states:

"47. 6 (b) references to the alternation of this Constitution are references to amendment, modification, re -enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in place of that provision."

It is noted that there is constant reference to a provision of this Constitution in the singular. Section 123 (9) (b) provides:

"9. In this Constitution, unless the context otherwise requires –

(b) Words in the singular shall include the plural, and words in the plural shall include the singular."

The Indian case of Kesavananda was decided by 9 out of 13 judges of the supreme Court of India. Article 368 of the Indian Constitution which was under discussion is fairly similar to our section 47. One of the dissenting Judges, Ray, J. had this to Say:

'The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There ca n be or is no distinction between essential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of the Constitution. Under article 368 the power to amend can also be increased. Amendment does not mean mere abrogation or wholesale repeal of the Constitution. An amendment would leave organic mechanism providing the Constitution, organization and system for the State. Orderly and peaceful cha nges in a constitutional manner would absorb all amendments to all provision of the Constitution which in the end would be "an amendment of this Constitution ."'

In view of sections 47 (6) (b) and 123 (9) (b) of The Constitution of Kenya, it is my respectful view that it is legitimate to interpret Parliament's alteration power under section 47 to mean that if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all. And this conclusion flows. From the Constitution itself.

There is no constitutional vacuum in Kenya today. We have a Constitution negotiated by representatives of Kenyans with the colonial power, i.e. Britain. Applicants' counsel acknowledged that the received Constitution has been amended many times" beyond recognition" by the representatives of Kenyans. The people have not been involved directly before. The Bomas Constitutional Review process is the first of its kind to Involve Kenyans directly in Constitution making. There is no defined procedure for the development of any Bills in for presentation to Parliament in this country. Bills can take the form of public Bills or private Bills. They still end up in Parliament and it is up to Parliament to decide how to treat them. Why should the Bill expected from the Bomas process be discriminated against?

It is not lost on me that the Bomas delegates expect Parliament to accept the Bill without change but Parliament is not bound by this. It can reject the Bill. And I think the rationale for the delegates' wish is that they have bares it on what they understand to be the wishes of Kenyans. Of course if the question arises whether the Bill does or does not represent the views and wishes of Kenyans, the best way to resolve that question is by referring what is considered not to represent Kenyans' views and/or wishes to Kenyans themselves.

I am of the considered opinion that section 47 of the Constitution of Kenya does not limit the power of Parliament to amend or repeal the Constitution and replace it with a new Constitution. The words in section 47 do not in my respectful view impose any limitations as contended by the applicants.

As was observed in the Singapore case of Lung:

> ***"If the framers of the - - - Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations."***

I have noted the contention of the counsel for the applicants that he thinks Lung's case was decided the way it was because the Singapore Constitution provided for it to be interpreted like an ordinary statute. That may be so. In this regard I wish to revisit my discussion on the EI Mann case earlier on in this judgment and reaffirm my view that where the words of the Constitution are clear and unambiguous, they should be given their natural meaning. And in my view the words of section 47 of the Constitution of Kenya are adequately clear and do not impose limitations on the power of Parliament to amend, re-enact, repeal and/or replace the Constitution with a new constitution.

Section 28 (3) and (4) is not in my view purporting to confer any power on Parliament but it is merely acknowledging Parliament's Legislative power.

I note that Section 28(4) talks of the Bill from Bomas being presented to the National Assembly for "enactment". The correct position is that the National Assembly passes Bills: See Section 46(1) of the Constitution. The legislative power of the Republic is by virtue of Section 30 of the Constitution vested in the Parliament of Kenya, which shall consist of the President and the National Assembly.

I have come to the clear finding that the applicants have not made out a case to support their prayer that sub sections (3) and (4) of Section 28 of the Constitution of Kenya Review Act (Cap 3A) be declared inconsistent with Section 47 of the Constitution.

Accordingly, I would refuse to grant prayer 9.

Prayer 17

Under this prayer the applicants seek an order:-

17 THAT the National Conference at Bomas of Kenya be and is hereby stopped for a period of six months pending compliance of the review process with the Constitution and rectification of the defects in the Constitution of Kenya Review Act (Cap 3A).

As I understand the National Constitutional Conference held at the Bomas of Kenya to have concluded its deliberations, this prayer is overtaken by events and I shall not consider it.

Prayer 19

Under this prayer the applicants asked that the 1st respondent be ordered to pay costs in any event. I would order that the parties bear their own respective costs.

Dated at Nairobi this day of 2004

B.P. KUBO

JUDGE