Cherono v Independent Electoral and Boundaries Commission (IEBC) & another (Constitutional Petition E025 of 2021) [2024] KEHC 141 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 141 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CONSTITUTIONAL PETITION E025 OF 2021

JRA WANANDA, J

JANUARY 19, 2024

IN THE MATTER OF ARTICLES 3(1), 22(1), 23, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALEGED VIOLATION AND INFRINGEMENT OF THE RULE OF LAW AND CONSTITUTIONAL RIGHTS GUARANTEED AND PROTECTED UNDER ARTICLES 2(1), 3(2), 10, 27, 38(3)(A), 47, 88(4)(A) & (B) AND 95(4)(B) & (C) AND 5(B) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PROVISIONS OF LAW AS GUARANTEED AND PROTECTED UNDER THE STATUTES: INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) ACT, NO. 9 OF 2011: ELECTIONS ACT, NO. 24 OF 2011 AND FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

PATRICK TOROITICH CHERONO .... PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) .... 1ST RESPONDENT

NATIONAL ASEMBLY .... 2ND RESPONDENT

High Court does not have the jurisdiction to determine the adequacy of funds allocated by the National Assembly

The petitioner alleged that the Independent Electoral and Boundaries Commission (the 1st respondent) carried out periodical national mass voter registration and failed to continuously carry out national voter registration; and that the National Assembly (the 2nd respondent) failed to allocate sufficient funds to the 1st respondent to continuously carry out national voter registration. The court found that the law only required the 1st respondent

to carry out continuous voter registration, not enhanced continuous voter registration and that there was also no legal requirement obligating the 1st respondent to decentralize or spread the voter registration exercise from the constituency level to the ward level. Furthermore, the court held that it lacked the necessary tools and expertise to determine the question of the adequacy or otherwise of funds allocated by the 2nd respondent to various State organs, including the 1st respondent.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of the High Court – jurisdiction to review the constitutionality of decisions of co-ordinate arms of Government - whether courts had full and unhindered jurisdiction to review the constitutionality of decisions of co-ordinate arms of Government beyond procedural matters - whether High Court had the jurisdiction to determine the adequacy of funds allocated by the National Assembly to State organs – Constitution of Kenya, articles 95(4)(b), 206(2)(a) and 221.*

Constitutional Law *– public finance – budget making process - what were the steps involved in the budget making process?*

Electoral Law *– Independent Electoral and Boundaries Commission (IEBC) – duties of IEBC – voter registration – continuous voter registration vis a vis enhanced voter registration - whether the IEBC was required to carry out enhanced continuous voter registration - whether the IEBC was required to decentralize or spread the voter registration exercise from the constituency level to the ward level.*

Evidence Law *– evidence – proof of facts – facts that do not require proof – facts judicially noticed – requirements for a court to take judicial notice of a fact - whether it was mandatory for evidence to be tendered to prove that facts had gained sufficient notoriety for the court to take judicial notice of the same – Evidence Act, (cap 80), section 59.*

Judicial Review *– judicial review orders – mandamus – issuance of orders of mandamus against public bodies or officers - when could an order of mandamus be issued against a public body or officer - whether an order of mandamus could be issued where it was sought to compel the exercise of discretionary power by a public body or officer.*

Brief facts

The petitioner averred that on or about October 4, 2021, the Independent Electoral and Boundaries Commission (the 1st respondent) launched a national mass voter registration exercise targeting at least 4.5 million new registered voters and was expected to close the exercise on November 2, 2021. It was claimed that the 1st respondent only managed to register about 760,000 new voters as at October 25, 2021. The petitioner further averred that the 1st respondent would not extend the mass voter registration deadline despite the low turnout of citizens due to lack of funds allocated to it by the National Assembly (the 2nd respondent).

According to the petitioner, periodic and/or seasonal mass registration that only lasted about 30 days or so hindered accessibility to voters and as such violated voters' political rights and the right to fair administrative action. The petitioner thus sought for among other orders; a declaration that the 1st respondent, by carrying out seasonal and/or periodical national mass voter registration and by failing to continuously carry out national voter registration without breaking limits was unconstitutional and a declaration that failure by the 2nd respondent, to allocate enough and/or sufficient funds to the 1st respondent to enable it to conduct continuous national voter registration was unconstitutional.

Issues

i. Whether the High Court had the jurisdiction to determine the adequacy of funds allocated by the National Assembly to State organs.
ii. Whether courts had full and unhindered jurisdiction to review the constitutionality of decisions of co-ordinate arms of Government beyond procedural matters.
iii. What were the steps involved in the national budget making process?
iv. Whether the Independent Electoral and Boundaries Commission was required to carry out enhanced continuous voter registration.

v. Whether the Independent Electoral and Boundaries Commission was required to decentralize or spread the voter registration exercise from the constituency level to the ward level.
vi. Whether it was mandatory for evidence to be tendered to prove that facts had gained sufficient notoriety for the court to take judicial notice of the same.
vii. When could an order of *mandamus* be issued against a public body or officer?
viii. Whether an order of *mandamus* could be issued where it was sought to compel the exercise of discretionary power by a public body or officer.

Relevant provisions of the Law

Constitution of Kenya

Article 249 - Objects, authority and funding of commissions and independent offices

(3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

Held

1. The court's jurisdiction to hear and determine constitutional petitions arising from allegations of violation or infringement of fundamental freedoms enshrined in the Bill of Rights was donated under articles 22 as read together with articles 23 and 258 of the Constitution. Those constitutional provisions were complemented by rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the *Mutunga* Rules).
2. There was a long-standing principle in constitutional petitions that a petitioner must identify the constitutional entitlement threatened, infringed or violated and demonstrate with some level of precision, the manner of violation so as to enable a respondent mount a defence. Indeed, on the procedure for instituting a constitutional petition and the contents required to be included and/or disclosed. Upon perusal of the petition, the petitioner had brought out the alleged violations to an acceptable degree. The petition sufficiently met the threshold required for constitutional petitions.
3. There was an emerging norm for all respondents in constitutional petitions to always automatically raise the defence of alleged non-compliance with the *Annarita Karimi* case precision test as a default defence even where the same was not merited. That emerging practice added nothing but only unnecessarily convoluted court proceedings, it was not and could not amount to good practice.
4. The 1st respondent was the body established under article 88 of the Constitution charged with the exclusive mandate of conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. The importance of the right of citizens to freely register to vote and participate in elections could not be gainsaid.
5. It was not for the Judiciary to micro-manage the 1st respondent as an electoral body. The 1st respondent must be given the room and space to exercise its discretion in the discharge of its mandate. However, the electoral body must comply with the letter and spirit of the Constitution and the law in general. Like all other independent commissions established under article 249 of the Constitution, the 1st respondent was subject to the Constitution and the law in general and therefore, the exercise of discretion in the discharge of its constitutional and statutory mandate must be within the law. Failure by the 1st respondent to honour the provisions of the Constitution and the law in general in making any decision, would thus, render such decision unlawful and susceptible to being set side by the High Court.
6. The petitioner had not demonstrated that voter registration was not continuing at the constituency level even as the case went on. There was no reason to disbelieve the 1st respondent on its insistence that the voter registration process was and had been continuous and that any person who wished to exercise his right to register as a voter was able to do so at any of the 290 constituency offices in Kenya on any day. The petitioner failed to prove that closure of the enhanced continuous voter registration (ECVR) would lock out citizens wiling to register as voters.

7. Under the provisions of section 59 of the Evidence Act, courts could be called upon to take judicial notice of certain facts that had attained some notoriety and which facts did not therefore need to be proved. However, evidence must be tendered to prove that the alleged facts have indeed gained sufficient notoriety for the court to take judicial notice of the same. Furthermore, where an allegation of dereliction of a constitutional duty was heavily contested as it was in the instant matter, the same could not be simply assumed. Therefore, it was not safe to make assumptions in the circumstances of the case.
8. In Kenya, registration as a voter, and even the exercise of the right to vote in a general election, was an optional choice unlike in some other countries where registration as a voter and participation in elections was automatic and mandatory by law upon attainment of the age of majority. In Kenya therefore, citizens were free to choose to register as voters at any time and could exercise their political rights as they wished on their own volition. One could therefore lawfully opt not to register as a voter.
9. Article 38(3) of the Constitution only required that the registration exercise should be without unreasonable restrictions and therefore not limit any citizen from exercising his political rights to so register. Article 83(3) of the Constitution stipulated that administrative arrangements for registration of voters and conduct of elections should be designed to facilitate, and should not deny, a citizen the right to vote or stand for election. Therefore, the burden on the petitioner was to demonstrate that the 1st respondent's actions or omissions, if any, resulted into such unreasonable limitation as prohibited under article 38(3) of the Constitution. However, the petitioner had failed to discharge such burden since he had failed to controvert the 1st respondent's insistence that the CVR was ongoing and would only be closed 60 days to the next general election as required by law.
10. The petition would have been much stronger had the petitioner provided evidence such as affidavits sworn by people who had recently attained the age of majority and who alleged that they presented themselves to the 1st respondent's constituency offices but were unable to register as voters because the 1st respondent was not carrying out such registration. Not a single person was reported to have come out to complain over failure to achieve such registration.
11. An order of *mandamus* could only issue where it was demonstrated that in the performance of public duty, a public body or officer had refused to perform that duty and which had as a result, amounted to an infringement of the legal right that an applicant possessed. The petitioner had failed to demonstrate any such failure, refusal or dereliction of duty on the part of the 1st respondent. In the absence of demonstration of violation or threatened violation of the fundamental rights and freedoms or breach of the law, the court could not interfere with the discretionary mandate of the 1st respondent and purport to step into its shoes.
12. *Mandamus* could only issue to compel a person to perform a particular duty imposed on him by the Constitution or statute and which duty he had failed, refused or neglected to perform to the detriment of the applicant. For an applicant to therefore succeed in an application for *mandamus*, he must demonstrate that a respondent had failed to perform a constitutional or statutory duty. *Mandamus* could not therefore issue where it was sought to compel the exercise of discretionary power and more so, the exercise of such power with a view to arriving at a particular result.
13. It had not been shown that the 1st respondent had in any way failed to adhere to any law nor that it had failed to discharge a specific mandate as required of it or infringed upon any fundamental right of the petitioner or any other Kenyan voter. The law only required the 1st respondent to carry out continuous voter registration (CVR), not enhanced continuous voter registration (ECVR). Carrying out an ECVR was a decision that could only be determined by the 1st respondent on the basis of many factors, including the resources available to it.
14. There was also no legal requirement obligating the 1st respondent to decentralize or spread the voter registration exercise from the constituency level to the ward level. The petitioner had not presented any concrete evidence to support his claims. He had only made casual allegations. The court could

not grant the drastic reliefs in the form of mandatory orders as sought against the respondents in the absence of any concrete evidence to support the same. The issues raised by the petitioner were weighty but without evidence, they remained in the realm of conjecture.

15. Articles 95(4)(a), (b) and (c) and 95(5)(b) of the Constitution were categorical that the 2nd respondent budgeted, collected, shared between the levels of Government, and audits revenue. It also had a general oversight function which meant that it worked hand in hand with the National Treasury over the finances of the country.

16. No definition was given on what amounted to adequate funds as used in article 249(3) of the Constitution nor was any formula provided to determine the phrase adequate funds. Funds allocated or appropriated to the 1st respondent came from the consolidated fund. Withdrawal of funds from the consolidated fund was itself a matter regulated under the Constitution and in regard thereto, it was Parliament that was mandated to oversee the same. That was clear from article 206 of the Constitution.

17. The consolidated fund was the main bank account of the National Government into which all money raised by it or received on its behalf was paid. Funds from the consolidated fund could only be withdrawn with the authority of Parliament and as approved by the Controller of Budget. The 2nd respondent exercised its mandate after a comprehensive budget process as set out under article 221 of the Constitution.

18. The question of the adequacy or otherwise of funds allocated by the 2nd respondent to various State organs, including the 1st respondent, was a policy and political question, that the court lacked the necessary tools and expertise to determine such questions. The 2nd respondent was the only body authorized under article 95(4)(b) of the Constitution to appropriate funds for expenditure by the National Government and other State Organs, including the 1st respondent. The power of the purse was the exclusive preserve of Parliament under article 206(2)(a) of the Constitution which provided that funds could only be appropriated from the consolidated fund as approved by an Act of Parliament, and the 2nd respondent exercised that mandate after a comprehensive budget process under article 221 of the Constitution.

19. The budget process was broken-down into five steps, namely, that;

    1. the Cabinet Secretary for Finance submitted estimates of the coming financial year to the National Assembly;
    2. the 2nd respondent considered the estimates together with those submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary;
    3. the Budget and Appropriation Committee (BAC) of the 2nd respondent made recommendations to the 2nd respondent on the estimates submitted by the National Government organs to the House;
    4. Budget and Appropriation Committee (BAC) facilitated extensive public participation before making its recommendations; and
    5. the 2nd respondent debated and passed the Appropriation Bill.

20. Courts should not issue decisions that would amount to an unlawful interference with the powers vested by the Constitution on the Executive and the Legislature. The court should not be seen to be intruding into the realm of powers bestowed on other arms of the Government. The doctrine of separation of powers between the different arms of Government dictated that the court embraced constitutional humility and accepted the decisions of the other constitutional organs.

21. The doctrine of separation of powers did not, in appropriate cases, and each case depending on its own peculiar circumstances, facts, and evidence, oust the court's jurisdiction to nullify and/or revoke actions made by the other organs if such actions violated the spirit and the letter of the Constitution. The courts' mandate was to provide checks and balances for the Executive and would not therefore hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandates. To do otherwise would be a dereliction of the courts' constitutional role. The

only rider was that the court would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that had proceeded with due regard to procedure.

22. The courts had full and unhindered jurisdiction to review the constitutionality of a decision by a co-ordinate arm of Government beyond procedural matters. There was however need by the courts to exercise utmost caution when exercising that jurisdiction so as not to usurp the powers of other organs of Government.

23. The merits of the budgetary process of allocation of funds to the 1st respondent was a process that the Constitution laid in the hands of the Legislature working hand in hand with the Executive. What the petitioner was questioning was not the constitutionality of the process or manner adopted in allocating the funds but the adequacy or sufficiency of the amount of funds allocated. That was not a matter within the purview of the courts to direct. Doing so, where procedural infirmity was not alleged or proved in the decision-making process, would amount to the court overstepping its mandate.

24. The charge of constitutional impropriety levelled against the 2nd respondent that allegedly it allocated insufficient funds to the 1st respondent was without any evidential basis and therefore misconceived and unfounded. The court was unable to uphold such allegations and assertions for it was not for the court to pronounce policy or to legislate. If the drafters of the Constitution or the pieces of legislation enacted thereunder wished to specify a formula on how to determine sufficient or adequate funds to be allocated to the 1st respondent for the purpose of voter registration, nothing would have been more difficult than to expressly state so.

25. By stopping short of prescribing a specific amount to be allocated to the 1st respondent for the purposes of conducting voter registration and not defining the term adequate funds, the Constitution allowed for some degree of flexibility on the part of the Executive and the Legislature in determining what was adequate funds on the basis of the many dynamics and variables that came into play during the national budgetary process.

26. In *Orange Democratic Movement (ODM) v National Treasury & 5 others* [2017] eKLR, the court issued an order compelling the National Assembly to allocate and appropriate not less than 0.3% of the National Government revenue collected, to the Political Parties Fund. That decision was however inapplicable in the instant matter and was easily distinguishable since by law (section 24(1) of the Political Parties Act) the political parties fund was entitled to receive from the National Government such funds being not less than 0.3.% of the revenue collected by the National Government, as may be provided by Parliament; and contributions and donations to the fund from any sources. The 0.3% percentage was therefore expressly stipulated. That was not the case herein where the amount to be allocated or appropriated to the 1st respondent for carrying out its mandate, or specifically, to conduct voter registration, was not specified but left to budgetary policy and availability of national resources as deliberated upon by the Legislature and the Executive.

27. Under article 95(4)(a) of the Constitution, the authority to determine the allocation of financial resources revenue was an exclusive preserve of the 2nd respondent. National budget making and legislative processes therefore should be allowed to continue in the State organ mandated by the Constitution to undertake such task.

28. The 1st respondent had absolved the 2nd respondent of any blame by confirming that indeed the 2nd respondent had in compliance with article 249(3) of the Constitution, always allocated to it adequate funds to enable it carry out its mandate. It was therefore also doubtful whether the petitioner would, in the circumstances, possess any recognizable cause of action against the 2nd respondent yet the 1st respondent, on whose behalf the petitioner seemed to be agitating for allocation of more funds had rebuffed any such agitation purportedly made on its behalf.

Petition dismissed.

Orders

Each party shall bear its own costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) (Consolidated) - (Applied)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) (Consolidated) - (Applied)
4. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Explained)
5. *Independent Electoral and Boundaries Commission & 4 others v Ndii & 312 others; Ojwang & 4 others (Amicus Curiae)* Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021; [2021] KECA 363 (KLR) (Consolidated) - (Mentioned)
6. *Jotham Mulati Welamondi v Chairman, Electoral Commission of Kenya* Miscellaneous Application 81 of 2002; [2002] KEHC 1123 (KLR) - (Applied)
7. *Kaberia & another v Attorney General & another; Katiba Institute (Interested Party)* Petition E001 of 2022; [2024] KEHC 14067 (KLR) - (Applied)
8. *Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* Constitutional Petition 244 of 2019; [2021] KEHC 450 (KLR) - (Applied)
9. *Kenya Airports Authority v Mitu-Bell Welfare Society & another* Civil Application 114 of 2013; [2014] KECA 444 (KLR) - (Applied)
10. *Kenya Youth Parliament & 2 others v Attorney General & 2 others* Constitutional Petition 101 of 2011; [2012] KEHC 5436 (KLR) - (Applied)
11. *Kitheka, Simeon Kioko & 2 others v County Government of Machakos & 3 others* Petition 3 of 2016; [2016] KEHC 373 (KLR) - (Applied)
12. *Mati, Jayne & another v Attorney General & another* Petition 108 of 2011; [2011] KEHC 4292 (KLR) - (Applied)
13. *Mwangi, Onesmus Kihara vs Attorney General & 2 others* Miscellaneous Application No 975 of 2001; [2002] KEHC 920 (KLR) - (Applied)
14. *Mwangi, Peter Deter Karuoro v Attorney General* [2018] KEELC 337 (KLR) - (Applied)
15. *Ndoria, Stephen v Minister for Education & 2 others* Petition 464 of 2012; [2015] KEHC 3437 (KLR) - (Applied)
16. *Ng'ang'a v Minister for Justice, National Cohesion & Constitutional Affairs & another* Petition 354 of 2012; [2013] KEHC 6091 (KLR) - (Followed)
17. *Ojiayo, Samson Owimba v Independent Electoral and Boundaries Commission (IEBC) & another* Petition 104 of 2013; [2013] KEHC 7004 (KLR) - (Mentioned)
18. *Okiya, Omtatah Okoiti v Independent Electoral & Boundaries Commission & 2 others* Petition 504 of 2017; [2017] KEHC 9448 (KLR) - (Mentioned)
19. *Onyango, Patrick Ouma & 12 others v Attorney General & 2 others* Miscellaneous Civil Application 677 of 2005; [2005] KEHC 3204 (KLR) - (Applied)
20. *Orange Democratic Movement (ODM) v National Treasury & 3 others* Civil Appeal 15 of 2018; [2019] KECA 708 (KLR) - (Applied)
21. *Republic v Speaker of the National Assembly & 4 others ex-parte Edward RO Ouko* Miscellaneous Application 108 of 2017; [2017] KEHC 9413 (KLR) - (Applied)

22. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu & another (Interested Parties); Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Applied)
23. *Wamwere v Attorney General* Application 15 of 2015; [2018] KESC 38 (KLR) - (Applied)
24. *Wanyiri, Kihoro & others v Attorney General & another* Civil Appeal 149 of 2009; [2016] KEHC 4222 (KLR) - (Applied)
25. *Welamondi, Jotham Mulati v Chairman, Electoral Commission of Kenya* Miscellaneous Application 81 of 2002; [2002] KEHC 1123 (KLR) - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 22, 27(1); 38(3); 88; 95(b); 165; 206(a); 221; 223; 249(3); 258 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rules 4, 10(4) - (Interpreted)
3. Elections Act (cap 7) section 5(1) - (Interpreted)
4. Independent Electoral and Boundaries Commission Act (cap 7C) section 4(a) - (Interpreted)
5. Public Finance Management Act (cap 412A) In general - (Cited)
6. Public Procurement and Asset Disposal Act (cap 412C) In general - (Cited)

Advocates

Mr Nabasenge for the petitioner

JUDGMENT

1. The petition herein is dated 1 November 2021 and was filed on the same date. The petitioner describes himself as a resident of Uasin Gishu County and states that he brings the petition in his capacity as a person acting on his own interests in terms of articles 22 and 258 of the *Constitution*, a person with an obligation to respect, uphold and defend the Constitution in terms of article 3 thereof and a person acting in the public interest within the meaning of articles 22(2)(c) and 258(2)(c) thereof.

2. The petitioner correctly described the 1st respondent as a Commission established pursuant to article 88 of the *Constitution* and that by dint of the provisions of article 88(4)(a) and (b) thereof, the 1st respondent is responsible, *inter alia*, for the continuous registration of citizens as voters and the regular version of the voter's roll.

3. As regards the 2nd respondent, the petitioner described it as the legislative arm of the Government of the Republic of Kenya and in accordance with the provisions of articles 95(b) and (c) of the *Constitution*, has the powers, authority and mandate to appropriate funds for expenditure by the national government and other State organs, exercise oversight over national revenue and its expenditure and exercise oversight of State organs.

4. The petitioner then pleaded that the 1st respondent launched mass voter registration on or around 4 October 2021 and was expected to close the exercise on 2 November 2021.

5. The prayers made in the petition are as follows:

    a. A declaration be and is hereby issued that the Electoral Commission (IEBC), the 1st respondent, by carrying out seasonal and or periodical national mass voter registration and by failing to continuously carry out national voter registration without breaking and or limits is

unconstitutional and in total violation of the Constitution of Kenya and in particular it offends articles 38 (3) (a); 27(1) & (2); 47(1) and 88(4)(a) of the *Constitution of Kenya 2010*.

b. A declaration be and is hereby issued that national mass voter registration that is due to end on 2 November 2021 is unconstitutional and in particular it offends articles 27(1) & (2); 38(3) (a), 47(1), and 88(4)(a) of the *Constitution of Kenya 2010*. (Spent).

c. A declaration be and is hereby issued that failure by the National Assembly, the 2nd respondent, to allocate enough and/or sufficient funds to the Electoral Commission (IEBC) to be able to continuously carry out national voter registration is unconstitutional and in total violation of article 95(4)(b) of the *Constitution of Kenya 2010*.

d. The honourable court do issue and hereby issues an order prohibiting the Electoral Commission, (IEBC) from ending national mass voter registration that is due to end on 2 November 2021. (Spent)

e. The honourable court do issue and hereby issues a mandatory injunction compelling the Electoral Commission (IEBC) to extend the national mass voter registration for a period of not less than three months or such period that the honourable court may deem fit and just to enable more citizens register as voters and in order for the IEBC to achieve its target of registering 4.5 million new registered voters. (Spent).

f. The honourable court do issue and hereby issues a mandatory injunction compelling the 2nd respondent, the National Assembly, to always allocate sufficient funds to the IEBC to enable it carry out its responsibility of continuous national voter registration in accordance with article 88(4)(a) of the *Constitution*.

g. The honourable court do issue and hereby issues a mandatory injunction compelling the IEBC to always carry out continuous and/or perpetual national voter registration without any breaks and/or limits in accordance with the provisions of article 88(4)(a) of the *Constitution* and section 4(a) of the *IEBC Act*, No 9 of 2011.

h. Any other relief and or further orders, writs, declarations and directions as this honourable court may deem appropriate, fair, just and fit to grant

i. Costs of and incidentals to this petition.

6. After setting out the contents and provisions of the various articles of the Constitution cited, the petitioner averred that on or about 04 October 2021, the 1st respondent launched national mass voter registration targeting at least 4.5 Million new registered voters, that it is in the public domain that the 1st respondent only managed to register about 760,000 new voters across the country as at 25 October 2021, that it became apparent that the 1st respondent would not extend the mass voter registration deadline despite the low turnout of citizens nor would it be able to extend the said mass registration due to lack of funds allocated to it by the 2nd respondent, that according to reports that were circulating through social media and the press, the 1st respondent's budget and Appropriations Committee (BAC) which has the mandate of continuous voter registration pointed that there is no money to be given to the 1st respondent to continue with the registration exercise, that it then became apparent that there would be no indication of extending the registration beyond 02 November 2021, that bearing in mind that there was the COVID 19 pandemic, Kenyans who had attained the age of majority needed ample time to exercise their political right of registering as voters as enshrined under article 38 of the *Constitution*, and that the extension of national mass voter registration was not an exception since in the

year 2017, the High Court through EC Mwita J extended the exercise vide the case of *Okiya Omtata vs Independent Electoral and Boundaries Commission and 2 others* [2017] eKLR.

7. Among other articles of the Constitution cited by the petitioner, he contended that by dint of article 88(4), the 1st respondent is obligated to continuously register citizens as voters, that pursuant to article 95(4)(a) and (c) and 5(b), the 2nd respondent is authorized to appropriate funds for expenditure to the 1st respondent to enable it perform and carry out its responsibilities which responsibilities include continuous voter registration. According to the petitioner, periodic and/or seasonal mass registration that only lasts about 30 days or so hinders accessibility to register voters and as such violates voters' political rights protected and guaranteed under article 38(3) of the Constitution. He cited the case of *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others amicus curiae*, Court of Appeal (CA) at Nairobi, Civil Appeal No E291 of 2021 in which, he pleaded, Kiage JA opined that by dint of the provisions of article 88(4)(a) of the Constitution as read with section 4(a) of the *IEBC Act*, the 1st respondent has an obligation to carry out a sustainable and continuous voter registration due to the fact that thousands of young people attain the age of majority on daily basis.

8. The petitioner contended further that article 47(1) of the *Constitution* guarantees the right to fair administrative action that is lawful, reasonable and fair, that the actions or omissions of the respondents are in violation of article 47(1) aforesaid and also article 27(2) which guarantees full and equal enjoyment of all rights and freedoms. In conclusion, the petitioner averred that young persons who attain the age of majority have a legitimate expectation that on attaining majority they would be given an opportunity to register as voters without any hindrance and/or being discriminated, in full realization of their constitutional rights as guaranteed and protected under article 38(3)(a) thereof.

1st Respondent's Response

9. The 1st respondent opposed the petition vide the replying affidavit filed on December 10, 2021 and sworn by Marjan Hussein Marjan, its then Acting Chief Executive/Secretary. He deponed that the 1st respondent is established under article 88 of the Constitution and section 4 of the *Independent Electoral and Boundaries Commission Act*, 2011 (hereinafter referred to as the "IEBC Act") and is mandated to continuously register citizens as voters and regularly revise the voter's roll, that following the 2017 general elections and the consequential closure of the register of voters, the 1st respondent re-opened the registration process at its Constituency Offices countrywide in early 2018, that this process is known as the Continuous Voter Registration (CVR) and as at 2020, it had netted a total of 180,938 registered voters, that in view of the low numbers of voters registered through the CVR as at June 2020, the 1st respondent decided to launch an outreach programme for registration of voters at the Ward Level for a period of 30 days, a process internally described as Enhanced Continuous Voter Registration (ECVR), that the 1st respondent intended to conduct the ECVR and subsequently revert to its regular registration at the Constituency Offices thereafter.

10. According to the deponent therefore, the registration process has been and continues to be continuous and any person who wishes to exercise his right to register as a voter is able to do so at any of the 290 constituency offices in the country following conclusion of the ECVR, that the 1st respondent shall continue to conduct continuous registration of voters at the constituency offices following conclusion of the ECVR, that the 1st respondent shall continue to conduct the continuous registration interspersed with outreach initiatives at Constituencies up until 60 days to the election date as stipulated under section 5(1) of the *Elections Act, 2011*, that by dint of that section the register is always open unless as restricted above, it is therefore not true that the closure of the ECVR will lock out citizens wiling to register as voters, that any eligible citizen can walk up to the 1st respondent's offices

located in each of 290 constituencies and register provided the said registration is within the stipulated statutory timelines.

11. He deponed further that ECVR is a cash incentive exercise which requires prior planning and funding since the activity is conducted at all the 1,450 Wards across the country, that often the 1st respondent deploys an average of 4 registration kits per Ward and slightly over 15,000 temporary staff who are paid an average of Kshs 1,000/- per day. This excludes administrative expenses associated with the process and hence a hefty for the ECVR, the 1st respondent is only able to execute such an undertaking through funding allocated by Parliament in a consultative budgeting process involving various stakeholders, that the 1st respondent is a public institution funded from exchequer allocations as appropriated by Parliament and which allocation is to be utilized in accordance with the *Public Finance Management Act* and the *Public Procurement and Asset Disposal Act*, and that the 1st respondent continues to engage Parliament for assistance in discharging its duties.

12. Mr Marjan appreciated that any member of the public may, pursuant to articles 22 and 258 of the *Constitution*, institute a constitutional petition on the basis of a threat of violation of a constitutional right or on the premise that a public wrong or injury has been caused to the general public or to him individually, but contended that such an individual must however disclose the said threat or violation with precision, that the requirement is to show that through an act or omission, the public entity has acted in violation of the Constitution, that in this case, the petitioner herein has invoked the jurisdiction of the court prematurely in that he has failed to disclose a violation of a constitutional right or a threat thereof.

13. He added that Kenya adopts an optional registration model as opposed to a mandatory model adopted by other countries like Argentina, Israel and the Netherlands where registration is automatic based on the census data and upon attainment of the age of majority, that article 38 of the *Constitution* also adopts an optional registration model where citizens are free to register as voters at any time and may therefore exercise their political rights as they wish on their own volition, that this therefore plays a huge role in the number of voters that the 1st respondent is able to register because some people may opt not to register as voters, that the petitioner faults the low voter registration numbers on the 1st respondent without appreciating that voter registration is optional and as such, blame for low voter registration numbers cannot solely be placed on the 1st respondent, that article 30 of the Constitution provides that the registration exercise should not unreasonably limit any citizen from exercising their political rights to so register, that the petitioner has not disclosed any such unreasonable limitation, that the CVR is ongoing and will only be closed as stated above according to the law, and that the orders sought by the petitioner will have the effect of interfering with the exercise of the operational mandate of the 1st respondent.

14. Regarding the case of *Okiya Omtata v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR cited by the petitioner and in which the court extended the ECVR exercise, Mr Marjan deponed that the petitioner has failed to disclose that the extension ran for 5 days only and even then, it occasioned huge financial and logistical challenges to the 1st respondent and that the unbudgeted expenditure for the extension was in excess of Kshs 200 million.

2nd Respondent's Response

15. The 2nd respondent (National Assembly) also opposed the petition and in doing so, relied on the grounds of opposition filed on 12 January 2022 and the replying affidavit sworn on 20 April 2023 and formally filed on 8 May 2023 though earlier forwarded *via* email. The two were filed through Messrs Mbarak Awadh Ahmed, Advocates.

16. In the grounds of opposition, the 2nd respondent stated that the petition is misconceived and without basis as the orders sought violate the mandate of the National Assembly, that the role of the High Court under article 165 of the *Constitution* and the question of the amount of funds allocated by the National Assembly to various state organs is not one of constitutional interpretation, that the power of the purse is the exclusive preserve of Parliament under article 206(a) of the Constitution which provides that funds can only be appropriated as approved by an Act of Parliament, and that the budget process is an extensive process set out under article 221.

17. The grounds of opposition then summarized the steps involved in the budget process to be as follows; that the Cabinet Secretary responsible for finance submits estimates of the coming financial year to the National Assembly, that the National Assembly considers the estimates together with those submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary, that a Committee of the National Assembly then carries out public participation and then the National Assembly debates and passes the Appropriation Bill

18. It was stated further that the sole body authorized to appropriate funds under article 95(4) of the Constitution is the National Assembly and therefore, the question as to what amounts to an adequate appropriation is to be determined by the National Assembly which carried out its constitutional mandate and appropriated adequate funds to the 1st respondent, a matter which the 1st respondent has acknowledged, that article 223 allows Parliament to approve Supplementary appropriations within the financial year to cater for circumstances where the approved allocation is insufficient and therefore the 1st respondent can be allocated additional funds in supplementary appropriations if the need arises, and that the petition fails to meet the test set in the *Anarita Karimi Njeru* case.

19. The replying affidavit was sworn by Samuel Njoroge, the Clerk of the 2nd respondent who deponed that he was authorized by the Rt Hon Speaker of the National Assembly to swear the affidavit on its behalf. He deponed that the question of the adequacy or otherwise of funds allocated by the 2nd respondent Assembly to various State Organs, such as the 1st respondent, is a policy and political question, that this court lacks the necessary tools and expertise to determine such questions, that the 2nd respondent has always allocated sufficient funds to the 1st respondent in compliance with article 249(3) of the Constitution, that in the premises, the petitioner has no cause of action against the 2nd respondent, that the 2nd respondent is the only body authorized under article 95(4)(b) of the Constitution to appropriate funds for expenditure by the National Government and other State Organs, including the 1st respondent, that the power of the purse is the exclusive preserve of Parliament under article 206(2)(a) which provides that funds can only be appropriated from the Consolidated Fund as approved by an Act of Parliament, that the 2nd respondent exercises this mandate after a comprehensive budget process under article 221. He again summarized the process into 5 steps as already set out in the grounds of opposition.

20. He deponed further that the National Treasury also conducts extensive public sector hearings on the Budget Policy Statement, that for the financial year 2020/21, the National Treasury invited the public to submit views on the national budget. He exhibited a copy of a Press Release by the National Treasury requesting the Public and Stakeholders to submit comments on the 2020/21 National government budget and added that the proposed budget estimates for the financial year 2020/21 were submitted to the National Assembly on 29 April 2020 and committed to BAC for review, that BAC facilitated extensive public participation on the estimates for the Financial Year, that BAC also held public consultations in Tana River, Garissa, Kitui, Murang'a, Turkana, Samburu, Kericho, Narok, Busia, Homabay and Kisii. He exhibited a copy of BAC's Report containing the views from the public and

averred that as captured in the Report, in identifying the said Counties as venues for public hearings, BAC considered diversity and the principle of wider participation.

21. Mr Njoroge further deponed that BAC also received written memoranda from the public, considered views from the public and stakeholders and tabled its Report on the estimates for the financial year 2020/21 as can be discerned from the exhibited Report, that the Report was approved by the 2nd respondent which then appropriated the funds. According to him, Gross total estimate of Kshs 4,213,340,190 was allocated to the 1st respondent under Vote 0617000 and Kshs 259,544,652 under Vote 0618000 for management of electoral process.

22. He averred further that in the Appropriation Act assented to by the President of the Republic, for the Vote R2031 for the year ending 30 June 2022 for current expenses, the 1st respondent was allocated the aggregate sum of Kshs 14,226,688,218/- (being Kshs 14,124,691,611 for Vote 0617000 for management of electoral processes and Kshs 101,996,607 for delimitation of electoral boundaries). He exhibited a copy of the Appropriation Act 2021. He further deponed that on 30 June 2021, the Supplementary Appropriation Act was published, that the same allocated a further sum of Kshs 107,393,869 to the 1st respondent for management of electoral process. He also exhibited a copy of the Supplementary Appropriation Act 2021. According to the deponent therefore, the 2nd respondent has met the requirements of article 249(3) of the Constitution which requires Parliament to allocate adequate funds to enable each commission and independent office to perform its functions.

23. In conclusion, Mr Njoroge deponed that the petition has failed the specificity test established by the authority of *Anarita Karimi Njeru* which stated that "if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) 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."

Hearing of the Petition

24. I took over this matter on 04 May 2023 when it was first placed before me. By then, directions had already been given by my brother, Ogola J on 11 October 2022 who had directed that the matter would be canvassed by way of written submissions. Pursuant thereto, the petitioner was directed to file and serve his submissions within 21 days upon which the respondents would then also file and serve theirs. However, by the time I took over the matter, the petitioner, although the originator of the case, had 5 months later, not complied with Ogola J's directions since he had not yet filed his submissions. The 1st respondent had however already filed its submissions on 05 December 2022. I then gave strict timelines upon which the Petitioner must have filed and served his submissions to enable the 2nd respondent also so file. I however notice that the 2nd respondent then filed its submissions on 09 May 2023 and the petitioner eventually also filed on 24 May 2023, the last party to file submissions, contrary to the directions given by Ogola J.

25. Be that as it may, considering the weighty nature of the matters raised herein, I allowed the parties, through their Advocates, to orally highlight their submissions. This was duly done on 10 November 2023.

26. It is also relevant to note that by the interim orders granted by Ogola J on November 1, 2021, the 1st respondent was temporarily prohibited from closing the voter registration exercise slated for closure on 02 November 2021. It however appears that the orders were later set aside. In any event, the 2022 general elections having come and gone during the intervening period, the issue of extension of the voter registration exercise became spent, as was a number of other prayers made in the petition. The

specific prayers overtaken by events and which are no longer matters for determination are prayer (b), (d, (e). The prayers that are still live are prayers (a), (c), (f), and (g). Prayers (h) and (i) on the other hand are mere ancillary prayers and are therefore not substantive.

27. For clarity therefore, the prayers that are still in contention are the following 4:

a. A declaration be and is hereby issued that the Electoral Commission (IEBC), the 1st respondent, by carrying out seasonal and or periodical national mass voter registration and by failing to continuously carry out national voter registration without breaking and or limits is unconstitutional and in total violation of the Constitution of Kenya and in particular it offends articles 38(3)(a), 27(1) & (2); 47(1) and 88(4)(a) of the *Constitution of Kenya 2010*.

c. A declaration be and is hereby issued that failure by the National Assembly, the 2nd respondent, to allocate enough and/or sufficient funds to the Electoral Commission (IEBC) to be able to continuously carry out national voter registration is unconstitutional and in total violation of article 95(4)(b) of the *Constitution of Kenya 2010*.

f. The honourable court do issue and hereby issues a mandatory injunction compelling the 2nd respondent, the National Assembly, to always allocate sufficient funds to the IEBC to enable it carry out its responsibility of continuous national voter registration in accordance with article 88(4)(a) of the *Constitution*.

f. The honourable court do issue and hereby issues a mandatory injunction compelling the IEBC to always carry out continuous and/or perpetual national voter registration without any breaks and/or limits in accordance with the provisions of article 88(4)(a) of the *Constitution* and section 4(a) of the *IEBC Act*, No 9 of 2011.

Petitioners' Submissions

28. On whether the petition meets the test set in the case of *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272, counsel for the petitioner submitted that the question to be answered is "how precise should the constitutional petition be drafted?". He submitted that by dint of the provisions of articles 22 as read together with article 23 of the Constitution, the cornerstone of constitutional petitions is the Bill of Rights, that there is no specific way that has been designed in respect of how a constitutional petition should be tailored but what is paramount is that the same must be reduced into writing and must disclose the constitutional provisions that are alleged to be infringed. He cited rule 10(4) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (hereinafter referred to as 'the *Mutunga* Rules') and contended that the petition is well drafted in accordance with the law, that it discloses all that pertains and is required in a constitutional petition, it cites the constitutional rights that are threatened and or violated by the respondents, it demonstrates the nature of the threat and violation and the extent to which they are threatened and/or violated, it has precisely set out facts that relate to the complaint, and that it has also sought for declarations (Reliefs) as per article 23 of the Constitution as read together with rule 10(2)(g), of the *Mutunga* Rules. He also cited the three-Judge High Court decision in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR, HC at Nairobi, Constitutional Petition No 229 of 2012.

29. On whether the 1st respondent should carry out mass/national voter registration continuously and/or in perpetuity, counsel submitted that the reliefs sought are informed by the fact that the 1st respondent does its mass voter registration seasonally and/or periodically, that it is in the public domain and the court should take judicial notice, that it is only during mass/national voter registration that the 1st respondent registers significant number of voters, as much as they have contended that voter registration is a continuous process that takes place at the respective branch offices, there is nothing that

has been submitted to this court to demonstrate and or prove that there is significant voter registration that takes place at 1st respondent's respective offices and or branches until and unless they launch mass/national voter registration - what the 1st respondent has referred to as outreach programme. He then cited article 88(4) of the *Constitution* and submitted that in view of that provision, the 1st respondent has constitutional obligation to continuously carry out mass/national voter registrations, that it is not in dispute that indeed the 1st respondent does not continuously carry out mass/national voter registration as envisaged under article 88(4), that they do it seasonally and or periodically, that according to the 1st respondent, they do outreach programmes for registration of voters which are limited and subject to the funds allocated and/or appropriated to it by the 2nd respondent. According to counsel, the failure to continuously carry out mass/national voter registration violates the citizens' rights envisaged under article 38(3)(a) of the *Constitution* that guarantees constitutional right to register as a voter, that therefore the court should declare that 1st respondent's failure to continuously carry out mass/national registration of voters as unconstitutional.

30. On whether the 2nd respondent should allocate/appropriate sufficient funds for mass/national continuous voter registration by the 1st respondent, counsel cited article 95(4)(b) of the *Constitution* and submitted that in view of the provisions of that article, the 1st respondent has the mandate to appropriate funds for expenditure by the state organs, that in the replying affidavit filed by the 1st respondent, it is deposed that the 1st respondent depends on funds allocated to it by the 2nd respondent and as such operates within the means of the funds appropriated, in other words, what the 1st respondent is saying is that it has failed to continuously carry out mass/national voter registration due to the fact that the 2nd respondent has failed to allocate it sufficient funds, that in its pleadings, the 1st respondent contended that the funds allocated to it by the 2nd respondent is not sufficient for it to carry out continuous outreach programmes for mass/national voter registration. According to counsel, the 1st respondent's failure is attributed to lack of sufficient funds, and that the 2nd respondent has constitutional obligation by dint of the provisions of article 95(4)(b) of the *Constitution* to ensure that the 1st respondent's constitutional mandate under article 88(4) is realised and fulfilled.

31. Counsel submitted further that through its grounds of opposition, the 1st respondent has stated that by dint of the provisions of article 165 of the *Constitution*, the High Court lacks jurisdiction to deliberate on funds appropriated by the National Assembly. According to him, the question that arises therefore is; does this honourable court has jurisdiction, mandate, power and authority to compel the National Assembly to appropriate sufficient funds to the IEBC to enable it carry out continuous mass/national voter registration?

32. He submitted that by dint of the provisions of article 23 of the Constitution, the High Court may make declarations and issue injunctions in respect of infringement and violation of constitutional rights, that further by dint of the provisions of article 165(6), the High Court has jurisdiction to supervise all government institutions, the 2nd respondent included. He cited the case of *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR, HC at Machakos Constitutional Petition No 9 of 2018, and submitted that in view of the holding made therein by Odunga J (as she then was) this court has power and mandate to supervise the 1st respondent and can as well compel it to do what is just in the interest of the public. He submitted further that in the case of *Orange Democratic Movement (ODM) v National Treasury & 5 others* [2017] eKLR, HC at Nairobi, JR Case No 483 of 2016, Aburili J issued an order compelling the National Assembly to allocate and appropriate not less than 0.3% of the national government revenue collected, to the Political Parties Fund.

1st Respondent's Submissions

33. On his part, counsel for the 1st respondent submitted that article 38 of the *Constitution of Kenya* adopts a voluntary model whereby citizens are free to register as voters and voluntarily exercise their political rights as they wish, that this is juxtaposed to the mandatory model where Kenyans would be automatically registered as voters whenever they reached the age of majority, that article 38(3)(a) provides that every adult citizen has the right without unreasonable restrictions to be registered as a voter, and that article 88(4) provides the statutory basis for the 1st respondent's mandate to conduct continuous registration of voters. He also cited section 5(1)(a) of the *Elections Act* No 24 of 2011 and section 4 of the *Independent Electoral and Boundaries Commission Act*, No 9 of 2011 (IEBC Act) and submitted that in compliance with the said provisions, the 1st respondent has always undertaken and continues to undertake continuous registration of voters at the constituency level, a process which is always undertaken from when the register of voters is opened until 60 days before the general elections, that what was to terminate on November 1, 2021 was the ECVR exercise and not the continuous CVR, that ECVR is an outreach program rolled out with the aim of having as many people to register as voters, and that the 1st respondent is not obligated and neither is there any requirement under the law to carry out ECVR.

34. Counsel submitted further that the primary reason why the petitioner filed the instant petition is because the 1st respondent did not achieve its target of registering 6 million new voters. According to counsel however, it is due to the low voter registration turnout that it embarked on the ECVR exercise, that failure by the 1st respondent to achieve its target is not sufficient reason why it should be compelled to undertake "a perpetual national voter registration exercise without break and that registration as a voter is a voluntary exercise and only willing citizens can so register. He cited the case of *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2017] eKLR.

35. He contended further that the law has set out the manner in which the 1st respondent is to conduct its constitutional mandate including registration of voters and this court should exercise restraint in interfering with such mandate, that the 1st respondent is a statutory organ which should be allowed to act independently, that further, the ECVR is a cash incentive exercise with a significant financial implication and the 1st respondent can only undertake the same to the extent that budgetary allocation would allow, allocation of funds is a role of the 2nd respondent and the 1st respondent would be more than willing to undertake ECVR as would be provided there is sufficient allocation of funds for the exercise. He cited the Court of Appeal case of *Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others* [2016] eKLR in which the case of Madison v Marbury 5 US 137 was relied upon, in respect to the limitation on the Judiciary's engagement in formulation of government policy which is a function of the executive. On the same point, he also cited the holding of Mumbi Ngugi J (as she then was) in the case of *Ndoria Stephen vs Minister for Education & 2 others*, Nairobi High Court Petition No 464 of 2012.

2nd Respondent's Submissions

36. On his part, the 2nd respondent's counsel agreed with the 1st respondent that the role of the High Court in article 165 of the *Constitution* is not to question the amount of funds allocated by the 2nd respondent to state organs. He submitted that the question of the adequacy or otherwise of funds allocated to various State organs falls under the policy and political mandate of the 1st respondent, and the court should be hesitant to interfere. He cited the case of *Patrick Ouma Onyango & 12 others v Attorney General and 2 others* [2005] eKLR as quoted in the case of *Republic v Speaker of the National Assembly & 4 others ex-parte Edward RO Ouko* [2017] eKLR in which the court, on the issue of whether it

should interfere with a political or legislative process, stated that "the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters".

37. Further, counsel submitted that in its response, the 1st respondent has conceded that the 2nd respondent has always allocated sufficient funds to it, in compliance with article 249(3) of the *Constitution*. According to counsel therefore, the petitioner has no cause of action against the 2nd respondent.

38. On whether the 2nd respondent carried out its constitutional mandate and appropriated adequate funds, counsel submitted that the power of the purse is the exclusive preserve of Parliament under article 206(2)(a) of the *Constitution*, that the 2nd respondent exercises this mandate after a comprehensive budget process under article 221 of the *Constitution*. He again summarized the steps as already set out in the 2nd respondent's replying affidavit, namely, the Cabinet Secretary for Finance submitting estimates of the coming financial year to the 2nd respondent, the latter considering the estimates together with those submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary, the Budget & Appropriation Committee (BAC) of the 2nd respondent making recommendations to the 2nd respondent on the estimates submitted by National government organs, BAC facilitating public participation before making its recommendations, the 2nd respondent debating and passing the Appropriation Bill, and the National Treasury also conducting public sector hearings on the Budget Policy Statement.

39. Counsel reiterated that for the financial year 2020/21, the National Treasury invited the public to submit their views on the national budget through a press release, that the proposed budget estimates were submitted to the National Assembly on 29 April, 2020 and committed to the BAC for review, that BAC facilitated extensive public participation on the estimates and prepared a comprehensive report, that BAC also received written memoranda from the public, BAC considered views from the public and stakeholders and tabled its Report which was approved by the 2nd respondent upon which the 2nd respondent appropriated the funds to the 1st respondent, that in the Appropriation Act assented to by the President, the 1st respondent was allocated the funds, that on 30 June 2021, the Supplementary Appropriation Act was published which allocated further funds to the 1st respondent. According to counsel therefore, the 2nd respondent has met the requirements in article 249(3) of the *Constitution* which requires Parliament to allocate adequate funds to enable each commission and independent office to perform its functions.

40. Counsel also reiterated that the petition has failed to meet the specificity test established by the authority of *Anarita Karimi Njeru* (*supra*) as quoted in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. He contended that the petition has not been pleaded with reasonable precision and does not provide adequate particulars of the claims relating to the alleged violations of the Constitution.

Analysis and Determination

41. Upon carefully considering the record including the affidavits, submissions and authorities presented, I find that the matters raised herein can all be summarized into two broad issues as follows:

    i. Whether the petition has met the specificity and precision test set out in the *Anarita Karimi* case.

    ii. Whether, contrary to constitutional provisions requiring the 1st respondent to continuously carry out national voter registration, the 1st respondent is or has only been carrying out seasonal and/or periodical national mass voter registration and thus whether by such alleged acts or

omissions, the 1st respondent is in violation of the provisions of articles 38(3)(a), 27(1) & (2), 47(1) and 88 (4) (a) of the *Constitution of Kenya*.

iii. Whether the 2nd respondent has not been allocating or has failed to allocate to the 1st respondent enough and/or sufficient funds to enable the latter continuously carry out national voter registration and whether by such alleged acts or omissions, the 2nd respondent is in violation of article 95(4)(b) of the *Constitution*.

42. Before I delve into determination of the issues identified above, I may comment that this court's jurisdiction to hear and determine constitutional petitions arising from allegations of violation or infringement of fundamental freedoms enshrined in the Bill of Rights is donated under articles 22 as read together with article 23 and also article 258 of the *Constitution.*

43. article 22(1) of the *Constitution* provides as follows;

> " Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

44. On its part, article 23(1) of the *Constitution* states that:

> " 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.

46. article 258(1) then provides as follows;

> " Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

45. The foregoing constitutional provisions are complemented by rule 4 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013,* commonly referred to as "the Mutunga Rules which provides as follows:

> " Contravention of rights or fundamental freedoms
>
> > "Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules".

46. On interpretation of constitutional provisions, article 259(1) of the Constitution then provides that "this Constitution 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; and (c) contributes to good governance."

i. Whether the Petition meets the test set out in the Anarita Karimi case

47. Before answering the substantive issues identified above, I first address the challenge raised by the 2nd respondent to the effect that the threshold for constitutional petitions has not been met by the petitioner because, in its view, the petitioner has not stated with precision how the rights cited have allegedly been violated.

48. In determining the said challenge, I agree that there is a long-standing principle in constitutional petitions that a petitioner must identify the constitutional entitlement threatened, infringed or violated and to demonstrate with some level of precision the manner of violation so as to enable a respondent mount a defence. Indeed, on the procedure for instituting a constitutional petition and the contents required to be included and/or disclosed therein, rule 10 of the *Mutunga Rules* stipulates as follows:

> "(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
>
> (2) The petition shall disclose the following—
>
> (a) the petitioner's name and address;
>
> (b) the facts relied upon;
>
> (c) the constitutional provision violated;
>
> (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
>
> (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
>
> (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
>
> (g) the relief sought by the petitioner.
>
> (3) Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the court."

49. On this need for precision, in the oft cited decision in Miscellaneous Criminal Application 4 of 1979, *Anarita Karimi Njeru v Republic* [1979] eKLR, the court remarked as follows:

> "...... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) 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...

50. This position has been affirmed in various subsequent decisions. For instance, in the Court of Appeal case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the court reiterated the importance of compliance with procedure despite the provisions of article 159 of the *Constitution* and despite the overriding objective principle under section 1A and 1B of the *Civil*

Procedure Act. The court affirmed that there is always need for precision in the framing of issues in constitutional petitions and pronounced itself in the following terms:

> "41. We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

51. The Supreme Court, too, weighed in on the issue in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where it stated as follows:

> "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. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

52. Upon my perusal the petition herein, I am satisfied that the petitioner has brought out the alleged violations to an acceptable degree. I do not believe that any reasonable person can truthfully claim that he or she, upon reading the petitioner, would be unable to decipher or understand the violations alleged by the petitioner or the grounds or the articles or provisions of the Constitution invoked. In my view, apart from merely alleging that the petition has not been drafted with precision, the 2nd respondent's counsel has not demonstrated or identified any specific alleged deficiencies. On the contrary, I find the petition to be quite articulate, eloquent and well-organized. In my view, the petitioner has laid out the constitutional provisions that he believes, warrant the court's intervention and has clearly identified the grounds and the manner in which those articles and rights are alleged to have been infringed or violated. The reliefs sought have also been well set out and linked to the facts stated. The petition has also laid out the factual matrix upon which the petition is based. I therefore find that the petition sufficiently meets the threshold required for constitutional petitions as set out in *Annarita Karimi* (*supra*).

53. I may also mention that it now regrettably appears to be the emerging norm for all respondents in constitutional petitions to always automatically raise the defence of alleged non-compliance with the *Annarita Karimi* case precision test as a default defence even where the same is clearly not merited. This emerging practice adds nothing but only unnecessarily convolutes court proceedings, it is not and cannot amount to good practice..

ii. Whether the 1st respondent has not been continuously carrying out national voter registration as required by law

54. The petitioner has alleged that 1st respondent has not been continuously carrying out national voter registration as required by law and that instead, the 1st respondent is or has only been carrying out seasonal and/or periodical national mass voter registration. According to the petitioner therefore, the 1st respondent is in violation of the provisions of articles 38(3)(a), 27(1) & (2), 47(1) and 88(4)(a) of the *Constitution of Kenya*.

55. The 1st respondent - the Independent Electoral Boundaries Commission (IEBC) - is the body established under article 88 of the Constitution charged with the exclusive mandate of conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. The importance of the right of citizens to freely register to vote and participate in elections cannot be gainsaid. In respect thereto, the Constitution of Kenya Review Commission, in its Final Report of, remarked as follows:

> " The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people's representatives, but also to elect or determine government election or appointment. They demonstrate the people's sovereignty and accountability by politicians. They lend legitimacy to governments."

56. In addressing the issue of political rights, article 38(3)(a) of the *Constitution* is relevant for purposes of the present Petition as it provides as follows;

> " Every adult citizen has the right, without unreasonable restrictions-
>
> (a) To be registered as a voter;

57. article 88(4) of the *Constitution* then outlines the mandate of the 1st respondent and sub-article (4)(a) provides one of those duties as follows:

> " 88
>
> (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-
>
> a. The continuous registration of citizens as voters;"

58. Further, section 5(1)(a) of the *Elections Act* provides as follows:

'5. Registration of Voters

1. Registration of voters and revision of the register of voters under this Act shall be carried out at all times except—

   a. in the case of a general election or an election under article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election;"

59. Further to the above, section 4(a) of the *Independent Electoral and Boundaries Commission Act* (IEBC Act) also states as follows:

> As provided for by article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for –
>
> b. The continuous registration of citizens as voters;"

60. On its part, article 83(3) of the *Constitution* provides as follows:

> " Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny an eligible citizen the right to vote or stand for election".

61. I must emphasise that it is not for the judiciary to micro-manage the 1st respondent as an electoral body. The 1st respondent must be allowed the room and space to exercise its discretion in the discharge of its mandate. However, the electoral body must comply with the letter and spirit of the Constitution and the law in general. Like all other independent commissions established under article 249 of the *Constitution*, the 1st respondent is subject to the Constitution and the law in general and therefore the exercise of discretion in the discharge of its constitutional and statutory mandate must be within the law. It follows therefore that failure by the 1st respondent to honour the provisions of the Constitution and the law in general in making any decision, would render such decision unlawful and susceptible to being set side by the High Court. This was the position reiterated by Lenaola J (as he then was) in the case of *Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission (IEBC) & another* [2013] eKLR where he stated as follows:

> " The IEBC is an independent body established under article 248(2)(c) of the Constitution and as an independent Commission and as such, in the performance of its functions the Commission is not subject to control or direction from any person or authority, including the court. article 249(2) of the Constitution lays emphasis on this independence devoid of any direction or control from any other person. The IEBC must be given discretion to assess the situation and intervene when in a particular situation demands such intervention. It is not for this court to compel the independent Commission to flex its muscles and exercise discretionary powers and least of all dictate to it when and how it is to flex those muscles."

62. As aforesaid, the petitioner has alleged that 1st respondent has not been continuously carrying out national voter registration as required by law and that instead, the 1st respondent is or has only been carrying out seasonal and/or periodical national mass voter registration. A similar matter previously came up before Chacha Mwita J in the run-up to the 2017 general elections during which time the 1st respondent had been undertaking mass voter registration for a period 1 month and which was to scheduled end on 14 February 2017. This was in the case of *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2017] eKLR. I appreciate that in that decision, Judge Mwita was dealing with an interlocutory application prior to hearing the main substantive petition. However, in directing the 1st respondent not to stop the mass voter registration

exercises as scheduled, and to continue with the exercise for another 5 days up to 19 March 2017, the Judge made the following relevant statements:

> "............ The applicant has sought this courts discretion to stop the 1st respondent from closing voter registration which was due to close on 14 February 2017 until the petition is heard and determined or until sixty days to the election. However, according to the 1st respondent voter's registration will continue until sixty days to the election, that is sometime in May 2017
>
> Voter registration is a constitutional right, it is clearly provided for in the Constitution. Every citizen has a right to vote and be voted for. He/she can only do so that, is exercise the inalienable right to vote by registering. Voter registration is continuing even as this case goes on, only that it will be scaled down to the constituency level.
>
> The 1st respondent has argued that extending voters' registration any time after today will have serious implications to the 1st respondent.
>
> This court is aware that the 1st respondent has a constitutional mandate to perform and will only interfere in exercise of its jurisdiction under article 165(3) if there is evidence that the 1st respondent has acted unlawfully or irrationally.
>
> From the submissions tendered on behalf of the 1st respondent, there is no evidence that voter registration will be closed anytime soon. What was to end was the initiative rolled out to reach many voters called "Mass Voter" registration.
>
> To conduct such an exercise involves mobilization of personnel and equipment and has financial implications. The 1st respondent has power to extend mass voter registration on assessment the need and resources available
>
> To my mind, the issues for determination are not in the motion but in the petition. The petition raises substantial issues that would have been addressed in order to conclusively determine this matter, for instance even if I granted the orders, there is still the question of what documents potential voters will present during registration. There is also the question of whether passports should be valid or not or whether birth certificates should be used or not.
>
> From that perspective, allowing mass voter registration to continue, which is at the discretion of the 1st respondent, will not be the solution. Which document will be used even during continuous voter registration is critical without resolving that issues will not conclude this matter. That is where the petitioner's main concern is.
>
> I am alive to the provisions of article 83(3) which provides that administrative arrangements for registration of voters and conduct of elections should be designed to facilitate, and should not deny, a citizen the right to vote or stand for election.
>
> The question is whether the arrangement to continuously register voters at the constituency level has in anyway negated the provisions of article 83(3) and therefore violated voters rights.
>
> The petitioner has argued passionately that it has. He has given examples of some areas in this county where the ward may be as big as a constituency, and that people may have difficulties accessing the constituency headquarters for purpose of registration, as voters,

That argument is not without merit. That perhaps informs why the 1st respondent has to conduct periodic mass voter registration,

The 1st respondent has not shown any sign of extending the period for mass registration to allow those who have not registered to register.

Although this court should not get involved in administrative matters of the 1st respondent, taking into account the fact that this exercise has been going on for the one month and was due to end on 14 February 2017 and in order to give any would be potential voter to register, and taking into account the logistical and financial implication of extending the period for mass voter registration as the petitioner has urged, I will make the following orders.

1. The notice of motion dated 13 February 2017 is allowed in part.

2. The 1st respondent, the Independent Electoral and Boundaries Commission is hereby directed to continue with mass voter registration up to 19 February 2017 at 6.00p.m after which it shall stand closed.

3. Each party do bear their own costs."

63. In this instant case, in response to the petitioner's allegations, the 1st respondent has explained that following the 2017 general elections and the consequential closure of the Register of Voters, the 1st respondent re-opened the registration process at its Constituency Offices countrywide in early 2018, that this process is known as the Continuous Voter Registration (CVR), that as at 2020, it had netted a total of 180,938 registered voters, that in view of the low numbers of voters registered through the CVR as at June 2020, the 1st respondent decided to launch an outreach programme for registration of voters at the Ward Level for a period of 30 days, a process internally described as Enhanced Continuous Voter Registration (ECVR), that the 1st Respondent intended to conduct the ECVR and subsequently revert to its regular registration at the Constituency Offices thereafter.

64. I find the above explanation to be plausible and reasonable and I accept it. I agree with the 1st respondent that the petitioner has not demonstrated that voter registration is not continuing at the Constituency level even as this case goes on as alleged. I also have no reason to disbelieve the 1st respondent on its insistence that the voter registration process is and has been continuous and that any person who wishes to exercise his right to register as a voter is able to do so at any of the 290 constituency offices in the country on any day. The 1st respondent has also stated on oath that it shall continue to conduct such continuous registration of voters at the constituency offices interspersed with outreach initiatives at constituencies up until 60 days to the next election date as stipulated under section 5(1) of the *Elections Act*, 2011. On his part, the petitioner has not presented any evidence to this court to controvert the 1st respondent's averment that the register is always open. The petitioner has therefore failed to prove that closure of the ECVR will lock out citizens wiling to register as voters. Apart from mere allegations, the petitioner has failed to offer any evidence to controvert the 1st respondent's submission that any eligible citizen can walk up to the 1st respondent's offices located in each of 290 constituencies and register as a voter.

65. Apparently in appreciating the failure to present evidence, the petitioner's counsel has resorted to urging this court to take judicial notice of the alleged fact that voter registration is not continuing at the 1st respondent's Constituency level. This, the court cannot do. It is true that under the provisions of section 59 of the *Evidence Act*, courts can be called upon to take judicial notice of certain facts that have attained some notoriety and which facts do not therefore need to be proved. However, evidence must be tendered to prove that the alleged facts have indeed gained sufficient notoriety for the court

to take judicial notice of the same. Furthermore, where an allegation of dereliction of a constitutional duty is heavily contested as it is in this matter, the same cannot be simply assumed. It is therefore not safe in my view to make assumptions in circumstances such as obtains in this case.

66. I also agree with the 1st respondent that in Kenya, registration as a voter, and even exercise of the right to vote in a general election, is an optional choice unlike in some other countries where registration as a voter and participation in elections is automatic and mandatory by law upon attainment of the age of majority. In Kenya therefore, citizens are free to choose to register as voters at any time and may exercise their political rights as they wish on their own volition. One may therefore lawfully opt not to register as a voter. As aforesaid, article 38(3) of the *Constitution* only requires that the registration exercise should be "without unreasonable restrictions" and therefore not limit any citizen from exercising his political rights to so register. article 83(3) stipulates that administrative arrangements for registration of voters and conduct of elections "should be designed to facilitate, and should not deny, a citizen the right to vote or stand for election". In my view therefore, the burden on the Petitioner was to demonstrate that the 1st respondent's actions or omissions, if any, resulted into such unreasonable limitation as prohibited under article 38(3) of the *Constitution*. However, the petitioner has failed to discharge such burden since he has failed to controvert the 1st Respondent's insistence that the CVR is ongoing and will only be closed 60 days to the next general election as required by law.

67. I believe that the petition would have been much stronger had the petitioner provided evidence such as affidavits sworn by people who have recently attained the age of majority and who allege that they presented themselves to the 1st respondent's constituency offices but were unable to register as voters because the 1st respondent was not carrying out such registration. In this case, not a single person is reported to have come out to complain over failure to achieve such registration in the manner aforesaid. Indeed, I did put this question to the petitioner's counsel during highlighting of submissions and he graciously conceded that indeed he has not availed any such evidence.

68. It is also settled that an order of *mandamus* can only issue where it is demonstrated that in the performance of his public duty, a public body or officer has refused to perform that duty and which has as a result, amounted to an infringement of the legal right that an applicant possesses. As I have already held, in this case the petitioner has failed to demonstrate any such failure, refusal or dereliction of duty on the part of the 1st respondent. In the absence of demonstration of violation or threatened violation of the fundamental rights and freedoms or breach of the law, this court cannot interfere with the discretionary mandate of the 1st respondent (IEBC) and purport to step into its shoes. To this end, I am also guided by the decision of Lenaola J (as he then was) in the case of *Wamwere v Attorney Genera*l [2004] 1 eKLR where he stated the following:

> "...... I see no need to seek leave that a public officer should be compelled to do something when there is no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal had been shown, it must also be shown to be unlawful. Sadly, in this case, neither has been shown."

69. *Mandamus* can therefore only issue to compel a person to perform a particular duty imposed on him by the Constitution or statute and which duty he has failed, refused or neglected to perform to the detriment of the applicant. For an applicant to therefore succeed in an application for *mandamus*, he must demonstrate that a respondent has failed to perform a constitutional or statutory duty. *Mandamus* cannot therefore issue, where, as herein, it is sought to compel the exercise of discretionary power and moreso, the exercise of such power with a view to arriving at a particular result (see for instance, the decision of Majanja J in *Republic v Attorney General & another ex parte Wanyiri Kihoro & 5 others* [2014] eKLR

70. Similar sentiments were also made by Ringera J in the case of *Jotham Mulati Welamondi v The Electoral Commission of Kenya* [2002] 1 KLR 486) where he found as follows:

> " On whether or not an order for mandamus could issue to compel the Electoral Commission to perform a duty imposed upon it by the Constitution, I am in agreement with the submission of counsel for the applicant that it would in appropriate circumstances. The authorities cited show that *mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. A *fortiori* it is should be an appropriate remedy to compel the performance of a constitutional duty. In similar vein I reject the submission of counsel for the respondent that the court cannot by way of Judicial Review intervene where the public body is exercising a discretionary power. In my judgment, the court would be perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. But such intervention would only be by way of prohibition (if the act is incomplete) or certiorari (if the act is complete) and not by way of *mandamus*. As the application before court is for an order of *mandamus*, the proper question here is this: Has the Electoral Commission refused to perform a duty imposed on it by the Constitution to the detriment of the applicant? Section 43(5) of the Constitution which has been invoked here provides:-
>
> > "Whenever a census of the population has been held in pursuance of any law, or whenever a variation has been made in the boundary of an existing administrative area, the Commission may carry out a review and make an alteration to the extent which it considers desirable in consequence of that census or variation."
>
> To my mind, the above provision does not impose any duty on the Electoral Commission to carry out a review and make an alteration to constituency boundaries whenever there has been either a census or a variation in the administrative boundaries. It confers a discretionary power to be exercised in a manner considered desirable by the commission. In those premises I am of the persuasion that there being no peremptory duty imposed on the Commission by that provision of the Constitution, the submission by counsel for the respondent that *mandamus* as a remedy is misconceived is irresistible. *Mandamus* cannot issue to compel the exercise of a discretionary power let alone its exercise with a view to arriving at a particular result as prayed by the applicant here ...."

71. In this case, it has not been shown that the 1st respondent – IEBC - has in any way failed to adhere to any law nor that it has failed to discharge a specific mandate as required of it or infringed upon any fundamental right of the petitioner or any other Kenyan voter. The law only requires the 1st respondent to carry out continuous voter registration (CVR), not "enhanced" continuous voter registration (ECVR). Carrying out a ECVR is a decision that can only be determined by the 1st respondent on the basis of many factors, including the resources available to it. There is also no legal requirement obligating the 1st respondent to decentralize or spread the voter registration exercise from the constituency level to the ward level. Like Lenaola J (as he then was) in the case of *Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission (IEBC)* (*supra*) therefore, I too find that the petitioner has not presented any concrete evidence to support his claims. He has only made casual allegations. This court cannot grant the drastic reliefs in the form of mandatory orders as sought against the respondents in the absence of any concrete evidence to support the same. Of course, the issues raised by the petitioner are weighty but without evidence, they remain in the realm of conjecture.

72. In view of my above findings, the second issue identified above does not arise. Nevertheless, I will still determine it.

iii. Whether the 2nd respondent has failed to allocate to the 1st respondent enough and/or sufficient funds to enable the latter to continuously carry out national voter registration and whether by such alleged omission, the 2nd respondent is in violation of article 95(4)(b) of the Constitution does not arise

73. In tackling this issue, I cite the said article 95(4)(a),(b) and (c) and also 95(5)(b) which are premised as follows:

> " 95. Role of the National Assembly
>
> (4) The National Assembly—
>
> (a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;
>
> (b) appropriates funds for expenditure by the national government and other national State organs; and
>
> (c) exercises oversight over national revenue and its expenditure...
>
> (5) The National Assembly—
>
> (a) ....
>
> (b) exercises oversight of State organs.

74. The above articles are therefore categorical that the 2nd respondent - National Assembly - budgets, collects, shares between the levels of government, and audits revenue. It also has a general oversight function which means that it works hand in hand with the National Treasury over the finances of the Country.

75. On its part, article 249(3) of the *Constitution* provides as follows:

> " 249. Objects, authority and funding of commissions and independent offices
>
> ....
>
> (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote."

76. It is clear that no definition is given on what amounts to "adequate funds" as used above nor is any formula provided to determine the phrase "adequate funds".

77. It is also evident that funds allocated or appropriated to the 1st respondent come from the Consolidated Fund. Withdrawal of funds from the Consolidated Fund is itself a matter regulated under the

Constitution and in regard thereto, it is Parliament that is mandated to oversee the same. This is clear from article 206 which provides as follows:

" 206. Consolidated Fund and other public funds

(1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—

(a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or

(b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

(2) Money may be withdrawn from the Consolidated Fund only—

(a) in accordance with an appropriation by an Act of Parliament;

(b) in accordance with article 222 or 223; or

(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament.

(3) Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.

(4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

78. The Consolidated Fund is therefore the main bank account of the national government into which all money raised by it or received on its behalf is paid. It is also clear from the foregoing provisions that funds from the Consolidated Fund can only be withdrawn with the authority of Parliament and as approved by the Controller of Budget (see the decision of Lessit, Mwita and Njuguna J, in the case of *Katiba Institute & another v Attorney General & another* [2020] eKLR)

79. As correctly submitted by counsel for the 2nd respondent, the 2nd respondent exercises its above mandate after a comprehensive budget process as set out under article 221 of the *Constitution*. The article provides as follows:

221. Budget estimates and annual Appropriation Bill

(1) At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.

(2) The estimates mentioned in clause (1) shall-

(a) include estimates for expenditure from the Equalisation Fund; and

(b) be in the form, and according to the procedure, prescribed by an Act or parliament.

(3) The National Assembly shall consider the estimates submitted under clause (21) together with the estimates submitted under clause (1) together with the estimates submitted by the parliamentary Service Commission and the Chief Registrar of the Judiciary under articles 127 and 173 respectively.

(4) Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly.

(5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

(6) When the estimates of national government expenditure and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorise the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for appropriation of that money for the purposes mentioned in the Bill.

(7) The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution of an Act of Parliament.

80. With the above scenario therefore, it is no surprise that in this case, the 2nd respondent – National Assembly – has taken the position, which I agree with, that the question of the adequacy or otherwise of funds allocated by the 2nd respondent to various state organs, including the 1st respondent, is a policy and political question, that this court lacks the necessary tools and expertise to determine such questions, that the 2nd respondent is the only body authorized under article 95(4)(b) of the *Constitution* to appropriate funds for expenditure by the National Government and other State Organs, including the 1st respondent, that the power of the purse is the exclusive preserve of Parliament under article 206(2)(a) which provides that funds can only be appropriated from the Consolidated Fund as approved by an Act of Parliament, and that the 2nd respondent exercises this mandate after a comprehensive budget process under article 221.

81. I also agree with counsel for the 2nd respondent's counsel's break-down of the budget process into 5 steps, namely, that the Cabinet Secretary for Finance submits estimates of the coming financial year to the National Assembly, the 2nd respondent considers the estimates together with those submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary, the Budget & Appropriation Committee (BAC) of the 2nd respondent makes recommendations to the 2nd respondent on the estimates submitted by the National government organs to the House, BAC facilitates extensive public participation before making its recommendations and that finally, the 2nd respondent debates and passes the Appropriation Bill.

82. What the 2nd respondent's counsel has raised is basically the question of "justiciability" or the "political question". The courts have had occasion to deal with this doctrine on several occasions. One instance was the decision of Lenaola J (as he then was) in the case of *Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion & Constitutional Affairs & another* [2013] eKLR in which the court differentiated a justifiable controversy (which is amenable to judicial review) and a policy decision by

the political branches of government (which is a "political question" inappropriate for judicial review). The Judge expressed himself as follows:

> " The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand."
>
> In *Patrick Ouma Onyango & 12 others v Attorney General & 2 others*, Nairobi, High Court Misc App 677 of 2005 (OS) [2005] eKLR the court asked whether it should interfere with a political or legislative process stated;
>
> > "The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters".

83. It is also agreed that courts should not issue decisions that would amount to an unlawful interference with the powers vested by the Constitution on the Executive and the Legislature. The court should not be seen to be intruding into the realm of powers bestowed on other arms of the Government. The doctrine of separation of powers between the different arms of government dictates that the court embraces constitutional humility and accepts the decisions of the other constitutional organs.

84. It is however also agreed that that the doctrine of separation of powers does not, in appropriate cases, and each case depending on its own peculiar circumstances, facts, and evidence, oust the court's jurisdiction to nullify and/or revoke actions made by the other organs if such actions violate the spirit and the letter of the Constitution. It is also a fact that the courts mandate is to provide checks and balances for the Executive and will not therefore hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandates. To do otherwise would be a dereliction of the courts' constitutional role. The only rider is that the court will hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure (see the decision of Mwera, Warsame and Mwilu, JJA in the case of *Kenya Youth Parliament & 2 others v Attorney General & another*, Constitutional Petition No 101 of 2011).

85. I also refer to the remarks made in the 3-Judge bench High Court 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) JM Ngugi, M Ngugi & GV Odunga, JJ (as they all were) where the court expressed itself as follows:

> " 71. As was rightly argued by counsel for the amici, there is nothing like supremacy of Parliament outside the Constitution. There is only supremacy of the Constitution. Given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. Where any state organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. ...."

86. The courts therefore have full and unhindered jurisdiction to review the constitutionality of a decision by a co-ordinate arm of government beyond procedural matters (see the decision of, again, Mwera,

Warsame and Mwilu, JJA in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011]* eKLR).

87. There is however need by the courts to exercise utmost caution when exercising this jurisdiction so as not to usurp the powers of other organs of government. To this end, I cite the decision of Majanja J in the case of *Jayne Mati & another v Attorney General & anothe*r [2011] eKLR. In that case, although the judge very correctly reiterated that the Constitution 2010 ushered in a new era, not of "Parliamentary supremacy" but one of "supremacy of the Constitution" and observed that the conduct of Parliament may well be questioned before the courts in appropriate circumstances, he nevertheless, also very correctly, appreciated that budget and appropriation process is a matter within the competence of the legislature, and not the courts. He pronounced himself as follows:

> " 31. At this juncture I must emphasise that separation of powers between the judiciary executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.
>
> 32. *In the Matter of the Interim Independent Electoral Commission* (*supra* at para 54) the Supreme Court stated, "The Effect of the Constitution's detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."
>
> 33. These sentiments, in my view, apply with equal force to the legislature and legislative processes. For the Constitution has ushered in a new era, not of Parliamentary supremacy but one of supremacy of the Constitution. The superintendents of the Constitution are the courts of law which recognise that each organ in its own sphere working in accordance with law not only strengthens the Constitution but ensures that the aspirations of Kenyans are met.
>
> 34. The collective effect of articles 3, 10(1) and 20(4) is that every person has the obligation to respect, uphold and defend the Constitution and that the Constitution binds every state organ, state officer, public officer, person, or authority. In the day-to-day running of the affairs of state, the court will hardly intervene nor be called upon to give guidance of certain aspects of the Constitution. It is neither expected nor required that the courts will be involved in the minutiae of running government.
>
> 35. The principle of the separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The role of the Judiciary within

this framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so.

36. The budget and appropriation process is within the competence of the legislature. The Speaker of the National Assembly, who was alive to these breaches, gave guidance as is required of any officer of state acting in accordance with the Constitution. In my view, the Speaker's decision was guided by provisions and values of the Constitution. In other words, the ruling by the Speaker, the procedures adopted and directions given were made in good faith, they were not calculated to undermine the constitutional bedrock of the budget process and the Constitution itself."

88. In view of all the authorities cited above and having considered this matter intensively, it is clear that the merits of the budgetary process of allocation of funds to the 1st respondent is a process that the Constitution lays in the hands of the Legislature working hand in hand with the Executive. What the petitioner is questioning is not the constitutionality of the process or manner adopted in allocating the funds but the "adequacy" or "sufficiency" of the amount of funds allocated. That is not, in my view, a matter within the purview of the courts to direct. Doing so, where procedural infirmity is not alleged or proved in the decision-making process, would amount to this Court overstepping its mandate.

89. On the above view, I find good company in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General* (*supra*) in which the Judges stated as follows:

> "...... the Constitution gives the Judiciary the power to interpret and enforce the Constitution. We know for a fact that that power and independence does not enable us to do what we like or think to be right by undertaking incursions into a territory solely reserved for the Executive and the Legislature. That reservation was made by the Constitution which also imposed the restriction upon us. This court cannot therefore behave like the Octopus stretching its eight tentacles here and there grasping powers not constitutionally spared for us. To grant the orders sought would undoubtedly be encroaching upon policy and legislation undertakings which are not reserved for the Judiciary."

90. Like the judges in the above case, I too, find that the charge of constitutional impropriety levelled against the 2nd respondent that allegedly it allocated insufficient funds to the 1st respondent to be without any evidential basis and therefore misconceived and unfounded. I too, am unable to uphold such allegations and assertions for it is not for this court to pronounce policy or to legislate. If the drafters of the Constitution or the pieces of legislation enacted thereunder wished to specify a formula on how to determine "sufficient" or "adequate" funds to be allocated to the 1st respondent for the purpose of voter registration, nothing would have been more difficult than to expressly state so.

91. In conclusion, I wholly embrace the sentiments made by the already referred to 3-Judge bench High Court case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others*; *Matemu* (*supra*) where the court expressed itself as follows:

> "71. .... As the cases cited above demonstrate, however, there is a legitimate question of how far the authority of the court to review the decisions of other state organs which exercise independent constitutional authority go. There are some areas where the court can simply not go; some outer limits on its power to review the decisions and actions of the other branches and state organs."

92. I also take cognizance of the guidance discernable from the Supreme Court case of *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR where the following was stated:

> "(95) By stopping short of prescribing a specific time limit, article 219 allows for a degree of flexibility on the part of the National Treasury in effecting monetary transfers to Counties. We would be hesitant to interfere with this arrangement, given the complexity and elasticity of the subject matter. We don't think that this court is the appropriate forum to determine with precision, when monies due to counties, should be actually transferred ...."

93. In light of the above, I too, find that by stopping short of prescribing a specific amount to be allocated to the 1st respondent – IEBC – for the purposes of conducting voter registration and not defining the term "adequate funds", the Constitution allows for some degree of flexibility on the part of the Executive and the Legislature in determining what is "adequate funds" on the basis of the many dynamics and variables that come into play during the national budgetary process. If the court were to purport to increase the budgetary allocation to the 1st respondent as sought by the petitioner, noting that resources can never be enough for every one and for every purpose, what will tomorrow stop any other state organ or independent commission to also approach the court and demand for a similar increase?

94. I note that the petitioner has relied on the case of *Orange Democratic Movement (ODM) v National Treasury & 5 others* [2017] eKLR, HC at Nairobi, JR Case No 483 of 2016, in which Aburili J issued an order compelling the National Assembly to allocate and appropriate not less than 0.3% of the national government revenue collected, to the Political Parties Fund. That decision is however inapplicable in this instant matter and is easily distinguishable since by law - section 24(1) of the *Political Parties Act* - the Political Parties Fund is entitled to receive from the National Government "such funds being not less than 0.3.% per cent" of the revenue collected by the National Government, as may be provided by Parliament; and contributions and donations to the fund from any sources. The 0.3% percentage is therefore expressly stipulated. This clearly is not the case herein where the amount to be allocated or appropriated to the 1st Respondent for carrying out its mandate, or specifically, to conduct voter registration, is not specified but left to budgetary policy and availability of national resources as left to deliberated upon by the Legislature and the Executive.

95. I must also mention the Court of Appeal case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR where the following was stated:

> "99. In *Peter Njoroge Mwangi & 2 others v Attorney General & another*, Nairobi Petition No 73 of 2010, it was aptly expressed that the legislature determines the legislative policy through the statute it enacts. In Speaker of the *Senate & another v Attorney General & 3 others* (2013) eKLR, the Supreme Court expressed itself as follows:
>
> > "... courts ought not to indiscriminately take up all matters that come before them but must exercise caution to avoid interfering with operations of the other arms of government save for where they are constitutionally mandated ...."
>
> 100. In *Ndora Stephen v Minister for Education & 2 others*, Nairobi High Court Petition No 464 of 2012, Mumbi Ngugi, J correctly observed that the

formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to article 43(1) of the Constitution, the provisions of article 20(5)(c) of the Constitution must be borne in mind. article 20(5)(c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues ....”

96. It is therefore my finding that under article 95(4)(a) of the *Constitution*, the authority to determine the allocation of financial resources revenue is an exclusive preserve of the 2nd respondent - National Assembly. National budget making and legislative processes therefore should be allowed to continue in the State organ mandated by the Constitution. to undertake such task.

97. In any event, in this case, the 1st respondent – IEBC - has absolved the 2nd respondent of any blame by confirming that indeed the 2nd respondent - National Assembly - has in compliance with article 249(3) of the *Constitution*, always allocated to it “adequate funds” to enable it carry out its mandate. It is therefore also doubtful whether the petitioner would, in the circumstances, possess any recognizable cause of action against the 2nd respondent yet the 1st respondent, on whose behalf the petitioner seems to be agitating for allocation of more funds has rebuffed any such agitation purportedly made on its behalf.

98. Mr Nabasenge, counsel for the petitioner, has put across powerful, commendable and attractive submissions on behalf of his client but in light of the clear and express constitutional provisions, I am unable to agree with or accept his submissions.

Final Orders

99. In the premises, I rule as follows:

    i. The petition dated November 1, 2021 is hereby dismissed.

    ii. This being a well-intentioned public interest litigation, each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY 2024

....

WANANDA J. R. ANURO

JUDGE