



REPUBLIC OF KENYA



KENYA LAW
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Omondi & another v Attorney General & 2 others; Ethekekon & 7 others (Interested Parties) (Constitutional Petition E269 of 2025) [2025] KEHC 9956 (KLR) (Constitutional and Human Rights) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9956 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E269 OF 2025

RE ABURILI, JM CHIGITI & AB MWAMUYE, JJ

JULY 10, 2025

IN THE MATTER OF THE SELECTION AND APPOINTMENT OF COMMISSIONERS OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

BETWEEN

KELVIN ROY OMONDI 1ST PETITIONER

BONIFACE MWANGI. 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

HEAD OF PUBLIC SERVICE 2ND RESPONDENT

THE NATIONAL ASSEMBLY 3RD RESPONDENT

AND

ERASTUS EDUNG ETHEKON INTERESTED PARTY

ANNE NJERI NDERITU INTERESTED PARTY

MOSES ALUTALALA MUKHWANA INTERESTED PARTY

MARY KAREN SOROBIT INTERESTED PARTY

HASSAN NOOR HASSAN INTERESTED PARTY

FRANCIS ODHIAMBO ADUOL. INTERESTED PARTY

FAHIMA ARAPHAT ABDALLAH INTERESTED PARTY

JUSTUS MUTUNGA MUTUKU INTERESTED PARTY



JUDGMENT

Introduction

“Those who cannot remember the past are condemned to repeat it.”

George Santayana, ‘Reason in Common Sense’ [19 05]

1. The tragic events that followed the announcement of the presidential election results on 30th December 2007 left an indelible scar on the conscience of our nation. The violence that followed thereafter engulfed large swathes of the Republic, and the upheaval was marked by loss of life, displacement of thousands of people, and the breakdown of public order.
2. Those most unfortunate events were precipitated, largely, by the perception and allegations that the Electoral Commission of Kenya (ECK) and its Chairperson and Commissioners had failed in their solemn duty to conduct a free, fair and credible election. The social, economic and institutional trauma that followed laid bare the dangers of electoral mismanagement and the fragile nature of public trust in democratic institutions.
3. We begin this judgment by venturing back to one of the darkest chapters in Kenya’s history because that historical viewpoint provides the context within which the former electoral body was dissolved and a new electoral management body reimagined under the Constitution of Kenya, 2010 as the Independent Electoral and Boundaries Commission (IEBC).
4. There is perhaps no more of a herculean task or an onerous role within Kenya’s public life than serving as the Chairperson or a Commissioner of the IEBC. Serving in the IEBC is not just another mundane ceremonial or administrative role; it is a solemn and weighty constitutional trust that calls upon the Members of the IEBC to safeguard the most sacred expression of the people’s sovereignty:

The Vote

5. Persons who serve within the IEBC must, therefore, at all times, be guided by the memory of that tragic period in our history and they must commit themselves to embodying the commitment made by the people of Kenya that we shall never as a nation return to those dark days.
6. The IEBC occupies a unique and constitutionally entrenched role in the sustenance of democratic governance in Kenya. Established under Article 88 (1) of the Constitution, the Commission is mandated to continuously register citizens as voters, regularly revise the voters’ register, delimit constituencies and wards, regulate the process by which parties nominate candidates for elections, settle electoral disputes including those disputes arising from party primaries nominations, register candidates for election, carry out voter education, facilitate election observation and monitoring, regulate campaign financing, develop and enforce a code of conduct for parties and candidates in respect of any election, monitor compliance with legislation relating to elections, delimit electoral units, conduct and supervise referenda and elections to any elective body or office established by the Constitution and to ensure that such elections are free, fair, transparent and credible.
7. Article 88, upon establishing the Commission, proceeds to provide for the appointment of the Members of the IEBC, and commences with prohibitions of persons who are not eligible for appointment as Members of the Commission at sub-article two.



8. From the Commission's constitutional mandate reproduced above, which is not exhaustive, the IEBC is a constitutional commission whose existence and functionality go to the very heart of representative democracy.
9. In a constitutional order founded on the sovereignty of the people and the rule of law, the integrity of the electoral process is indispensable and non-negotiable. It is through elections that the sovereign will of the people of Kenya is periodically expressed and government authority legitimately renewed. The IEBC is the primary guarantor of this foundational process.
10. The Constitution envisages and demands an electoral body that is independent, neutral, efficient and accountable, as underscored in Articles 81 and 86 of the Constitution. These provisions are not aspirational. They are immediate and imperative. The IEBC is under a constitutional and legal obligation to operate, at all times, free from political or partisan control and to serve all Kenyans with impartiality and courage. Its independence is not meant to exist only on paper, it must be real and unimpeachable. The IEBC's independence is a safeguard for democracy, rule of law, electoral integrity, public confidence and political stability of this country.
11. The history of electoral disputes in Kenya, particularly the events surrounding the 2007 and 2017 general elections, underscore the far-reaching consequences of public mistrust in the electoral process. As highlighted in the Kriegler Report and later reinforced by the Supreme Court's annulment of the initial 2017 presidential election results, institutional failures or perceived partiality by the IEBC can precipitate a constitutional crisis, civil unrest, and the erosion of state legitimacy.
12. As the institutional embodiment of the people's democratic right to choose their leaders in a free and fair contest, the IEBC's competence, independence and preparedness directly influence electoral legitimacy, peaceful transitions of power and the realization of constitutional values such as equality, transparency, accountability and inclusivity.
13. It is now a well-settled principle of democratic governance that elections are not a one-day event, but a structured and continuous process governed by the Constitution, electoral laws and the values of accountability and legitimacy.
14. This understanding was strongly underscored in the Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (the IREC/ Kriegler Report), which Report warned against treating elections as isolated occurrences. The Kriegler Report emphasized that elections are a process not an event and that the credibility of an election begins with the Constitution of a credible electoral management body.
15. The Petition before this Court squarely revolves around the question of the credibility of the IEBC that is proposed to be constituted. Drawing from the lessons of the past, it is beyond dispute that the timely establishment, adequate resourcing and operational autonomy of the IEBC are matters of urgent constitutional priority for this nation. As recommended by the Kriegler Commission and as echoed in the country's subsequent reform initiatives and proposals, a fully constituted and operational IEBC should be in place at least two years prior to any general election. This allows for proper delimitation of boundaries, voter registration, civic education, procurement of electoral materials, recruitment and training of staff and resolution of pre-election disputes, among other critical functions and milestones.
16. As we close this introductory part of this judgment, we would be remiss not to mention that it is deeply concerning that, for nearly two years since the expiry of the terms of the former Chairperson and Commissioners, the Commission has operated without a Chairperson and Commissioners. This gap has meant that the IEBC has been unable to conduct some of its critical activities, including the



holding of by-elections after the deaths or resignations of elected members of the national or county legislatures.

17. To neglect or delay the proper constitution of the IEBC is not a procedural lapse. It is a direct affront to the constitutional order and a potential catalyst for electoral illegitimacy and political uncertainty.
18. In light of the exceptional nature and urgency of the issues presented in this Petition and pursuant to the directions of the Honourable the Chief Justice and President of the Supreme Court of Kenya, this Court has, in recognition of the importance of this matter, set aside other judicial commitments, including the regular cause lists of and the delivery of judgments by the three judges that form this bench; so as to undertake and conclude the hearing and determination of this matter within an expedited timeline.
19. Accordingly, the Court has heard and determined this Petition within a period of seventeen (17) days from the date of hearing, being 23rd June 2025, in full fidelity to the constitutional imperative for prompt and efficient resolution of disputes touching on matters of high public importance.
20. This Petition invites the Court to reflect upon a foundational principle in the architecture of our democratic governance, which is, the right of the citizens of Kenya to participate in free, fair, transparent and credible elections administered by an independent, impartial and competent electoral body.
21. The social contractual relationship between the people and the State will be a dead letter, unless we have a credible IEBC. The issues raised before this Court are not only of legal concern, but of deep constitutional, historical and public significance; touching on the very legitimacy of the electoral process in the Republic of Kenya.

The Petition

22. The Petition dated 13th May 2025 is brought pursuant to Article 22 and Article 258 of the [Constitution](#). It is supported by the affidavit of Kelvin Roy Omondi, the 1st Petitioner, sworn on 13th May 2025.
23. The Petitioners are adult citizens who describe themselves as public interest spirited individuals.
24. The 1st Respondent is the principal legal advisor to the National Government and is established under Article 156 under the [Constitution](#).
25. The 2nd Respondent is the Head of Public Service, an Office established under Section 8(3) of the [National Government Co-ordination Act](#), Cap 127 Laws of Kenya.
26. The 3rd Respondent is the National Assembly, a House of Parliament established under Article 93(1) of the [Constitution](#).
27. The 1st to 7th Interested Parties are the persons nominated to serve as Chairperson (1st Interested Party) and Commissioners (2nd to 7th Interested Parties) of the Independent Electoral and Boundaries Commission (IEBC).
28. The 8th Interested Party is a Kenyan adult and who described himself as a public spirited individual.
29. The Petitioners are aggrieved by the manner in which the 1st to 7th Interested Parties were selected and nominated to serve as Chairman and Commissioners of the Independent Electoral and Boundaries Commission. They contend that the process of selection and nomination of the 1st to 7th Interested Parties was unconstitutional. Specifically, they allege that:



- a. the nominations contravene the *Constitution* in that they were individually and collectively not representative of Kenya’s diverse communities;
 - b. no Person with Disabilities was nominated;
 - c. the names were selected without any such prior consultation by the President with the Majority and Minority Leadership of the National Assembly contrary to the National Dialogue Committee Report;
 - d. Some of the nominees are constitutionally barred from selection, nomination, and appointment to the IEBC by virtue of having candidates for election within the constitutionally disallowed timeframe, by virtue of having held high office within a political party within the constitutionally disallowed timeframe, or by virtue of holding State or Public Office;
 - e. Some of the nominations were not merited as the particular nominees received low scores at the interviews;
 - f. Some of the nominations are tainted with bias or the perception of bias;
 - g. The selection and nomination processes lacked the requisite standards of public participation, transparency, and accountability; and
 - h. The selection and nomination processes were procedurally flawed, as typified by the issuance of a second and expanded shortlist of candidates.
30. The Petitioners contend that the selections made by the IEBC Selection Panel were not based on merit as some of the candidates did not achieve high scores in the interviews.
31. Secondly, the Petitioners allege that Mr. Hassan Noor Hassan, the 5th Interested Party, was never shortlisted for the interviews and was only snuck in through an addendum contrary to the selection and nomination process under the *Independent Electoral and Boundaries Commission Act*.
32. Further, the Petitioners state that the nomination of Ms. Mary Karen Sorobit, the 4th Interested Party, is unconstitutional and unlawful as she was, at the time of her nomination, a member and office bearer of a political party, specifically having served as a County Chairperson of the Jubilee Party within the preceding five years of Elections which were held in August 2022.
- This, according to the Petitioners, contravenes the express provisions of Article 88(2)(a) of the *Constitution*, which prohibits the appointment of any person who has, within the preceding five years, held office in a political party.
33. The Petitioners aver that moreover, the nomination of Ms. Sorobit violates Article 10 of the *Constitution*, which imposes upon all State organs and public officers the duty to uphold the national values and principles of governance including integrity, transparency and accountability.
34. The said nomination allegedly offends Article 73(2)(a) of the *Constitution*, which provides that the guiding principles of leadership and integrity include selection based on personal integrity, competence and suitability.
35. The Petitioners argue that recent political affiliation of Ms Sorobit undermines public confidence in the independence, neutrality and impartiality required of members of the Independent Electoral and Boundaries Commission.



36. Lastly, that the process leading to the nomination of Ms Sorobit does not meet the threshold of a fair, open and merit-based process as contemplated under Article 232(1)(g) of the Constitution, which requires transparency and timely, accurate provision of information to the public in matters of public service appointments.
37. The Petitioners are further aggrieved by the nomination of a proposed Chairperson and a proposed Commissioner both said to hail from the 'Rift Valley'. The Petitioners say that this contravenes Articles 10, 232 and 250 (3) & (4) of the Constitution, as the Constitution did not anticipate what they term as a composition of the Independent Electoral and Boundaries Commission that would be dominated by a majority of persons from the same region while excluding other regions of the Republic of Kenya.
38. The Petitioners also lament that the nomination list is unconstitutional and illegal as it failed to include any person with disability, despite one such person having been selected by the IEBC Selection Panel and forwarded to the President of the Republic for consideration.
39. The Selection Panel is further accused of acting illegally and unconstitutionally contrary to Article 88 (2) of the Constitution in the following instances:
- i. Anne Njeri Nderitu, the 2nd Interested Party who currently serves as the Registrar of Political Parties, was and still is a State Officer and hence she was and/or is ineligible to apply for or be selected as a nominee to serve as a Commissioner of the Independent Electoral and Boundaries Commission;
 - ii. Mary Karen Sorobit , the 4th Interested Party, was and/or is ineligible to apply for or be selected as a nominee to serve as a Commissioner of the Independent Electoral and Boundaries Commission as she was the Executive Director and member of the governing body of the Jubilee Political Party in the last 5 years preceding her selection and nomination;
 - iii. Hassan Noor Hassan, the 5th Interested Party, was and/or is ineligible to apply or be selected as a nominee to serve as a Commissioner of the Independent Electoral and Boundaries Commission as he had contested and vied for public office in the 2017 and 2022 General Elections, in Mandera County as a Governor which automatically disqualified him from applying, being shortlisted and being selected as a commissioner of the Independent Electoral and Boundaries Commission; and
 - iv. The nomination of Erastus Edung Ethekeon, the 1st Interested Party , as the Chairperson of the Independent Electoral and Boundaries Commission is unconstitutional and illegal as his nomination is laced with perception of likelihood of being biased on account of his inclinations and affiliations with Josephat Nanok, the Statehouse Deputy Chief of Staff of the President, which allegedly arise from the 1st Interested Party having served the said Josephat Nanok as his County Attorney when Josephat Nanok was the Governor of Turkana County; and hence nomination is tainted with political partiality and lack of neutrality contrary to what is required of a Chairperson of IEBC.
40. Additionally, the Petitioners fault the selection and nomination of the 1st to 7th Interested Parties by the President stating that the same was illegal and contrary to Articles 10 and 27 (1) of the Constitution on the requirement for public engagement, participation and consultation as the President did not engage or consult the Majority and Minority Political Parties of the National Assembly prior to making the selection as recommended by the National Dialogue Committee.



41. According to the Petitioners, the failure of the President and the Selection Panel to publicize the information relating to the performance of the candidates and to publish the IEBC Selection Panel's Report on the interviews also offended Article 35 of the Constitution.
42. Furthermore, the Petitioners aver that the subsequent failure by the Selection Panel to avail the information pertaining to the interviews as requested by the Petitioners was a second violation of Article 35 of the Constitution.
43. The Petition seeks the following reliefs, verbatim:
 - a) A declaration does issue to the effect that the nomination and selection of Erastus Edung Etheke; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah, is illegal, null and void and contrary to Articles 10, 232 and 250 (3) & (4) of the Constitution of Kenya, 2010 as read with the provisions of the Independent Electoral and Boundaries Commission Act.
 - b) A declaration that the nomination of Mr. Hassan Noor to the office of Commissioner of the Independent Electoral and Boundaries Commission (IEBC) is unconstitutional, illegal, and invalid for being in contravention of Article 88(2) as read with Article 250(4) of the Constitution of Kenya, 2010, and Section 6(1)(a) of the Independent Electoral and Boundaries Commission Act, 2011, by virtue of the fact that he contested for the position of Governor of Mandera County in the 2022 General Elections, thereby rendering him ineligible for appointment to the Commission having held political office within the prescribed disqualifying period of five years;
 - c) A declaration that the recommendation of Ms. Mary Karen Sorobit for appointment as a member of the Independent Electoral and Boundaries Commission (IEBC) is unconstitutional, unlawful, and invalid for reason that she was, at the time of her nomination, a member and office bearer of the Jubilee Party, contrary to Article 88(2)(a) of the Constitution of Kenya, 2010, and is therefore conflicted and incapable of discharging her duties with the impartiality, independence, and integrity required of a commissioner under Articles 10, 73, and 232 of the Constitution.
 - d) A declaration that the recommendation of Ms. Anne Njeri Nderitu for appointment as a member of the Independent Electoral and Boundaries Commission (IEBC) is unconstitutional, unlawful, and invalid for reason that she was, at the time of her nomination, State Officer, contrary to Article 88(2)(b) of the Constitution of Kenya, 2010, and is therefore conflicted and incapable of discharging her duties with the impartiality, independence, and integrity required of a commissioner under Articles 10, 73, and 232 of the Constitution.
 - e) An Order Of Certiorari be and is hereby issued to quash the decision and/or recommendation of the Selection Panel for the Appointment of Commissioners to the IEBC to nominate Ms. Mary Karen Sorobit for appointment to the said Commission.
 - f) A declaration that the nomination of Erastus Edung Etheke; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah for appointment to the Independent Electoral and Boundaries Commission (IEBC) by the Selection Panel is unconstitutional, unlawful, null and void for having been undertaken in a process that failed to comply with the requirements of Articles 10, 73(2)(a), 88(2)(a), and 232(1)(g) and (h) and 250 (3) & (4) of the Constitution of Kenya, 2010.



- g) Pursuant to Article 23 (3) of the Constitution of Kenya, 2010, an order of certiorari does issue quashing the decision dated 8TH MAY; 2025 issued by the Head Of Public Service To The Effect Of Nominating Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah as members of the Independent Electoral and Boundaries Commission.
- h) An order of permanent injunction restraining Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah nominated and/or recommended by the Selection Panel for appointment as Commissioners of the Independent Electoral and Boundaries Commission from assuming, occupying, or performing the functions of the office of Commissioner of the Independent Electoral and Boundaries Commission, on grounds of violation of the Constitution, including but not limited to breach of the principles of political neutrality, integrity, and fair administrative action as enshrined under Articles 10, 73, 88(2)(a), 232 and 250 (3) & (4) of the Constitution of Kenya, 2010.
- (i) A Declaration that the Attorney General failed in their constitutional mandate under Article 156(4) of the Constitution of Kenya, 2010 by neglecting to provide independent, impartial, and sound legal advice to the Executive regarding the nomination of Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah Commissioners of the Independent Electoral and Boundaries Commission (IEBC), thereby failing to protect the rule of law and the public interest, as mandated by the Constitution.
- j) Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the Petitioners' fundamental rights and freedoms.

Responses to the Petition

44. The 1st Respondent opposes the Petition dated 13th May, 2025 through a Preliminary Objection dated 16th May, 2025 raising the following grounds:
1. The Petition is non-justiciable on account of having been instituted contrary to the principle of ripeness.
 2. The Petitioners has offended the doctrine of exhaustion as they have not exhausted the constitutionally provided remedy before invoking the jurisdiction of the Honourable court
 3. That the exercise of jurisdiction by the Honourable court at the stage of the appointment process of Commissioner of an independent constitutional commission would be contrary to the doctrine of separation of powers and would constitute a usurpation of the primary role of the legislature in the approval process.
 5. The petition merits dismissal under the constitutional avoidance doctrine
45. The 1st Respondent also filed Grounds of Opposition dated 9th June, 2025 to oppose the Petition on the following grounds, verbatim:
1. The Petitioners have failed to dislodge the legal presumption of regularity of all executive action in the entire petition; *Omnia praesumuntur rite esse acta*



2. The petition is supported by a defective supporting affidavit that offends the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules in that the deponent has not confined himself to such facts as he is able of his own knowledge to prove and are contains inadmissible averments.
3. The annexure marked 'KRO-2' to the supporting affidavit of Kelvin Roy Omondi constitutes illegally obtained evidence which ought to be struck out.
4. The Petitioners approbates and reprobates in their averments; on the one hand they aver that they haven't been furnished with information in respect to the recommendations and scores on the candidates and on the other hand they aver that the selection was not based on merit as some candidates did not achieve high scores in the interviews.
5. The Petitioners do not disclose the basis of his assertion that one Moses Alutalala Mukhwana got low marks.
6. The Petitioners fail to appreciate that 'public service' is expressly defined in Article 260 of the Constitution as '...the collectivity of all individuals, other than State officers, performing a function within a state organ.
7. The 1st to 7th Interested Parties meet the constitutional criteria provided in Article 250 (4) in that they are from diverse ethnic backgrounds and are from different counties as specified in the first schedule to the Constitution as provided in Article 6 (1) of the Constitution which are the constitutionally prescribed regions.
8. Article 250 (4) of the Constitution provides for a wholesome consideration of all appointments to all commissions and independent offices, there is no legal basis for the Petitioners' allegations that it was mandatory for the nomination and appointment of a person with disabilities into the Independent Electoral and Boundaries Commission.
9. Article 88 (2) of the Constitution provides for eligibility for appointment not for nomination.
10. Article 250 (2) of the Constitution contemplates identification and recommendation, approval by the National Assembly and appointment by the President as distinct steps in the appointment process, the allegations in respect to appointment of state officers is therefore premature.
11. The allegation that the provisions of Article 88 (2) (a) of the Constitution prohibit persons who have vied for the position of Governor is not provided for in the Constitution.
12. The personal view of an unelected private individual cannot supersede the views of a duly elected constitutional house of representatives as being representative of public perception.
13. The petition is oblivious to the constitutional prescription of equality before the law and to equal protection of the law as the Petitioners seek to subordinate the fundamental freedoms and rights of the 1st to 7th Interested Parties to those of the Petitioners.
14. The allegations of non-participation, non-consultation with minority and majority parties is fallacious as the entire process was specifically subjected to the approval of the very same parties in the August house under Article 250 (2) (b) of the Constitution.
15. The allegations in respect to infringement of Article 35 of the Constitution are contradicted by the documents published by the state and made available subsequent to such publication which have been presented before court by the Petitioners.



16. The Petitioners have not availed of the statutory mechanism for access to information set out in the [Access To Information Act](#) contrary to the doctrine of constitutional avoidance.
 17. This Honourable court lacks an appellate jurisdiction over the decision of the President and the National Assembly.
 18. This Honourable court lacks the capacity to determine the polycentric considerations on the merits of appointments of commissioners of independent constitutional commissions.
 19. This Honourable court should exercise deference to the constitutional repository of the functions and decline the Petitioners invitation to undermine the comity that is necessary for the proper function of the [Constitution](#)'s institutional arrangement.
46. The 2nd Respondent opposes the Petition through a Preliminary Objection dated 17th May, 2025 raising the following grounds, verbatim:
1. The jurisdiction of this Honourable Court has been wrongly invoked as the issues raised herein shall be subject to vetting and approval by the National Assembly pursuant to Article 250 (2) of the [Constitution](#) as read with Section 3 (5) of the First Schedule of the [IEBC Act](#);
 2. The Petition is an attempt to circumvent and usurp the Constitutional and statutory mandate and authority of the National Assembly in the approval of the Chairperson and members of the IEBC;
 3. The Petition offends the findings in [Bishop Donald Kisaka Mwawasi v Attorney General & 2 others](#) [2014] KECA 561 (KLR) which confirms that the eligibility of a candidate for a public office is at the time of taking said office and not at nomination.
47. The 2nd Respondent also filed Grounds of Opposition dated 9th June, 2025 to oppose the Petition on the following grounds, verbatim:
1. The Selection Panel of the IEBC complied with the requisite provisions of the [Constitution](#) as read with the First Schedule of the [IEBC Act](#) in nominating the 1st to 7th Interested Parties as Chairperson and Commissioners of the IEBC.
 2. The allegation that the nominations do not represent Kenya's diverse communities as it excludes ethnic communities is misconceived noting that the 1st to 7th Interested Parties, originate from 7 different ethnic communities and 7 different counties.
 3. The allegation that the some of the nominees of the position of Chairperson and Members of the IEBC did not "achieve high scores in the interviews" is nothing short of conjecture as no material evidence has been placed before this Honourable Court to substantiate such allegation.
 4. There exists no Constitutional or Statutory obligation on the Selection Panel to "engage or consult" the Minority/Majority Political Parties at the National Assembly prior to nominating candidates for Chairperson and Members of the IEBC as urged by the Petitioners. The candidates were vetted at the National Assembly according the members of the political parties the opportunity to be "engaged and consulted".
 5. The 5th Interested Party was, part of the 111 persons on the shortlist.



6. The claim by the Petitioners of want of regional balance in the list of nominees is unmerited as provinces that the Petitioners rely on are unknown in law and not envisaged under the 2010 Constitutional dispensation.
7. There exists no mandatory Constitutional or statutory provision for the nomination of Persons with Disabilities to serve as a chairperson or commissioner of the IEBC.
8. All candidates that were nominated and subsequently approved by the National Assembly are duly qualified i.e.:
 - a) Erastus Edung Ethekeon- The allegation of bias on account of his supposed inclination and affiliation to Josephat Nanok is unsubstantiated and amounts to conjecture;
 - b) Anne Njeri Nderitu- The disqualification of a State Officer provided for under Article 88 (2) (b) of the Constitution of Kenya takes effect on appointment and not at nomination;
 - c) Moses Atulala Mukhwana- No material has been placed before this Honourable Court not to warrant his appointment.
 - d) Mary Karen Sorobit- No material has been placed before this Honourable Court to exhibit that she was a member of the governing body of the Jubilee Party five years prior to her nomination as stipulated by Article 88 (1) (a) (ii) of the Constitution;
 - e) Hassan Noor Hassan- No material has been placed before this Honourable Court to suggest that he held office or stood for election as a Member of Parliament of County Assembly in the last 5 years of his nomination as explicitly provided for under Article 88 (2) (a) (i) of the Constitution.
 - f) Francis Odhiambo Oduol- No material has been placed before this Honourable Court not to warrant his appointment.
 - g) Fahima Araphat Abdallah- No material has been placed before this Honourable Court not to warrant her appointment.
48. The 3rd Respondent opposes the Petition through a Notice of Preliminary Objection dated 15th May, 2025 raising the following grounds, verbatim:
 1. The Petitioners' Notice of Motion and Petition are not justiciable for violating the doctrine of ripeness.
 2. To the extent that Petition and the Notice of Motion challenges an ongoing constitutional process in respect of which no decision or action has been taken by the National Assembly, the Petitioners' Notice of Motion and Petition are speculative and deals with prospective anticipatory circumstances rather than current or probable events.
 3. The Petitioners, having failed to exhaust all avenues available to them under the Constitution and the Standing Orders, the Petition and Application violate the doctrine of exhaustion and are therefore premature.
49. The 3rd Respondent also filed two Replying Affidavits, one sworn by Jeremiah Ndombi, the Deputy Clerk of the National Assembly of Kenya sworn on 15th May, 2025, and the other sworn by Samuel Njoroge, the Clerk, National Assembly of Kenya sworn on 10th June, 2025.



50. It is the 3rd Respondent's overall contention is that the Petition is premature and it offends the doctrine of ripeness; and it is therefore not justiciable and ought to be dismissed in limine.
51. According to the 3rd Respondent, this Court lacks jurisdiction to entertain the Petition.
52. It is deposed by the 3rd Respondent that by a letter dated 9th May, 2025, the Head of the Public Service (the 2nd Respondent), on behalf of the President, forwarded to the Speaker of the National Assembly the names of the 1st to 7th Interested Parties as the persons nominated for the positions Chairperson and Commissioners of the IEBC.
53. The 3rd Respondent further contends that as at the time of filing the Petition, the National Assembly (the 3rd Respondent) had not yet conducted the parliamentary vetting and approval process of the nominees.
54. In response to the alleged failure to include persons with disabilities, the 3rd Respondent argued that Article 54(2) provides for the progressive implementation of the principle that at least 5% of members of the public in elective and appointive bodies are Persons with Disabilities.
55. With respect to access to the Report of the Selection Panel, it is contended by the 3rd Respondent that the Petition is caught up by the doctrine of exhaustion of remedies as the Petitioners invoked processes that they did not allow to run their course but instead prematurely moved to Court.
56. On the alleged perception of bias of Mr. Erastus Edung Ekethon, the 3rd Respondent contends that the Petitioners' allegations are baseless since the 1st Interested Party served as the County Attorney for Turkana County and not as former Governor Josphat Nanok's personal legal advisor.
57. On the allegations that Ms. Anne Njeri Nderitu was and still is a serving State Officer, and therefore was disqualified from being appointed as a Commissioner of the IEBC, the 3rd Respondent noted that at the time of the filing of the Petition the 2nd Interested Party was yet to be appointed to the Commission and that her appointment was subject to the prior approval by the National Assembly and resignation before assuming office in accordance with Article 88(2) of the [Constitution](#).
58. Regarding the alleged disqualification of Mary Karen Sorobit pursuant to Article 88(2) (a) (ii) of the [Constitution](#), the 3rd Respondent's position was that the 4th interested party was not a member of the governing body of the Jubilee Political Party at the time of her nomination and that in any case, that disqualification would only apply at the appointment stage, which is yet to be reached.
59. With respect to Mr. Hassan Noor Hassan, the 3rd Respondent contended that while Article 88(2) (a)(i) disqualifies a person who stood for election as a Member of Parliament or Member of County Assembly from appointment as a member of the IEBC, that disqualification does not apply to the 5th Interested Party since he did not vie for either of those positions within the proscribed period, if at all.
60. On the allegation that the 5th Interested Party was improperly included in the shortlist through a republished shortlist, the 3rd Respondent underscored that the said nominee was amongst the applicants in the longlist and that the shortlist as republished by the Selection Panel on 25th March 2025 was in accordance with Paragraph 2 of the First Schedule to the [IEBC Act](#).
61. Concerning Fahima Araphat Abdalla, the 3rd Respondent noted that the 7th Interested Party was nominated in furtherance of the constitutional imperatives on affirmative action for youth, women, and persons from minority marginalized communities, in compliance with Articles 27(8), 55 and 56 of the [Constitution](#). The 3rd Respondent underscored the status of the 7th interested party as a youth,



- a woman, and a member of the Bajuni tribe which is a distinct minority, in addition to her general qualifications and suitability.
62. As regards the suitability of the nominees, the 3rd Respondent deponed that all the seven nominees demonstrated a comprehensive understanding of the mandate and operations of the IEBC and their respective roles as Chairperson and Commissioner. The 3rd Respondent also stated that the nominees possessed the requisite academic qualifications and relevant professional experience as required by law.
 63. The 3rd Respondent urges this Court to find that the Petition is devoid of merit and it should be dismissed with costs to the 3rd Respondent.
 64. The 1st Interested Party filed a Replying Affidavit sworn on 10th June 2025 by Erastus Edung Ethekeon opposing the Petition.
 65. He depones that the allegations that he is likely to be biased due to his previous professional relationship with Josephat Nanok are baseless, speculative, and made in bad faith. It is his case that he was appointed the County Attorney for Turkana County on 25th September 2018 and served until 30th September 2024; and that during that period he served under two Governors, Governor Josephat Nanok between 2018-2022 and Governor Jeremiah Lomorukai between 2022-2024.
 66. He also argues that he had no personal familial or undue political relationship with Mr. Nanok, who was merely his supervisor in the official capacity of County Governor, and that their interaction was strictly professional.
 67. The 1st Interested Party depones that as indicated in his detailed curriculum vitae, he is suitable to be appointed as Chairperson of the Commission and that the allegations of bias, misconduct or ethical impropriety against him are misplaced and unsubstantiated.
 68. According to the 1st Interested Party, the selection of nominees from seven distinct counties (Turkana, Nyandarua, Kakamega, Uasin Gishu, Mandera, Kisumu, Lamu) reflects and upholds Kenya's regional diversity, as contemplated by Article 232(1)(g) of the Constitution.
 69. The 1st Interested Party further states that the assertion that his nomination fails to reflect diversity is incorrect as he is a person from Turkana, and that he represents a historically marginalized tribe and area. It is his case that his nomination accords with Articles 10, 27 and 81 of the Constitution on inclusivity and diversity.
 70. It is his case that the allegations in the Petition that the selection process lacked transparency are unfounded as the Selection Panel complied with the IEBC Act, and specifically the First Schedule, by conducting an open and transparent process featuring the publication of vacancy notices and shortlists as required by law.
 71. The 1st Interested Party also states that his professional history demonstrates independence from political influence and a commitment to upholding the mandate of an impartial IEBC under Article 88.
 72. He further states that subsequent to the filing of this Petition, the National Assembly (the 3rd Respondent) vetted the 1st – 7th Interested Parties under the Public Appointments (Parliamentary Approval) Act; and in that process, the 3rd Respondent received and considered public concerns and objections on the suitability, integrity and competence of the 1st – 7th Interested Parties, pursuant to Paragraph 6(9) of the First Schedule to the Act.
 73. The 1st Interested Party argues that the Petitioners, just like all other persons, had the opportunity to raise objections during the vetting process in the National Assembly. As such, the Petition invites the



Court to encroach upon the constitutional functions of the National Assembly, thereby offending the principle of separation of powers.

74. According to the 1st Interested Party, the Petitioners have not demonstrated any violation of the Constitution or statute nor provided evidence of procedural irregularities warranting the grant of the reliefs sought.
75. Opposing the Petition, the 2nd Interested Party filed a Replying Affidavit sworn on 15th May 2025, a Further Affidavit dated 18th June 2025 and a Notice of Intention to raise a Preliminary Objection dated 19th June, 2025.
76. In the Notice of Preliminary Objection, the 2nd Interested Party objects to the Petition on grounds of violation of the doctrine of exhaustion. She concurs with the 1st Interested Party's position that the proper forum for the Petitioners to have raised their grievances was before the National Assembly during vetting.
77. The 2nd Interested Party's further case is that the Petition lacks merit as it fails to specify the constitutional violations, if any, that have been committed.
78. According to the 2nd Interested Party, there exists no bar against State Officers applying for the position of Member of the IEBC, provided that upon appointment the State Officer tenders their resignation from the prior office held. The 2nd Interested Party also states that the disqualification under Article 88(2)(b) only crystallizes at the point of appointment and not at the stage of application or nomination. She argues that the rationale behind Article 88(2)(b) of the Constitution is to prevent the concurrent holding of multiple state or public offices by a single individual.
79. According to the 2nd Interested Party, expecting a State Officer to resign from any other state office held prior to being formally confirmed or appointed to a new public office would be illogical and premature. She further argues that in that regard Article 88(2)(b) must be read together with Article 250(6)(b) of the Constitution.
80. On the failure to include a person with disability among the list of nominees, the 2nd Interested Party argued that the same cannot be characterized as unconstitutional as the Chairperson of the IEBC Selection Panel publicly encouraged applications from youths and persons with disabilities; and that indeed, some such candidates applied and were subsequently shortlisted and interviewed.
81. In her Further Affidavit sworn on 18th June 2025, the 2nd Interested Party depones that the Petition is fatally defective and incompetent for failure to enjoin the IEBC Selection Panel, against whom adverse allegations have been made and adverse orders sought.
82. The 2nd Interested Party argues that there exists no legal obligation compelling the IEBC Selection Panel to publish or publicize the interview report or results. It is her case that the legislative intent underlying the relevant legal framework must be interpreted in conformity with applicable data protection principles, including the right to privacy as enshrined under Article 31 of the Constitution and the Data Protection Act.
83. She further argues that public dissemination of such results, particularly in respect of candidates who may have performed poorly, poses a real risk of reputational harm and may prejudice their future employment prospects. According to her, such publication may result in more harm than good.
84. The 2nd Interested Party also states that the Petitioners seek to introduce new matters that were not pleaded in the Petition through the Petitioners' Supplementary Affidavit (2) dated 15th June, 2025



- which she characterizes as irregular for having been filed after close of pleadings and without leave of the Court.
85. It is her case that the Petitioners have not discharged the burden of proof with respect to their allegations; which remain speculative, unsubstantiated and purely sensational.
 86. In response to the Petition, the 3rd Interested Party filed a replying affidavit sworn on 10th June 2025. In the said affidavit, Moses Alutalala Mukhwana contends that the Petition is devoid of merit and does not establish substantive defects, fundamental omissions, or a consideration of extraneous factors so as to render the cumulative nomination process unconstitutional.
 87. He further states that the Petition lacks reasonable degree of precision of the Petitioners' complaints regarding the alleged violations. He claims that the Petition does not disclose with a reasonable degree of certainty and clarity what claim the 3rd Interested Party is required to defend himself against.
 88. It is also his case that the allegations levelled against him lack correlation between the facts pleaded in the Petition, the prayers sought, and the averments made in the Supporting Affidavit.
 89. The 3rd Interested Party also states that the claim that he scored low marks was not supported by any evidence.
 90. On the allegation that the Selection Panel failed to consider persons with disabilities, the 3rd Interested Party states all persons were allowed to apply and one of the names sent to the President for consideration for nomination for position of chairperson was a person living with disability.
 91. On the alleged lack of consultation with the opposition political parties as required by the NADCO Report, the 3rd Interested Party's case is that a report such as the one cited by the Petitioners has no force of law to override and/or warrant the invalidation of a constitutionally mandated and statutorily prescribed process.
 92. The 3rd Interested Party concludes that the legal threshold for the grant of the reliefs in a constitutional petition has not been met in the present case.
 93. The 4th Interested Party filed a Replying Affidavit sworn on 9th June 2025 and a Notice of Preliminary Objection dated 19th June 2025 in opposition to the Petition.
 94. In her Replying Affidavit, Mary Karen Sorobit depones that the Petition offends the doctrines of exhaustion, ripeness, separation of power, and justiciability.
 95. She denies that she has ever served as an Executive Director or was even a Member of Jubilee Party's governing body within the last five years, a fact she says was confirmed by the Registrar of Political Parties in the letter dated 15th May 2025 Ref: RPP/FRP/027 VOL.VI (39) annexed to her Replying Affidavit.
 96. The 4th Interested Party also states that contrary to the Petitioners' allegations, she does not have any political affiliation with any political party, political formation, or political coalition that is likely to undermine public confidence in her independence, neutrality, or impartiality if successfully approved and subsequently appointed as a Member of IEBC.
 97. It is also her case that the Petitioners have not provided any evidence to show that she served as an Executive Director or a member of the Jubilee Party's governing body. She avers that this is demonstrated in the letter at page 859 of the Petition where the Petitioners sought information about the 4th Interested Party's political status from the Office of the Registrar of Political Parties.



98. The Petitioners, she argues in conclusion, have failed to provide any evidence of how the selection and nomination process violated and/or breached Article 10 and 73 (2) of the Constitution, in particular, on issues touching on the 4th Interested Party's integrity, competence and suitability.
99. The 5th Interested Party opposes the Petition through two Replying Affidavits sworn by Hassan Noor Hassan on 19th May, 2025 and 10th June, 2025 respectively.
100. Hassan Noor Hassan posits that he was duly nominated, vetted, and approved for the position of Member of the Independent Electoral and Boundaries Commission. It is his case that he applied and was shortlisted for the interview for the position of commissioner of IEBC which was held on 24th April 2025 at 12.30 pm; and his nomination followed a rigorous, competitive and very fair selection process, any allegation to the contrary is denied.
101. The 5th Interested Party argues that the nomination and selection process was undertaken in strict adherence to the provisions of the Constitution, the Independent Electoral and Boundaries Commission Act and the Public (Appointments (Parliamentary Approval) Act.
102. He further argues that the Petitioners have not adduced any evidence in support of their allegations that he was not selected on merit or that he scored low scores during the interview.
103. On the Petitioners' allegation that the 5th Interested Party was snuck into the shortlist through the publication of an expanded shortlist, it is his case that on 25th March 2025, the Selection Panel clarified that after reviewing the longlist of the applicants it deemed it necessary to update the list of shortlisted candidates in order to further enhance compliance with the constitutional principles of regional balance, representation of the youth, and overall inclusivity.
104. The 5th Interested Party avers that the Petitioners' argument that he is disqualified under Article 88 (2) (a) (i) of the Constitution due to having run for election as the Governor for Mandera County at the last General Elections is founded on a misreading of the provision of the Constitution; which plainly only disqualifies persons who ran for Member of Parliament or Member of a County Assembly but not candidates in a gubernatorial election conducted within the last five years.
105. The 5th Interested Party contends that the Petitioners deliberately elected not to join the Selection Panel as a party to these proceedings despite them being a necessary party. To his mind, that omission of what he views as a mandatory party rendered the Petition unenforceable.
106. In sum, it is the 5th Interested Party's case that the Petitioners are not entitled to the reliefs sought and that the Petition is without merit and ought to be dismissed with costs.
107. The 6th Interested Party opposes the Petition through Grounds of Opposition dated 15th May, 2025 and the Replying Affidavit sworn on 10th June, 2025.

The Grounds of Opposition are that, verbatim:

1. The Petition is an abuse of the Court process, fatally defective and hence ought to be struck off and/ or dismissed with costs.
2. The 6th Interested Party was vetted by IEBC selection panel but the Selection Panel is not a party to this petition.
3. The said List of Nominees complied with the requirements of Section 5 of the Independent Electoral Boundaries Commission Act.



4. Section 5 of the *Independent Electoral Boundaries Commission Act* provides a membership limited to seven (7) members hence it is impractical to represent all ethnic groups or achieve complete regional or ethnic balance in Kenya on the Independent Electoral Boundaries Commission.
 5. Section 5 of the *Independent Electoral Boundaries Commission Act* does not set out a strict formula for achieving ethnic and regional balance in a body limited to seven (7) members hence that discretion is let to the selection panel.
 6. The principle of inclusiveness under Article 10 of the *Constitution* was complied with in context of selecting nominees to the Independent Electoral Boundaries Commission as provided for under the *Independent Electoral Boundaries Commission (Amendment) Act, 2024*, which contemplates a broad diversity particularly regarding gender and integrity as opposed to the selection of specific nominees based on their regional locality, although the discretion is entirely bestowed on the respective bodies.
 7. Article 54(2) of the *Constitution* of Kenya is framed in a language envisaging progressive realization, to ensure that no less than 5% of public bodies comprise of persons with disabilities. This requirement means that an appointing authority must take active steps to search for and include qualified candidates with disabilities, subject to the size and nature of the body.
 8. Section 107 and 108 of the *Evidence Act* require the Applicant to prove that qualified persons living with disability applied or were interviewed but were overlooked that the selection panel acted in bad faith or in deliberate disregard of known disabled candidates who met the qualifications listed under Section 6 of the *Independent Electoral Boundaries Commission Act*.
 9. The Applicant has failed to satisfy and/ or provide the provisions of the law the 6th Interested Party has violated.
 10. The Applicant's Application is premised to deny the 6th Interested Party enjoyment of the fruits of the Selection Panel's outcome and to serve the nation as a qualified commissioner contrary to Section 4 of the *Independent Electoral Boundaries Commission Act*.
 11. There is no prejudice that will be occasioned upon the Applicants.
 12. The Application ought to be struck out or dismissed with costs to the 6th Interested Party.
108. The 6th Interested Party in response to the petition also filed a Replying Affidavit by Francis Odhiambo Oduol sworn on 10th June, 2025.
109. It is his case that the process through which he was shortlisted, interviewed, and recommended for nomination was conducted legally and was procedurally sound.
110. Francis Odhiambo Oduol avers that the Petitioners have not adduced any material showing any impropriety, lack of qualification, or violation of the *Constitution* in his selection and nomination.
111. It is his overall position that the Petition is unmerited, incompetent, misconceived, and an abuse of court process that ought to be dismissed with costs.
112. The 7th Interested Party, filed a statement setting out the grounds relied upon to oppose the Petition, stating, verbatim that:
1. The Affidavit sworn on 13.05.2025 and the Further Affidavit sworn on 15.05.2025 are argumentative and disclose no issues of facts capable of being responded to by the 7th



Interested Party. As such, there is neither a legal nor viable cause of action by the Petitioners as against the 7th Interested Party. The 7th Interested Party should be struck out from these proceedings in accordance with Section 5(d)(i) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#).

2. The Petition is drafted in an omnibus manner. The process of shortlisting and nomination was conducted on the basis of individual qualification and merit. The omnibus manner in which the Petitioners gravamen is espoused is prejudicial and unfair to the candidature 7th Interested Party whose process of shortlisting and nomination the Petitioners find no issue with.
3. The petition violates the doctrine of judicial restraint as it invites this Court to interfere with the constitutional and statutory mandate of Constitutional institutions and mechanism.
4. The petition violates the doctrine of separation of powers as it invites this court to determine the outcome of a process within the exclusive legal mandate of Parliament.
 - a. Article 250(2) that requires chairpersons and each member of a commission, and the holder of an independent office, to be identified and recommended for appointment in a manner prescribed by national legislation, approved by the National Assembly and appointed by the President.
 - b. Section 7 and 10 of the [Public Appointments \(Parliamentary Approval\) Act](#) that requires Parliament to consider the procedure used to arrive at a nomination, any constitutional or statutory requirements relating to the office in question, the suitability of the nominee and being clothed with the powers to reject any such nominees after such consideration.
 - c. This is a direct mandate and process entrusted to Parliament and it has already called for public participation vide submission of memoranda including supporting affidavits on oath contesting the suitability of any the Nominees as provided for under Section 6 of the [Public Appointments \(Parliamentary Approval\) Act](#).
 - d. The petition is premature and if at all the same was to be in issue, it would have sufficed as a memorandum submitted before the Departmental Committee on Justice and Constitutional Affairs in Parliament for consideration rather than a matter before this court
 - e. Interference with the Parliament's internal arrangements and procedures
 - f. That the 7th Interested party is a woman from the Bajuni Community, a minority group and was also professionally and academically qualified to be a member of the Commission and her presence amongst the nominees reflect the regional and ethnic diversity in this Country within the provisions of Paragraph 6 in the 1st schedule of the [Independent Electoral and Boundaries Commission Act](#).
 - g. Further, there are no sufficient grounds or evidence on the face of the Notice of Motion and the Petition to support the allegation that the shortlisting and nomination of the 7th Interested Party violated the guiding principles of leadership and integrity under Article 73(2) (a) or that she failed to meet the eligibility criteria set out under Article 88(2) (a).
 - h. That petition and the Further Affidavit sworn on 15.05.2025 are consequently incompetent, incurably defective and an abuse of the court processes and should be dismissed with costs.



113. The 7th Interested Party, Fahima Araphat Abdallah, also relied on her sworn Replying Affidavit filed on 5th June 2025 in which she situated herself as a Kenyan female youth from the Bajuni tribe, and a resident of Shella Village situated in Lamu County. She added that she is professionally and academically qualified to be a Member of the Commission; and that her presence in the list of nominees promotes the regional and ethnic diversity in this Country.
114. In response to the Petitioners' affidavit in support of the Petition, the 7th Interested Party largely covered the same grounds as the 1st to 6th Interested Parties.
115. The Fahima Araphat Abdallah depones that although she was Member of the Lamu County Public Service Board at the time of her selection and nomination, holders of that office are not state officers as defined under Article 260 nor are they designated as such by end statute. To that end, she avers that the Petitioners' argument that she is disqualified under Article 88(2)(b) are without legal basis.
116. The 7th Interested Party prayed that the Petition be found to be without merit and consequently dismissed.
117. The 8th Interested Party Justus Mutunga Mutuku was enjoined in the petition on 9th June, 2025 with the consent of all the Parties to the Petition. He filed a Replying Affidavit sworn by himself on 10th June, 2025 opposing the Petition, in his eyes, the Petition is baseless and is contrary to public interest and constitutional fidelity.
118. He asserts that he participated in the public vetting process of the 1st to 7th Interested Parties by submitting a memorandum to both the Selection Panel and the National Assembly.
119. According to the 8th Interested Party, the process of nominating the 1st to the 7th Interested Parties for appointment as Members of the IEBC was in accordance with the Constitutional and statutory dictates.
120. He argues that the continued delay in operationalizing the IEBC just two years to the general election may fatally hinder the boundary delimitation process and compromise electoral fairness and representation.
121. It is his case that the Petition fails to demonstrate any breach of the law in the appointments, which he avers complied with Articles 250(2)(b),248 of the [Constitution](#) and the [Public Appointments \(Parliamentary Approval Act\)](#) with adequate public participation and due process.
122. It is his further case that judicial interference in this process, without demonstration of any illegality, would offend the doctrine of separation of powers and institutional independence as guaranteed under Article 249(2)(b) of the [Constitution](#).
123. The 8th Interested Party urged the Court to dismiss the Petition and affirm the legality of the appointments to enable the IEBC to carry out its constitutional mandate including boundary review and referendum facilitation.

The Petitioners' Rebuttal: Further Affidavit and Supplementary Affidavit (2)

124. In rebuttal to the Respondents' and Interested Parties' responses to the Petition, the Petitioners filed a Further affidavit sworn on 15th May, 2025 and a Supplementary Affidavit (2) sworn on 15th June, 2025 by Kelvin Roy Omondi. The two depositions reiterate the Petitioners' earlier averments in addition to responding to the contentions of the Respondents and the Interested Parties.



125. In the said affidavits, the Petitioners argue that the issue of jurisdiction is res judicata in light of the Ruling of this Court rendered on 29th May, 2025 and that as such, this Court cannot be invited to sit on appeal over its own decision concerning the issue of jurisdiction.
126. The Petitioners maintain that this Court has jurisdiction to hear and determine the Petition by virtue of Articles 22, 165(3), and Article 258 of the Constitution.
127. In response to the 3rd Interested Party's assertion that the "Supporting Affidavit contains inadmissible averments since statements of information and belief showing the sources and grounds thereof are only permitted in interlocutory proceedings to such facts as he is able of his own knowledge to prove contrary to the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules", the Petitioners assert that Constitutional Petitions are guided by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), and that under Rules 10 and 11 a Petition need not be supported by any such affidavit.
128. In response to the assertions by the 1st Respondent and the 5th Interested Party that "the Annexure marked "KRO-2" constitutes illegally obtained evidence", the Petitioners state that the annexure is a document that is in the public arena.
129. The 1st Petitioner added that annexure 'KRO-2' was presented to his advocate by an anonymous whistleblower and that neither the Respondents nor the Interested Parties have questioned its authenticity.
130. Further, the Petitioners counter that the doctrines of justiciability and ripeness do not apply and that the Court should decline the invitation to exercise deference, as the selection, nomination, and appointment processes are already tainted.
131. The Petitioners further challenge the actions and conduct by the Selection Panel on one hand, and on the other hand the legality and constitutionality of the actions by the President in selecting the nominees and their gazettment on 10th June 2025; an action that came notwithstanding the ruling and express orders of this Court issued on the 29th May, 2025.
132. In rebuttal, the Petitioners accuse the Speaker of the 3rd Respondent and the Members of the National Assembly of making public utterances to the effect that they would approve the list of nominees to the Commission no matter what; and that they proceeded to do so. The Petitioners argue that this was evidence of a predetermined decision that made the vetting and approval processes, including public participation, a mere facade.
133. They further claim that the National Assembly glossed over the concerns raised during their vetting of the nominees and that this was a continuation of the alleged impunity of the Selection Panel which illegally expanded the shortlist.
134. The Petitioners depone that subsequent to the filing of the Petition they received further information that the 7th Interested Party had confirmed during her vetting by the National Assembly that she is a current Member of the Lamu County Assembly Service Board. The Petitioners contend this makes the 7th Interested Party a State Officer who is consequently ineligible for shortlisting, nomination, and appointment.
135. The Petitioners further state that the 4th Interested Party stated before the National Assembly that she served as the Deputy Executive Director of the Jubilee Party until 2021.



- The Petitioners annexed the Jubilee Party Constitution to their Supplementary Affidavit (2) in support of their contention that the Deputy Executive Director position is a member of the National Executive Committee whose membership forms part of the National Governing Council of the Jubilee Party.
136. They reiterated their contention that the 5th Interested Party, having admitted to contesting for the position of Governor in the 2022 General Elections, is disqualified under a purposive reading of Article 88(2)(a)(i) of the Constitution.
 137. The Petitioners further argue that the 5th Interested Party's admission that he is the brother-in-law of the Leader of Minority in the National Assembly shows a close family tie to a senior political figure and casts doubt on whether the Selection Panel truly acting independently and in good faith in adding his name to the expanded shortlist. The Petitioners also added that this relationship with a senior political figure casts doubts on the 5th Interested Party's ability to exercise impartiality and be free from bias were he to be appointed to the IEBC.
 138. On the issue raised by the Respondents and Interested Parties that the regions referred to by the Petitioners are unknown in law, it is their case that the said regions are known in law by dint of Article 262 as read together with Section 17 of the Sixth Schedule of the Constitution and Section 14 of the National Coordination Act Cap 127.
 139. It is the Petitioners' case that there is a perception from the general public that the 1st to the 7th Interested Parties have secured their selection and nominations through the influence of their "godfathers" Raila Amollo Odinga and Junet Mohammed who are members of Orange Democratic Movement on one hand, and the President, Josephat Nanok and Musalia Mudavadi, who are members of the United Democratic Party on the other hand; all of whom are working together pursuant to the political memorandum of cooperation that is popularly referred to as the 'broad-based government'.
 140. According to the Petitioners on 10th June, 2025, and in blatant defiance of the conservatory orders issued by this Court, the Respondents, vide the Office of the President and the Government Printer, caused the appointment of the 1st -7th Interested Parties as Chairperson and Commissioners of the IEBC.
 141. The Gazette Notices 7724 and 7725, according to the Petitioners, are therefore void ab initio for violating a court order. Further, that having been tainted by an appointment which the President rushed through in defiance of court orders, the Petitioners argue that the members of the public have certainly lost confidence in the 1st -7th Interested Parties' political neutrality and their ability to run the IEBC independently.
 142. The Petitioners state that they are apprehensive that if the orders sought in the Petition are not granted the appointments shall be finalized through swearing-in, but the process and the IEBC as a whole will lack the legitimacy expected of the institution mandated to conduct elections in Kenya.
 143. The Petitioners also state that contrary to the averments by the 6th Interested Party to the contrary, Rule 5 (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is clear that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties. Consequently, they do not see their failure to include the Selection Panel in the Petition as fatal, and they further argue that in any case the Selection Panel is now functus officio and was dissolved hence it cannot sue or be sued.
 144. Overall, the Petitioners state that the Petition meets the threshold for the grant of reliefs sought.



Written Submissions

145. The Petition was canvassed by way of written submissions, with oral highlighting on 23rd June, 2025.

The Petitioners' Written Submissions

146. The Petitioners filed written submissions dated 15th June 2025 in support of their contentions. The Petitioners' written submissions addressed the following thematic areas.

a. Lack of representation of Kenya's diverse communities

147. The Petitioners submit that Articles 10, 27, and 232 of the Constitution espouse inclusivity and equitable representation of all communities in public appointments.

148. They argue that where the nominees are predominantly from a few ethnic groups, and this contravenes the constitutional principle of regional and ethnic balance required for bodies like the IEBC, as well as the express provisions of the National Cohesion and Integration Act which discourages overrepresentation of any single community in public institutions.

149. They also submit that the nomination of the Chairperson and Commissioner from the former Rift Valley region while excluding other regions of the Republic also violates Articles 10, 232, and 250 (3) & (4) of the Constitution.

150. The Petitioners rely on the case of Community Advocacy & Awareness Trust & 8 Others v Attorney General; Interested Party National Gender & Equality Commission & 5 Others, Petition 243 of 2011, [2012] eKLR where Majanja J (as he then was) observed that public appointments must uphold constitutional values like transparency, equality and national diversity; and that while ethnicity and regional balance are important considerations, there are no clear legal guidelines on how to determine them.

b. On the exclusion of marginalized groups

151. The Petitioners submit that Article 54(2) of the Constitution mandates that at least 5% of public appointments should be Persons with Disabilities. Further, they submit that Article 81 (c) of the Constitution demands that a fair representation of persons with disabilities must guide in the totality of the electoral system, including appointment of the IEBC Commissioners.

152. According to the Petitioners, the list containing the proposed IEBC Chairperson and Commissioners is unconstitutional and illegal as it is discriminatory and failed to include any person with disability. The Petitioners relied on the cases of Okoiti & Another v Public Service Commission & 73 Others; Law Society of Kenya & Another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated)) [2021] KEHC 464 (KLR) (Constitutional and Human Rights) (20 April 2021) (Judgment) and Marilyn Muthoni Kamuru v & 2 others v Attorney General & Another, Petition 566 OF 2012, [2016] KEHC 8370 (KLR). In the latter case, the Court is said to have reiterated that ultimately, all public appointments must strictly comply with the Constitution and the law.

c. On no prior consultation with opposition political parties

153. The Petitioners submit that (Article 88(2)(e)) of the Constitution and the IEBC Act(2011) require a transparent and consultative process in the appointment of Members of the IEBC as this promotes fairness, inclusivity, and public confidence in the electoral body.



154. The Petitioners argue that the selection and nomination of the 1st to 7th Interested Parties by the President is illegal and contrary to Articles 10 and 27 (1) of the Constitution on the requirement of public engagement, participation and consultation as the President did not engage or consult the Majority and Minority Political Parties at the National Assembly prior to making the selection, contrary to the recommendations of the National Dialogue Committee.
155. They further submit that the Kriegler Report , which followed the disputed 2007 presidential election and the subsequent post-election violence, underscored the dangers of a partisan electoral commission and emphasized the need for impartiality in its composition.
156. The Petitioners also submitted that the Inter-Parliamentary Parties Group (IPPG) reforms of the late 1990s further reinforced the idea that broad political consensus in appointing key electoral officials helps mitigate distrust and enhances the legitimacy of electoral outcomes. They submit that over time, this bipartisan engagement has become an unwritten norm and a constitutional convention that, while explicitly outlined in the Constitution, is nevertheless widely accepted as a necessary requirement to prevent political bias and ensure electoral integrity.
157. Thus, the Petitioners submit that the IPPG process and the Kriegler Report have contributed to a constitutional tradition where inclusivity and political consensus in appointing commissioners of the elections body are regarded as essential for credible elections and democratic stability in Kenya. They also submit that this historical fact cannot be sacrificed at the altar of rigid formalism. To buttress this argument, the Petitioners rely on the Supreme Court case of In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) where the Apex Court observed that the Constitution of Kenya requires a purposive approach to interpretation that avoids rigid formalism and that courts must consider non-legal factors such as historical, social, economic and political contexts.
158. It is the Petitioners' further submission that the IEBC Selection Panel violated constitutional principles of transparency, accountability and fair administrative action during the selection process. Specifically, that they argued that the Selection Panel failed to publicize names, disclose scores, or explain its decision-making criteria; thereby breaching Articles 10, 35, 47, 232, and 250 of the Constitution.

d. Breach of procedure, legitimate expectation , fair administrative action, and perception of bias

159. Another major concern for the Petitioners is that Hassan Noor Hassan , who while longlisted was not in the initial shortlist, was included in a republished and expanded shortlist in a manner that was unprocedural, illegal and discriminatory against all other candidates. To the Petitioners, this inclusion violated the rule of law, legitimate expectation, and fair administrative action.
160. It was their submission that the Selection Panel's action and decision in this regard erodes public trust in institutions but also creates a dangerous precedent where rules can be bent to favour individuals; undermining the very essence of a lawful and just administrative system. The Petitioners also submit that this highlights a legitimacy concern with respect to the 5th Interested Party, whom the people of Kenya will reasonable conclude was snuck into the Commission to serve as a political acolyte rather than as an independent and non-partisan State Officer who administers his duties free of political influence.
161. The Petitioners relied on the Indian cases of Ram Prवेश Singh & Others v State of Bihar & Others 2006 AIR SCW 5312, 2007 (1) AIR JHAR R 373 2006 LAB. I. C. 4241, 2006 LAB. I. C. 4241; M.P. Oil Extraction and Anr. Etc. v State of Madhya Pradesh and Others AIR 19 98 SUPREME COURT 145, 1997 (7) SCC 592, 1997 AIR SCW 4104, (1997) 6JT 97 (SC) and Madras City Wine Merchants'



Asson. and ... v State of Tamil Nadu and Anr 19 94 AIR SCW 3915, 1994 (5) SCC 509, (1995) 2 MAD LJ 2, (1995) 1 MAD LW 21, (19 94) 4 JT 6 55 (SC) in support of their submissions under this thematic area.

On nomination of a person affiliated to a political party

162. The Petitioners submit that the selection and nomination of Mary Karen Sorobit is unconstitutional and unlawful due to her recent affiliation with a political party. It is submitted that she served as a County Chairperson of the Jubilee Party within five years of the General Elections that were held in August 2022.

According to the Petitioners, this contravenes the express provisions of Article 88(2)(a) of the Constitution, which bars recent political party office bearers from being appointed to the IEBC.

163. They submit that her nomination violates Article 10, by failing to uphold transparency, integrity, and accountability, and Article 73(2)(a), which demands that public appointments be based on the guiding principles of leadership and integrity and also selection based on personal integrity, competence, and suitability. The Petitioners further submit that her recent political affiliation undermines public confidence in the independence, neutrality, and impartiality required of members of the Commission.

164. According to the Petitioners, the process leading to her nomination fails to meet the threshold of a fair, open, and merit-based process as contemplated under Article 232(1)(g) of the Constitution.

165. The Petitioners linked that alleged failure with the Selection Panel's alleged failure to publicize the names submitted to the President. It was submitted these compound failures breached the constitutional obligations of openness under Article 10, casting doubt on the integrity and transparency of the process.

166. The Petitioners rely on the case of *Trusted Society of Human Rights Alliance v Attorney General and Others* Nairobi Petition 229 of 2012 where the Court is said to have held that courts are constitutionally empowered to review the appointment of persons to State or public office for both procedural fairness and legality. This, it is submitted, involves examining whether the appointing authority properly investigated whether the nominee met constitutional requirements and determine whether the appointment itself is rational and reasonable .

167. The Petitioners further submit that the IEBC's composition must inspire public trust; and if nominees are perceived as biased, exclusionary or politically imposed, it could undermine electoral credibility, fuel disputes and protests, and violate constitutional safeguards meant to ensure an independent and representative Commission.

e. On nomination of State Officers and persons disqualified under the Constitution

168. The Petitioners submit that the Selection Panel and the President acted unconstitutionally by shortlisting, interviewing, and nominating unqualified persons to the IEBC.

169. Concerning Anne Njeri Nderitu , they argue that the Selection Panel and the President acted unconstitutionally under Article 88(2) as, the nominee was and still is a State Officer as the Registrar of Political Parties and hence she was and/or is ineligible to apply for or be selected as a nominee or approved to serve as a Commissioner of the Commission.

170. It is further submitted that Mary Karen Sorobit , was ineligible to apply or be selected as a nominee to serve as a Commissioner of the Commission as she was the Executive Director and member of the governing body of the Jubilee Political Party in the last 5 years preceding her selection and nomination.



171. Additionally, they submit that Hassan Noor Hassan, on the other hand was ineligible to apply or be selected as a nominee to serve as a commissioner as he had contested and vied for public office in the 2017 and 2022 General Elections, in Mandera County as a gubernatorial candidate, which automatically disqualified him from applying, being shortlisted and being selected as a commissioner.
172. The Petitioners argue that the qualifications of members of County Assemblies is similar to that of Governors hence a harmonious reading of the Constitution implies that the contestation by Hassan Noor Hassan for position of Governor disqualifies him under Article 88 of the Constitution.
173. Finally, they contend that Fahima Araphat Abdallah was ineligible to apply or be interviewed and nominated to serve as a commissioner as she is a State Officer and a current member of the County Assembly Service Board for Lamu County.
174. They also submit that the Constitution does not anticipate that any State Officer would hold any other office or be eligible for interviews and nomination for such other offices such as in Constitutional Commissions and Independent Offices. In their submissions, the Petitioners argued that it would be an absurdity for instance to see a Judge, while holding the position of a Judge, to apply and attend interviews for a position in the IEBC. They submitted that the same standard should apply for all other State Officers.
175. The Petitioners urge the Court to take note that for State and Public Officers to contest in elective offices, they must first resign from office before they can be cleared.
176. Reliance is placed by the Petitioners on the case of /Benson Riitho Mureithi v J. W. Wakhungu & 26 Others, Petition NO. 19 of 2024, [2014] eKLR where the Court is said to have held that the High Court has jurisdiction to review the appointment of individuals to public office where integrity concerns under Chapter Six of the Constitution arise, and that although statutes like the Leadership and Integrity Act regulate the conduct of public officers already in office, they do not provide mechanisms for assessing the suitability of proposed appointees.

On the nomination of Erastus Edung EtheKon

177. The Petitioners submitted that the nomination of Erastus Edung EtheKon as Chairperson of the IEBC is unconstitutional and illegal as his nomination is laced with perception of likelihood of being biased on account of his inclinations and affiliations with Josephat Nanok, the Statehouse Deputy Chief of Staff of the President. In reiterating the contents of the Petition and their affidavits on this issue, the Petitioners added in submissions that the nomination is tainted with impartiality and does not uphold the neutrality required of a Chairperson of IEBC.

f. On publication of the outcome and report of the interviews by the Selection Panel

178. The Petitioners also contend that the Report and outcome of the interviews constitute important information to be shared with the public pursuant to Article 35 of the Constitution; and that it is unconstitutional for the President and the Selection Panel to fail to publicize the information relating to the performance of the candidates and the Report on the interviews.
179. They further submit that the Constitution demands that all such appointments be conducted in a transparent and competitive way hence by dint of Article 35 (3) the State and the Selection Panel was under an obligation to publish and share with the public the report and general performance of all the selected candidates and to justify how the requirement of merit appointment was reached by the Selection Panel and the President.



180. The Petitioners assert that both the Constitution at Article 47 and the Fair Administrative Action Act impose a legal obligation on the Selection Panel to disclose relevant information. Further, it was submitted that under the constitutional principles of transparency, accountability and public participation, state organs, including the Selection Panel, are required to conduct their affairs in an open manner.
181. The Petitioner argue that the Fair Administrative Action Act codifies this duty to disclose relevant information and mandates that administrative bodies provide reasons for their decisions and allow affected parties access to pertinent information. They assert that the Selection Panel must adhere to these disclosure requirements in the interest of justice and compliance with statutory and constitutional mandates.
182. The Petitioners further submit that the score sheet and reasons for the Selection Panel’s decision do not fall within the category of exemptions under section 6 of the Access to Information Act. Further, that there is no prohibition on disclosure of scores, reasons for the decisions and that the failure to disclose the information is constitutionally indefensible. The Petitioners rely on the South Africa Supreme Court of Appeal (Schultz J) in / Transnet Limited v Goodman Brothers (Pty) Ltd [2000] ZASCA 151; 2001 (1) SA 853 (SCA) where the Court is said to have observed inter alia , that a duty to give reasons entails a duty to rationalize the decision.
183. According to the Petitioners, the failure of the Selection Panel to disclose individual candidate scores and the rationale behind its decisions undermines fundamental principles of transparency and accountability. It is submitted that without access to this critical information, the evaluation process remains opaque, leaving candidates and the public unable to assess whether selections were made fairly, objectively, and in accordance with established criteria.
184. The Petitioners further rely on the case of Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 Others; Independent Electoral and Boundaries Commission [2021] eKLR where the Court declined to grant interlocutory relief on the basis that the decision of the Selection Panel could be reversed if the petition therein succeeded on merit.
185. The Petitioners also rely on the case of Kenya Youth Parliament & 2 Others v Attorney General & 2 Others [2012] KEHC 5436 (KLR) where the Court is said to have pointed out that courts are vested with jurisdiction to annul and declare as unconstitutional any such appointments to public office where a step in the process of appointment was side stepped.
186. In conclusion, the Petitioners submit, relying on the decision by the South African Constitutional Court in Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC) (‘Democratic Alliance CC’ or ‘Simelane’) where it was stated that the requirement of rationality obliges courts to engage in an evaluation of the relationship between the means employed to reach a decision on the one hand and the purpose for which the power to make the decision was conferred, on the other; that each and every step in the process of reaching the decision must be rationally related to the outcome; and that a failure to take into account relevant material that colours the entire process with irrationality will render the decision irrational.
187. The Petitioners also filed submissions on the Preliminary Objections raised by the Respondents and the Interested Parties to the effect that the petition was not ripe for determination and that therefore the dispute is not justiciable.
188. The Petitioners maintain that the Petition is competently before this Court and that the issues raised are justiciable under Articles 22, 165(3) (b), and 258 of the Constitution. They argue that Article 22 grants



every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. They also submitted that Article 258 grants every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

189. It is also their submission that Article 165 (3) (b) vests in the High Court the original jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.

190. They rely on the *Senate v Attorney-General & Another & 3 Others* [2013] eKLR where Mutunga CJ (as he then was) is said to have observed that

“When there is even a scintilla of a threat...the court must ward off the threat”.

191. The Petitioners further rely on *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] KEHC 7074 (KLR) where the Court stated that a person can seek court intervention even before a constitutional right is violated, if there is a credible threat of violation; and that Article 165(3)(b) and (d)(i) allows courts to act on threatened breaches, recognizing that anticipated harm justifies preventive relief.

192. The Petitioners also rely on the case of *Katiba Institute v Inspector General of Police & another; Law Society of Kenya (Interested Party)* [2025] KEHC 5240 (KLR) where the Court observed that one does not need to wait for an actual violation of rights to file a constitutional petition, and that a credible threat is sufficient to justify legal action.

193. They state that the selection and nomination of the 1st -7th Interested Parties threatens multiple violations of the Constitution and the right to a free and fair election conducted by an independent body. In that regard, the Petitioners submitted the constitutional validity of the selection and nomination processes are questions ripe for determination by this Court.

194. In reaction to the second ground of the 3rd Respondent’s Notice of Preliminary Objection, the Petitioners submit that the National Assembly, the Attorney-General, and the nominees alleging non-exhaustion bear the burden of demonstrating the existence of such remedies, their adequacy, and that the remedies have not been exhausted. The Petitioners invoke

In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR, where the Supreme Court observed that:

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

195. Further reliance is placed on *Mark Ndumia Ndung’u v Nairobi Bottlers Ltd & another* [2018] eKLR, where the Court is said to have observed that

“a remedy is available if the Petitioner can pursue it without impediment, it is effective if it offers a prospect of success, and it is sufficient if it is capable of redressing the complaint”.



196. According to the Petitioners, the claims in this case are not amenable to the claimed alternative remedies, if at all they exist.
197. They further submit that the 2nd Interested Party's Preliminary Objection that only Parliament can consider the issues in the Petition is equally unmerited. Reliance in that regard was placed on the Supreme Court case of *Likowa v Aluochier & 2 others* [2025] KESC25 (KLR) in which the Supreme Court is said to have stated that where a petition raises a significant constitutional question it should be determined on its merits.
198. The Petitioners also submitted that the Attorney-General's call for constitutional avoidance, in a grave matter concerning the country's democratic core, is pointless.
199. The Petitioners rely on the case of *Jovet (Kenya) Limited v Bavaria NV* (SC Petition E039 of 2024 Petition) (unreported) where the Supreme Court is said to have faulted the High Court for avoiding a constitutional dispute about 'property' in goodwill.
200. Further, that the Supreme Court is said to have held that that under Article 20(3) of the *Constitution* courts are obligated not merely permitted to develop the law to align with the values of the Bill of Rights. It is further submitted that unlike the doctrine of constitutional avoidance, which discourages reliance on constitutional values and norms in disputes, the primacy of rights approach requires courts to actively apply constitutional norms in resolving disputes where existing laws fall short.
201. On whether the Petition is arguable, the Court observes that these were arguments in favour of the prayers for conservatory orders, which matter is spent and therefore we need not rehash them here.

The 1ST Respondent's Submissions

202. According to the 1st Respondent, the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR sets out the applicable principles and the contours of jurisdiction of the Court in matters concerning review of appointments made into public office.
203. It was submitted that in the above case, the Court of Appeal stated that whereas a Court may conduct review of appointments to State or Public Office on grounds of procedural soundness and as to the legality of such appointments, that may only be to the extent of applying a rationality test respecting the discretion conferred by law to the repository of the function.
204. It was submitted that there exists a legal presumption of regularity of all executive and legislative action in law which clothes the actions of both the Selection Panel and subsequently. the National Assembly with legality; and that a court must presume that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary.
205. The 1st Respondent relied on *Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others* [2018] eKLR in arguing that the Petitioners have failed to dislodge that presumption.
206. The 1st Respondent submits the Petitioners' various affidavits offend Order 19 Rule 3 (1) of the *Civil Procedure Rules* as they contain averments that are not confined to such facts as the deponent is able of his knowledge to prove and therefore inadmissible and ought to be struck out.
207. The 1st Respondent also submits that the Petition is not supported by evidence that can sustain the assertions that it makes.
208. The 1st Respondent also submitted that the provisions of the *Constitution* that prescribe the manner of appointment of members of the IEBC are Articles 250 and 88 of the *Constitution* and not Article 232 as alleged by the Petitioners, since the IEBC is not part of the public service.



209. On the allegations of non-observance of the constitutional requirements for regional and ethnic diversity, the 1st Respondent argues that the Petition is premised on a misappreciation of the law. To their mind, the regional and ethnic diversity in the composition of constitutional commissions is to be considered wholesome, that is, assessing the totality of all commissions and independent offices as one. In support of this position, the cases of *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others* [2013] eKLR and *John Waweru Wanjohi & Others v Attorney General (supra)* as consolidated with *Kipngetich Maiyo & Others v Kenya Land Commission Selection Panel & Others* were cited.
210. Flowing therefrom, the 1st Respondent submitted that the Petitioners have not provided any evidence of the composition of the other Commissions and Independent Offices; and without such evidence, the 1st Respondent submits that this Court cannot proceed to carry out an inquiry to interrogate compliance with Article 250(4).
211. The 1st Respondent also submits that the 1st -7th Interested Parties are from different regions and ethnic backgrounds as demonstrated in their respective replying affidavits, and that the Petitioners have failed to support their allegations to the contrary.
212. Turning to the allegations that some of the Interested Parties were not eligible for nomination and appointment on account of alleged contravention of the provisions of Article 88 (2) of the *Constitution*, it is the 1st Respondent's submission that the Petitioners have not proved the said allegations.
213. Additionally, and with regard to Hassan Noor Hassan, it was the 1st Respondent's submission that Article 88 of the *Constitution* does not apply to gubernatorial aspirants and the invitation by the Petitioners for this Court to make a finding that it does would be this Court adding words to the *Constitution*; a role that is outside the Court's jurisdiction.
214. On the issue of the National Dialogue Committee (NADCO) Report and the Petitioners' contention that there should have been consultation with the Majority and Minority Leadership of the National Assembly, the 1st Respondent submits that Article 250 of the *Constitution* provides that the approval process for nominees shall be undertaken by the National Assembly, which is composed of both minority and majority parties. Consequently, the Petitioners' point on this aspect is already well catered for in law, and the 1st Respondent urges the Court to exercise deference to the repository of the function.
215. It is the 1st Respondent's submission that the allegations in respect to infringement of Article 35 are contradicted by the very documents adduced by the Petitioners in this case.
216. It is submitted that the Petitioners failed to avail themselves of the statutory mechanism for access to information set out in the *Access to Information Act* and that their claim in the circumstances is contrary to the doctrine of constitutional avoidance and exhaustion of available remedies.
217. The 1st Respondent urged the Court to dismiss the petition with costs to the 1st Respondent.

The 2nd Respondent's Submissions

218. The 2nd Respondent submitted relying on written submissions dated 18th June, 2025 augmented by oral highlights. The 2nd Respondent adopted the submissions by the 1st Respondent before proceeding to frame two main issues for determination, namely:



- i. Whether the selection and nomination process as undertaken by the Selection Panel of the IEBC was constitutional; and
 - ii. Whether the 1st to 7th Interested Parties were suitable for selection and nomination.
219. On the Petitioners' claim that the nominations were not representative of Kenya's diverse communities, the 2nd Respondent submits that Kenya is divided into 47 counties and not the eight former provinces/regions; and thus, the Petitioners' use of the concept of "Rift- Valley" as a basis to challenge the nomination of the 1st and 4th Interested Parties is unfounded. Reliance was placed on *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others* [2013] KEHC 2527 (KLR) where Mumbi Ngugi J (as she then was) stated:
- "As correctly argued by the Respondents, the Constitution has now divided the country into 47 Counties, so that the administrative units known as provinces or regions on which this petition is based are no longer in existence."
220. On the allegation that the nominations were conducted without prior consultation with the Majority and Minority Political Parties in the National Assembly, the 2nd Respondent submitted that the allegation has no legal basis because the IEBC Selection Panel was composed of 9 members, 4 of whom are nominated by the Minority and Majority Parties in the National Assembly hence, if there was need for political consultation, this was done prior to the selection process. Additionally, the 2nd Respondent submits that in any event Parliament amended the IEBC Act to expand the composition of the IEBC Selection Panel in line with the NADCO Report, hence the NADCO was implemented before the process of selection.
221. On alleged failure to include Persons with Disabilities, the 2nd Respondent submitted that there is no express requirement that each constitutional commission must have a person with disability, a position set out by the Court in the case of *Njogu v Attorney General* [2025] KEHC 301(KLR).
222. On whether the 1st to 7th Interested Parties were suitable for selection and nomination, the 2nd Respondent submits that each of the nominees is duly qualified to hold the respective positions of Chairperson and Commissioners. It is submitted that the alleged constitutional violations levelled against their selection and nomination are baseless and unsupported by evidence.
223. On the alleged disqualification and bias levelled against Erastus Edung Ethekeon , the 2nd Respondent submits that the allegation is unsubstantiated. The case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR was relied on, to distinguish between actual and apprehended bias.
224. On the allegations levelled against Anne Njeri Nderitu being a State Officer and therefore ineligible to apply and be nominated to serve as a Commissioner of the IEBC, it is the 2nd Respondent's submission that Article 88 (2) of the Constitution of Kenya solely bars the appointment of State Office holders and is silent on their nomination. That the disqualification, the 2nd Respondent submitted, must therefore takes effect only at appointment.
225. On the Petitioners' claim that Moses Alutalala Mukhwana was ineligible for nomination to the IEBC because he scored low marks, the 2nd Respondent submits that no material was placed before the Court by the Petitioners to substantiate that allegation.



226. The 2nd Respondent submits that as against the 6th Interested Party, the Petitioners have not provided any particulars of his ineligibility, and thus Francis Odhiambo Aduol's selection and nomination should be allowed to stand.
227. Regarding the challenge to the eligibility of Mary Karen Sorobit, the 2nd Respondent submitted that the Petitioners had similarly not placed material before this Court to prove their claim that she was an Executive Director and member of the governing body of the Jubilee Political Party within the last 5 years prior to her nomination and thus contrary to Article 88 (2) (a) of the Constitution. They thus submit that the claim as urged by the Petitioners against the 4th Interested Party is without merit and ought to be dismissed.
228. On the Petitioners' allegations that Hassan Noor Hassan was snuck into the shortlist of nominees, is a relative of Junet Mohammed, MP and Minority Leader of the National Assembly, and that the nominee stood for Governor of Mandera County within the last five years contrary to Article 88 (2) (a) (i) of the Constitution; the 2nd Respondent submits that the allegations are unfounded.
229. On the allegations of ineligibility of Fahima Araphat Abdallah on account of her being a member of the Lamu County Assembly Service Board, the 2nd Respondent submits that even if the 7th Interested Party served as a Member of the Lamu County Assembly Public Service Board, she would still be eligible for nomination and appointment because members of County Public Service Board are not State Officers as contemplated by Article 260 of the Constitution. Reliance was placed on /County Public Service Boards National Consultative Forum & 47 others v Salaries and Remuneration Commission [2024] KEELRC 1279 (KLR).
230. For the foregoing reasons, the 2nd Respondent urged the court to dismiss the Petition with costs.

The 3rd Respondent's Submissions

231. The 3rd Respondent filed written submissions dated 18th June 2025 and its Counsel made oral highlights on 23rd June, 2025.
- The 3rd Respondent adopted the submissions of the 1st and 2nd Respondents opposing the Petition. The issues identified by the 3rd Respondent for determination are:
- a) Whether the correct procedure was followed in nominating the 1st to 7th Interested Parties as IEBC Chairperson and Commissioners nominees;
 - b) Whether the National Assembly complied with the Constitution and the Public Appointments (Parliamentary Approval) Act, 2011, in particular Section 7 thereof, in approving the nominees; and
 - c) Whether this Honourable Court has jurisdiction to carry out "a merit review" of the approval process or to "sit on appeal" over the decision of the National Assembly.
232. On the first issue, the 3rd Respondent submitted that the procedure for selection, nomination, and appointment of IEBC Commissioners as stipulated in Articles 88 and 250 of the Constitution, the IEBC Act and the Public Appointments (Parliamentary Approval) Act was fully complied with.
233. According to the 3rd Respondent, the Selection Panel lawfully conducted interviews, shortlisted candidates, submitted names to the President; and the latter lawfully nominated seven individuals and forwarded their names to Parliament for vetting.



234. The 3rd Respondent, the National Assembly, submitted that the House published the names of the nominees for public participation pursuant to Article 118 of the Constitution and conducted approval hearings on 31st May 2025.

At those hearings, the National Assembly is said to have vetted the nominees on their qualifications, integrity, impartiality and competence through the National Assembly's Justice and Legal Affairs Committee (JLAC). Upon JLAC vetting the nominees, a positive report with respect to each of the nominees was submitted to the whole House which approved all seven nominees.

235. On the Petitioners' contention that the nomination of the Chairperson and one Commissioner from the Rift Valley region violates Articles 10, 27(1), 232, and 250(3) and (4) of the Constitution and undermines the constitutional imperative of regional balance and inclusivity, the 3rd Respondent adopted the positions taken by the 1st and 2nd Respondents before adding that the Petitioners misapprehended the scope and application of the cited constitutional provisions.

236. The 3rd Respondent submitted that the proper interpretation of Article 250(4) was given in the Legal Advice Centre (Kituo Cha Sberia) v Attorney General & 3 Others [2015] eKLR, where the Court held that Article 232 of the Constitution must be interpreted holistically, taking into account the full spectrum of national values and principles of public service, citing with approval the decision in Mohamed Osman Warfa & Others v Office of the President & Others, H.C. Petition No. 77 of 2013 where the High Court stated inter alia, that while ethnic and regional diversity is an important factor, it must be balanced with other constitutional imperatives such as equal opportunity for men and women, fair competition, merit and the inclusion of persons with disabilities; and that no one principle operates in isolation.

237. The 3rd Respondent further relied on Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others [2013] eKLR which case was also relied upon by the 1st and 2nd Respondents, in which the Court rejected the argument that "regional diversity" required representation of every administrative region (formerly provinces) or all 47 counties in every commission. The 3rd Respondent also cited the case of Godfrey Musaina & another v Cabinet Secretary for Tourism & 7 others [2017] eKLR where the Court stated, inter alia, that concerns about skewed regional composition must be substantiated by evidence and that there being few positions in appointments such as the ones under consideration in this petition, it was not possible for all communities to be represented in every single appointment.

238. The 3rd Respondent also relied on Njogu v Attorney General & Another [2025] KEHC 301 (KLR), where the Court is said to have clarified that the principle of inclusiveness does not require representation of every ethnic group in every public body; and that instead, the expectation is for general diversity and inclusivity across the constitutional order, not strict regional quotas within each institution.

239. According to the 3rd Respondent, the Petitioners' argument that the appointment of two individuals from the Rift Valley region invalidates the entire nomination process is legally untenable and that such a demand is guided by narrow and mechanistic interpretations of regional diversity, particularly where no statistical or comparative data is provided to show systemic exclusion or dominance across multiple commissions.

240. On the Petitioners' claims that the selection and nomination process failed the constitutional requirement under Article 54(2) for inclusion of persons with disabilities (PWDs), the 3rd Respondent submits that Article 54(2) does not impose an immediate or absolute obligation, rather, it mandates



progressive realization of this representation threshold. The 3rd Respondent further argued that this interpretation accords with broader constitutional principles of affirmative action that allow for gradual implementation depending on institutional capacity, availability of qualified candidates and other practical considerations.

241. It was further submitted that in recognition of this principle, the Selection Panel and the Justice and Legal Affairs Committee of the National Assembly duly considered the issue of representation of persons with disabilities during the nomination and approval processes and that deliberations on this issue were recorded at various stages of the Committee's proceedings. Reliance was once more placed on the case of *Njogu v Attorney General & Another* [2025] KEHC 301 (KLR) where the Court emphasized that the duty imposed by Article 54(2) is one of progressive realization, and that the failure to meet the 5% threshold does not in itself establish a constitutional breach, in the absence of evidence that qualified persons with disabilities applied or were deliberately overlooked, or that the appointing authorities acted in bad faith or ignored known qualified candidates.
242. It was submitted that in this case, the Petitioners had not demonstrated deliberate exclusion, discriminatory intent or a failure to take proactive steps to include qualified candidates with disabilities who met the criteria under the First Schedule to the *IEBC Act*.
243. On the Petitioners' alleged ineligibility of certain nominees, the 3rd Respondent submits that the Committee considered the eligibility of each nominee and made specific findings based on the evidence presented.
244. Regarding Hassan Noor Hassan, the 3rd Respondent submits that the JLAC found that the nominee had not stood for election as Member of the County Assembly or Member of Parliament in the five years preceding the nomination and was therefore not disqualified under Article 88(2)(a)(i) of the *Constitution*.
245. On the Petitioners' claims that Mary Karen Sorobit was a member of the governing body of a political party, namely the Jubilee Party, and therefore disqualified under Article 88(2)(a)(ii), it was submitted that following vetting, the Committee concluded that Ms. Sorobit was not disqualified from appointment under Article 88(2) of the *Constitution* for the reasons that: a. Section 2 of the *Political Parties Act* defines 'governing body' as the Committee responsible for administering the affairs of a political party. Further, that paragraph 7 of the First Schedule to the *Political Parties Act* provides for the eligibility criteria for election to the governing body; b. The nominee demonstrated by affidavit and extracts of records from the Office of Registrar of Political Parties that her name does not appear in the governing body of the Jubilee Party; c. Membership to a political party is not a bar to nomination or appointment to public office; and d. The Gazette Notices did not mention the name of the nominee as a member of the governing body of the Jubilee Party.
246. Regarding Anne Njeri Nderitu, the 3rd Respondent submits that the Committee noted that she was, at the time of vetting, serving in a State Office as the Registrar of Political Parties, but had not yet been appointed as a Member of the Commission. The 3rd Respondent submitted that the same was no bar at this stage provided that the nominee complied with requirement that she must resign from her current office before assuming office in the IEBC.
247. According to the 3rd Respondent, the phrase "holds any state office" under Article 88(2)(b) connotes that ineligibility is determined as at the time of appointment, not at the time of nomination or vetting.
248. The 3rd Respondent relies on the case of *Kibeh v Waibara & another* (Civil Appeal E468 of 2020) [2022] KECA 388 (KLR), where the Court of Appeal is said to have distinguished different stages in the public appointment process and held that nomination and appointment (or election) are two



- distinct and sequential stages, and that disqualification thresholds must be evaluated at the relevant stage. The Court of Appeal is also said to have found that nomination to vie for parliamentary office did not amount to being elected, and hence could not trigger the disqualifying provisions under Article 99 of the *Constitution*.
249. The 3rd Respondent argues that by analogy, nomination to serve in the IEBC does not in itself amount to appointment and therefore the disqualification under Article 88(2)(b) can only be assessed at the point of appointment. Accordingly, it was submitted that the nomination was not unconstitutional and that any requirement to resign would take effect prior to assuming office.
250. On the claims by the Petitioners that the failure to publish the report of the Selection Panel undermines the legality and transparency of the recruitment process, the 3rd Respondent submits that there is no provision of the *Constitution*, the IEBC Act, or any other statute that mandates the publication of the Selection Panel's report as a prerequisite to the forwarding of nominees to the National Assembly for vetting.
251. The 3rd Respondent further submits that the Petitioners' letter seeking access to the Selection Panel's report was dated 9th May 2025, while the Petition was filed a mere four days later on 13th May 2025; thereby offending Section 9(1) of the *Access to Information Act* which gives a public entity twenty-one (21) days within which to respond to a request for information. According to the 3rd Respondent, the Petitioners acted prematurely in approaching this Court before the statutory period had lapsed.
252. The 3rd Respondent further faults the Petitioners for failing to exhaust the remedies provided under the *Access to Information Act*, which include a right of review by the Commission on Administrative Justice under Section 14 of the *Act*, which is a mandatory statutory mechanism for redress before invoking jurisdiction of this Court.
253. In support of the above position, reliance was placed on *Commission for Human Rights & Justice (CHRI) & another v Chief Officer, Medical Services, County Government of Mombasa & 3 others* (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR), where the Court is said to have affirmed the doctrine of exhaustion and held that Petitioners must comply with statutory remedies, including timelines for requesting and appealing the refusal of information.
254. On the Petitioners' allegation that the President acted unlawfully in nominating persons for appointment to the IEBC without first consulting the majority and minority political parties in the National Assembly, the 3rd Respondent mirrored the submissions of the 1st and 2nd Respondents on the issue.
255. On the Petitioners' concerns regarding alleged perception of bias on the part of Erastus Edung Ekethon, the nominee for Chairman, on account of his prior service as County Attorney for Turkana County and his past association with Josphat Nanok, it was submitted that the Justice and Legal Affairs Committee considered this issue and found no factual or legal basis to support a claim of bias.
256. It was submitted that it was established by the Justice and Legal Affairs Committee of the National Assembly that 1st Interested Party continued to serve as County Attorney for Turkana after the conclusion of Governor Nanok's term and that no evidence was presented to show that he engaged in partisan political activity or conducted himself in a manner inconsistent with the impartiality required of an IEBC Commissioner.
257. On the Petitioners' allegation of an illegal and irregular shortlisting of Hassan Noor Hassan, the 3rd Respondent submits that it reviewed the Report on the Recruitment of Nominees for Appointment of Chairperson and Members of the (IEBC) and established that Mr. Hassan's name was duly included



in the longlist of applicants and subsequently in the expanded shortlist republished by the Selection Panel on 25th March 2025.

The 3rd Respondent submitted that the expanded shortlist was published by the Selection Panel pursuant to Paragraph 2 of the First Schedule to the IEBC Act, which the 3rd Respondent submitted grants the Selection Panel the discretion to determine and vary the number of shortlisted candidates as necessary.

258. Further submission was that the decision to expand the shortlist was made to ensure compliance with constitutional imperatives, including the principles of regional balance, gender equity, inclusion of marginalized groups and merit-based selection. The 3rd Respondent submits that the Petitioners have not demonstrated that this decision by the Selection Panel was made in bad faith, arbitrarily, or in contravention of the IEBC Act, the Constitution or any other law.
259. The 3rd Respondent also submitted Petitioners have not provided any evidence to show that Hassan Noor Hassan was either ineligible to apply or that his inclusion in the shortlist prejudiced any qualified candidate or undermined the fairness, competitiveness or transparency of the process. As such, it was submitted that there is no basis for this Court to interfere with the discretion and mandate of the Selection Panel in that regard.
260. It was submitted that the mere fact of expansion or revision of a shortlist, where lawfully undertaken and transparently published, does not render the recruitment process unlawful, particularly in the absence of any legal requirement limiting the number of shortlisted candidates or prohibiting revision of the shortlist.
261. On the second issue of whether the National Assembly complied with the Constitution and the Public Appointments (Parliamentary Approval) Act, 2011, in particular Section 7 thereof, in approving the nominees, the 3rd Respondent submits that the JLAC undertook a merit-based and reasoned evaluation of the nominees and thereafter discharged its statutory responsibility with diligence and objectivity, satisfying itself that each of the nominees met the criteria for nomination before clearing them. Reliance was placed on the case of /Marilyn Muthoni Kamuru & 2 Others v Attorney General & another [2016] eKLR in support of the 3rd Respondent's contention that where Parliament has properly scrutinized a nominee the courts ought not to interfere.
262. The 3rd Respondent submits that this Court's jurisdiction is limited to evaluating whether the approval process complied with constitutional and statutory standards, not to conduct a fresh merit evaluation of the nominees or substituting its own assessment for that of the Committee. Reliance was further placed on /Katiba Institute v Attorney General & 6 others [2018] eKLR to support this position.
263. In its submissions, the 3rd Respondent contended that this Court would violate the doctrine of separation of powers if it were to direct another organ on how to exercise its mandate; a position underscored by the Supreme Court in the case of /Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR .
264. Based on the above decisions, the 3rd Respondent submits that this Court has no jurisdiction to substitute its findings for that of the National Assembly's approval process and the August House's consequent decisions in the absence of evidence that the National Assembly disregarded the Constitution and the law.



265. The 3rd Respondent urged this Court to find that the Petition is devoid of merit and dismiss it with costs to the National Assembly.

The 1st Interested Party's Submissions

266. The 1st Interested Party filed written submissions dated 19th June 2025 as highlighted on 23rd June, 2025.

He adopted the Respondents' submissions and supported their respective positions.

267. With regard to the allegations leveled against him specifically, the 1st Interested Party submitted that the Petitioners' allegation that he is likely to be biased due to his previous professional association with former Governor of Turkana County, Josephat Nanok is speculative, unsubstantiated and fails to meet the constitutional or jurisprudential threshold required to impugn a nominee's suitability for public office.

268. He further submits that he was appointed as the County Attorney for Turkana County on 25th September 2018 and served until 30th September 2024.

During that period, he submits, he served under two different governors, Governor Nanok (2018–2022) and Governor Jeremiah Lomorukai (2022–2024).

269. The 1st Interested Party further submits that his appointment to the Office of County Attorney was through a transparent, merit-based process under the County Attorneys Act, 2020.

He submits that his role was technical, non-political, and primarily advisory in nature; and that no evidence been tendered to suggest that his service was marred by political bias, impropriety, or partisanship.

270. The 1st interested party submits that the Petitioners' attempt to discredit him without factual support is inconsistent with the principle laid down in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others; Matemba (Interested Party)* [2012] eKLR where the Court stated that the test for disqualifying a person from public office is the existence of substantial, unresolved, and credible allegations raising real concerns about their suitability and integrity.

271. A further submission was that he has consistently demonstrated integrity, competence, and impartiality throughout his career; and thus, that there is no rational or constitutional basis to disqualify him or to question the legality of his nomination.

272. On the Petitioners' claim that the composition of the IEBC violates Articles 10, 232, and 250 of the *Constitution* by failing to reflect regional balance, citing the nomination of two individuals from the "former Rift Valley region", the 1st Interested Party adopted the same positions and authorities as the Respondents, save to add that that in the present case, the composition of the Commission reflects appointees from at least seven distinct counties Turkana, Nyandarua, Kakamega, Uasin Gishu, Mandera, Kisumu, and Lamu and as such these counties represent different regions and communities across Kenya, satisfying the objective test for diversity.

273. The 1st Interested Party's submission is that Turkana County represents a historically marginalized and pastoralist community and as such his nomination promotes inclusivity and equity, as envisaged by Article 27(6), (7), (8), Article 21(3) and Article 56 .

274. The 1st Interested Party submits that the Petitioners' emphasis on "former provincial boundaries" as a basis for asserting imbalance is flawed and legally misplaced. That the Sixth Schedule to the *Constitution*, at Paragraph 7 and Article 262 clearly abolish the legal effect of the former provinces



as administrative units and consequently, there exists no constitutional requirement to balance appointments by reference to the defunct provincial structure.

275. The 1st Interested Party prayed that the Petition be dismissed with costs.

The 2nd Interested Party's Submissions

276. The 2nd Interested Party filed written submissions dated 19th June 2025 which were highlighted orally. She also associated herself with the submissions by the Respondents and the 1st interested party.

277. The 2nd Interested Party submitted that this Petition is fatally defective and incompetent for failure to enjoin the IEBC Selection Panel Committee, a crucial party whom adverse allegations have been made. It was submitted that that the IEBC Selection Panel ought to have been enjoined so as to be given a fair hearing, as guaranteed under Article 50 of the Constitution.

278. The 2nd Interested Party relies on the case of Okoti v Attorney General & 5 others [2021] KEHC 439 (KLR) where the Court is said to have observed that as the Members of the Selection Panel had not been enjoined in the proceedings, the Court could not issue any orders to the detriment of any of them as the same is an infringement on the said Members' right to a fair trial.

279. On the doctrine of Separation of Powers, the 2nd Interested Party submits that the Petitioners are demanding this Court to undertake a merit review of the nominations but without the Petitioners having substantiated that a procedural illegality was committed by the Selection Panel or the National Assembly contrary to the dicta of the Court of Appeal in the case Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR).

280. Reliance is also placed on the case of Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) [2013] KESC 7 (KLR) where the Supreme Court is said to have observed as follows:

“This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. the court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”

281. The 2nd Interested Party also submits that the petition does not meet the requisite legal threshold for the grant of orders sought as pronounced in the case of Anarita Karimi Njeru v The Republic (1976-19 80) KLR 1272.

282. The 2nd Interested Party submits that the Petition has been overtaken by events in view of the fact that the National Assembly has approved the nominees to be appointed as Members of the Commission by the President, and the Petition is now moot. In support of the above position, the 2nd Interested Party relies on the case of / Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) v County Government of Nairobi [2019] eKLR where Mativo J (as he then was) held that a matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law.

283. On the Petitioners' contention that the 2nd Interested Party was ineligible to apply and/or be selected as a nominee to serve as a Commissioner of the IEBC on account that she is a State Officer, the 2nd interested party submits that Articles 88(2) and 77(1) of the Constitution, when holistically interpreted, would dictate that indeed a state officer cannot hold two state offices, but can progress from one office to another.



284. Further, the 2nd Interested Party submitted that the bar at Article 88(2)(b) only takes effect upon the assumption of office of such a person and that in the instant case, the Interested Parties including the 2nd Interested Party have not assumed office under Section 9 of the IEBC Act.
285. The 2nd Interested Party relies on Article 259 and the Supreme Court cases of /Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) and Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) on constitutional interpretation.
286. The 2nd Interested Party equally relies on Kibeh v Waibara & another [2022] KECA 388 (KLR) in support of her submission that a party need not resign from a State Office until the day of oath-taking and assumption of the new office.
287. The 2nd Interested Party submits that the Petition is lacking in merit and should be dismissed.

The 3rd Interested Party's Submissions

288. The 3rd Interested Party filed written submissions dated 19th June 2025.
- At the highlighting of written submissions, the 3rd Interested Party adopted the submissions and positions of the Respondents and the 1st and 2nd Interested Parties.
289. With regard to the specific allegations against him, the 3rd Interested Party submitted that no evidence had been adduced by the Petitioners that he had scored poorly in the interviews or that his selection and nomination were not based on competence and merit.
290. The 3rd Interested Party relied on the case of Ouma v Orengo & another (Constitutional Petition E001 of 2023) [2023] KEHC 3722 (KLR) (26 April 2023) (Judgment) where the Court held that Sections 107(1), (2) and 109 of the Evidence Act on the burden of proof provide that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
291. The 3rd Interested Party submits that the burden of proof on a petitioner in a Constitutional Petition was also considered by the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR where it was observed that although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance.
292. On whether the Petition as drafted and filed has met the threshold in drafting constitutional petitions, the 3rd Interested Party urges that it is trite law that in a petition claiming constitutional violations the Petitioner has the burden of demonstrating the specific provisions said to be infringed and the manner in which they are alleged to be infringed. The decision in Anarita Karimi Njeru v Republic [1979] KLR 1 as was emphasized by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR was relied on.
293. According to him the petition has not established a clear connection between the alleged constitutional violations and the 3rd Interested party. Further, it is the 3rd Interested Party's submission that the Petition is laced with ambiguity and confusion, with no clarity in the presentation of factual situations relevant to the 3rd interested party. He relies on the case of /Gesicho v Kenyatta & 3 others (Constitutional Petition 321 of 2018) [2022] KEHC 10935 (KLR) (Constitutional and Human Rights) (23 June 2022) where the Court held that it was difficult to have a fair trial premised on a



pleading where there was no nexus between the body of the Petition and the reliefs that the Petitioner seeks.

294. The 3rd Interested Party urged this Court to dismiss the Petition with costs.

The 4th Interested Party's Submissions

295. The 4th Interested Party filed submissions dated 19th June 2025 and made oral highlights in which her Counsel adopted the earlier submissions by the Respondents and the 1st, 2nd and 3rd Interested Parties.

296. The 4th Interested Party zeroed in on the Petitioners' claim that her nomination, approval, and appointment violated Article 88 (2) (a) for reasons that she was a member of the governing body of a political party having served as County Chairperson and Executive Director of the Jubilee Party within the preceding five years and submitted that the same were unsubstantiated, unmerited, unfounded, spurious, frivolous, vexations and has been brought with ill-intention to derail a constitutional and statutory process which was conducted in an open, transparent and fair manner as contemplated by the law.

297. The 4th Interested Party submits that for one to be deemed to have served or held office as a "member of the governing body of a political party" for the purposes of Article 88 (2) (a) (ii), the particulars of such a member would have to be within the records maintained by the Registrar of Political Parties and submitted to that Office by the concerned political party pursuant to the provisions of the [Political Parties Act](#) and the Registration Regulations.

298. The 4th Interested Party submits that she has never served as a member of the governing body of Jubilee Party within the preceding five (5) years, or at all, and that no such evidence has been adduced by the Petitioners to establish their claim. The 4th Interested Party further submitted that the letter dated 15th May, 2025 from Registrar of Political Parties clearly show that the 4th Interested Party has never served as a member of the Jubilee Party's governing body or as an executive director or county chairperson not just not within the preceding five (5) years but at all.

299. The 4th Interested Party submits that for avoidance of doubt, during approval hearing, she clarified that she was a member of the Jubilee party's secretariat staff as the director in charge of legal affairs and that in fact, under article 10.2 (1) and (2) of the Jubilee Party's constitution, the directors are full time party employees responsible for rendering technical support to the Secretary General.

300. It is also submitted that having been a member of the secretariat staff, the 4th Interested Party could not have served as a county chairperson or county director of the Jubilee Party at the same time as alleged by the Petitioners.

301. The 4th Interested Party further submits that the proposed composition of the IEBC, in particular the nomination for appointment of the 1st and 4th Interested Parties, is compliant with the ethnic and regional diversity principle as required under Articles 10, 232 and 250 (4) of the [Constitution](#).

302. In conclusion, the 4th Interested Party submits that she is eligible to be appointed as one of the Members of the IEBC Commission having met all the statutory qualification and constitutional eligibility criteria.

The 5th Interested Party's Submissions

303. The 5th Interested Party filed submissions dated 19th June, 2025 and made oral highlights that adopted the submissions made by the Respondents and the preceding Interested Parties.



304. It is his submission that the Petitioners deliberately avoided enjoining of the Selection Panel as a party to these proceedings despite them being a mandatory party. He relies on *Zuma & another v Independent Electoral and Boundaries Commission & 2 others* [2023] KEHC 353 (KLR) where the High Court while dealing with an election petition, held that it was fatal not to join a mandatory party to a suit. He further relies on *Tang Gas Distributors Limited v Said and Others* [2014] 3 EA 448.
305. He submits that this court cannot make adverse orders against the Selection Panel which is not a party to these proceedings.
306. According to the 5th Interested Party, the allegations that his name was snuck into the shortlist via an addendum list are not only unfounded but also false and misleading. He argues that his name clearly appears at page 230 of the Petition as entry No 985 which shows that he applied and was longlisted.
307. It is the 5th Interested Party's submission that that the failure to publish his name in the first shortlist of 14th March 2025 does not in any way invalidate his nomination.
308. The 5th Interested Party submits that despite there being no law requiring the publication of the shortlisted candidates, the Selection Panel in advancing openness and transparency in the recruitment process, published two sets of lists of names of the shortlisted candidates-one dated 14th March 2025 and the other dated 25th March 2025.
309. The 5th Interested Party submits that his name was published in the list dated 25th March 2025 and his interview scheduled for 24th April 2025 at 12.30PM and that in the publication of the list of 25th March 2025, the Selection Panel clarified that after reviewing the longlist of the applicants, it deemed it necessary to update the list of shortlisted candidates in order to further enhance compliance with the constitutional principles of regional balance, representation of the youth and overall inclusivity. He argues that this was within the mandate of the Selection Panel to regulate its own procedure and that therefore, the process cannot be said to be shrouded with opaqueness.
310. On the claim by the Petitioners that the 5th Interested Party was not eligible for selection and nomination as a Member of the Commission on the ground that he had previously contested as a Governor Manderu County in 2017 and 2022 General Elections, he submits that his candidature is not a bar to his nomination as a Member of the Commission, since Article 88(2)(a)(i) of the *Constitution* clearly excludes the President and Governors in the disqualifications. He relies on *Mboya & another v Judicial Service Commission & another; Rawal & 5 others (Interested Parties)* in that regard.
311. It is also his submission that Petitioners' challenging his nomination on the allegation that he is a brother-in-law of Hon. Junet Mohamed who is the current Minority Leader in the National Assembly is not a criterion contemplated nor provided for in the *Constitution*.
312. He further submits that his relationship with Hon. Junet Mohamed cannot be used as a basis for the court to annul and /or revoke the selection, nomination and his appointment.
313. The 5th Interested Party urged the Court to find that the petition is bereft of merit and should be dismissed with costs to him.

The 6th Interested Party's Submissions

314. The 6th Interested Party filed written submissions dated 17th June, 2025.
- He also made oral highlights and associated himself with the submissions by the Respondents and 1st to 5th Interested Parties.



315. It is his submission that the Petitioners have not demonstrated that his selection, nomination and possible appointment is inconsistent with the object and purpose of the Constitution. He relies on the case of Transafric Timber Limited v Kenya Forest Service & 2 others (Constitutional Petition E003 of 2024) [2024] KEHC 9 177 (KLR) which advances the legal principle espoused in Section 107 of the Evidence Act that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of a fact that he asserts, must prove that those facts exist.
316. Reliance was also placed by the 6th Interested Party on the case of Pastoli v Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304 cited with authority in Republic v National Land Commission & another Ex Parte; Farmers Choice Limited [2020] eKLR which sets out the grounds upon which one may seek Judicial Review reliefs. It was the 6th Interested Party's submission that none of the grounds for the grant of judicial review reliefs have been met in the present Petition.
317. The 6th Interested Party submitted that the Petition does not in any way challenge his suitability, eligibility, capacity, competence, observance of the Constitution or even concerns of conflict of interest with any particulars.
318. Consequently, the 6th Interested Party prays that the Petition be dismissed with costs to him.

The 7th Interested Party's Submissions

319. The 7th Interested Party filed submissions dated 18th June 2025 and made oral highlights on 23rd June 2025.
- She also relied on and adopted the submissions of the Respondents and 1st to 6th Interested Parties in opposition of the Petition.
320. Concurring with the Respondents and the 1st to the 6th Interested Parties, the 7th Interested Parties submitted that the Petition does not meet the threshold of a constitutional petition.
321. The 7th Interested Party further submitted that the Petitioners had sought to amend their petition through the backdoor by introducing new issues through their Supplementary Affidavit (2); which was filed after close of pleadings, without leave of Court, contrary to the rule that parties are bound by their pleadings. It was further submitted that this Court lacks jurisdiction to deal with any issues raised that were not contained in the Petition. The 7th Interested Party submitted that this position was cemented in the case of Macharia & another v Kenya Commercial Bank Limited & 2 others.
322. Reliance was also placed by the 7th Interested Party on the case of Munya v The Independent Electoral and Boundaries Commission & 2 others [2014] KESC 38 (KLR) where the Supreme Court held that parties must be bound by their pleadings. The 7th interested party further relied on the case of Eastland Hotel Limited v Wafula Simiyu & Co. Advocates Eastland Hotel Limited v Wafula Simiyu & Co. Advocates [2014] KECA 296 (KLR) on what a pleading is, in submitting that an affidavit is evidence not a pleading and thus it cannot be a basis for introduction of new issues for determination by a court.
323. On the assertion that she is disqualified by virtue of being a State Officer, the 7th Interested Party concurred with the Respondents and the preceding Interested Parties that the positions she holds is not a State Office and she is not State Officer. It is her submission that Article 260 defines a state officer to mean a person holding state office. She submits that none of the County Government Act, the County Assembly Services Act, 2017, the Public Officer Ethics Act nor any other Act of Parliament defines members of the County Service Boards as state officers.



324. In general, the 7th Interested Party submitted that as a youth, a woman, and a member of a minority community that has historically been marginalized, her selection and nomination upholds the constitutional edicts on diversity and inclusivity. Additionally, the 7th Interested Party submitted that she also has all the requisite qualifications, competence, integrity, and abilities required for the role of Commissioner of the IEBC.
325. For those reasons, the 7th Interested Party urged the Court to find that the Petition lacks merit and is an abuse of the court process; and that it should therefore be dismissed with costs.

The 8th Interested Party's Submissions

326. The 8th Interested Party filed written submissions dated 21st June 2025 and made oral highlights on 23rd June, 2025.
- The 8th Interested Party submits that the Petition is legally baseless, constitutionally misdirected, and a grave affront to the sovereign will of the people as enshrined in Articles 1, 10, 38 and 88 of the *Constitution*. He argues that the petition seeks to halt a lawful, participatory and procedurally sound reconstitution of the Independent Electoral and Boundaries Commission (IEBC), thereby disrupting national electoral processes and readiness.
327. The 8th Interested Party further submitted that the National Assembly retains exclusive vetting powers and that Courts cannot substitute their views for Parliament's unless there is demonstrable illegality. He relies on the case of *Trusted Society of Human Rights Alliance v AG & 2 Others* [2012] eKLR) to support his proposition.
328. The 8th Interested Party submits that the Petition, if it were to succeed, would cause constitutional paralysis and jeopardize Kenya's compliance with international norms as Kenya is a signatory to the African Charter on Democracy, Elections and Governance and the International Covenant on Civil and Political Rights (ICCPR), both of which obligate the country to maintain a competent, independent electoral agency to ensure periodic elections and political representation.
329. It is his case that Petition is speculative, lacks legal merit, undermines Parliament's constitutional mandate, threatens electoral continuity, and suppresses citizen driven constitutional engagement.
330. It was his submission that in order for this Court to uphold constitutionalism by protecting due process, institutional integrity, and democratic continuity the Petition herein should be dismissed in its entirety.

The Petitioners' Oral Rebuttal of the Respondents and Interested Parties Submissions

331. In the rejoinder to the Respondents' and Interested Parties' submissions, the Petitioners reiterated their earlier submissions and took issue with the entirety of the defenses and positions taken by the Respondents and the Interested Parties.
332. The Petitioners submitted that this Court has jurisdiction to interrogate the decisions and processes of the Selection Panel, the President, and/or National Assembly. In support of this submission, they relied on the case of *Marilyn Muthoni Kamuru & 2 Others v Attorney General & Another*, Petition 566 OF 2012, [2016] KEHC 8370 (KLR).
333. In advancing their argument on the criteria for selection of candidates and the proposition that this Court can review the same where there is an illegality, the Petitioners referred to Paragraph 77 of the judgment in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another*



(Amicus Curiae) (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment).

334. On the issue of eligibility of the candidate who vied as Governor, the Petitioners submitted that Article 88 is meant to disqualify politicians and that elections have to be supervised by an independent body. He also relied on Article 81.
335. Citing the case of Buoga v Attorney General & another [2022] KEHC 13214 (KLR) where Mr. J held that pursuant to Article 180(2) as read with Article 19(3) of the Constitution, the qualification for the election of a County Governor is similar to the eligibility for election as a Member of County Assembly, the Petitioners submitted that the reasoning in that case should be extended to and applied in Article 88; with the intention is to eliminate political interference and discrimination.
336. On the 4th Interested Party, the Petitioners reiterated their earlier submission that she held a position of member of the governing body of a political party and that she conceded to be the Deputy Executive Director & Head of Legal of the Jubilee political party during her vetting.
337. It was submitted that the Jubilee Party Constitution annexed to the Supplementary Affidavit (2) filed by the Petitioners was clear on membership of a governing body of the political party and it had not been rebutted by evidence.
338. A further submission was that it is not true that in ascertaining whether selections and nominations in the present case are constitutionally compliant in terms of inclusivity and diversity the standard should be the examination of all the Constitutional Commissions and the Independent Offices. On the contrary, it was submitted that the proper standard is an examination of the Commission and the Secretariat.
339. In rebuttal of the Respondents' and Interested Parties' contentions that the expanded shortlist was procedurally proper, the Petitioners submitted that none of the parties who backed the same were able to cite any express legal provision or authority in support of their contention that the Selection Panel acted legally and procedurally in issuing an expanded shortlist.
340. The Petitioners reiterated that consultations with the Majority and Minority leaders of the National Assembly was mandatory under our constitutional dispensation by way of a constitutional convention that developed in the late 1990s.
341. On the submission by some of the Interested Parties that the Petition was moot in light of the presidential gazette notices, the Petitioners submitted in rebuttal that the Gazette Notices were of no legal consequence as the same had been issued in contravention of a conservatory order issued by this Court.
342. It was also submitted that joinder or misjoinder does not defeat a Constitutional Petition and that a weighty Petition such as this one, which was certified for hearing and determination by a three-judge bench, should not be defeated on account of a mere technicality.
343. On the penultimate issue, the Petitioners submitted in rebuttal that a Person with Disability was clearly discriminated against for the reason that while he was recommended for consideration alongside the 1st Interested Party for the position of Chairperson, the appointing authority did not nominate him nor did the National Assembly find that he should have been presented to the House instead of the 1st Petitioner. This, to their minds, was a clear act of discrimination.
344. The Petitioners rested their case by reiterating that the Petition is merited and should be allowed as prayed.



Analysis and Determination

345. We have considered the petition, the opposition thereto and the respective parties' counsel's submissions. The issues identified for determination, are as follows:
- A. Whether the Petition is properly founded on Article 22 of the Constitution;
 - B. Whether the Petition is justiciable and ripe, or whether it offends the doctrines of exhaustion, separation of powers and parliamentary approval processes under Article 250(2) of the Constitution;
 - C. Whether the IEBC Selection Panel acted illegally by issuing a subsequent expanded shortlist;
 - D. Whether the Attorney General failed in exercise of her constitutional mandate to provide independent, impartial and sound legal advice to the executive regarding nomination of commissioners thereby failing to protect the rule of law and public interest.
 - E. misadvised or refused to give proper advise to the Executive with regard to the process of selection and nomination of the nominees to IEBC
 - F. Familial relationship between the 5th Interested Party and the Leader of Minority in the National Assembly;
 - G. Alleged Constitutional Disqualifications under Article 88 (2) of the Constitution;
 - H. Other Allegations Against the Nominees, including non-inclusion of persons with disabilities
 - I. Whether the processes of selection, nomination, and appointment of the IEBC nominees violated the constitutional principles of public participation, consultation with political parties, and access to information as enshrined in Articles 10, 35, and 38 of the Constitution and/or the Recommendations contained in the Report of the National Dialogue Committee (NADCO);
 - J. What is the validity of Gazette Notices No. 7724 and 7725 both dated 10th June, 2025;
 - K. Whether the reliefs sought by the Petitioners are available;
 - L. What orders should the Court make; and
 - M. Costs of the Petition

A. Whether the petition is properly founded under Article 22 of the Constitution

346. The Respondents and Interested Parties are in agreement that the Petition presently before this Court does not properly invoke the jurisdiction of the High Court under Article 22 of the Constitution, which is principally concerned with the enforcement of the Bill of Rights. It is their collective submission that, notwithstanding the Petitioner's reliance on various constitutional provisions, including those situated within the Bill of Rights, the Petition does not raise justiciable issues capable of demonstrating a denial, violation, infringement, or threat to any right or fundamental freedom guaranteed under the Constitution. In their view, the mere citation of constitutional provisions, absent a cogent and particularized demonstration of how specific rights have been violated or are under threat of violation, is insufficient to trigger the Court's jurisdiction under Article 22.
347. The Respondents and Interested Parties further submit that, even where the Petition purports to invoke provisions of the Bill of Rights, specifically Article 35, in alleging a denial of the right of access



to information and Article 47, in alleging a violation of the right to fair administrative action, the alleged infractions have not been pleaded with the level of specificity and particularity required in constitutional litigation. They contend that the Petition fails to set out, with clarity, the precise acts or omissions complained of, the manner in which they allegedly contravene the stated rights and the resultant prejudice, if any, suffered by the Petitioners.

348. In any event, they argue, the claims are rendered untenable by the application of the Doctrine of Exhaustion, on account of the Petitioners' failure to first pursue available statutory or administrative mechanisms for redress. Alternatively, they invoke the principle of Constitutional Avoidance, submitting that the matters raised are capable of resolution without recourse to constitutional interpretation or application and therefore fall outside the proper remit of a constitutional petition under Article 22.
349. The Petitioners, for their part, maintain that the Petition is properly and competently before this Court, and that the issues raised therein are justiciable within the meaning and scope of Articles 22, 165(3)(b), and 258 of the Constitution. They assert that Article 22(1) vests in every person the right to institute court proceedings alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened with infringement. Additionally, the Petitioners rely on Article 258, which confers upon every person the right to institute proceedings where it is alleged that the Constitution has been contravened or is threatened with contravention, irrespective of whether a specific right in the Bill of Rights is implicated.
350. On that basis, the Petitioners submit that the constitutional foundation for the Petition is firmly grounded and that the Court's jurisdiction has been properly invoked.
351. This Court's analysis of this issue must, of necessity, commence with the express language of the Constitution. Article 23(1) provides as follows: /"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."
352. Article 23(1) of the Constitution unequivocally vests the High Court with the primary jurisdiction for the enforcement of the Bill of Rights, and affirms its authority to grant appropriate reliefs where a party alleges, or demonstrates a real and imminent threat of, a violation of a constitutional right or fundamental freedom. It is within this constitutional framework that the justiciability of this Petition must be examined. The Court is thus duty-bound to assess whether the pleadings disclose a competent claim grounded in the alleged infringement or threatened violation of the Bill of Rights, so as to properly invoke its jurisdiction under Articles 22 and 23.
353. Article 23(3) of the Constitution sets out the range of remedies available to a court seized of a matter under Article 22.

It provides as follows:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;



- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.”

354. Article 23(3) affirms the Court’s broad and flexible remedial discretion in the adjudication of alleged violations of constitutional rights. The remedies enumerated therein, ranging from declarations to conservatory and injunctive relief and judicial review orders, are not exhaustive, but illustrative of the Court’s authority to craft effective and contextually appropriate reliefs. This expansive remedial jurisdiction reflects the transformative character of Kenya’s constitutional framework, which envisages a judiciary empowered not merely to pronounce rights in the abstract, but to enforce them in a manner that renders them practical, effective and meaningful. Of particular significance is the fusion of constitutional and administrative law remedies, which enables the Court to address violations arising from both public and quasi-public actions within a unified constitutional context.
355. The jurisdictional issues arising from the application of the Doctrine of Exhaustion and the principle of Constitutional Avoidance are addressed in a separate part of this judgment.
356. The specific question presently falling for determination is whether, on the face of the pleadings, the Petition raises constitutional issues anchored in the Bill of Rights so as to properly invoke the jurisdiction of this Court under Articles 22, 23, and 165(3)(b) of the Constitution. In this regard, the Court must undertake a preliminary examination of the Petition to ascertain whether it discloses an arguable case that a right or fundamental freedom guaranteed under the Constitution has been denied, violated, infringed, or is threatened. Only where such a threshold is met does the Court’s constitutional mandate to intervene under its human rights jurisdiction properly arise.
357. In the circumstances, this Court bears the duty to interrogate the true nature of the dispute and to discern the substantive character of the Petitioners’ case, with a view to determining the most appropriate relief, if any. In undertaking that task, the Court must first be satisfied that it is properly seized of jurisdiction, not only to entertain the Petition, but also to grant the specific reliefs sought. Jurisdiction is not assumed; it must be affirmatively established and it is trite that a court must down its tools the moment it determines that it lacks the jurisdiction to proceed.
358. This jurisdictional principle finds anchorage in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the Supreme Court made it clear that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or



tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

359. Upon careful examination of the reliefs sought in the Petition as reproduced in this judgment, this Court notes that none of the prayers enumerated from (a) to (j) expressly invoke or anchor themselves upon a specific right or fundamental freedom guaranteed under the Bill of Rights, which the Petitioners allege has been denied, violated, infringed or threatened with infringement. The absence of such express linkage raises legitimate questions as to whether the Petition, in its formulation, meets the threshold for enforcement of rights under Articles 22 and 23 of the Constitution.
360. This Court further observes that, while the Petitioners allege a breach of Article 27 at their paragraphs 39 and 47 of the Petition and refer to a breach of Article 35 at paragraph 50, with a suggestion, though not an express citation of Article 54 at paragraph 41 in connection with the alleged failure to include persons with disabilities in the nominations list, these constitutional claims are not properly anchored to or reflected in the reliefs sought. There exists a discernible disconnect between the alleged infringements and the prayers framed, thereby diminishing the coherence and specificity required in constitutional pleadings.
361. It is not sufficient to merely allege a breach of constitutional provisions; the reliefs sought must be logically and legally traceable to those alleged violations.
362. Similarly, while the Petition makes reference to Article 28, which guarantees the right to dignity and Article 47, which secures the right to fair administrative action, under the section titled 'Legal Foundations of the Petition', these provisions are neither invoked nor particularized under the substantive section of the Petition in the title: 'Contravention of the Constitution and the Various Statute Laws', which spans from paragraphs 31 to 51 of the Petition. This omission reflects a lack of precision and coherence in the formulation of the alleged violation of the Bill of Rights, thereby undermining the clarity of the claims and the ability of the Court to ascertain whether a justiciable issue properly invoking its jurisdiction has been established.
363. In the considered view of this Court, the apparent disconnect between the alleged violations of constitutional fundamental rights and freedoms and the reliefs sought is, in large part, attributable to the Petitioners' failure to enjoin critical parties in these proceedings, most notably, the IEBC Selection Panel, the Parliamentary Service Commission which acted as the Secretariat to the IEBC Selection Panel and the appointing authority.
364. It is manifest that the actions or omissions giving rise to the alleged breaches of the Bill of Rights, if any, would lie at the feet of the IEBC Selection Panel and/or the appointing authority. The non-joinder of these necessary parties therefore undermines the effectiveness of the Petition and renders it procedurally deficient in so far as constitutional accountability is sought against entities that are not before the Court.
365. In the absence of a clear and demonstrable nexus between the alleged breaches of the Bill of Rights and the reliefs sought, this Court is unable to properly characterize this Petition as one that has been rightly and competently brought under the provisions of Articles 22 and 23 of the Constitution.
366. It is now well established that a constitutional petition must not only cite the relevant constitutional provisions, but must also plead with specificity the manner in which such provisions have been violated, infringed or threatened, and must further link those alleged violations to the remedies being pursued. The failure to do so deprives the Petition of the constitutional coherence necessary to invoke the High Court's jurisdiction under the said Articles.



367. This position was articulated in the seminal decision of the High Court in *Anarita Karimi Njeru v Republic* (1979) eKLR, where the Court (Trevelyan & Hancox JJ) held:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

368. This principle was later reaffirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, where the Court stated:

“43. The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. “We reiterate that in constitutional litigation, a party must plead with precision the constitutional provisions violated, the nature of the violation, the manner in which the violation occurred and the relief sought for each alleged violation. This is not a technical requirement; it is necessary to define the scope of the controversy and to allow the respondent to respond adequately.”

369. Similarly, in *Trusted Society of Human Rights Alliance v AG & Others* [2012] eKLR, the Court in answering the question of what the courts were to consider when determining the admissibility of constitutional petitions while using the reasonable precision test set out in *Anarita Karimi Njeru v The Republic* (1976-1980) 1 KLR 1272.

The three Judge Bench-JM. Ngugi, M. Ngugi & Odunga JJ (as they then were) held:

“*Anarita Karimi Njeru v The Republic* was decided under the repealed Constitution. The decision in that case had to be reconciled and brought into consonance with the *Constitution* of Kenya, 2010.

The instant position with regard to the admissibility of petitions that sought to enforce the *Constitution* had to begin with the provisions of article 159 of the *Constitution* (2010) on the exercise of judicial authority that provided that justice was to be administered without undue regard to procedural technicalities.

The Supreme Court did not purport to overrule *Anarita Karimi Njeru* as it lay down an important rule of constitutional adjudication: a person claiming constitutional infringement had to give sufficient



notice of the violation to allow her adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that were not appropriately phrased as justiciable controversies. However, the proper test under the Constitution of Kenya, 2010 was whether a petition raised issues which were so insubstantial and so attenuated that a court of law properly directing itself to the issue could not fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test did not demand mathematical precision in drawing constitutional petitions. Neither did it demand talismanic formalism in identifying the specific constitutional provisions which were alleged to have been violated. The test was a substantive one and inquires whether the complaints against respondents in a constitutional petition were fashioned in a way that gave proper notice to the respondents about the nature of the claims being made so that they could adequately prepare their case.

While the instant petition was not the epitome of precise, comprehensive, or elegant drafting, the complaints raised by the petitioner were concrete enough to warrant substantive consideration by the court. The instant case being a constitutional issue of immense public importance and interest, the court declined a formalistic approach. The controversy at issue had been defined with reasonable precision to warrant a proper judicial determination on merits.”

370. In view of the foregoing authorities, we find that the failure by the Petitioners to articulate how the cited provisions of the Bill of Rights have been violated or threatened with violation in relation to the reliefs sought, the Petition, in so far as it claims to be brought under Articles 22 and 23 of the Constitution falls short of the threshold required to invoke the Court’s jurisdiction under the said Articles 22 and 23.
371. We are further fortified on this finding by the Court of Appeal decision in the case of David Sironka Ole Tukai v Francis Arap Muge & 2 others [2014]KECA 155(KLR) where the Court considered the issue of unpleaded matters and the issue of lack of an express relief being sought. The appellate court stated:

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in Gandy V Caspar Air Charters Ltd[1956] 23 EACA, 139:

“[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to



meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given”

Later in *Galaxy Paints Co Ltd V Falcon Guards Ltd*[2000] 2 EA 385, this Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Hence in *Odd Jobs Vmubia*[1970] EA 476, Law, JA; speaking for the predecessor of this Court stated that:

“ [A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.”(See also *Vyas Industries Ltd V Diocess Of Meru*[1982] KLR 114).”

372. Notwithstanding the foregoing finding that the Petition does not meet the threshold for enforcement of the Bill of Rights under Articles 22 and 23 of the Constitution, this Court is not persuaded that it would be just to dismiss the Petition in limine. This decision is informed by two principal reasons.

373. First, the Respondents and Interested Parties have extensively addressed the alleged violations of the Bill of Rights, and in doing so, intertwined their arguments with other constitutional provisions. Second, and of equal importance, the Petition also raises allegations of constitutional and statutory violations beyond the confines of the Bill of Rights under Articles 10, 88(2), 232 and 250.

These Articles touch on the structure, process and conduct of public appointments under various Articles of the Constitution.

374. While relying on the provisions of Article 258 on the enforcement of the Constitution, the Petitioners have further invoked the jurisdiction of this Court under Article 165(3). This buttresses our position as above that the Petition in its entirety should be heard and determined on its relative merits.

375. In these circumstances, and guided by the imperative to do substantive justice, this Court is satisfied that it ought to consider and analyze the rival positions of the parties on the issues raised, albeit within the framework of the objections raised, based on the Doctrines of Exhaustion and Constitutional Avoidance and mindful of the limits imposed by our earlier finding on jurisdiction under Articles 22 and 23.

B. Whether the petition is justiciable or ripe or whether it offends the doctrines of exhaustion, separation of powers and parliamentary approval processes under Article 250(2) of the Constitution

376. The 1st Respondent opposes the Petition dated 13th May, 2025 on the following grounds:

- a. The Petition is non-justiciable on account of having been instituted contrary to the principle of ripeness.
- b. The Petitioners have offended the doctrine of exhaustion as they have not exhausted the constitutionally provided remedy before invoking the jurisdiction of the Honourable Court.

377. On its part, the 3rd Respondent, the National Assembly contended that the petition is not justiciable for violating the doctrine of ripeness. It was argued that to the extent that the petition challenges an ongoing constitutional process in respect of which no decision or action has been taken by the National



- Assembly, the Petition are speculative and deals with prospective anticipatory circumstances rather than current or probable events.
378. The 2nd Interested Party agrees with the 3rd interested party and argues that the proper forum for the petitioners to have raised their grievances was before the National Assembly during vetting.
379. The Respondents argue that this Court would be violating the doctrine of separation of powers if it was to direct another organ on how to exercise its mandate as was underscored by the Supreme Court in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
380. The Respondents and the interested parties argued that this Court has no jurisdiction to substitute its findings for that of the National Assembly approval process and its ultimate decision in the absence of evidence that the National Assembly disregarded the Constitution and the law.
381. The petitioners maintained that the petition is competently before this Court and that the issues raised are justiciable under Articles 22 , 165(3) (b) and 258 of the Constitution. They argue that Article 22 grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.
382. It is their case further, that Article 258 grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and that Article 165 (3) (b) vests in the High Court jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
383. According to the petitioners, the nomination of the interested parties threatens violation of the Constitution and the right to a free and fair election conducted by an independent body. Further, that the validity of the nomination process and its outcome is a question ripe for determination by this Court and that therefore, the dispute is justiciable.
384. The petitioners relied on *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR , where the Supreme Court observed that:
- “The effect of the Constitution’s detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.”
385. The bastion of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based on the universal concept or principle of justiciability.
386. The doctrine of justiciability encompasses such principles as the refusal of the court to make declarations to, assume jurisdiction over matters which are allocated to such other branches of the government as the legislature or the executive, refusal to decide issues which are not ripe or those which are moot.
387. *Black’s Law Dictionary* 9th edition defines justiciability to mean- a matter is “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision.” It further defines



a 'justiciable controversy' as "a controversy in which a claim or right is asserted against one who has an interest in contesting it."

388. The other definition given of a justiciable controversy is "a question as may properly come before a tribunal for decision". In other words, courts should only decide matters that require to be decided.

389. In */Ashwander -v- Tennessee Valley Authority* [19 36] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite "a real earnest and vital controversy".

390. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. It is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness and an issue before the court must be ripe, through a factual matrix, for determination.

391. Conversely, the court is also prevented from determining an issue that has been overtaken by events. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time. The exception, it must be noted, exists where the court is allowed by law to offer advisory opinions.

392. The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in *John Harun Mwau & 3 Others -v- AG & 2 others* HCCP No. 65 of 2011 (unreported) stated as follows:

"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."

393. In *Jesse Kamau & 25 Others V. Attorney General* [2010]e KLR, the court stated as follows:

"To us therefore the doctrines of justiciability, ripeness, mootness, collusive suits and the political question cannot be determined on their own. They are aids to, or matters to be considered in the interpretation and determination of a particular constitutional issue, if any, before the court. If any of the above grounds are present in an application, whether by way of reference from a subordinate or a lower court, or directly by Petition to the High Court, the court may uphold or strike out the application on those or other grounds.

Even without those doctrines, the constitutional position in Kenya is very clear. The High Court has a sextuple jurisdiction. Firstly it has original and unlimited jurisdiction in civil and criminal matters. Secondly it has supervisory jurisdiction over the subordinate courts under section 65(2) of the Constitution in all matters in which subordinate courts have jurisdiction. Thirdly it has jurisdiction to interpret any provision of the Constitution under section 67 (references, appeals and interpretation of the Constitution).

394. In */Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another* HCCP 628 of 2014 [2015]eKLR, the Court cited the case of *Patrick Ouma Onyango & 12 Others -v- AG & 2 Others* Misc. Appl No. 677 of 2005 in which the Court endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise *American Constitutional Law*, 2nd Ed . as follows:

"In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted."



In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors."

395. With regard to the several objections raised concerning the competency of the Petition, this Court reiterates its earlier finding under Issue No. 1, to the effect that the Petition is not properly anchored on Article 22 of the Constitution.
396. However, notwithstanding that procedural deficiency, the Court is satisfied that the Petition raises substantial and weighty constitutional questions. These include, inter alia, alleged violations of Chapter Six of the Constitution on leadership and integrity, Article 88 concerning the establishment, composition, and independence of the (IEBC), as well as the constitutionally prescribed procedure for the selection, nomination and appointment of Commissioners to the said Commission.
397. It is the finding of this Court that, at the time the Petitioners moved the Court, the issues surrounding the nomination, appointment, and assumption of office by the Interested Parties as Commissioners of the (IEBC) were real, live, and justiciable. These issues formed the substantive basis of the cause of action.
398. It is also noted that one of the reliefs that the Petitioners are seeking is that this court do issue an injunction to restrain the interested parties from occupying office. The Assumption of office issue is alive and pending determination.
399. Additionally, while the shortlisting of candidates had already been concluded, the appointment of the Interested Parties by the President had not taken place.
400. We are further fortified by the case of Hon. Martin Nyaga Wambora -v- Speaker of County Assembly of Embu and 5 Others HCCP No. 3 of 2014, the court observed as follows:
- “It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.”
401. The Respondents and the interested parties further argued that the Petitioners did not exhaust the available alternative remedies including the National Assembly. According to the Respondents and the interested parties, the Petitioners, having failed to exhaust all redress avenues available to them



under the Constitution and the Standing Orders, the Petition and Application violate the doctrine of exhaustion and are therefore premature.

402. In Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex parte the National Super Alliance (NASA) Kenya & 6 others [2017] KEHC 4663(KLR) it was held that:

“While, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricism of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.”

403. In MMM (Suing Through IMM as Guardian and Next Friend) v Attorney General & 8 others; Moi Primary School Kabarak – Nakuru (Interested Party) (Petition E488 of 2023) [2024] KEHC 4010 (KL), the court expressed itself as follows on the question of the doctrine of exhaustion;

“Equally, the Supreme Court in Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (2019) eKLR stated as follows:“... the Court must exercise restraint in exercising its jurisdiction under Article

165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance.... The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the Constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance ...”

404. With the foregoing background this court is of the view that the petition is not moot. The same is justiciable and properly before us pending determination.

C. What is the effect of non-joinder of the IEBC Selection Panel, the Parliamentary Service Commission and persons adversely mentioned by the Petitioners? Can a Court issue adverse orders against persons who are not parties to the petition?

405. It is not in dispute that the IEBC Selection Panel, the Parliamentary Service Commission in its capacity as the secretariat of the IEBC Selection Panel and nominating authority, are not parties to these proceedings.

406. The 2nd Interested Party and the 5th Interested Party in particular argued that the Petition is fatally defective for failing to join those crucial parties against whom adverse allegations have been made and adverse orders sought. They contend that if the adverse orders sought in the Petition are issued as against the IEBC Selection Panel, the Parliamentary Service Commission and the President of the Republic; their rights to due process and a fair hearing as enshrined in the Constitution will be violated.



407. On their part, the Petitioners argue that Rule 5 (b) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides that a Petition shall not be defeated by solely for the reason of the misjoinder or non-joinder of parties.

408. The Petitioners argue that in any event, the IEBC Selection Panel is now functus officio and dissolved, and hence it has no capacity to sue or be sued.

409. In the case of *Okoti v Attorney General & 5 others* [2021]KEHC439(KLR) the Court held as follows;

“On non-joinder, the petition was filed when the IEBC Amendment Act had been passed into law, but the selection panel was yet to be appointed. Later, the selection panel was put in place. On learning of that development, the petitioner filed the notice of motion dated April 27, 2021.

There was no attempt to amend the petition. The petitioner was using the application to expand the petition without properly amending it. The status of the members of the selection panel sought to be served through the Hon. Attorney General was not clear.

The correct procedure to have been adopted by the petitioner was to apply to court to amend the petition and introduce the new cause of action which was the appointment of the selection panel. The petitioner would then have indicated how the members of the selection panel would participate in the matter and the amended petition would have had concise prayers for the new cause of action. The petitioner would have taken the game to a level playing field. As the petitioner failed to do so, the court did not find any justification to deal with that application first or to issue any interim conservatory orders. The court directed that the application be heard together with the petition.

Given that the members of the selection panel were not enjoined as parties in the instant matter, the court could not, at the tail-end of the proceedings, issue any orders to the detriment of any of them. If the court did so then it would infringe on the members’ right to a fair trial which was guaranteed under article 50(1) of the *Constitution*. The right to a fair trial was one of the rights which could not be limited in any manner whatsoever as provided for under article 25 of the *Constitution*.”

410. The Supreme Court in the case of *Jirongo v Soy Developers Ltd & 9 others* [2021]KESC32(KLR) observed thus;

“This court in the case of Hon.Christopher Odhiambo Karan v David Ouma Ochieng & 2 others[2018]SCPetitionNo36 of 20 19 had an opportunity to discuss the significance, distinctive meaning, scope and implication of the right to a fair trial and stated that “It is therefore settled law that all persons who come to any court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.”

411. The Petitioners did not sue the IEBC Selection Panel, the Parliamentary Service Commission, and the nominating authority being the President of the Republic; nor did they apply to amend their Petition to introduce those parties.

412. It is our finding that granting any of the reliefs sought in the Petition as against parties whom the Petitioners failed to sue would offend Article 50(1) of the *Constitution* and thereby create an illegality. This Court cannot countenance that, and accordingly we decline to grant any of the reliefs sought



against parties not sued in these proceedings. The prayers in the Petition that seek those orders must necessarily be dismissed on that basis, and we hereby dismiss the same.

D. Whether the IEBC Selection Panel acted illegally and unconstitutionally by issuing a subsequent expanded shortlist

413. It is the Petitioner's case that Mr. Hassan Noor Hassan, the 5th Interested Party was never shortlisted for the interviews and that he was only snuck in through an addendum shortlist, contrary to the selection and nomination process under the *Independent Electoral and Boundaries Commission Act*. The Petitioners claim that the IEBC Selection Panel acted illegally and in a manner that discriminated against all other candidates.
414. They contend that the inclusion and subsequent publication of the name of the 5th Interested Party during the course of the interviews, despite not having been initially shortlisted, was procedurally irregular and devoid of any lawful justification. In their view, this act contravened the principles of transparency, fairness, equality and public participation, as enshrined in Articles 10, 47, 232, and 250 of the *Constitution*, as well as Section 3 of the *IEBC Act*. The Petitioners argue that the manner in which the process was conducted violated their legitimate expectation and that of the public at large, that the IEBC Selection Panel would at all times discharge its mandate in an open, accountable and procedurally fair manner, consistent with the constitutional and statutory framework governing appointments to independent commissions.
415. On the part of the Respondents, they contended that the 5th interested Party was amongst the applicants in the longlist who applied and was shortlisted for the interview for the position of commissioner of IEBC which interviews were held on 24th April 2025 at 12.30 pm and that the shortlist as republished by the IEBC Selection Panel on 25th March 2025 was in accordance with paragraph 2 of the First Schedule to the *IEBC Act*.
416. In response, the Respondents and Interested Parties maintain that the selection process was conducted in strict conformity with the relevant constitutional and statutory provisions. They contend that the nomination of the 5th Interested Party was the product of a rigorous, competitive and fair selection process, undertaken in accordance with established procedures and criteria.
417. Accordingly, they reject the Petitioners' assertions of procedural impropriety or constitutional breach and assert that the process met both the letter and spirit of the law governing public appointments to independent commissions.
418. The question that we must answer, from the rival positions above is whether the deviation from the original shortlist through the republication and adding of more names of applicants who were on the long list offended Articles 10, 27, 47, 232 and 250 of the *Constitution* and the selection process under the *IEBC Act* and the *Public Appointments (Parliamentary Approval) Act*.
419. Article 10 of the *Constitution* sets out the national values and principles of governance which include transparency, accountability, non-discrimination and inclusiveness. Article 27(1) guarantees equality before the law and equal protection and benefit of the law, while Article 47(1) secures every person's right to lawful, reasonable and procedurally fair administrative action. Article 232(1) lays down the values and principles of public service, which include fair competition, merit-based appointments, transparency and representation of Kenya's diverse communities. These principles are replicated in Chapter six of the *Constitution* and more specifically, Article 73 on responsibilities of Leadership.
420. We have carefully considered the sequence of events. On 5th March, 2025, the IEBC Selection Panel published a longlist of all applicants and a shortlist containing 92 persons excluding the 5th interested



party. The 5th interested party is number 985 on the long list at page 230 of the petition. The total number of applicants was 1,356.

421. Subsequently, on 25th March 2025, the IEBC Selection Panel republished the shortlist with six additional names, comprising the 5th interested party and five others. The name of the 5th interested party is number 4 of the interviewees for 24th April, 2025 at 12.30 pm and is contained at page 325 of the petition, accompanied by a public explanation at page 320 of the petition, indicating that the revision of the shortlist was made to further enhance compliance with the constitutional principles of regional balance, representation of the youth and overall inclusivity.
422. The First Schedule to the IEBC Act, at Paragraph 5, empowers the Selection Panel to regulate its own procedure, provided that such procedure complies with constitutional and statutory requirements.
423. The petitioners referred us to paragraph 2 of the First Schedule to the *IEBC Act* which nonetheless makes no reference to any procedure to be adopted by the IEBC Selection Panel. Neither did the petitioners point out to this Court any specific procedure which the IEBC Selection Panel allegedly failed to adhere to in their selection of the applicants.
424. Notably, the republication occurred prior to the interview stage and no previously shortlisted or longlisted candidate has come forward to allege prejudice or challenge the fairness of the process.
425. There is also no evidence that the IEBC Selection Panel acted covertly or arbitrarily; rather, it took an open, reasoned and corrective step in alignment with its constitutional obligations.
426. In our humble view, the discretion to revise a shortlist, as was exercised by the IEBC Selection Panel, in the absence of evidence of bad faith and for a constitutionally justifiable reasons which they provided by way of an explanation in the republication, does not, per se, offend the law.
427. Courts have previously dealt with similar concerns. In *Trusted Society of Human Rights Alliance v AG & Others* [2012] eKLR, the High Court underscored that appointment to public office must not only comply with constitutional standards but must also be seen to be fair, competitive and merit-based and we fully concur. However, the Court did not suggest that mere perception, without supporting evidence of impropriety, is enough to invalidate a lawful appointment. Borrowing from the persuasive South African jurisprudence, in *Ngwenya v Minister of Police* (SS24398/2013) [2015] ZAGPJHC 323 (23 November 2015), the Southern Gauteng High Court, explained that if a discretion is “bona fide exercised,” courts should not substitute their views, unless the decision is mala fide, capricious, or wholly irrational. The above decision cited *Shadiack v Union Government (Minister of interior)* 1912 AD 642 at 651-652, where the Court stated:

“Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgement bona fide expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would he, and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law to make him change his mind or to substitute its conclusion for its own. There are circumstances in which inference would be possible and right. If for instance such an officer has acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provision of a statute, in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.” [emphasis ours]



428. Additionally, in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR, the Court of Appeal cautioned against conflating public suspicion or political pressure with constitutional violations. It affirmed that each appointment must be assessed on the evidence of its compliance with legal criteria and not on assumptions of impropriety based on identity or association.
429. In the case English case of *R v Commission for Racial Equality ex p Hillingdon* LBC [1982] QB 276 Griffiths LJ has stated as follows concerning exercise of discretion:
- “Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law since the last war.”
430. In *Kimpi v Attorney General & Anor* (Miscellaneous Cause No.23 OF 2017) [2018] UGHCCD 92 (17 August 2018), Ugandan High Court, (persuasively) stated as follows regarding exercise of legislative discretion:
- “It can therefore be deduced from the above decisions that where Parliament confers power upon some institution like the IEBC Selection Panel, or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not the court....On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion.”
431. In the case of *Sharp v Wakefield* [1891] AC 173 the court observed that:
- “‘discretion’ means when it is said that something is to be done within the discretion of the authorities that something is to be done according the rules of reason and justice, not according to private opinion: Rookes case; according to the law and humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”
432. It was further stated in *Republic v Judicial Service Commission ex parte Pareno* [2004] eKLR, that fairness and transparency are central to public appointments, but not every procedural irregularity amounts to a constitutional violation.
433. From the explanation given to the public on why the expanded shortlist was necessary, the IEBC Selection Panel the petitioners have not set out circumstances or plausible facts upon which the exercise of discretion to add more candidates in the second shortlist could be challenged on grounds of wrongful exercise of discretion.
434. Accordingly, we find that the IEBC Selection Panel did not violate any law or constitutional provision in adding more candidates to the second republished shortlist.



435. On alleged breach of legitimate expectation of the petitioners and other candidate applicants, the doctrine of legitimate expectation was extensively considered by the Supreme Court in *Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others* [2014] eKLR. Several principles of the doctrine were extrapolated as follows:

“It is a well-established and recognized doctrine in administrative law, legitimate expectation arises when a body, by representation or past practice has raised an expectation in a citizen that it is within its power to fulfil, a legitimate expectation must be founded upon a promise or practice by a public authority, the representation must be one that the public authority is competently and lawfully capable of making, clear statutory words override any contrary expectation, and that a public authority that has made a representation which in law it has no power to make is not precluded from asserting the correct position in law.”

436. This Court appreciates that any violation of constitutional values would vitiate the selection process. However, in this case, there was no evidence showing that the subsequent expanded shortlist was a substantive procedural deviation which violates rights and caused harm and therefore, this Court finds no constitutional violation.

437. In our view, the principle *De Minimis Non Curat Lex* –(the law does not concern itself with trifles) applies in this case. This principle applies in constitutional interpretation that minor deviations that do not cause substantive harm or infringe constitutional values are often not treated as violations that warrant judicial nullification.

438. Accordingly, we find and hold that the republished shortlist did not offend Articles 10, 27, 47, or 232 of the *Constitution*. On the contrary, the IEBC Selection Panel’s action, which was taken transparently and explained publicly, demonstrates a good-faith effort to align the selection process with Kenya’s constitutional ethos. We further find no evidence of violation of the principles of equality, fairness or procedural justice.

E. Effect of Familial relations of the 5th interested party, Hassan Noor Hassan with the leader of Minority in the National Assembly, on the selection and nomination of the 5th interested party

439. Apart from challenging the 5th interested party’s selection and nomination on account of his having been shortlisted in the republished shortlist, on another front, the petitioners also contend that the 5th interested party admitted during his vetting by the National Assembly that he is the brother-in-law to the Member of Parliament for Suna East Constituency, Migori County, Hon. Junet Mohamed, who is also the current Minority Leader in the National Assembly.

440. Consequently, it is the Petitioners’ case that the 5th Interested Party is not eligible for appointment as a member of the Commission and that he will not be impartial.

441. The issue for determination is whether the alleged familial relationship between the 5th Interested Party and Hon. Junet Mohamed, the Leader of Minority in the National Assembly, is sufficient to create a reasonable apprehension in the mind of a fair-minded and informed member of the public that the said nominee may not exercise impartiality if appointed. It is further necessary to consider whether this alleged relationship was the sole or primary basis for the inclusion of the 5th Interested Party in the republished shortlist of nominees to the IEBC.

442. It is public knowledge that this allegation was widely circulated in the media, with headlines such as “Godfathers have it” appearing in a publication dated Thursday, 5th June 2025 in one of the Daily



- Newspapers of nationwide circulation. Such reports had the effect of framing a narrative in the public domain that the nomination process was influenced by political patronage. Nevertheless, among all the nominees, it was only the 5th Interested Party whose familial connection to a senior political figure was specifically alleged.
443. The 5th Interested Party, in his response, admitted to the existence of a familial relationship with the Leader of Minority in the National Assembly, saying that the latter was his brother in-law.
444. It is trite law that public appointments must adhere to the constitutional principles of integrity, fairness, merit and transparency. These principles are entrenched in Articles 10, 27, 73, 232, and Chapter Six of the Constitution. Specifically, Article 73(2)(a) emphasizes that the guiding principle of leadership and integrity includes selection based on personal integrity, competence and suitability. Additionally, Article 232(1)(g) requires fair competition and merit as key criteria in public service appointments.
445. More importantly, Article 232 of the Constitution sets out the core values and principles that govern all public service in Kenya. The Article mandates that public officers and institutions must uphold standards of professionalism and competence; ethical conduct and integrity; accountability and transparency; non-discrimination and equality; efficient, effective, and responsive service delivery and promotion of national values and unity.
446. In essence, Article 232 ensures that the public service operates in a manner that is ethical, impartial and dedicated to serving the public interest in accordance with constitutional values. These values and principles apply to State organs at both levels of government as well as state corporations.
447. On the other hand, Article 73 provides for responsibilities of leadership and makes it clear that leadership is a privilege and responsibility to serve the people. That Article mandates that state officers must be selected on the basis of personal integrity, competence and suitability, not connections or influence.
448. Further, public trust demands that decisions (including appointments) be made objectively, impartially and in the public interest. It follows that state officers must avoid nepotism, favoritism or conduct that undermines integrity and public confidence. Article 75 calls on State Officers to avoid any conflict between personal interests and public duties, compromising any public or official interest in favour of a personal interest or demeaning the office the officer holds.
449. The Leadership and Integrity Act, 2012 operationalizes Chapter Six of the Constitution and specifically requires that appointments to State offices must be transparent and based on merit; nominees must demonstrate integrity, competence and ethical conduct and a person with a history or risk of conflict of interest, or who cannot serve independently, should not be appointed.
450. Thus, an appointment that appears to serve personal, familial or political interests may be challenged under this provision and therefore it is for this reason that State officers should not place themselves in positions where they might be influenced by relationships or loyalties that compromise impartiality.
451. Furthermore, while the existence of a familial relationship between a nominee and a politician is not in itself a legal bar to appointment, such a connection cannot be ignored where it gives rise to a reasonable perception of partiality, undue influence or political patronage. Public office is held in trust for the people and the perception of independence and impartiality is as vital as the reality.
452. That said, the Constitution does not impose a blanket prohibition against individuals related to politicians from holding public office. Doing so would risk violating the right to equal opportunity



- and the principle of merit-based appointments, unless such appointment would raise reasonable apprehension of bias in the minds of a reasonable and informed person.
453. The proper approach is a contextual and case-specific evaluation, considering whether the nominee has demonstrated a track record of independence, professionalism and transparency regarding the relationship, whether institutional safeguards against conflict of interest are in place and whether their appointment would undermine or reinforce public confidence in the appointing institution. It is this balance between safeguarding institutional integrity and ensuring fair access to public service that the *Constitution* seeks to uphold.
454. In *Wanjigi v Chebukati*[2022]eKLR the Court of Appeal dealing with the doctrine of bias and citing other decisions had this to say on the test of bias: /“Earlier on, expounding further on the above test, the Supreme Court of Canada explained as follows in *R. v S (R.D.)*[1977] 3 SCR 484: The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.” (Emphasis added).
455. In this case, the 5th interested party did not deny the fact that he is the brother in-law to Hon. Junet Mohamed. The question is whether that was the sole reason for his being selected, shortlisted and nominated as the proposed member of the IEBC.
456. As we answer this question, we observe that the petitioners have not impeached the 5th interested party’s professional qualifications and neither have they said that he is wanting in integrity. Save for the alleged disqualification under Article 88(2) (a) (i) which is addressed elsewhere in this judgment, the Petitioners have not challenged the 5th interested party’s overall suitability for appointment as Commissioner of the IEBC.
457. Therefore, while perceived conflicts of interest, nepotism and bias are legitimate public concerns, they must be grounded in evidence of procedural breach, bias or influence. Where none of these features exist and where a candidate has undergone a transparent and competitive process, has been interviewed, vetted and found to be competent and meeting all other set criteria, familial relations alone cannot be a constitutional disqualifier. To hold otherwise would effectively impose an extra-constitutional bar based on association, thus offending the principles of equality and dignity of opportunity, particularly where merit has been established.
458. The Court of Appeal in *Gachagua & 5 others v Maingi & 80 others* (Civil Appeal E829 of 2024 & E022 of 2025 (Consolidated)) [2025] KECA 790 (KLR) (9 May 2025) (Judgment) (the Gachagua Case), dealt with these very concerns of familial relations. The Superior Court had this to say concerning allegations of bias on account of familial relations, addressing the issue of whether the Judges in the



High Court should have recused themselves from hearing the case on the impeachment of the Deputy President of the Republic of Kenya, a principle which we find is relevant to the instant petition:

“197. We fully endorse the findings of the High Court that family members of judges are entitled to pursue independent careers, and such pursuits, in and of themselves, should not cast doubt on a judge’s impartiality. Family members of judges, like any other qualified Kenyan, can lawfully be appointed to any public office, and that, per se, cannot be a ground for a judge’s recusal, unless it is demonstrated that the appointment was intended to give the appointing authority an undue advantage in judicial proceedings, or for any other improper factor relating to the appointment and the judge’s discharge of judicial duties. To suggest otherwise would impose an unreasonable and disproportionate burden on judges and judicial officers. The professional undertakings of a judge’s spouse, particularly where they bear no direct relevance to the matter before the court, cannot serve as a valid basis to question the judge’s objectivity. In the absence of specific and compelling evidence of a conflict of interest, such allegations amount to mere speculation and fail to meet the requisite legal standard for recusal.”

459. In this case, we find that the petitioners have not discharged the legal burden of proving that the 5th interested party’s selection and nomination was influenced by his relation with a top politician or that the nominee if appointed as a member of the IEBC will not be impartial in the discharge of his constitutional mandate as a member of IEBC.

460. In *Evans Nyakwana –v - Cleophas Bwana Ongaro* [2015] eKLR it was stated that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

461. In view of the foregoing, we find that in the absence of undue influence, interference or irregularity in the selection and nomination process of the 5th interested party, his admitted familial relationship to a political actor or public official cannot, without more, invalidate or negate his selection, nomination and appointment to serve as a member of the IEBC, which is a state office, provided the selection, nomination and appointment satisfies all other constitutional and statutory requirements.

462. We therefore reject the invitation by the petitioners to declare the 5th interested party ineligible for nomination and possible appointment as IEBC Commissioner on account of familial relations with a serving politician.

F. Alleged disqualifications against each of the nominees

463. This section of our decision answers the issues raised by the petitioners that some of the nominees are allegedly automatically disqualified to be selected, nominated and appointed to serve in the IEBC as Commissioners and that therefore their selection and nomination was unconstitutional.



464. In every constitutional democracy, the conduct of free, fair and credible elections is the bedrock upon which the legitimacy of government rests. At the heart of this process lies the electoral body, an institution entrusted with safeguarding the sovereign will of the people. The integrity, impartiality and competence of such a body are not mere procedural formalities; they are fundamental constitutional guarantees.
465. the *Constitution* of Kenya, 2010, in recognizing the centrality of electoral justice, envisages an electoral commission that is independent, transparent, accountable and composed of individuals who exemplify merit, impartiality and integrity. The process of appointment to such a constitutional commission must therefore be guided by clear, objective and fair criteria that uphold the values of Chapter Six of the *Constitution* on leadership and integrity and give effect to Articles 10, 81, and 88.
466. Any departure from these constitutional imperatives in the appointment of commissioners undermines not only public confidence in the electoral process but also erodes the very foundation of democratic governance. The significance of appointing commissioners on the basis of merit and integrity is thus not abstract, it is a constitutional obligation designed to secure electoral processes that reflect the true and sovereign will of the people.
467. This part of the decision is the heartbeat of this judgment and the nerve centre of the petition. It examines whether the process and criteria for the appointment of members to the IEBC met the constitutional threshold of suitability, transparency, merit/qualification and integrity as well as the requirements under Article 232 of the and whether any failure in this regard has a bearing on the validity of the Commission's anticipated composition and its ability to discharge its constitutional mandate under Article 88(4).
468. But first things first, what is the rationale for the constitutional disqualifications? Many Articles of the *Constitution* provide for disqualifications of State officers from being appointed to other State offices while still serving. This constitutional bar may be attributed to a number of reasons, among others: a. Upholding the Doctrine of Separation of Powers. the *Constitution* is built on the principle of separation of powers between the Executive, Legislature and Judiciary. Allowing one person to serve simultaneously in two or more State offices undermines institutional independence and blurs lines of accountability. b. Preventing Conflict of Interest. Dual office-holding creates real or perceived conflicts of interest where a state officer may prioritize the interests of one office over another or use information improperly. Chapter Six of the *Constitution* (Leadership and Integrity) demands that State officers avoid situations where personal interests conflict with public duties.

In *Trusted Society of Human Rights Alliance v AG & Others* [2012] eKLR, the High Court stressed that public officers must adhere to the highest standards of integrity and impartiality. c. Safeguarding Public Resources and Accountability. Each State office attracts remuneration, security and public funding. Holding two offices may lead to misuse of public resources, double compensation or non-performance. In this regard, Article 73(1)(b) emphasizes objectivity and accountability in service to the public, which is undermined when serving officers occupy multiple offices. d. Ensuring Merit-Based Appointments. Disqualification provisions prevent politically motivated or opportunistic transfers between powerful offices without proper vetting. It ensures due process, competitive recruitment and public participation in State appointments, as required under Article 232 (Values and Principles of Public Service). e. Promoting Fairness and Equal Opportunity. Allowing serving State officers to occupy multiple roles limits opportunities for other qualified Kenyans, violating Article 27 (Equality and Non-Discrimination). Constitutional disqualification promotes equity, inclusiveness and transparency, which are the cornerstones of democratic governance. f. Guarding Against Abuse of Power. A serving officer could use their current position to influence or interfere



with the appointment process for another role (e.g., through lobbying, intimidation or misuse of State machinery). Disqualifying such appointments reduces patronage and impunity, which the Constitution was designed to eliminate post-2010.

g. Respecting Constitutional Design and Checks. the Constitution intentionally defines State offices as distinct, with different mandates, responsibilities and checks and balances. Allowing overlap violates Articles 10 (national values) and Article 73 (leadership standards).

469. Such disqualifications are not punitive, but necessary safeguards to protect the integrity, functionality and legitimacy of public institutions.
470. The petitioners challenge the lawfulness and constitutional validity of the process through which the 1st to 7th Interested Parties were selected and subsequently nominated and vetted to serve as Chairman and Commissioners of the (IEBC). It is the petitioners' case that the said process contravened the provisions of the Constitution, particularly those enshrining the national values and principles of governance under Article 10, the principles of public participation, transparency and accountability and the requirements of Chapter Six on leadership and integrity.
471. One of the major challenges to the selection and nomination of the 1st to 7th interested parties is the allegation that some of them are not suitable or qualified to be appointed as Commissioners of the IEBC.
472. The petitioners have also set out specific allegations against each of the 1st to 7th Interested Parties, contending that the individuals in question do not meet the constitutional and statutory criteria for nomination to serve as Chairman and Commissioners.
473. The petitioners assert that the respective nominations were not only procedurally flawed but that the 1st to 7th Interested Parties are, in various respects, unsuitable for the positions to which they were nominated, thereby undermining the spirit and letter of the Constitution.

a. Allegations of unsuitability of the 1st interested party Mr. Erastus Ethekeon Edung

474. The Petitioners have challenged the selection and nomination of Mr. Erastus Edung Ethekeon, the 1st Interested Party, as the Chairperson of IEBC, on grounds that the entire selection and nomination process is tainted by a perception of political bias and partiality. The crux of the challenge is the alleged past professional association between the 1st Interested Party and Mr. Josephat Nanok, the Deputy Chief of Staff in the Office of the President, stemming from the 1st Interested Party's prior service as County Attorney in Turkana County during Mr. Nanok's tenure as Governor.
475. The petitioners allege that this past association gives rise to a perception that the 1st Interested Party may be beholden to or influenced by Mr. Nanok, thereby undermining the appearance of independence, neutrality and impartiality required of the Chairperson of the IEBC under the Constitution. The Petitioners assert that this association also raises a reasonable apprehension of bias, thus disqualifying the 1st Interested Party under Chapter Six of the Constitution and Article 88(2).
476. In response, the 1st Interested Party avers that his nomination as chairperson of IEBC followed a competitive recruitment process and that his service as County Attorney was not in a personal capacity to the then Governor, but as a public officer under the County Government of Turkana. The 1st Interested Party's case is that his appointment was made under Section 5 of the County Attorneys Act, Cap 265E Laws of Kenya, through a transparent process involving nomination by the Governor and vetting by the County Assembly. He also argues that he had no personal familial or undue political relationship with Honourable Nanok and that the latter was his supervisor in the official capacity of County Governor and their interaction was strictly professional.



477. He further asserts that he served under two successive governors from different political affiliations, thereby rebutting the claim that he harbours partisan allegiance or political bias. The 1st Interested Party maintains that his professional conduct was guided by the law and that no evidence has been placed before this Court to demonstrate otherwise.
478. This Court is mindful that public confidence in the IEBC is integral to the credibility of the electoral process. It is equally alive to the fact that actual bias need not be proved; what is sufficient is a reasonable apprehension of bias on the part of a fair-minded and informed observer.
479. In public and electoral administration, perception matters greatly and it is more important for the process to be fair and to be seen to be fair. However, this principle must be balanced against the constitutional right of individuals to public service and the imperative of fairness in public appointments.
480. In addition, the burden is on the party alleging bias to establish a reasonable suspicion of bias on a balance of probabilities, using cogent, factual evidence, not mere assertions.
481. This Court is guided by established jurisprudence on the question of bias in public appointments. In *Charles Ndungu Mwangi v IEBC Chair & 4 Others* [2018] KEHC 8444, the High Court affirmed that both actual bias and a reasonable apprehension of bias are grounds for disqualification. The applicable standard, however, is an objective one: whether a fair-minded and informed observer, having regard to all the circumstances, would reasonably apprehend that the person in question may not bring an impartial mind to the matter at hand.
482. Similarly, in *Wanjigi v Chebukati & 2 Others* [2022] KECA 724, the Court of Appeal underscored that mere suspicion, conjecture, or unsubstantiated allegations are inadequate to establish a constitutional violation on the basis of perceived bias. The threshold is a high one and must be met with cogent and credible evidence.
483. In *Kaplana H. Rawal v Judicial Service Commission & 2 Others* [2016] eKLR, cited in the *Wanjigi v Chebukati* (supra), the Court of Appeal stated: -
- “It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn.”
484. In the *Wanjigi v Chebukati & 2 Others* (supra), the Court of Appeal further stated as follows, regarding the test of bias:
- “In a case founded on apparent bias, the test is an objective one, of whether there is reasonable apprehension of bias. The test was expressed as follows in *Attorney General of the Republic of Kenya v. Prof. Peter Anyang Nyong'o & 10 Others*, EACJ Application No. 5 of 2007:-
- “We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not apply his mind to the case impartially? Needless to say, (a) litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be



the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.” (Emphasis added).

485. The Court of Appeal in the above cited *Wanjigi v Chebukati* case, citing with approval the decision by the Supreme Court of Uganda in *Re Application for Recusal of Owiny-Dollo, CJ. by Male H. Mabirizi K. Kiwanuka* Misc. App No. 3 of 2021, where the Supreme Court of Uganda was dealing with an application whose facts bear uncanny resemblance to the appeal before the Court of Appeal in the *Wanjigi v Chebukati* (*supra*) case and to this matter, albeit the alleged bias is not against a judge or judicial officer, in which case, the application sought the recusal of the Chief Justice from hearing an election petition against the President of Uganda on the main ground that as a private practitioner, the Chief Justice had acted for the President. In rejecting the application, the Court held:

“The onus to pass the test for bias is upon the person seeking recusal by a judicial officer. An unfounded or unreasonable apprehension of bias cannot be a justifiable cause for recusal. Furthermore, even where the apprehension of bias is expressed by a reasonable person, such apprehension must be assessed in the light of the true facts established at the hearing of the application. Courts are hesitant to make a finding of bias or to conclude that there is reasonable apprehension of bias in the absence of convincing evidence to that effect; meaning, it does not suffice to merely allege. The reasonable, objective, and informed person should be appraised of all the correct facts before determining whether or not, there is bias.”

486. In this case, just like in the *Wanjigi v Chebukati* (*supra*) case, other than the insipid assertion that the nominee chairperson will be partisan or partial and biased because he worked as the County Attorney under the leadership of governor Nanok who now works at Statehouse, the Petitioners have not placed any material that would persuade us that a reasonable, well-informed and fair-minded person would conclude, merely from having worked as a County Attorney under governor Nanok, that the nominee chairperson for IEBC would be biased in the discharge of his constitutional mandate, if appointed.

487. The 1st Interested Party’s evidence that he served under more than one governor further weakens the allegation of political allegiance to a single individual.

488. The Petitioners have not placed before this Court any evidence of conduct, utterances, affiliations or decisions by the 1st Interested Party that would give rise to a reasonable apprehension of bias or suggest a lack of neutrality. Perception alone, if not grounded in fact, cannot be elevated to a constitutional disqualification.

489. Indeed, to disqualify a nominee solely on the basis of prior professional engagement with a political figure, without more, would amount to setting a precedent that unfairly excludes competent and experienced public officers and individuals from national service.

490. In the result, this Court finds and holds that the selection and nomination of the 1st Interested Party, Mr. Erastus Edung Etheke, for appointment as Chairperson of the IEBC has not been shown to contravene the *Constitution*.

491. Accordingly, the challenge to his nomination on the ground of perceived bias is without merit and is hereby dismissed.

b. Allegations of disqualification against the 2nd interested party Anne Njeri Nderitu

492. According to the Petitioners, Anne Njeri Nderitu who is the 2nd interested party was and is still a State Officer and hence she was and/or is ineligible to apply for or be selected and appointed to serve as a Commissioner of the IEBC. The petitioners state that during her vetting /approval hearing by the



- National Assembly, she admitted that, at the time of her nomination and interview for appointment as a member of the IEBC, she was still serving as the Registrar of Political Parties, a state office. That this admission is contrary to the provisions of Article 88(2)(b) of the Constitution, which expressly provides that a person is not eligible for appointment as a member of the Commission if the person holds any State office.
493. In response to this alleged disqualification, the 3rd respondent which is the National Assembly contended that during the vetting of the nominee, the National Assembly Justice and Legal Affairs Committee (JLAC) noted that the nominee is yet to be appointed to the Commission and that her appointment was subject to approval by the National Assembly and resignation before assuming office in accordance with Article 88(2) of the Constitution.
494. In response to the constitutional disqualification argument, the 2nd Interested Party states that she applied for Member of the IEBC and that upon due consideration of her qualifications, including her academic credentials and professional experience, she was deemed to have met the requisite statutory and regulatory criteria, whereupon she was duly shortlisted and she appeared for her interview on the 28th March 2025 at 3:50pm.
495. According to the 2nd Interested Party, there is no bar against State Officers applying for the positions of Member of the IEBC provided that upon appointment, such individual tenders their resignation from the prior office held, which is the lawful and logical course of action in accordance with established constitutional and statutory principles. She maintains that the disqualification under Article 88(2)(b) only crystallizes at the point of appointment, and not at the stage of application or shortlisting.
496. She argued that the rationale underpinning Article 88(2)(b) of the Constitution is to prevent the concurrent holding of multiple state or public offices by a single individual. This provision, she argues, serves to safeguard the principles of separation of powers, prevent conflicts of interest and ensure that public officers discharge their duties with undivided loyalty and independence.
497. According to the 2nd Interested Party, this constitutional safeguard aims to promote good governance, accountability and integrity in public service by requiring an individual to relinquish any existing state office before assuming a new appointment.
498. It is her case that during her vetting in Parliament, she was asked questions on a memorandum filed concerning the alleged ineligibility of a state officer, an issue which she answered by tendering credible evidence to her aid and which included a ruling made by Parliament in a similar scenario.
499. The 2nd Interested Party argues that Section 9 of the IEBC Act clearly stipulates that appointment can only crystallize upon oath taking.
500. Further, that expecting a state officer to resign from any other state office held prior to being formally confirmed or appointed to a new public office would be premature and contrary to established constitutional and administrative practice. She further argues that Article 88(2)(b) must be read together with Article 250(6)(b) of the Constitution.
501. The 2nd Interested Party maintains that her nominations to the IEBC fully complied with the constitutional requirements set out under Articles 10, 27(1), 232, 250(3) and (4), as the nominations demonstrably uphold the principles of national unity by ensuring equitable regional representation and ethnic balance.
502. On allegations of violation of the principles espoused in Articles 10, 20 and 232, she further argues that given that the Commission's membership is limited to seven persons, it is inherently infeasible to



- represent every interest or group exhaustively and that the nomination process must reasonably balance constitutional diversity with merit and requisite competences.
503. She further argues that the petitioners' averments that nominees are not eligible due to their place of origin is unconstitutional and discriminatory as everyone is equal before the law and the positions were open to everyone to apply as long one met the criteria set.
504. Article 88 (1) of the Constitution establishes the Independent Electoral and Boundaries Commission. The Article also provides for eligibility for appointment as Commissioner or member of the Commission at sub-article 2 thereof as follows:
- 88(2) A person is not eligible for appointment as a member of the Commission if the person—
- (a) has, at any time within the preceding five years, held office, or stood for election as—
 - (i) a member of Parliament or of a county assembly; or
 - (ii) a member of the governing body of a political party; or
 - (b) holds any State office.
505. This provision imposes a specific disqualification for appointment to the IEBC as a member. Its intent is to safeguard the independence, neutrality and public confidence in the electoral body by insulating it from political or governmental entanglements.
506. It is not in dispute that the 2nd interested party is the sitting Registrar of Political Parties and that the Office of Registrar of Political Parties is a state office established and designated as such by Section 33 of the Political Parties Act. The designation of the Office of Registrar of Political Parties as a state office is by dint of Article 260 of the Constitution which defines office to mean any of the following offices—
(q) an office established and designated as a state office by national legislation.
507. Section 33 of the Political Parties Act provides: /33.
- 1) There is established the Office of the Registrar of Political Parties which shall be a body corporate with perpetual succession and a seal and which shall be capable of suing and being sued in its corporate name.
 - (2) The Registrar shall be deputised by three Assistant Registrars, not more than two of whom shall be of the same gender.
 - (3) The Office of Registrar shall be a State office
508. The 2nd interested party does not deny that she is a state officer by virtue of her office being designated by legislation to be a state office, as contemplated in Article 260.
- Her argument is that she was eligible for selection, nomination and appointment as a member of the Commission and that only upon her assuming office by taking oath of office as stipulated in section 9 of the IEBC Act would she be expected to resign.
509. She argues that in that manner, she will not have held two state offices and that she should not have been expected to resign from her position as Registrar of Political Parties before applying for the new job.
510. We have carefully considered the arguments for and against the disqualification. The question for determination is whether, being a state officer constitutes an automatic bar under Article 88(2)(b), and more broadly, whether a serving State officer is precluded from transitioning to another constitutional or independent office.



511. In our considered view, a literal and rigid interpretation of Article 88(2)(b) of the Constitution that disqualifies any person who is currently a State officer from applying for a new State office, even with the intention of resigning upon successful appointment, would lead to unreasonable and impractical consequences.
512. The interpretation of “holds any state office” in this context must be approached purposively. A literal reading, that any current State officer is per se disqualified, would result in an unreasonable bar to career development and advancement within the public sector. It would also contradict the logic of other provisions of the Constitution which contemplate that an individual may move from one constitutional office to another, provided there is no simultaneous occupation of both offices.
513. In *Ndynabo v Attorney General* [2001] 2 E.A. 485 the court held as follows:
- “the Constitution is a living instrument, having a soul and consciousness of its own ... it must be construed in line with the lofty purpose for which its makers framed it. ... A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document.”
514. In the Ugandan case of *Tinyefuza v Attorney General*, Constitutional Appeal No. 1 OF 1997, the court held as follows:
- “The entire Constitution has be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”
515. In the instant case, our view is that an interpretation that bars career reasons serving in the public service from any upward mobility within the public service would unjustifiably fetter the right to seek employment and career progression in the public sector. It would also go against the constitutional values under Article 27 (equality and non-discrimination) and Article 41 (labour rights).
516. We take judicial notice that in the Kenyan legal and administrative practice, it is not uncommon for persons currently holding one public or even state office to apply for another, on the understanding that they will vacate the former upon appointment to the new position. For example, a magistrate may apply to be appointed as a judge and upon successful recruitment by the Judicial Service Commission and appointment by the President, they will be required to automatically relinquish their prior position. Similarly, public servants who are also designated as state officers routinely apply for higher positions in constitutional commissions or independent offices, with resignation being a precondition to assumption, not application of office.
517. Additionally, in interpreting Article 88 on disqualifications, it is important to consider other constitutional and legislative provisions. Under Article 77(1) on General Restriction Against Gainful Employment While in State Office, it provides:
- “A full-time State officer shall not participate in any other gainful employment.”
518. This provision does not bar application for another State office. Rather, it prohibits concurrent gainful engagement, especially where the public interest, time commitments or conflict of interest may arise. It presumes that once a state officer assumes a new office, the prior one must be relinquished to avoid dual obligations.
519. Notably, Article 88(2) (b) does not mandate resignation at the point of application. Instead, it prohibits simultaneous service. This supports the view that one may apply and be vetted for a different



- constitutional or independent office, including the IEBC, as long as they do not concurrently hold both positions.
520. Article 78 (1) on Citizenship Requirements for State Officers focuses on citizenship and provides:
A person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya.
521. This Article further bars persons holding dual citizenship from being elected or appointed to State office unless they renounce the foreign citizenship. This is a personal status-based bar, distinct from the time-based or role-based restrictions in Article 88(2)(b). Like Article 77, this Article 88(2)(b) does not preclude application, but limits eligibility upon appointment, unless the dual citizenship is renounced before assumption of office.
522. We are also alive to the legislative bar to simultaneous service by state officers as reinforced by various statutes and codes of conduct and we cite here a few examples:
- i. Section 16 of the *Leadership and Integrity Act* provides:
“ A State officer shall not hold more than one full-time public office.”
 - ii. Section 26 of the *Public Service Commission Act*, prohibits public officers from engaging in activities that present a conflict of interest or affect the performance of their duties.
523. The above legal framework confirms that the issue is not applying for another office but holding multiple offices simultaneously. Thus, disqualification applies only at the point of assumption of the new office.
524. This disqualification in Article 88(2)(b) is distinct from that in Article 88(2)(a) which ensures that persons with recent active political roles do not serve on the IEBC, preserving the Commission’s impartiality. The 5-year “cooling-off” period, in our view, is intended to create distance from partisan influence. The disqualification is also intended to prevent the recycling of politicians into electoral management roles shortly after leaving office or party positions.
525. In the case of Article 88(2)(b), the disqualification is, in our opinion, intended to ensure institutional independence and guard against conflict of interest or abuse of office. This is achieved by precluding simultaneous occupancy of State roles. This constitutional provision serves a similar protective function as the persuasive English Gallaher doctrine, which was developed to ensure independence, integrity and undivided loyalty in the leadership of the office. The Gallaher principle enunciated in *R v Gallaher*, (1883) 12 QBD 5 15 guards against concurrent office-holding due to incompatibility of duties. In the said English case, Mr. Gallaher was elected as a member of a municipal corporation (a local council). Subsequently, he accepted a second public office that was legally incompatible with his role as a municipal councillor.
526. The central issue before that court was whether, by accepting this second office, he had automatically vacated his existing seat on the council, even though he had not tendered a formal resignation. The Court held that the acceptance of the second, incompatible office operated by law to vacate the first office. This decision became foundational for the common-law doctrine now known as the Gallaher principle, which mandates that where the functions of two offices are inherently incompatible, the assumption of one creates an implied vacancy in the other.
527. Under a purposive interpretation (aligned with Article 259), this interpretation ensures that public officers are free to seek appointment, while preserving the constitutional integrity of the IEBC by



prohibiting dual office-holding. In our understanding, what the Constitution and the law prohibit is simultaneous service, not career progression within public service.

528. We are therefore persuaded that there is no blanket constitutional bar for a serving State officer to apply for consideration for appointment to the IEBC, so long as they resign from their current office before they take oath of office of Commissioner.
529. Consequently, we find and hold that the mere fact that the 2nd Interested Party Anne Njeri Nderitu was a state officer at the time of application, did not in itself render her constitutionally ineligible for consideration for appointment to the IEBC, provided that she relinquishes the prior office before taking oath and assuming the new one, if successfully appointed.

b. As against the 3rd and 6th interested parties

530. The petitioners only alleged that the 3rd interested party scored low marks. No specific allegations of constitutional disqualification was levelled against the 6th interested party, Francis Odhiambo Aduol. However, no evidence was adduced to prove that the 3rd interested party, Mr. Moses Alutalala Mukhwana scored low marks at the interview. No score sheets were availed to court and therefore we find that allegation to be farfetched and spurious. On the whole, we find that the petitioners have not made out any case against these two interested parties to warrant any adverse findings against them. c. Allegations Regarding the Nomination of the 4th interested party, Ms Mary Karen Sorobit
531. The petitioners contend that the nomination of the 4th interested party, Ms. Mary Karen Sorobit is unconstitutional and unlawful. It is their assertion that, at the time of her nomination, Ms. Sorobit was a member and office bearer of a political party, specifically, that she had served as the County Chairperson/Executive Director of the Jubilee Party within the five-year period preceding the General Elections held in August 2022.
- In view of this, the petitioners argue that her nomination contravenes the express provisions of Article 88(2)(a)(ii) of the Constitution, which disqualifies any person who, within the preceding five years, has held office or stood for election as a member of the governing body in a political party from being appointed to the IEBC.
532. Further, the petitioners assert that the said nomination violates Article 10 which binds all State organs, State officers, public officers and all persons to uphold the national values and principles of governance. These values include- integrity, transparency, accountability and adherence to the rule of law.
533. It is the petitioners' position that the circumstances surrounding Ms. Sorobit's nomination fall short of these constitutional ideals. They also allege that the nomination of Ms. Sorobit offends the provisions of Article 73(2)(a), which outlines the guiding principles of leadership and integrity, including selection on the basis of personal integrity, competence and suitability. The petitioners maintain that Ms Sorobit's recent political affiliations raise legitimate concerns as to her ability to discharge the duties of the office impartially and without bias.
534. The petitioners further argue that Ms. Sorobit's recent and active involvement in partisan political affairs undermines public confidence in the independence, neutrality and impartiality of the IEBC, attributes which are fundamental to the constitutional and institutional integrity of the Commission.
535. Lastly, the petitioners contend that the process leading to Ms. Sorobit's nomination did not meet the threshold of a fair, open and merit-based recruitment process as envisaged under Article 232(1)(g) of the Constitution. They claim that there was a lack of transparency and that the public was not afforded timely and accurate information regarding the process, thereby rendering her selection procedurally defective and constitutionally infirm.



536. The 4th Interested Party, Ms Sorobit, emphatically denies having served as either Executive Director or member of the Jubilee Party’s governing body within the five-year period preceding her nomination. She relies on the unequivocal confirmation from the Registrar of Political Parties in a letter dated 15th May 2025 (Ref: RPP/FRP/027#VOL.VI (39)), annexed to her replying affidavit, which affirms that she held no such office during the material timeframe.
537. She further submits that the petitioners’ allegations of her political affiliation are wholly unsubstantiated. She maintains that she bears no current or recent affiliation, formal or otherwise, with any political party or formation, so as to cast any doubt upon her independence, neutrality, or impartiality, particularly in the event of her assuming office as a member of the IEBC.
538. To further counter the petitioners’ assertions, the 4th interested party in her replying affidavit and submissions contends that no cogent evidence has been adduced demonstrating her alleged service as an Executive Director or party office-bearer or member of the governing body, despite extensive efforts by the petitioners, referenced at page 859 of the Petition, in a letter dated 9th May 2025 addressed to the Registrar of Political Parties seeking information on her political party 2020 to 2024.
539. Regarding constitutional challenge under Articles 10 and 73(2), the 4th Interested Party avers that mere allegation, without proof, fall short of the constitutional standards.
540. The 4th interested party submits that the petitioners have failed in law to demonstrate any contravention of Articles 10, 73(2)(a) or 88(2)(a), as they have not shown:
- (i) that she held disqualifying office within the Jubilee Party during the relevant five-year period;
 - (ii) that her integrity, competence, or suitability have been compromised; or
 - (iii) that the selection process itself was conducted in a manner inconsistent with constitutional requirements.
541. The 4th Interested Party further submits that the interpretation and application of Article 88(2)(a) (ii) of the Constitution must be undertaken contextually and purposively, and in light of related constitutional and statutory provisions. Specifically, it is her contention that Article 88(2)(a) (ii) ought to be read together with Article 91 and Section 4 of the Political Parties Act, which collectively provide the framework for the formation, structure and governance of political parties in Kenya.
542. She submitted that Article 91 outlines the minimum requirements for political parties, including democratic principles, internal democracy and organizational structure, while Section 4 of the Political Parties Act, in turn, sets out what constitutes a political party and the mandatory elements that every political party must incorporate in its constitution, including the definition and composition of its governing body.
543. The 4th Interested Party submits that the phrase “member of the governing body of a political party,” as used in Article 88(2)(a)(ii), is not a matter of conjecture or subjective determination by political parties themselves. Rather, that it is a legal status defined by legislation, specifically under the Political Parties Act and that any inquiry into whether a person held such a position must be based on the statutory and constitutional framework, not on informal, perceived, administrative or honorary roles within party structures.
544. She relies on the principle of harmonious interpretation of the Constitution, as espoused in Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR , where the Court held that constitutional provisions must be read in an integrated manner, without any one provision destroying the meaning of another. Accordingly, that a literal reading of Article 88(2)(a)



- (ii) in isolation would risk disqualifying individuals on the basis of unclear or informal roles, which is inconsistent with the precision and legal certainty required in matters of eligibility for public office.
545. In view of the above provisions, the 4th Interested Party further submits that there is no evidence demonstrating that she was ever elected or appointed to a position within the formal governing organs of any political party as defined by law. She emphasizes that the confirmation letter from the Registrar of Political Parties, a statutory office under the *Political Parties Act*, is authoritative and must be accorded probative weight.
546. In conclusion, the 4th Interested Party contends that, in the absence of any legally admissible evidence that she held office in a political party's governing body as defined under Section 4 of the *Political Parties Act*, Article 88(2)(a)(ii) cannot operate to disqualify her.
547. She urges this Court to adopt a legally grounded and constitutionally harmonious interpretation of the relevant provisions and to find that the petitioners have failed to meet the threshold for her disqualification under the law.
548. The 4th interested party denied serving as a member of the governing body of Jubilee Party in the five years preceding the 2022 general elections. However, during her vetting by the Justice and Legal Affairs Committee of the National Assembly, and upon being questioned as to her eligibility under Article 88(2) (a) (ii), she stated that she only served as the Director in charge of Legal Affairs.
549. The question is whether the 4th Interested Party, having admitted that she served as Director in charge of Legal Affairs within Jubilee Political party, qualifies as having held office in the "governing body of a political party" within the meaning of Article 88(2)(a)(ii) and therefore, whether she is disqualified from appointment to the IEBC.
550. We have already given the justification for constitutional disqualifications. In this case, the applicable provision is Article 88(2) (a) (ii) which we have reproduced in the preceding part of this judgment
551. As affirmed in *G'oganyo v IEBC Selection Panel* [2022], the burden of proof lies on the petitioners to establish that political activity or affiliation is of such a nature as to render the nominee ineligible under Article 88(2)(a) (ii) of the *Constitution*. In the absence of any credible record, assertions of constitutional disqualification or impropriety would remain speculative and legally inadequate. The petitioners bear the evidentiary burden to prove that the 4th Interested Party held a disqualifying position within a political party.
552. To answer the question of whether the 4th interested party is ineligible for nomination or appointment as a member of the IEBC, in the context of the arguments by the petitioners and the 4th interested party, this requires interpretation of the Constitutional provisions. We shall therefore briefly revisit the principles of constitutional interpretation
553. In interpreting the *Constitution*, this Court is bound by the provisions of Article 259 which require that the *Constitution* be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and the human rights and fundamental freedoms in the bill of rights; permits the development of the law and contributes to good governance. Article 259(3) states, in part that:

“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking ...”



554. In *David Ndi & others v Attorney General & others* [2021] eKLR(‘the BBI case’) the High Court precisely captured the manner in which the Constitution ought to be interpreted. The five-judge bench stated as follows:

“ 399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence: a) First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No 1 of 2012*; [2014] eKLR thus (at paragraph 26): But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances. b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle. In *re Interim Independent Election Commission* [2011] eKLR, para [86] thus: The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). the Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the Constitution has a most modern Bill of Rights, that envisions a human right based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts. c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in *In Re the Speaker of the Senate & another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155- 157): (155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect. (156) The Supreme Court of Kenya, in the exercise of



the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide from and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsman ship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsman ship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras. d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya Case. It stated thus:

- (356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145- 163.
- (357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus: (232) ...References to Black’s Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts. (233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the



Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya. (400) With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions....”

555. In Centre For Rights Education And Awareness (Creaw) & 7 Others V Attorney General [2011] KEHC 4297 (KLR), Musinga J (as he then was in the High Court) stated as follows, citing other decisions and constitutional provisions on interpretation of the Constitution: /“In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation. In the Ugandan case of Tinyefuza v Attorney General, Constitutional Appeal No. 1 OF 1997, the court held as follows:

“The entire Constitution has be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”

A similar principle was enunciated by the United States Supreme Court in Smith Dakota v North Carolina Para 19 2 U.S. 268 [PARA 19 40]. The court stated:

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

In NDynabo v Attorney General [2001] 2 E.A. 485 the court held as follows:

“the Constitution is a living instrument, having a soul and consciousness of its own ... it must be construed in line with the lofty purpose for which its makers framed it. ... A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document.”

It is in the background of the foregoing principle of harmonization that I will interpret the various Articles of the Constitution that were cited before this court....”

556. Article 165(3) (d) grants this court jurisdiction to hear and determine any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

557. With the above principles on constitutional interpretation in mind, we now proceed to interpret Article 88(2)(a) (ii) of the Constitution alongside other Articles and statutory provisions.



558. Article 88(2)(a) (ii) provides that a person shall not be eligible for appointment as a member of the Commission if the person has, at any time within the preceding five years, held office, or stood for election, as a member of the governing body of a political party.
559. The petitioners allege that the 4th Interested Party's prior role within the Jubilee Party as Executive Director disqualifies her under this provision.
560. As correctly submitted by the 4th interested party, this Court takes judicial notice that Article 88(2)(a) (ii) must be interpreted in light of other relevant constitutional and statutory provisions.
561. Both Article 91 and Section 4 of the *Political Parties Act* require political parties to establish internal democratic structures and define their governing bodies in their respective constitutions.
562. Article 91 provides:
91. Basic requirements for political parties
- (1) Every political party shall—
- (a) have a national character as prescribed by an Act of Parliament;
- (b) have a democratically elected governing body;
- (c) promote and uphold national unity;
- ...
563. On the other hand, section 4 of the *Political Parties Act* provides that: 4
- . Requirements of a political party
- (1) An association of persons or an organisation shall not operate or function as a political party unless it has been registered in accordance with the provisions of this Act.
- (2) The Registrar shall not register an association of persons or an organisation as a political party if such association or organisation does not meet the requirements set out in Article 91 of the *Constitution*.
564. Members of party governing bodies often play key roles in candidate nominations, coalition-building and election strategy. Their appointment to the IEBC would, therefore, in our view, create an inherent conflict of interest, particularly when resolving disputes involving their former or affiliated parties.
565. The IEBC is constitutionally mandated to conduct free, fair, and impartial elections (Article 88(4)). Therefore, a person who is, or recently was, part of a political party's leadership is presumed to have partisan loyalties or interests. Their presence on the Commission could compromise, or appear to compromise, the neutrality of IEBC decisions, especially in party-related disputes.
566. Disqualification of political party governing body members under Article 88(2)(a) (ii) is intended to protect the IEBC's constitutional obligation to be independent, impartial and credible. It promotes fairness, avoids conflicts of interest and sustains public confidence in the electoral system.
567. For this Court to determine whether Ms Mary Karen Sorobit was a member of the political party's governing body, we must examine several other provisions of the *Constitution* and the enabling legislation on the subject.



568. We begin with registration of political parties. One of the requirements for registration of a political party by the Registrar of Political Parties is that the party must meet the requirements set out in Article 91.

Article 91 provides for basic requirements for political parties among them is that a political party must, under Article 91(1)

(b) have a democratically elected governing body.

569. The 4th Interested Party has denied holding any such position and relies on a letter dated 15th May 2025 from the Office of Registrar of Political Parties, confirming that the 4th interested party has not served as a member of the governing body of the Jubilee Party within the relevant period. The Registrar of Political Parties, being the statutory custodian of all official records relating to political parties under the Political Parties Act, provides a credible and authoritative position in this regard, and there is no contrary position.

570. The petitioners, on their part, have not adduced any evidence, including minutes of meetings, appointment letters or records from the Registrar of Political Parties, to show that the 4th Interested Party was either elected or appointed to the governing body of the Jubilee Party.

571. Courts have generally required clear documentary evidence to show that a person held a governing role. Mere title or association has been found to be insufficient. In *Musalia Mudavadi v Registrar of Political Parties & Another* [2011] eKLR, the Court emphasized that the Registrar's records are authoritative in determining party office-bearers.

572. In our humble view, allegations founded on title or the 4th interested party's perceived membership to the political party's governing body, without legal or structural backing, do not meet the evidentiary threshold required to establish constitutional disqualification.

573. This Court reiterates the principle of harmonious and purposive interpretation of the Constitution as established in Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General (*supra*), citing other authoritative decisions, where the Court held that constitutional provisions must be read together and effect given to each without rendering others redundant.

574. In this case, we have also read the provisions of Article 233 which bear similarity with Article 88(2). In the former Article which concerns appointment of Commissioners of the Public Service Commission, it is clear that the Article at 233(3)(d) prohibits any person who (d) is, or has at any time been, the holder of an office in any political organisation that sponsors or otherwise supports, or has at any time sponsored or otherwise supported, a candidate for election as a member of Parliament or of a county assembly.

575. Unlike the above underlined provision, to be a member of a political party or holding an office in a political party, other than holding office or standing for election as a member of the governing body of a political party, would not be disqualified on that ground from being appointed as IEBC Commissioner. Article 88 (2) is not as expansive and restrictive as the similar sub article 3(d) of Article 233.

The drafters of the Constitution in this regard were deliberate in their choice of words in each of the respective Articles and therefore each Article must be read and interpreted in its own context.

576. In the present case, the petitioners have failed to demonstrate that the 4th Interested Party held office in the governing body of a political party as defined in law. Her alleged role as Deputy Executive Director (Legal), which was not proved, following her clarification during her vetting by the National Assembly,



appears to have been administrative or technical in nature and does not, without more, amount to holding office in a political party's governing body.

577. We therefore find and hold that the petitioners have not demonstrated that the disqualification under Article 88(2)(a)(ii) does apply to the 4th interested party.

578. On alleged lack of integrity by the 4th interested party, this Court is mindful that technical competence, academic qualifications and professional experience are important considerations in the appointment of individuals to public office. However, under the Constitution, integrity is not merely an accessory qualification. It is a foundational, non-negotiable requirement. Article 73(2)(a) provides that the guiding principles of leadership and integrity include:

“Selection on the basis of personal integrity, competence and suitability...”

579. Particularly, integrity is not an ancillary attribute. It is the very linchpin of public trust and legitimacy. A candidate's qualifications and competence, however impressive, are of little constitutional or practical value absent unblemished ethical character. Article 73(2)(a) expressly mandates that leadership be based on personal integrity, competence and suitability, placing integrity first, a deliberate constitutional choice. This in our view, underscores the primacy of integrity and reflects the constitutional vision of public service as a trust, not merely a profession. A person may possess exceptional qualifications and vast experience, but if their character is tainted by dishonesty, corruption or ethical lapses, they cannot meet the constitutional threshold for public leadership.

580. As was aptly stated in Trusted Society of Human Rights Alliance v. AG & Others [2012] eKLR and we concur, that it is not enough for a person to be academically qualified or professionally experienced if such a person does not meet the ethical and moral expectations of the Constitution.

581. It follows, therefore, that however qualified a person may be, if they lack integrity, the Constitution bars their appointment to public office. The suitability of a candidate must be evaluated not just by their flowery or long impressive curriculum vitae, but also by their moral record, ethical conduct and public trustworthiness. To permit otherwise would amount to constitutional betrayal and constitutional betrayal is infidelity to the sovereign people of Kenya, thereby allowing the gates of public power to be opened to those least fit to exercise that power.

582. The word Integrity was mentioned several times in this petition. Our scan of the petition shown that the term integrity was used more than 120 times. It would therefore mean that the term is so important that one cannot just alleged lack of integrity without evidence to support the allegation. As earlier stated, the burden of proof lay on the petitioners to adduce evidence to prove that the 4th interested party lacked integrity, a prerequisite for nomination and appointment as an IEBC Commissioner.

583. However, other than her alleged affiliation to the Jubilee political party as a member of the governing body, which allegation this Court has found to be baseless, there is also no evidence to show that Ms Mary Karen Sorobit failed the integrity test stipulated in Chapter six of the Constitution, or that she failed to meet the minimum qualifications provided for in section 6 of the IEBC Act.

584. The Court in the Trusted Society of Human Rights Alliance v The Attorney General & 2 Others (*supra*) case had this to say on integrity:

“To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution,



there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the Democratic Alliance case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity."

585. It is also worth noting that although the petitioners cited Articles, 10 and 232 of the Constitution alleging that these Articles were violated in the nomination of the 4th interested party as Commissioner of the IEBC, there is not a drop of evidence placed before this Court on how the Selection Panel or the 4th interested party violated these provisions of the supreme law.
586. In view of the foregoing, this Court finds and holds that the petitioners have failed to discharge the burden of proof required to demonstrate that the 4th Interested Party is constitutionally disqualified from being nominated and appointed to the Independent Electoral and Boundaries Commission on account of lack of integrity or on any other ground.

d. Further Allegations of disqualification of the 5th interested party Hassan Noor Hassan

587. Apart from claiming that the 5th interested party was related to the Leader of Minority Party in the National Assembly and that he was snuck in the second expanded shortlist, the petitioners further challenge the eligibility of the 5th Interested Party Hassan Noor Hassan for nomination to the IEBC on the basis that he stood for election as Governor of Mandera County during the General Elections held in August 2022.

According to the petitioners, this act alone brings the 5th interested party within the ambit of Article 88(2)(a)(i), which prohibits certain political actors from being appointed as commissioners of the IEBC.

588. The respondents and the 5th Interested Party, in rebuttal, submit that Article 88(2)(a)(i) applies specifically and exclusively to persons who have stood for election as members of Parliament or a county assembly and not to those who contested for office of Governor or other positions under Article 180 of the Constitution, these being, Governor and Deputy Governor. It is further argued that the Court should not read into the Constitution what the framers deliberately excluded.
589. It is argued that while Article 88(2)(a)(i) disqualifies a person who stood for election as a Member of Parliament or member of County Assembly from appointment as a member of the IEBC, that disqualification does not apply to the 5th Interested party.
590. Article 88(2)(a) provides as follows:

“A person is not eligible for appointment as a member of the Commission if the person—

- (a) has, at any time within the five years immediately preceding the date of appointment, held office, or stood for election as—
 - (i) a member of Parliament or of a county assembly; or
 - (ii) a member of the governing body of a political party.”

591. The operative disqualification is at Article 88(2) (a) (i), specifically, the reference to those who have
“stood for election as a member of Parliament or of a county assembly.”



The legal and constitutional question is whether this clause implicitly includes gubernatorial candidates, or whether its meaning is confined only to those who vied for seats in the National Assembly, Senate or County Assemblies.

592. As stated elsewhere in this judgment, and it is worth repeating it here, that Article 259 provides for the how the Constitution shall be interpreted.
593. Judicially, the Courts have interpreted Article 259 as requiring a liberal, purposive and holistic approach to constitutional interpretation, meaning, that the Constitution must not be interpreted narrowly or technically, but in a way that gives full effect to its values, spirit and transformative goals. In Centre for Rights Education and Awareness (CREAW) v AG & Another [20 15] eKLR, it was held that the Constitution must be interpreted holistically and in a manner that promotes its purposes, values and principles and advances the rule of law and human rights.
594. Additionally, and as stated elsewhere in this judgment, all provisions of the Constitution must be read together, not in isolation, to ensure internal consistency and to avoid conflict between different parts of the Constitution.
595. In the Re The Matter of the Interim Independent Electoral Commission [2011] eKLR , the Supreme Court emphasized that the Constitution must be read as an integrated whole, with no one provision destroying the other. Further, that the Constitution as a living document must be interpreted in a way that permits the development of the law, adapting to new realities and protecting rights in changing contexts.
596. In Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR the Court acknowledged that constitutional interpretation must allow for growth of jurisprudence to meet societal needs.
597. Article 259(1)(b) requires that all interpretation must promote and not limit the rights enshrined in Chapter Four. In Coalition for Reform and Democracy (CORD) & 2 Others v Republic [2015] eKLR, the Court stated that where two interpretations are possible, the one that better promotes fundamental rights and freedoms must be preferred.
598. On the interpretation that promotes good governance and accountability, courts have held that interpretation of the Constitution must reinforce the values of transparency, accountability and integrity under Article 10.
599. In Speaker of the Senate & Another v Attorney-General & 4 Others [2013] eKLR, the Supreme Court stated that constitutional interpretation should strengthen democratic institutions and good governance.
690. It is also a settled principle of constitutional interpretation that where the language of the Constitution is plain, clear and unambiguous, the duty of the Court is to give effect to that language as written, without straining its meaning or importing extraneous concepts.
691. the Constitution must, of course, and as stated above, be interpreted holistically and purposively. However, purposive interpretation does not permit the Court to rewrite the text or to read into the Constitution provisions or intentions that are not evident from its language, spirit or structure. The Court must remain faithful to the text and the context within which the drafters adopted it. As was stated by the Court of Appeal in Centre for Rights Education and Awareness (CREAW) v AG & Another [20 15] eKLR, the Court should avoid reading into the Constitution words which are not expressly stated unless doing so is necessary to effectuate its purpose and avoid absurdity. Similarly,



the Supreme Court in *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR warned that Judges are not at liberty to add or subtract from the language of the *Constitution*.

692. Accordingly, where the *Constitution* speaks in plain terms, it must be interpreted according to its natural and ordinary meaning, and courts must resist the temptation to legislate from the bench by infusing provisions with meanings that are neither supported by the text nor required to fulfill its purpose. This is not to say that the *Constitution* shall be interpreted restrictively. But that Courts must avoid giving an interpretation that leads to mutilating the *Constitution* and in effect rendering an unconstitutional decision when interpreting the *Constitution*.

693. In *Attorney General v Law Society of Kenya & 4 others* [2019] eKLR it was held that:

“The starting point, as always, is Article 259 on the construction of the *Constitution* which directs that it shall be interpreted 'in a manner that:

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance'. Those values must permeate the process of constitutional interpretation. Many local and international decisions were cited before us to illustrate other governing principles of interpretation but we shall not belabour them as they are largely common ground. For emphasis, however, we reiterate what this Court stated in the case of *Njoya & 6 Others v Attorney General & another* [2004] eKLR thus:

“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the *Constitution*, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”

694. This Court reaffirms the principle of holistic interpretation of the *Constitution*, which requires that the *Constitution* be construed as a whole, with each Chapter and Article reinforcing and complementing the others. The various provisions must not be read in isolation or in conflict, but rather in a manner that promotes coherence, internal consistency and harmonious interpretation, so as to give full effect to the *Constitution*'s values, principles, and objectives.

695. The Uganda Constitutional Court in the case of *Tinyefuze v Attorney General of Uganda* Constitutional Petition No. 1 of 1997 [1997] 3 UGCC

put it thus:

“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness.”

696. The Supreme Court *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR explained what a holistic interpretation entails when one counsel before it persisted on asking the



Court to find that Article 163(6) of the Constitution does not mean what it says, through “a holistic interpretation.” The Court stated:

“But what is meant by a ‘holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

697. In Stephen Wachira Karani & another v Attorney General & 4 others [2017] eKLR the Court clearly elaborated the guiding principles of constitutional interpretation as follows:

“26. The purposive approach (sometimes referred to as purposivism, or purposive construction, or purposive interpretation, or the modern principle in construction) is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (a statute, part of a statute, or a clause of a constitution) within the context of the law’s purpose.”

698. The five-judge bench in Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties) [2021] eKLR citing with approval Mativo J (as he then was) in the above Stephen Wachira Karani Case identified the principles a court should consider in both statutory and constitutional interpretation as follows:

“45. It is equally important that the court should also as far as possible, avoid any decision or interpretation of the Constitution, which would bring about the result of rendering the Constitution unworkable in practice or create a situation that will go against other provisions of the Constitution governing the subject in issue. In this case, it is important to bear in mind the goal and objects of the drafters of the Constitution. What was the mischief the drafters intended to cure...

46. There are important principles which apply to the construction of statutes such as

- (a) presumption against “absurdity” – meaning that a court should avoid a construction that produces an absurd result;
- (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces “unworkable or impracticable” result;
- (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an “anomaly” or otherwise produces an “irrational” or “illogical” result and
- (d) the presumption against artificial result – meaning that a court should find against a construction that produces “artificial” result and, lastly,
- (e) the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to “public interest,” “economic”, “social” and “political” or “otherwise.””



699. The above principle was affirmed by the Court of Appeal in *Timamy Issa Abdalla v IEBC & Others* [2014] eKLR, where the Court stated that Courts must give meaning to constitutional texts based on the ordinary meaning of the words used, unless doing so would result in absurdity or injustice.
610. Applying the above principles on constitutional interpretation, the petitioners have invited this Court to interpret Article 88 (2) (a) (i) to include Governor. They argue that since in the eligibility criteria for one to be elected as county governor, one must first be eligible for election as a member of the County Assembly, under Article 180(2), then by implication, governor is included in Article 88 (2) (a) (i). To the petitioners, that is a purposive holistic interpretation of the Constitution.
611. Article 88(2) (a) (i) provides that:
- (2) A person is not eligible for appointment as a member of the Commission if the person—
 - (a) has, at any time within the preceding five years, held office, or stood for election as—
 - i. a member of Parliament or of a county assembly;
 - ii.
612. On the other hand, Article 180(2) on election of county governor and deputy governor provides that:
- (2) To be eligible for election as county governor, a person must be eligible for election as a member of the county assembly
613. The language of Article 88(2)(a)(i) mentions only “members of Parliament or of a county assembly.” It is not in dispute that the office of Governor is a distinct constitutional office created under Article 180, separate from those enumerated under Article 88(2)(a)(i).
614. In our view, the principle of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) is applicable here. If the drafters of this very robust, progressive and always speaking Constitution had intended to include governors or other elective office holders such as President, Deputy President or Deputy Governor, they would have expressly done so.
615. We hold a further view that the Constitution is not to be interpreted in a manner that imputes intention where none is expressed or can be inferred in context. In other words, constitutional disqualifications must not be expanded by inference to include persons not expressly mentioned, unless it can be shown that such inclusion is necessary to fulfil the object of the provision, which is not the case here.
616. Accordingly, the petitioners’ invitation to this Court to expand the scope of the constitutional disqualification clause to include other elective offices is not supported by law and would offend the principle of literal and purposive interpretation of the Constitution, as there is no ambiguity in the language used in the Article.
617. Besides, there is no evidence placed before us or compelling reason presented in this petition to suggest that the exclusion of gubernatorial candidates from Article 88(2)(a)(i) was inadvertent or was a legislative oversight.
618. The IEBC is a body tasked with overseeing elections at all levels in the country and yet in the sub article as reproduced herein above, the Constitution disqualifies only those who stood for legislative roles. This selective disqualification, in our most humble view, appears deliberate and must be respected as such.
619. Consequently, in light of the clear wording of Article 88(2)(a)(i) and applying the principles of textual fidelity and non-interference with express constitutional design, this Court finds that the phrase “stood



for election as a member of Parliament or of a county assembly” in Article 88(2)(a)(i) does not include individuals who stood for election as Governor.

620. On integrity, no evidence was placed before us suggesting even faintly that the 5th interested party was tainted with integrity issues. On whether the 5th interested party met all other criteria in terms of competence among other criteria set out in Article 232, we have not been shown any evidence that excludes him from being considered for member of IEBC.
621. This Court further finds and holds that the 5th Interested Party, having previously vied for the position of Governor in the last general election, is not disqualified under Article 88(2)(a)(i) from being nominated or appointed as a Commissioner of the IEBC on the basis of having vied for that office.
622. We reiterate our earlier finding that familial relations with political leaders is not a bar to seeking public positions which are competitive and where the seeker of the public office if found to be competent and meeting all the constitutional requirements for appointment to such office.

e. Allegations of disqualification against Fahima Araphat Abdalla the 7th Interested Party

623. The petitioners impeach the nomination of Ms Fahima Araphat Abdalla the 7th interested party on the ground that she is a public officer/state officer. The petitioners contend that as such, she is disqualified from being appointed as a member of the IEBC and that disqualification is as stipulated in Article 88(2)(b) of the Constitution.
624. This disqualification is akin to that which was alleged to apply to the 2nd interested party, Anne Njeri Nderitu for allegedly being a state officer, although the petitioners stated that the 7th interested party is a public/state officer by virtue of he being a member of the Lamu County Assembly Service Board.
625. From the video recordings produced by the Petitioners in relation to the vetting exercise by the National Assembly, it was revealed that the 7th Interested Party is a youth and received her early education in Shela, Lamu. She holds a Bachelor of Commerce degree from Kenyatta University and a Master of Arts degree in Project Planning from the University of Nairobi. In addition to her academic qualifications, she has undertaken various professional courses and is currently pursuing the Certified Public Accountant (CPA) qualification.
626. She is a certified Project Management Professional and also holds a Diploma in Investment Advice (Securities). Her public service career includes serving as a Ward Administrator in 2014, a position she held until 2017.

Thereafter, she served as a County Executive Committee Member in various departments. Upon conclusion of her tenure as a County Executive, she was appointed on a part-time basis to serve at the Lamu County Assembly Service Board.

627. The issue for determination is whether membership in the County Assembly Service Board (CASB) constitutes holding a state office within the meaning of Article 260 and relevant statutory provisions.
628. The Court of Appeal in the case of Kibeh v Waibara & another (Civil Appeal E468 of 2020) [2022] KECA 388 (KLR) (4 March 2022) stated as follows regarding public officer vis avis state officer:

“... Article 99 of the Constitution, dealt with qualification and disqualification for election as member of Parliament. The 1st appellant, being a member of a county assembly, was the holder of a state office and therefore a state Officer. That was ascertainable from article 260 of the Constitution which defined a state officer as a person holding a State office and a member of a County Assembly as a State Office.



2. The proper meaning of public officer, for purposes of the electoral law, was that embodied in article 260 of the Constitution as read together with section 2 of the Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the constitutional provision. The proper meaning of public officer currently was:
 1. the person concerned was a State officer; or
 2. any other person who held public office – an office within the national government, county government, public service;
 3. a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”

629. A county assembly member is explicitly a State Officer. This is stated in the above Article 260 and other relevant statutes.

630. A state officer can only be determined by the Constitution and legislation, as stated in Article 260 and not by inference.

631. The County Assembly Service Board is established under section 12 of the County Governments Act No. 17 of 2012, which provides as follows:

The county assembly Service Board

- (1) There shall be a county assembly service board for each county assembly.
- (2) The county assembly service board shall be a body corporate with perpetual succession and a common seal.
- (3) The Board consists of—
 - (a) the Speaker of the county assembly, as the chairperson;
 - (b) a vice-chairperson elected by the Board from the members appointed under paragraph (c);
 - (c) two members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members in the county assembly; and
 - (d) one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly.
- (3A) The members of the Board appointed under section 12(3)(d) shall serve on a part-time basis.
- (4) The county assembly clerk shall be the secretary to the county assembly service board.
- (5) A member of the county assembly service board shall vacate office—
 - (a) if the person is a member of the county assembly—
 - (i) at the end of the term of the county assembly; or



- (ii) if the person ceases to be a member of the county assembly; or
 - (b) if the person is an appointed member, on revocation of the person's appointment by the county assembly; or
 - (c) if the person is the Speaker, when the person ceases to be such Speaker.
- (6) Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member's place in the next assembly
- (7) The county assembly service board is responsible for—
- (a) providing services and facilities to ensure the efficient and effective functioning of the county assembly;
 - (b) constituting offices in the county assembly service, and appointing and supervising office holders;
 - (c) preparing annual estimates of expenditure of the county assembly service and submitting them to the county assembly for approval, and exercising budgetary control over the service;
 - (d) undertaking, singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy; and
 - (e) performing other functions—
 - (i) necessary for the well-being of the members and staff of the county assembly; or
 - (ii) prescribed by national legislation.

632. The *County Assembly Services Act* (Act No. 24 of 2017) makes further provisions on the County Assembly Service Board and the County Assembly Service as established under the *County Governments Act* in relation to each county; and for connected purposes.

633. We have read the provisions of the *County Assembly Services Act* and we note that County Assembly Service Board (CASB) is an administrative body established within the framework of the County Assembly, tasked with overseeing the organization and functioning of County Assembly services.

634. Pursuant to Article 260, which defines a “State office and state officer, it is obvious that a County Assembly Service Board is not defined as a state office and neither is the office holder defined as a state officer. The Court must therefore establish whether there is any other legislation enacted which establishes and designates the county assembly public service Board as a state office upon which, the office holder of such office shall be a state officer.

635. The petitioners did not identify to us any legislation that makes the 7th interested party to be a state officer or a person holding a state office.



636. On our part, we have examined the various pieces of legislation including the [County Governments Act](#), [County Assembly Services Act](#), [Public Officer Ethics Act](#) among other statutes and we are unable to find that the members of the County Assembly Public Service Boards, other than those Members of the County Assembly who are members of the Board, are state officers. We are equally unable to find that the County Assembly Public Service Board of the respective Counties is a state office.
637. Additionally, there is no evidence that the 7th interested party is a member of Lamu County Assembly and serving in such capacity in the County Assembly Service Board.
638. It is however important to mention that public officers who are not state officers are not in the category of persons disqualified under Article 88(2) from appointment as members of the IEBC, save that if one is a public officer, they cannot hold another remunerative position. Further, under Articles 77(1) and 250(6), once appointed as a member of the Commission on full time basis one would not hold another remunerative office.
639. The Court observes that, had it been established that the 7th Interested Party holds the position of a state officer, the reasons and findings applicable to the 2nd Interested Party would have applied with equal force to the 7th Interested Party. However, upon careful examination of the material placed before the Court, we find that no evidence has been adduced to demonstrate that the 7th Interested Party is, in fact, a State officer within the meaning of Article 260 of the [Constitution](#).
640. Consequently, we find no basis upon which to invoke the disqualifying provisions of Article 88(2) against the 7th Interested Party. It is therefore the finding of this Court that the 7th Interested Party was not constitutionally disqualified from being nominated or appointed as a member of the IEBC.

E. Other allegations levelled against all the interested parties

641. The petitioners did not stop at claiming that the 2nd, 4th, 5th and 7th interested parties were disqualified by dint of Article 88(2) of the [Constitution](#). In their petition and submissions, they seek for declarations that globally call upon this Court to declare the selection and nomination of all the 1st to 7th interested parties to be unconstitutional.
642. According to the petitioners, the entire list as published is unconstitutional for, among other grounds, that the nomination did not meet the requirements of Articles 10, 27(1), 232 and 250(3) and (4) on the requirement of regional balance, ethnic balance and the inclusion for persons with disabilities.
643. On alleged failure to take into account regional balance, and as against the 1st and 4th interested parties, it was claimed that they both come from the same region which is the Rift Valley Region in the context of the former provinces and that therefore the nomination list did not meet the regional and ethnic balance threshold.
644. On the part of the respondents and interested parties, they contended that Article 262 as read together with Section 17 of the Sixth Schedule to the [Constitution](#) does not support the Petitioners' argument, nor does it lend legal justification to the claim that provinces remain operative or relevant for purposes of assessing regional representation and therefore that their reliance on this criterion is misplaced.
645. The respondents maintain that the nominees collectively reflect the face of Kenya, in accordance with the requirements of Article 232(1)(h), by embodying ethnic, cultural, and regional diversity in the public service.
646. We have considered the respective parties' positions on this question of regional balance and combined it with ethnic balance. We observe that there are only seven positions available for Chairman and six



Commissioners of the IEBC and this is a constitutional threshold at Article 250(1) which provides that each Constitutional Commission shall consist of at least three but not more than nine members.

647. We also note that the nominees as listed in the table on page 10 of the petition at paragraph 7 shows that the nominee Erastus Edung Etheke, as Chairperson, is from Turkana County, Anne Njeri Nderitu is from Nyandarua, Moses Alutalala Mukhwana is from Kakamega, Mary Karen Sorobit is from Uasin Gishu, Francis Odhiambo Aduol is from Kisumu, Hassan Noor Hassan is from Mandera, while Fahima Araphat Abdalla is from Lamu County.
648. It is also important to note that Kenya as a Nation and Republic has over 42 ethnic groups and under Article 6(1) of the Constitution, the Territory of Kenya is divided into the counties specified in the First Schedule. There are 47 Counties and from the list of nominees provided, each of them comes from a different County. Thus, seven counties are represented in the Commission in terms of Chairperson and Commissioner nominees.
649. Although the petitioners submit that there are regions and they use the analogy of the old provinces which were abolished by the devolved system of governance under the 2010 Constitution, and even if this Court was to use the old system of governance, it is clear that apart from the Chairperson nominee and Mary Karen Sorobit who come from the old larger Rift Valley province, the rest of the nominees are from different provinces. Of the former 8 provinces, Rift valley is the biggest of all.
650. That said, this Court would not make determinations based on provinces or regions which are not constitutionally recognized as a basis for disqualification of the nominees, that not being the constitutional yardstick for consideration of nominees for appointment to the Commission. We concur with the holding in Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others [2013] KEHC 2527 (KLR) where Mumbi Ngugi J (as she then was) stated, inter alia:

“As correctly argued by the Respondents, the Constitution has now divided the country into 47 Counties, so that the administrative units known as provinces or regions on which this petition is based are no longer in existence.”

651. In Mohamed Osman Warfa & Others v Office of the President & Others, H.C. Petition No. 77 of 2013 the High Court stated inter alia, that while ethnic and regional diversity is an important factor, it must be balanced with other constitutional imperatives such as equal opportunity for men and women, fair competition, merit and the inclusion of persons with disabilities; and that no one principle operates in isolation.
652. The petitioners also allege that Article 232 was violated. This Article concerns Principles and Values of Public Service and indeed, since the nominee commissioners will be occupying state offices of a state organ as defined under Article 260, they are bound by those principles, besides the values enshrined in Article 73 of Chapter Six on leadership and integrity. The IEBC Selection Panel and the National Assembly were equally bound by these principles in their selection and nomination respectively.
653. Under Article 232,
- (1) The values and principles of public service include—
 - (a) high standards of professional ethics;
 - (b) efficient, effective and economic use of resources;



- (c) responsive, prompt, effective, impartial and equitable provision of services;
 - (d) involvement of the people in the process of policy making;
 - (e) accountability for administrative acts;
 - (f) transparency and provision to the public of timely, accurate information;
 - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) representation of Kenya's diverse communities; and
 - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.
- (2) The values and principles of public service apply to public service in—
- (a) all State organs in both levels of government; and
 - (b) all State corporations.
- (3) Parliament shall enact legislation to give full effect to this Article.

654. the Constitution at Article 232 acknowledges fair competition and merit to be the basis of public appointments but that such merit is subject to other factors including representation of Kenya's diverse communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service and the following factors must be taken into account namely- men and women; the members of all ethnic groups; and persons with disabilities.

655. On ethnicity, from the list of nominees, we observe that there is no evidence placed before us to show that more than one nominee is from the same ethnic group. No evidence was adduced to show that any of the nominees are from the same community, Kenya being a country comprising diverse communities, or that the nomination list offends Article 27(8) which provides that not more than two thirds of the nominees are of the same gender or that they come from the same community.

656. On the question of consideration of persons with disabilities as provided for under Article 54(2) the Petitioners' case is that the list containing the nominated Commissioners for the IEBC is unconstitutional and illegal as it is discriminatory and failed to include any person with disability. That the transmittal letter gave the persons with disability but no affirmative action was taken.

657. In their submissions, counsel for the Petitioners indicated that there was a person with Disability who was discriminated against even after reaching the nomination stage. It was his submission that where the position is appointive, the command is mandatory and as such, there is no reason why he was not considered for Chairperson.

658. The 2nd Respondent contended that, there is no express legal requirement that each commission must have a person with disability. Reliance was placed on the case of Njogu v Attorney General [2025] KEHC 301 (KLR).



659. On the part of the 3rd Respondent, it was contended that on violation of Article 54(2) the JLAC appreciated this to be a progressive right. The 3rd Respondent also relied on the case of *Njogu v Attorney General* (*supra*) and argued that there is no constitutional violation unless there is evidence of bad faith and discrimination of qualified candidates.
660. It was submitted that the failure to include persons with disability cannot be characterized as unconstitutional as the Chairperson of the IEBC Selection Panel publicly encouraged applications from youths and persons with disabilities and that indeed, some such candidates applied, were shortlisted and interviewed. However, that the fact that these candidates did not meet the established criteria for nomination during the interview process cannot be imputed as a failure or illegality on the part of the IEBC Selection Panel, as the Panel was constitutionally mandated to select candidates who are suitable, qualified and competent, in accordance with the principles of fair administrative action and meritocracy as enshrined in the *Constitution*. Further argument was that a person with disability was interviewed and his name presented to the President.
661. It was submitted that the 5% provided for under Article 54(2) must be interpreted with data and also that the National Council for Persons with Disabilities has not been asked for data to say that the 5% threshold has not been attained.
662. On the allegation that the IEBC Selection Panel failed to consider persons with disabilities, it stated that nothing could be further from the truth as all persons were allowed to apply and one of the names sent to the President for consideration for nomination for position of chairperson was a person living with disability.
663. The 4th interested party's take on this issue was that it is true that discrimination on the basis of disability is prohibited under Article 10 and 27.
- However, that it was open for all to apply and that the Petitioners have failed to provide evidence of discrimination and/or disqualification on the basis of disability. It was contended that the list included Two (2) of the names of persons living with disabilities, one of them, being Mr. Edward Katama Ngeywa and thus the list was not discriminatory.
664. It was also submitted that Article 54(2) provides for progressive realization of the right. Further that nowhere in the Petition does it state that in all elective & appointive positions, the right is violated.
665. The 6th Interested Party adopted the position taken by the respondents.
666. We note that although the petitioners impeach the nomination of the 1st to 7th interested parties on the ground of failure to include persons with disabilities thereby discriminating against the said persons, the IEBC Selection Panel nominated a person with disability for consideration as chairman, a Mr. Ngeywa Katama, alongside the 1st interested party.
667. The question is whether this Court can interfere with the discretion exercised by the nominating authority to nominate the 1st interested party and not the person with disability.
668. Courts have pronounced themselves on this issue and we shall cite a few of these decisions while appreciating the international and regional instruments to which Kenya is a signatory and therefore forming part of the law of Kenya under the *Constitution* as stipulated in Article 2(5) and (6), constitutional and legislative on the rights of persons with disabilities.
669. Article 29 of the *United Nations Convention of Persons with Disabilities, 2006* on Participation in political and public life mandates that all State Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake



to:Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

670. On the regional front, the [*African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa*](#) under Article 21 provides as follows:

“ Every person with a disability has the right to participate in political and public life.

States Parties shall take all appropriate policy, legislative and other measures to ensure this right, on the basis of equality, including through:

Encouraging the effective participation of persons with disabilities in political and public life including as members of political parties, electors and holders of political and public offices in accordance with national laws.

671. Back home, Article 54 (2) of the [*Constitution*](#) is dedicated to persons with disabilities and it stipulates that:

54.

(1) A person with any disability is entitled—

- (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
- (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- (c) to reasonable access to all places, public transport and information;
- (d) to use Sign language, Braille or other appropriate means of communication; and
- (e) to access materials and devices to overcome constraints arising from the person’s disability.

(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

672. The implementing legislation in respect of Article 54 is the [*Persons with Disabilities Act*](#), No.4 of 2025.

The newly enacted Act was assented to on 8th May 2025 and took effect on 27th May, 2025.

It provides a comprehensive legal framework for the promotion, protection and advancement of disability rights, aligning with Kenya’s international and constitutional commitments under Articles 2 (6), 27, 54 and 260(definition of disability)) and the [*United Nations Convention on the Rights of Persons with Disabilities*](#) (UNCRPD).



673. The question is whether the failure to nominate Persons with disabilities for appointment as a member of the IEBC was unconstitutional.
674. In answering this question, we are alive to the fact that a person with disability was selected by the IEBC Selection Panel for nomination by the President, alongside the 1st interested party, for the position of Chairperson and that, this issue is not new or novel. Courts have, among other grounds, held that there must be prove of discrimination of the persons with disabilities.
675. In *Northern Nomadic Disabled Person's Organization (NONDO) v The Governor, County Government of Garissa & another* (Constitutional Petition 4 of 2013) [2013] KEHC 467 (KLR) (16 December 2013) (Judgment), S. Mutuku J was confronted with a constitutional petition by members of the Northern Nomadic Disabled Person's Organization (NONDO) as petitioners, claiming that they were left out of the County Government appointments.
676. The learned judge, after discussing the onus of proof borne by the petitioners of proving that its members applied and were not considered, stated as follows, citing other judicial decisions among them, a Supreme Court decision:

“I have perused the petitioner’s pleadings and I did not see any evidence that any of their members applied or presented themselves and were not considered.

45. The Supreme Court of Kenya in the Advisory Opinion No 2 of 2012 - In the Matter of the Principle of Gender Representation in the National Assembly and the Senate defined “Progressive realization” as a gradual movement or development towards a destination” (Concise Oxford English Dictionary). The Justices went on to say that: (53) We believe that the expression “progressive realization” is neither stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including a normative action.”
46. The language of Article 54(2) to my mind is clear that realization of five percent of the members of the public in elective and appointive bodies of persons with disabilities is progressive going by the Supreme Court Advisory Opinion (supra).
47. I have considered the provisions of article 54(2) and I agree with the respondents that it is not a right but a principle on how to implement the five percent of persons with disabilities requirement. The rights of persons with disabilities are to be found in article 54(1) of the *Constitution*. The petition did not claim that any of those rights under article 54(1) have been violated.
48. My understanding of Article 81 of the *Constitution* is that electoral system are obligated to comply with the principle of fair representation of persons with disabilities and as argued by the respondents, the matter before me is about appointive positions not elective.”



677. In *Constantine Joseph Advocates LLP v Judicial Service Commission & 2 others* (Petition 195 of 2021) [2023] KEELRC 1424 (KLR) (10 May 2023) (Ruling) the Employment and Labour Relations Court persuasively stated as follows:

“A careful reading of the law reveals this: section 13 of the Persons with Disabilities Act, 2003 as read with Regulation 11(3) of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 neither confers a right nor a duty upon any person or organ. Section 13 states that the 2nd Respondent shall endeavour to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. Read together with Article 54(2) of the Constitution which provides that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are to be persons with disabilities, means that the alleged failure to realise the implementation of the five percent rule espoused in Article 54 is not one that can be placed on the steps of either the 1st or 2nd Respondent but the State. The State is defined under Article 260 of the Constitution as the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution. I agree with the 1st Respondent that the phrase “the State” cannot be used synonymously with the independent commissions established under Chapter Fifteen of the Constitution.

The Petitioner submitted that in August 2020, the UN released its first ever guidelines on access to social justice for people with disabilities to make it easier for them to access justice systems around the world. On a side note, this was a decade after the promulgation of our Constitution. It seems lost in the wind that Principle 7 under the guidelines provides that persons with disabilities have the right to participate in the administration of justice on an equal basis with others. The Petitioner fails to appreciate that the guidelines under Principle 7 provide for progressive application of the principle. It provides for instance at Guideline 7.1 as follows:-

The right to equal access to justice requires that persons with disabilities have the opportunity to participate directly in adjudicative processes and be involved in various roles in the administration of justice on an equal basis with others. States should ensure that persons with disabilities are able to act as judges, lawyers, prosecutors, witnesses, jurors, experts and court officials in the justice system without discrimination.

The Respondents have not been shown to have impeded in any way, manner, shape or form, the implementation of Article 54, the Persons with Disabilities Act or the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009.

In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR Onguto J stated thus: _

- (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”

The Court opines that the Petition is an affront to the ripeness doctrine my brother the late Onguto J. spoke of in that case. As there is no dispute to resolve, no controversy requiring adjudication by this Court and no facts to support the assertions made in the Petition, the



Petition is premised on hypothetical scenarios devoid of a factual matrix and is only fit for dismissal.

As the Petition was brought mistakenly in the belief that the Respondents bear any responsibility in the implementation of the five percent rule, and the fact that it was articulated by a law firm that should have researched the matter better than a lay person or institution, it must be mulcted in costs since the Petition was merely full of hot air and nothing more.”

678. In *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2015] eKLR, the Court held that:

“...It is also our view that Article 27 as a whole or in part does not address or impose a duty upon the Judicial Service Commission in the performance of its Constitutional, Statutory and administrative functions. We think any claim on Article 27 can only be sustained against the Government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms by the State...”

679. In the above case, the Petitioner articulated the issue of alleged failure to comply with the Constitutional provision and to recommend for appointment qualified persons with disabilities as judges of the Supreme Court, the Court of Appeal and the High Court. Addressing that issue, the Court stated:

“A careful reading of the law reveals this: section 13 of the *Persons with Disabilities Act*, 2003 as read with Regulation 11(3) of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 neither confers a right nor a duty upon any person or organ. Section 13 states that the 2nd Respondent shall endeavour to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. Read together with Article 54(2) of the *Constitution* which provides that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are to be persons with disabilities, means that the alleged failure to realise the implementation of the five percent rule espoused in Article 54 is not one that can be placed on the steps of either the 1st or 2nd Respondent but the State. The State is defined under Article 260 of the *Constitution* as the collectivity of offices, organs and other entities comprising the government of the Republic under the *Constitution*. I agree with the 1st Respondent that the phrase “the State” cannot be used synonymously with the independent commissions established under Chapter Fifteen of the *Constitution*.”

680. The issues voiced in the above cases are on all fours with this petition. The petition was filed on 13th May 2025 while the new *Persons with Disabilities Act* came into effect on 27th May 2025.

It follows that the Act that was in place when this petition was filed was the now repealed *Persons with Disabilities Act*, 2003 and the Regulations made thereunder.

681. The Supreme Court of Kenya, in a landmark Advisory Opinion *in the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinions Application No. 2 of 2012) [2012] KESC 5 (KLR), addressed the meaning and implications of the principle



of progressive realization within the context of constitutional rights, including the attainment of equitable representation in public bodies and stated as follows:

- “4. Progressive realization” connotes a phased-out attainment of an identified goal - human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.
7. Whether a right is to be realized “progressively” or “immediately” is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; the mechanisms provided for attainment of gender- equity; the nature of the right in question; the mode of constitution of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); the identity and character of the players who introduce the candidates for appointment or election and it depends on the manner of presenting candidature for election or nomination.”

682. Applying the principles espoused in the above cited cases, it is clear that the 5% inclusion of persons with disabilities to appointive positions is not immediately enforceable in all instances. Instead, it is subject to “progressive realization”, meaning it depends on the availability of resources, policies and a legislative or regulatory framework.
683. More so, the legal meaning of progressive realization as given by the Supreme Court and other superior Courts and as stated in the above cited case of *Centre for Rights Education and Awareness (CREAW) & Others v Attorney General & Another*, (*supra*), asserted that affirmative action measures, including gender and disability representation, require implementation frameworks and cannot always be enforced without those structures. The Court observed that obligations such as the two-thirds gender rule and disability inclusion must be realized progressively, unless specific mechanisms are in place to enforce them.
684. What the above cited decisions are clear about is that there is no automatic invalidity in appointments that do not take into account the 5% aspect of persons with disability representation, without discriminatory intent.
685. Thus, to successfully argue discrimination in a public appointment, a party must show that the appointing body acted unreasonably or in a capricious manner and that the decision specifically excluded persons with disabilities without justification.
686. In *National Gender and Equality Commission v IEBC & Another* [2013] eKLR, the High Court held that the absence of persons with disabilities or women in electoral positions does not automatically render the appointments invalid unless it is shown that the appointing body failed to act reasonably and within constitutional principles. The Court emphasized that discretion must be exercised reasonably, and without unjustified exclusion of qualified individuals from marginalized groups.
687. In the instant case, besides the application of Article 54(2), the IEBC commissioners' appointments must comply with Articles 10 (national values), 27 (freedom from discrimination and 232 (values and principles of public service), which require inclusiveness, equality, non-discrimination and representation of Kenya's diverse communities.



688. However, owing to the discretion given to the appointing authority as there is no mandatory duty placed upon the appointing authority to appoint a person with disabilities to serve as a member of the Commission, then only an unreasonable or capricious exercise of that discretion can be challenged. Where discretion is given, unless there is evidence of bad faith, discrimination or failure to consider constitutional imperatives, courts will be slow to interfere.
689. It has not been demonstrated on a balance of probabilities that the IEBC Selection Panel or the nominating and appointing authority have impeded in any way, manner, shape or form, the implementation of Article 54, the *Persons with Disabilities Act* or the *Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009*.
690. As was stated in the case of *Sharp v Wakefield* [1891] AC173 cited above, the court the petitioners in this matter have not set out circumstances or plausible facts upon which the exercise of discretion to appoint the 1st interested party could be challenged on grounds of wrongful exercise of discretion by the President within the parameters set out in the above cited decisions.
691. We are further persuaded by the holding in *Okoti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties)* (Petition 33 & 42 of 2018 (Consolidated)) [2021] KEHC 464 (KLR) (Constitutional and Human Rights) (20 April 2021) (Judgment) , where Mrima J stated as follows:

- “ 39. When applying the progressive realization principle there were three important considerations. Article 81(b) of the *Constitution* on the two-thirds gender principle was about the election of members into public bodies. The issue in question was about appointments in public bodies. Secondly, any mandatory obligation that involved protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, was not necessarily inconsistent with the progressive realization of a goal. Thirdly, the word 'shall' would only translate into an immediate command where the task in question was a cut-and-dried one, executed as it was without further moulding or preparation, and where the subject was inherently disposable by action emanating from a single agency.
40. The nominations and appointments were made by a single agency; the President. The appointments did not involve protracted measures, legislative actions, policy-making or conception of plans to be attained. They were simply appointments into public offices. Therefore, the realization of rights related to the appointments translated into an immediate command.
41. Unless it could sufficiently be demonstrated that the appointments could not possibly be made in favour of qualified women, youths, persons living with disabilities, minorities and marginalized groups, the appointing authority had to comply with the constitutional calling. In case of a failure to appoint such categories of persons, the appointing authority had to show that there were no suitably qualified persons falling in the given category.
42. All appointments into public offices had to be done in strict conformity with the *Constitution* and the law unless otherwise legally permissible.”



692. In *Qabale Diba Badake & 2 others v Public Service Board Marsabit County & 3 others; National Gender & Equality Commission (Interested Party)* [2019] eKLR the Court stated:

“It is not in doubt that the State is required to ensure on a progressive basis that at least 5% of members to appointive and elective positions are persons with disabilities and the *Constitution* also requires that persons with disability are afforded adequate and equal opportunities for appointment, training and advancement at all levels of the public service. This must be a goal for each County including the 3rd Respondent and the progressive realization of the aspiration by the framers of our Constitution do not mean there will be immediate realization of the ideal. The Petitioners did not demonstrate that they were discriminated against or the appointees who secured the nominations considered more favourably than they were. In my considered view there was no proper challenge to the nominations as there was adherence to the law.”

693. In the end, we find and hold that the petitioners have not demonstrated that the failure to nominate persons with disabilities as members of the IEBC violated Article 54 of the *Constitution* or the *Persons with Disabilities Act* and Regulations (Access to Employment, Services and Facilities) Regulations, 2009, and that as a result, vitiated the entire process of recruitment and nomination of the person to serve as members of the IEBC.

694. Having said that, we trust that Parliament, the National Executive, the County Executive Governments and the County Assemblies shall move with speed to put in place the structures envisaged by Sections 4 and 5 of the *Persons with Disabilities Act*, 2025.

695. We are confident that Sections 4(f) and 5(1)(e) of the 2025 Act which require that the National and County Governments respectively shall promote the inclusion of persons with disabilities in their respective public services by putting in place measures to ensure that at least five per centum of the employment positions therein are filled by persons with disabilities will be implemented in the shortest time possible.

F. Whether the Attorney General failed in the exercise of her constitutional mandate to provide independent, impartial and sound legal advice to the executive regarding nomination of commissioners thereby failing to protect the rule of law and public interest.

696. The petitioners in their prayer (i) of their petition sought a declaration that the Attorney General failed in their constitutional mandate under Article 156(4) of the *Constitution* by neglecting to provide independent, impartial and sound legal advice to the Executive regarding the nomination of the 1st to 7th interested parties as commissioners to the IEBC and that she therefore failed to protect the rule of law and the public interest as mandated by the *Constitution*.

697. Submissions were made during the hearing that the Attorney General either misadvised or failed to advise the Executive on the process of selection and nomination and the subsequent appointment of the 1st to 7th interested parties as commissioners of IEBC.

698. The office of Attorney General is established under Article 156 of the *Constitution* and operationalized by the *Office of Attorney General Act*.

699. Under Article 156, material to this petition,

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;



- (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
- (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
 - (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.
 - (7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
700. It is a trite principle of constitutional adjudication that declaratory relief must be founded upon cogent evidence. A court cannot issue a declaration against a constitutional officeholder such as the Attorney General, whether for failure to advise or for misadvising the executive, without a factual basis establishing, at a minimum, that advice was sought or rendered, or that a refusal to advise occurred. Courts do not act in the abstract or upon speculation; they adjudicate live controversies based on proven or admitted facts.
701. Here, we do not need authority to resolve this issue. While Article 156 of the Constitution mandates the Attorney General to be the principal legal adviser to the government, it does not impose a blanket presumption that the Attorney General must advise in every instance unless specifically called upon to do so. In the instant case, there is no evidence that the Attorney General advised or failed to advise the executive on matters subject of this petition and therefore any finding or declaration attributing fault or failure to the Attorney General would amount to judicial conjecture, which offends both due process and the judicial function under the separation of powers.
702. Declaratory judgments are not to be granted in a vacuum; they must rest on concrete facts showing breach, omission, or violation of legal duty and therefore Courts must be guided by evidence before issuing declaratory relief. Mere speculation about the conduct of public officials does not suffice
703. Accordingly, in the absence of evidence that the Attorney General was called upon to advise the executive, that such advice was in fact rendered, or that there was a deliberate refusal to do so, a court cannot properly issue a declaratory judgment imputing failure or misadvice. To do so would breach the evidentiary threshold for declaratory relief and would risk transforming the judicial function into an inquisitorial or speculative exercise.
704. We therefore find the allegation and prayer for a declaration against her to be hypothetical and speculative. We decline the invitation to issue any declaration or adverse orders against her.

G. Whether the processes of selection, nomination, and appointment of the IEBC nominees violated the constitutional principles of public participation, consultation with political parties, and access to information as enshrined in Articles 10, 35, and 38 of the Constitution and/or the Recommendations contained in the Report of the National Dialogue Committee (NADCO)

705. The Petitioners allege a lack of public participation at two distinct stages. Firstly, they contend that upon receipt from the IEBC Selection Panel of the two nominees for the position of Chairperson and nine names for the six positions of Commissioner, the President should have engaged in quasi-public participation with the leadership of the Majority and Minority Parties in the National Assembly as per



the recommendations of the National Dialogue Committee Report, or put that list of eleven names to public participation through receipt of comments from the general public.

706. Secondly, the Petitioners argue that in the absence of the Report of the IEBC Selection Panel and the scoresheets indicating the scores of each interviewed candidate, the public was unable to form informed positions on the merit and suitability of the nominees forwarded to the National Assembly by the President; and thus, the subsequent public participation exercise was inherently watered-down and flawed.
707. The Petitioners assert that both the Constitution at Article 47 and the Fair Administrative Action Act impose a legal obligation on the IEBC Selection Panel to disclose relevant information. Further, they underscore that under the constitutional principles of transparency, accountability, and public participation; state organs, including the IEBC Selection Panel and the President, are required to conduct their affairs in an open manner.
708. The Petitioners also argue that the Fair Administrative Action Act codifies this duty to disclose relevant information and mandates that administrative bodies provide reasons for their decisions and allow affected parties access to pertinent information. They assert that the IEBC Selection Panel must adhere to these disclosure requirements in the interest of justice and compliance with statutory and constitutional mandates.
709. According to the Petitioners, the failure of the IEBC Selection Panel to disclose individual candidate scores and the rationale behind its decisions undermines the fundamental principles of transparency and accountability. It is submitted that without access to this critical information, the evaluation process remains opaque, leaving candidates and the public unable to assess whether selections were made fairly, objectively, and in accordance with established criteria; thus, rendering public participation at the National Assembly stage uninformed and thus unmeaningful.
710. The Respondents and the Interested Parties were diametrically opposed to the Petitioners' arguments. They argued in unison that the NADCO recommendations were now spent for the reason that they were incorporated into the IEBC Amendment Act, 2024.
- To their minds, there would be no value to requiring consultation with the Majority and Minority leadership of the National Assembly prior to the President submitting a list of nominees to the National Assembly for parliamentary vetting and approval, since those House Leaders can effectively express their views in the August House.
711. The 3rd Respondent, the national Assembly, in particular, situated the President's role as an intermediate step that was preceded by public participation at the IEBC Selection Panel stage and was followed by public participation at the National Assembly stage. In that regard, the 3rd Respondent argued that another round of public participation at the presidential stage would add no value and would only serve to create additional expense and delay without in anyway creating additional gains in terms of public participation, transparency and accountability.
712. They rested their arguments on this point by noting that the National Assembly has the power to reject a nominee under Section 10 of the Public Appointments (Parliamentary Approval) Act and the President would thereafter be compelled to transmit one of the other name or names in substitution thereof. Thus, there is no need for consultation with the House prior to submission of names by the President.
713. With respect to whether public participation was watered-down for want of the public having the IEBC Selection Panel's Report and scoresheets, and that failure to release those documents breached



the constitutional values and principles on transparency and accountability, the Respondents and Interested Parties took a mixed approach in response.

714. Some, and in particular the 2nd Interested Party, argued that there exists no legal obligation compelling the IEBC Selection Panel to publish or publicize the interview report or results. It was her contention that Articles 35 and Article 47 and their conjunction with public participation, transparency and accountability must be read in conformity with other constitutional and statutory provisions such as Article 28 on human dignity, Article 31 on privacy, and the provisions of [Data Protection Act](#).
715. The 2nd Interested Party further argued that public dissemination of the IEBC Selection Panel's Report and the scoresheets, particularly in respect of candidates who may have performed poorly, would pose a real risk of reputational harm and may prejudice their future employment prospects. According to her, such publication may result in more harm than good.
716. We have considered all the arguments above. The promulgation of the [Constitution](#) of Kenya 2010 was a major milestone towards realizing the positive transformation of our nation. At the heart of the desire of the people of Kenya for a fundamental break from an unfortunate past sits Article 10.
- This Article espouses the national values and principles of governance that bind all State Organs, State Officers, Public Officers, and any other person who is applying or interpreting the [Constitution](#) or Statute, or is crafting or implementing public policy decisions.
717. The question of public participation goes hand in hand with the issues of transparency and accountability. The Petitioners have rightly situated public participation as a means of promoting the constitutional values and principles of transparency and accountability. They have also linked it with Article 35 on Access to Information as well as Article 47 on Fair Administrative Action.
718. The proper discharge of the adjudicative function inherently involves balancing, to the greatest extent possible, competing rights and antagonistic interests. In the present petition, this Court is being called upon to weigh the Petitioners' contentions on public participation, transparency, accountability; access to information and fair administrative action in terms of consultations with the Majority and Minority Party Leadership in the National Assembly and the release of the IEBC Selection Panel's Report and the scoresheets as against the Respondents' and Interested Parties' calls for the same not be ordered by this Court in light of the constitutional rights to privacy and human dignity enjoyed by all those persons who applied for the positions of Chairperson and Commissioners.
719. This Court is also being called upon to ascertain where the public interest falls, with the Petitioners asserting that the public interest lies in the adoption of their position while the parties opposed contend that the aims of public participation, accountability and transparency were already well catered for even in the absence of the materials and information sought by the Petitioners.
720. We begin by cautioning that an element of this issue has already been determined by this Court in the Ruling on Disclosure and Notice to Produce dated and issued on 24/06/2025.
- Consequently, what remains available for determination by this Court at this stage is whether the unavailability of the Selection Panel's Report and the interviews scoresheets unconstitutionally limited the scope and vitality of public participation and was therefore inconsistent with the constitutional imperatives on transparency and accountability.
721. One basis for limiting the application of a right or fundamental freedom is the attempt at striking a balance between competing rights and interests. The Petitioners' positions on Public Participation, Transparency and Accountability and their proposals on how these values can be further promoted within the selection, nomination and appointment processes of IEBC Members, must be weighed



against the imperatives raised by the Respondents and Interested Parties regarding human dignity and privacy.

722. The Supreme Court, in its judgment in the case of *Cabinet Secretary for the National Treasury and Planning & 4 others v Okiiti & 52 others; Bhatia (Amicus Curiae)* (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 63 (KLR) had opportunity to consider and guide on how the constitutional imperatives of public participation, transparency and accountability should be construed. At Paragraphs 143 – 147 of its judgment the apex court stated:

“

“143. We have also considered Article 1 18(1) of the *Constitution* and based on the textual markers therein, Parliament’s duty is to “facilitate public participation and involvement in the legislative and other business of Parliament and its committees.” _

As is plain from its wording, this provision only imposes a duty to facilitate public participation and involvement in the legislative process and therefore cannot be the basis for the argument that the National Assembly is under an obligation to provide reasons for accepting or rejecting public views.

- a. We now turn to the question of whether this obligation arises from the values and principles of governance stipulated in Article 10(2) of the *Constitution*. As noted earlier, it is Article 10(2) upon which the Court of Appeal based its finding that Parliament is obligated to provide reasons for accepting or rejecting public views.
- b. In addressing whether this duty arises from the national values and principles of governance— particularly the values and principles of transparency and accountability in Article 10(2) (c)—we consider, 1st the nature of obligations arising from such values and principles. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR), this Court noted thus at paragraph 54:

“Certain provisions of *the Constitution* of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among



themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.” [Emphasis added]

In effect, this Court highlighted the need to avoid interpreting broad constitutional values and principles, such as those articulated in Article 10(2) of the Constitution as though they were prescribed normative rules. Values and principles act as guiding frameworks, outlining the considerations that duty bearers, such as Parliament, should take into account when making decisions. However, they do not define specific duties or actions. In this respect, values and principles are inherently open- textured, meaning they provide direction without prescribing exact steps to be taken by duty-bearers. See in this regard Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) p. 26; and Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2020) pp. 44-93; and Marcelo Neves, *Constitutionalism and the Paradox of Principles and Rules* (Oxford University Press, 2021) pp. 10- *Based on this proposition, courts should be careful to distinguish between values and principles on the one hand, and normative rules on the other hand, to avoid overprescribing duties from principles and values which are by nature open- textured. We draw from the words of Robert Alexy, a Legal Philosopher in his publication ‘Constitutional Rights and Proportionality’ (2014) 22 Revus - Journal for Constitutional Theory and Philosophy of Law 51, at page 52 that:*

“Rules are norms that require something definitively. They are definitive commands. Their form of application is subsumption. If a rule is valid and if its conditions of application are fulfilled, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with. By contrast, principles are optimization requirements. As such, they demand that something be realized to the greatest extent possible given the legal and factual possibilities.”

It follows that values and principles are optimizing commands that allow duty bearers to come up with suitable measures for fulfilment of the obligations that they impose, without dictating definitive and specific actions that they ought to take.”

723. Guided and bound by the above decision of the Supreme Court, it is our finding that the Selection and nomination of IEBC members process as it currently stands sufficiently applies public participation, transparency and accountability within its various milestones, and in a way that safeguards the dignity and privacy of applicants.



724. We note that the selection and vetting processes were highly publicized both in the print and electronic media which evidence of publication was generously availed to this Court by the petitioners themselves through a supplementary affidavit (2).
725. There is no dispute that the public was asked to submit any memoranda or any information that they possessed concerning each candidate/ nominee. There is no evidence that information supplied to the IEBC Selection Panel and the National Assembly by any member of the public was ignored to the advantage of the present nominees.
726. Parliament, of course, can always provide for greater levels of public participation, transparency and accountability in the process of selecting persons to serve in the IEBC; noting that the Commission is a highly sensitive one that arguably requires an even higher standard of public confidence in the individuals and the body than other Commissions and Independent Offices, a matter we have highlighted at the beginning of this judgment. This of course, can be done through the enactment of legislation on public participation that provides uniform and enforceable standards. This will actualize Article 18(1)(b) of the Constitution which provides that Parliament shall facilitate public participation and involvement in legislative and other business, as stated in the above cited Supreme Court in Cabinet Secretary for the National Treasury and Planning & 4 others v Okiiti & 52 others; Bhatia (Amicus Curiae) (Petition E031, E032 & E033 of 2024).
727. Currently, Kenya lacks a comprehensive Public Participation legislation and as a result, different bodies apply inconsistent procedures, leading to legal challenges and questions about legitimacy. This judgment therefore calls on Parliament to enact a law to standardize how public participation is carried out, especially for sensitive institutions like the IEBC.
728. As we conclude on this matter of alleged disqualifications and unsuitability of the nominees for appointment to the IEBC, this Court is acutely aware of the powerful role that public perception plays in shaping confidence in constitutional institutions.
729. In the present matter, it has been argued that the public was made to believe that all the nominees to the IEBC were products of political patronage, having been handpicked by powerful figures in government. These claims were widely disseminated through media narratives and public discourse, with headlines such as “Godfathers Have It” shaping a particular mental frame in the minds of the citizenry. However, as Aldous Huxley aptly observed,

“The deepest sin against the human mind is to believe things without evidence.”

This maxim finds particular relevance in public law, where decisions affecting rights, reputations and institutional integrity must rest upon verifiable facts, not conjecture, perception, or unproven allegations.

730. In the present petition, allegations of godfatherism and nepotism have been levelled against certain nominees to the IEBC. However, no credible or admissible evidence has been placed before this Court to substantiate that the appointments were secured through improper influence, familial favour, or breach of constitutional or statutory procedures. No material has been adduced to demonstrate that the Selection and nominating authorities acted outside the framework of merit, transparency or fairness as required under Article 232 of the Constitution.
731. The principle of legality, which underpins our constitutional democracy, requires that every exercise of power, particularly judicial power, must be based on objective facts and evidence. Courts are not to act on suspicion, speculation, or public sentiment, however strongly held. The presumption of regularity



in official acts and the right of individuals to be assessed on the basis of merit, not perceived associations, are fundamental tenets of administrative justice.

732. To hold otherwise would be to sanction a governance culture driven not by the rule of law, but by innuendo and populism. It would mean substituting proof with perception, and process with prejudice, an approach that is wholly incompatible with the demands of constitutional adjudication.
733. This Court underscores that constitutional adjudication must be grounded in verifiable facts, not innuendo or conjecture. While public perception is relevant, particularly where impartiality and integrity are in question, such perception must be objectively justified by evidence.
734. Accordingly, in the absence of any substantiated evidence of nepotism or improper influence, this Court finds no basis to impugn the selection and nominations of the 1st to 7th interested parties as Commissioners to the IEBC.
735. The allegations, while serious if proven, remain unproven and thus cannot form the basis of any adverse judicial finding or relief. In the absence of such evidence, this Court cannot lend legal credence to narratives, however widely circulated, that rest on speculation rather than proof.

What is the validity of Gazette Notices Nos. 7724 and 7725 both dated 10th June, 2025?

736. We now address the question of the two Gazette Notices appointing the 1st to the 7th interested parties as Chairperson and Commissioners of the Independent Electoral and Boundaries Commission.
737. On 29/05/2025, L.N. Mugambi J issued conservatory orders preserving the obtaining status quo and prohibited, inter alia, the gazettment and swearing in of the 1st to 7th Interested Parties as Chairperson and Commissioners of the IEBC.
738. It is not in dispute that Gazette Notice 7724 dated 10/06/2024 appointing the 1st Interested Party as the Chairperson of the IEBC and Gazette Notice 7725 dated 10/06/2025 appointing the 2nd to 7th Interested Parties as Commissioners of the IEBC were published in the Kenya Gazette Volume CXXXVII No. 122 of 10/06/2025.

Both Gazette Notices were issued by the President of the Republic in his capacity as the appointing authority.

739. The issue under consideration is whether individuals nominated for appointment as members of the IEBC may be lawfully sworn into office when there exists a conservatory order staying their appointment.
740. Specifically, whether proceeding with such appointments, in defiance of a court order issued on 29th May, 2025 and without recommencing the appointment process in accordance with the law, would render the appointments unconstitutional and illegitimate.
741. At the hearing of this petition on 23rd June, 2025, the Petitioners moved this Court orally, as highlighted in paragraph 43 of their supplementary affidavit (2), sworn on 15th June, 2025, urging us to find that the President of the Republic, the Head of Public Service, the Attorney-General and the Head of Government Press were jointly and severally in contempt of court for causing the publication or publishing the Gazette Notices appointing the 1st to 7th Interested Parties, despite the conservatory order prohibiting them from doing so.
742. In our ruling rendered on 24/06/2025, we declined to determine the issue substantively on the basis of an oral application for contempt of court, in light of the gravity and special nature inherent in contempt of court.



743. In our said ruling, this Court made it clear that court orders are not mere suggestions and obedience of court orders is not optional. This court also stated in no uncertain terms that contempt proceedings can be dealt with at any stage of the proceedings, including, post judgment.

744. Our Ruling dated 24/06/2025 therefore left the fate of the two Gazette Notices for this Judgment.

745. According to the petitioners, the two Gazette Notices 7724 and 7725, which appoint the 1st to 7th Interested Parties to the IEBC, are null and void *ab initio* for violating the Conservatory order issued by L.N. Mugambi J on 29th May, 2025.

In the petitioners' view, the only legal and logical outcome would be for this Court to quash the two Gazette Notices.

746. The Respondents took a nuanced approach to the issue. While they acknowledged the issuance of the two Gazette Notices, they nonetheless distanced themselves from the question of the legitimacy of the said Gazette Notices and left the matter to this Court to determine as we see fit.

747. The 1st to 7th Interested Parties similarly avoided the substance of the question of the legitimacy and standing of the two Gazette Notices, with a number, and in particular, the 6th Interested Party, taking the position that the 1st to the 7th interested parties having already been gazetted, they were already appointed to their respective offices hence the issue was moot. The 8th Interested Party did not address this question.

748. In resolving this issue and question, we shall briefly answer the question of whether the appointment of the nominees subject of this petition is moot.

749. First things first, what is the doctrine of mootness and what is it concerned with? In *Dande & 3 others v Inspector General, National Police Service & 5 others* SC Petition No. 6(E007) OF 2022 (Consolidated with Petition Nos. 4 (E005) & 8 (E010) OF 2022, the Supreme Court stated:

“The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”

750. Thus, mootness involves the situation where a dispute no longer exists. The question is whether the appointment of the nominees is an issue that no longer exists and which this Court is now deprived of any jurisdiction to entertain.

751. Articles 10 and 159 of the *Constitution* underscore respect for the rule of law as a foundational value of the Republic. The principle of the rule of law necessitates the faithful execution of court orders. Disobedience, particularly by state officials, undermines the legal framework and can lead to a breakdown of order, potentially resulting in citizens resorting to self-help.

752. One may argue that the nominees having been appointed, then they can only be removed from office in the manner provided for under Article 251 of the *Constitution*. A similar situation arose in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] KECA 445 (KLR).



The Court of Appeal addressed that issue as follows:

- “(37) It is clear that on its face, the jurisdiction of the High Court is broad enough to cover review of the constitutionality or legality of appointments by other organs of government. However, the analysis does not end there. We were urged by learned counsel for the appellant that having been gazetted, the appellant could only be removed through the procedure provided under Article 251 of the *Constitution*; that the High Court had no jurisdiction to set aside the appellant’s appointment because such an order amounted to a removal exercisable only by a tribunal appointed under Article 251 of the *Constitution*. It was contended further that had the learned Judges of the superior court below considered the provisions of section 42 of *Leadership and Integrity Act*, 2012, they would have laid down their tools and required the 1st respondent to comply with the procedures set therein for lodging complaints against a State Officer. We considered this latter argument as an averment that the petition was rendered moot by the gazette of the appointment of the appellant.
- (38) We disagree with this approach and are not prepared to hold as urged by the appellant as such an approach would pose a recharacterization risk in similar forms of constitutional litigation. In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant’s appointment. This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure. We note with affirmation the holding of the High Court in the *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another* (2011) eKLR, which we cite below in extenso for its relevance:

“In our view the jurisdiction of this Court under Article 165 is completely different from that of Tribunal under Article 168.

It is clear that the Tribunal’s jurisdiction kicks in when there is an alleged misconduct on the part of the Judge or when he is unable to perform the functions of his office...

On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore, what is at stake is the process used to nominate and appoint the Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the Judicial Service Commission was in accordance with the law, fairness and justice. If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie



for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment. In this sense, if the Judicial Service Commission a State Organ does anything or omits to do something under the authority of *the Constitution* and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly, we find and hold that we are properly seized of this Petition as we have the requisite jurisdiction.” (Emphasis supplied)

753. It is evident that the Petition before this Court does not seek the removal of commissioners from office, but rather challenges the legality and constitutionality of the process leading to their selection, nomination, and eventual appointment. As such, the core issue lies not in the suitability or conduct of the members’ post-appointment, but in whether the process of their appointment complied with the *Constitution* and relevant statutory provisions.
754. In this context, the Court is properly clothed with jurisdiction under Article 165(3)(d)(ii) of the *Constitution* to determine
- “ whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, the *Constitution*.”
755. This position finds support in the *Law Society of Kenya v Attorney General & 2 others* [2016]KEHC 5096 (KLR) where it was held that the Court has the constitutional duty and jurisdiction to intervene in actions of other arms of government and State organs where it is alleged or demonstrated that the *Constitution* has either been violated or is threatened with violation. In such circumstances, the High Court would be abdicating its constitutional mandate if it failed to intervene
- .
756. Similarly, in *Trusted Society of Human Rights Alliance v Attorney General & Others* [2012] eKLR , the Court emphasized that the process of appointment to public office must comply with the *Constitution* and the law, and it is within the Court’s jurisdiction to interrogate whether that process meets the constitutional and statutory threshold. This is not interference with executive authority, but rather, enforcement of constitutional norms.
757. Accordingly, this Court affirms that it has jurisdiction to interrogate whether the impugned gazette notices adhered to constitutional principles.
758. This is because, a State or public officer who proceeds to act in defiance of a lawful order issued by a court of competent jurisdiction, offends the *Constitution* and undermines judicial authority.
759. In our view, while the doctrine of mootness serves to prevent courts from engaging in abstract or academic determinations, this does not apply in the present situations as the issue of compliance remains alive and raises serious questions of constitutionality and or illegality.



760. The Court of Appeal in *Dr. Christopher Ndarathi H Murungaru v Kenya Anti-Corruption Commission & Another* Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77 had this to say, on why court orders should always be obeyed:

“Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court’s decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status.”

761. In other words, no Court of law should be seen to condone an illegality and especially when the illegality gives rise to illegitimacy. To do so would embolden disobedience, erode public trust in the administration of justice and render court orders sterile suggestions.

762. A situation similar to the one we face arose in *Judicial Service Commission v Speaker of the National Assembly & another* (Petition 518 of 2013) [2013] KEHC 911 (KLR) (Constitutional and Human Rights) (3 December 2013) (Ruling) where the Court had stayed the President’s appointment of a tribunal appointed to investigate the conduct of Commissioners of the Judicial Service Commission but the President went ahead and appointed the tribunal. Odunga J (as he then was), our very own Lord Denning, had this to say and we have no reason to depart from those extremely important judicial pronouncements:

“Lest we forget under Article 1(1) of the *Constitution*, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution and since the courts are the temples of justice and the last frontier of the rule of law, Court decisions must of necessity be respected and the dignity of the Court upheld at all times. I associate myself with the sentiments of Rawal, J (as she then was) in *Charles Lukeyen Nabori & 9 Others v The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331* that the Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity and that the old school of thought articulated by Sir Charles Bacon, that “Judges must be like lions, but yet lions who sit at the feet of the throne” has no place.

14. The people of Kenya in enacting the *Constitution* recognized in the preamble thereto that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 4(1) of the *Constitution*, declares the national values and principles of governance as the foundation upon which Kenya as a multi-party democratic state is grounded. In Article 10 of the *Constitution*, the people of the Republic of Kenya enacted that national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them--a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. One of the values and principles of governance under that Article is the rule of law and under Article 255 of the *Constitution*, the people of Kenya took these values and principles of governance so seriously that they provided that any amendment thereto must be subjected to a referendum. It is therefore clear



that an attempt to ignore the same may amount to attempt to usurp the powers of the people which the people reserved unto themselves under the said Article 255.

15. In this case, it is in effect contended that the orders of this Court issued on 6th November 2013 have been abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of Article 251 of the Constitution.
16. In *Central Bank of Kenya & Another v Ratalil Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect. See *Commercial Bank of Africa Ltd. v Isaac Kamau Ndirangu* Civil Appeal No.157 of 1995 [1990-1994] EA 69. Where an act is a nullity, it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so, the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See *Macfoy v United Africa Co. Ltd* [1961] 2 ALL ER 1169 at 1172 & *Omega Enterprises (Kenya) Ltd. v KTDC & 2 Others* Civil Appeal No. 59 of 1993.
17. In my view, it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.
18. If, therefore it turns out that the action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed.
19. To permit the Tribunal to commence its duties under such circumstances before all the parties are heard in the present application would not only amount to abetting and aiding the disobedience of the Court order but may end up being a waste of public funds.”

[emphasis ours]

763. In the above cited case, the petitioners also asked the court whether the Judicial Service Commission Commissioners who had been suspended and a tribunal appointed to investigate them would remain in office, following the finding by the court that the President had acted illegally by appointing the



tribunal, despite the existence of the conservatory order. The learned judge stated as follows, applying other decisions and we concur that:

- “21. The petitioners have urged the court to clarify that in light of the orders of the Court made on 6th November 2013, the said Commissioners do remain in the office. In the Privy Council Case of Attorney General –V- Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A. expressed himself follows:

“Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) “subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have ... the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too ... The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”

22. In Centre for Human Rights and Democracy & Others v The Judges and Magistrates Vetting Board & Others Eldoret High Court Constitutional Petition No. 11 of 2012 the Court held by a majority that:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is



threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission. Our determination is not in any way a final definition or determination of the dispute. It is meant to give an interim protection as sought by the applicants.”

23. Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

764. From the above decisions, it is clear to this Court that in the instant case, just as it was in the above cited cases, no party may benefit from their own wrongdoing and the court cannot fold its hands in the face of blatant disobedience whether deliberately or otherwise, on advice or lack of it, which is cloaked as mootness. The rule of law would collapse if court orders could be violated with impunity, only for the violator to plead that the issue is now academic.
765. Additionally, it matters not that the person alleged to have acted in disobedience of the conservatory order was unaware of the existence of the order or was not a party to proceedings. Whereas that person may escape conviction for contempt of a court order which the person was not aware of, the unawareness does not sanitise the illegal action which would still be null and void.
766. We reiterate that obedience of court orders is integral for upholding and maintaining the rule of law, judicial authority and the vitality of court proceedings.
767. The Orders of this Court issued on 29/05/2025 were contained in the Ruling dated and delivered on even date in the presence of all parties’ counsel. Paragraph 191(a) of that Ruling concerning the Petitioners/Applicants’ Notice of Motion Application dated 13/05/2025 seeking the grant of conservatory orders read as follows, verbatim: “

191. SUBPARa (a)

That pending the hearing and determination of this Petition, a Conservatory Order is hereby issued forbidding and/or preventing the gazettement, taking of oath or assuming office by the Interested Parties, namely: Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah or any other person(s) as the Chairman or Commissioners of the Independent Electoral and Boundaries Commission. For avoidance of doubt, the Vetting and Approval Process in the National Assembly may proceed but subject to this order.”

768. The two Gazette Notices were issued in violation of this Court’s Orders contained in the cited Ruling of 29/05/2025.

The wording of Paragraph 19 1(a) of that Ruling is plain, clear and unambiguous that there was to be no gazettement of the 1st to 7th Interested Parties to their respective nominated positions, pending the hearing and determination of this Petition which, in our humble view, has been fast tracked. We



note that from the time we were empaneled, we have burnt the midnight oil to ensure that this petition is heard and determined expeditiously, in recognition of the importance of this matter to the people of Kenya.

769. We must distinguish from the onset that the question of whether there was knowledge or service of the Conservatory Order and whether there was, thereafter, wilful disobedience of that Court Order are relevant factors to contempt of court proceedings which we addressed in our ruling of 24th June 2025. However, those are not the material factors to, whether an act taken in contravention of the express wording and intention of a Court and publicized to the whole world by our ever-informing media which has remained a pillar of transparency and open justice in this country, should be allowed to stand.
770. We have stated what other binding and or persuasive judicial pronouncements have said on this nerve rending issue. We reiterate that the authority and effectiveness of any judicial system rests upon uncompromising obedience to court orders and therefore, any person, whether a party or not a party to court proceedings, who knows of an order, whether in their most painstaking view, they consider that order to be worthless, regular or irregular, cannot be permitted to disobey it. The consequence of an action taken in contravention of a court order is that, the action is null and void ab initio.
771. We continue to cite more judicial pronouncements on this issue to demonstrate the importance of obeying court orders. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* {2005} 1KLR 828 Ibrahim J (as he then was) opined that:
- “It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times.
- It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”
772. The dicta by Lord Denning in the seminal case of *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1 169 , is instructive on the fate of an action taken in violation of a court order. He stated:
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
773. From the plethora of cases that we have cited, we have said enough that one of the most compelling aspects of a court order that safeguards its authority and vitality is the reality that, acting in contravention of the Court order, unless that order is set aside, varied or lapses by effluxion of time, the contravention whether brazen or not, renders the action so taken, null and void, and thus, to act in contravention of a court order is to act in vain.
774. Were the position to be otherwise, there would be no benefit to Court orders and the necessity to obeying them, since the orders in question would be mere suggestions.
775. The appointment of IEBC members is governed by Article 250(2)(b) of the *Constitution*, as read together with the *Independent Electoral and Boundaries Commission Act*. It is a constitutional process, not merely an administrative formality. The process involves multiple stages: declaration of the vacancies in the Commission, constitution of the Selection Panel, advertisements application,



- interviewing, selection, nomination, vetting, approval, appointment by the President and the swearing-in by the Honourable Chief Justice before assuming office.
776. Members of the Commission are appointed by the President in accordance with Article 250 of the Constitution. However, before assuming office, acting in state office or performing any functions of a state office, Article 74 mandates that the members of the Commission, being state officers, as designated by Article 260, must take and subscribe to the oath or affirmation of office in the manner and form prescribed by the Third Schedule or under an Act of Parliament.
777. The relevant legislation implementing this constitutional procedure is the IEBC Act. Section 9 provides for oath of office and replicates Article 74.
- The Chairperson and Commissioners of the Commission, under the said section 9 of the IEBC Act, before assuming office, shall make and subscribe to the oath or affirmation of office prescribed in the Third Schedule to the IEBC Act. Each stage in the process of bringing on board the IEBC Commissioners must conform strictly to constitutional principles, particularly those of transparency, accountability, integrity and legality.
778. The interim Conservatory orders issued by this Court on 29th May, 2025 under Article 23(3)(c) and reinforced by Article 165 of the Constitution are binding. Their purpose was to preserve the subject matter of this constitutional litigation and to prevent irreversible harm to the rule of law. Once such orders were issued staying the appointment of commissioners, any further step toward formalizing the appointment, including swearing-in, was expressly prohibited.
779. Under Article 2(1) and (2), the Constitution is the supreme law of the Republic of Kenya and it binds all persons and state organs. No person may claim or exercise authority contrary to the Constitution. Proceeding with appointments or swearing-in of the appointee commissioners despite a court order violates Article 10 (respect for the rule of law), Article 73 (responsibilities of leadership) and Article 250, thereby eroding the legitimacy of the Commission itself. For avoidance of doubt, swearing in is a constitutional imperative, under Article 74 and not a mere statutory and procedural requirement.
780. Any action taken in disobedience of a valid court order is not only a legal wrong but a constitutional violation. As courts have repeatedly held, including in Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR , acts done in defiance of court orders are null and of no legal effect.
781. Under the doctrine of legality, all public power must be exercised in accordance with the Constitution and the law. Appointments that violate express legal procedures, particularly where a court has intervened, are incurably defective. Indeed, the rule of law demands strict compliance with legal processes, especially in matters involving public institutions.
782. Therefore, one cannot take an oath based on a foundation of disobedience of court orders, for the reason that no legality can flow from an illegality. As a constitutional procedural act, the oath of office is contingent upon the legality of the appointment itself. An oath administered under a void appointment carries no legal weight and does not confer lawful authority to act in an office established under the Constitutional. Any subsequent decisions or actions by such Commissioners would be open to legal challenge and would in effect be ultra vires. This is because, the law does not recognize rights or legitimacy derived from acts done in defiance of judicial authority.
783. We conclude by stating emphatically, that any act of swearing-in of IEBC Commissioners in contravention of a court-issued conservatory order would be an unconstitutional act, undermining the rule of law and the integrity and constitutional legitimacy of the Commission.



784. For the above reasons, we entertain no doubt, that any person who proceeds to take the oath under such circumstances would do so under an illegitimate appointment, rendering them unlawful office holders with consequences that their purported service as commissioners would be open to judicial invalidation, not forgetting that their wrongful presence within the Independent Electoral and Boundaries Commission would compromise the credibility and legality of the electoral process.
785. These judicial pronouncements are in line with a hallowed principle of law that an act done in defiance of a court order is a nullity and of no legal effect, and a court may *suo motu* annul that act in order to uphold the rule of law and protect the dignity of judicial authority. Judicial authority, we have stated variously in this judgment, is derived from the people of Kenya and is exercised on their behalf by Courts and independent tribunals.
786. Thus, while the doctrine of separation of powers ensures the independence of the executive, legislature and judiciary, this doctrine must not be exploited by the executive, legislature or even the judiciary, as a shield to breach constitutional values and norms. Where such violations occur, the judiciary has both the authority and responsibility to intervene, not as an encroachment on the other branches, but as a guardian of the Constitution and the rule of law.
787. This has nothing to do with any perceived or imagined war between the judiciary and the Executive or any other arm of government or state office. All these institutions serve the people of Kenya and so, each one of them must just do things right.
788. As was further stated in the Ugandan Court of Appeal case of Makula International Ltd v His Eminence Cardinal Nsubuga & Another [1982] HCB 11, often cited by Courts in Kenya that:
“...a court of law cannot sanction what is illegal and an illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon.”
789. In view of the foregoing, and in order to uphold the rule of law and preserve the constitutional legitimacy of the Independent Electoral and Boundaries Commission (IEBC), this Court reiterates the well-established principle that
illegality cannot be the foundation of legitimacy
, and that no public office may be lawfully assumed in defiance of a valid court order.
790. In view of the above, and as to what orders to make, this Court is compelled by the Constitution and binding judicial decisions to find and hold, which we hereby do, that Gazette Notices Nos. 7724 and 7725, both dated 10th June 2025 and published in the Kenya Gazette Vol. CXXVII – No. 122 of even date, purporting to appoint the 1st to 7th Interested Parties as members of the IEBC, were issued and published in direct contravention of the conservatory orders of this Court dated 29th May 2025.
791. Consequently, arising from the preceding finding and holding that the impugned Gazette Notices were issued and published in contravention of valid interim conservatory court orders issued on 29th May, 2025, we further find and hold that the appointments of the 1st to 7th interested parties as gazetted on 10th June, 2025 and which were done in violation of the said conservatory orders are unlawful, unconstitutional, null and void ab initio.
792. Accordingly, in the exercise of the judicial authority conferred upon this Court by Articles 1, 2, 3, 159 and 165 of the Constitution, this Court hereby issues an order of certiorari removing into this Court, for purposes of quashing, and we hereby quash the decision appointing the 1st to 7th interested parties



as Chairperson and Commissioners of the Independent Electoral and Boundaries Commission vide Gazette Notices Nos. 7724 and 7725, both dated 10th June 2025.

793. In conclusion, we affirm that in order to enable Wanjiku secure and determine the form of Governance of our beloved and only country Kenya, The IEBC Commissioners who will have the privilege of being appointed to assume office must earn the trust of Kenyans in their discharge of their constitutional mandates, ensuring that the forthcoming elections are conducted in a free, fair, credible and transparent manner. This is the bare minimum expected of them.

Whether the reliefs sought by the petitioners are available

794. In view of our findings and holdings in this judgment, we make the following final orders:

- a) That the prayer for a declaration to the effect that the nomination and selection Of Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah, is illegal, null and void and contrary to Articles 10, 232 and 250 (3) & (4) of the Constitution of Kenya, 2010 as read with the provisions of the Independent Electoral and Boundaries Commission Act is declined.
- b) That the prayer for a Declaration That The Nomination Of Mr. Hassan Noor To the office of Commissioner of the Independent Electoral and Boundaries Commission (IEBC) is unconstitutional, illegal, and invalid for being in contravention of Article 88(2) as read with Article 250(4) of the Constitution of Kenya, 2010, and Section 6(1)(a) of the Independent Electoral and Boundaries Commission Act, 2011, by virtue of the fact that he contested for the position of Governor of Mandera County in the 2022 General Elections, thereby rendering him ineligible for appointment to the Commission having held political office within the prescribed disqualifying period of five years is declined;
- c) The prayer for a Declaration That The Recommendation Of Ms. Mary Karen Sorobit For appointment as a member of the Independent Electoral and Boundaries Commission (IEBC) is unconstitutional, unlawful, and invalid for reason that she was, at the time of her nomination, a member and office bearer of the Jubilee Party, contrary to Article 88(2)(a) of the Constitution of Kenya, 2010, and is therefore conflicted and incapable of discharging her duties with the impartiality, independence, and integrity required of a commissioner under Articles 10, 73, and 232 of the Constitution is declined.
- d) The prayer for the Declaration That The Recommendation Of Ms. Anne Njeri Nderitu For Appointment as a member of the Independent Electoral and Boundaries Commission (IEBC) is unconstitutional, unlawful, and invalid for reason that she was, at the time of her nomination, State Officer, contrary to Article 88(2)(b) of the Constitution of Kenya, 2010, and is therefore conflicted and incapable of discharging her duties with the impartiality, independence, and integrity required of a commissioner under Articles 10, 73, and 232 of the Constitution is declined.
- e) The prayer that an order of certiorari be issued to quash the decision and/or recommendation of the selection panel for the appointment of commissioners to the IEBC to nominate Ms. Mary Karen Sorobit for appointment to the said commission is declined.
- f) The Prayer For A Declaration that the nomination of Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah For appointment to the Independent Electoral



and Boundaries Commission (IEBC) by the Selection Panel is unconstitutional, unlawful, null and void for having been undertaken in a process that failed to comply with the requirements of Articles 10, 73(2)(a), 88(2)(a), and 232(1)(g) and (h) and 250 (3) & (4) of the Constitution of Kenya, 2010 is declined.

- g) The prayer for an Order Of Certiorari to Issue Quashing The Decision Dated 8th May, 2025 Issued By The Head Of Public Service To The Effect Of Nominating Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah as members of the Independent Electoral and Boundaries Commission is declined
- h) The prayer for an Order Of Permanent Injunction Restraining Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah nominated and/or recommended by the Selection Panel for appointment as Commissioners of the Independent Electoral and Boundaries Commission from assuming, occupying, or performing the functions of the office of Commissioner of the Independent Electoral and Boundaries Commission, on grounds of violation of the Constitution, including but not limited to breach of the principles of political neutrality, integrity, and fair administrative action as enshrined under Articles 10, 73, 88(2)(a), 232 and 250 (3) & (4) of the Constitution of Kenya, 2010 is declined.
- i) The prayer for A Declaration that the Attorney General failed in their constitutional mandate under Article 156(4) of the Constitution of Kenya, 2010 by neglecting to provide independent, impartial, and sound legal advice to the Executive regarding the nomination of Erastus Edung EtheKon; Anne Njeri Nderitu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah Commissioners of the Independent Electoral and Boundaries Commission (IEBC), thereby failing to protect the rule of law and the public interest, as mandated by the Constitution is declined.
- j) That the petition dated 13th May, 2025 is hereby dismissed.
- k) That this Court having found and held that Gazette Notices Nos. 7724 and 7725 published on 10th June, 2025 were issued and published in contravention of valid conservatory court orders dated 29th May, 2025; further having found and held that the appointments of the 1st to 7th interested parties as Chairman and Commissioners of the Independent Electoral and Boundaries Commission were done in violation of the said conservatory orders are null and void ab initio; this Court, now, in exercise of judicial authority conferred upon this Court by Articles 1, 2, 3, 159 and 165 of the Constitution, hereby issues an order of certiorari removing into this Court the decision appointing and publishing the appointment of the 1st to 7th interested parties as Chairman and Commissioners of IEBC respectively, for purposes of quashing, and we hereby quash the appointment of the 1st to 7th interested parties vide Gazette Notices Nos. 7724 and 7725 published in the Kenya Gazette Vol/ CXXXVII – No. 122 of 10/06/2025.
- l) The interim conservatory orders issued under paragraph 191(a) in the Ruling dated and delivered on 29th May, 2025 be and are hereby discharged.
- m) On costs, this being a public interest litigation, we order that each party bear their own costs.

795. We so order.



796. The full judgment shall be uploaded on the case tracking system and a copy send to Kenya Law for publication.

797. This file is closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2025

R.E. ABURILI

JUDGE (PRESIDING)

J. CHIGITI J, SC

JUDGE

B. MWAMUYE

JUDGE

