



Matindi v Independent Electoral and Boundaries Commission & 4 others; Commission on Administrative Justice (Interested Party) (Constitutional Petition E183 of 2022) [2024] KEHC 6777 (KLR) (Constitutional and Human Rights) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E183 OF 2022**

AC MRIMA, J

JUNE 11, 2024

BETWEEN

ELIUD KARANJA MATINDI PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST RESPONDENT

KPMG EAST AFRICA LIMITED 2ND RESPONDENT

THE NATIONAL ASSEMBLY 3RD RESPONDENT

THE SENATE 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

JUDGMENT

Background:

- On 7th April 2022, the Independent Electoral and Boundaries Commission (hereinafter referred to as ‘the 1st Respondent’, or ‘the Commission’ or ‘IEBC’), published through its Twitter account - @IEBCKenya that, pursuant to Section 8A of the *Elections Act* 2011, it had, on that very day, entered into a contract with KPMG East Africa Limited, the 2nd Respondent, to undertake an audit of the Register of Voters to ascertain its accuracy.



2. Pursuant to the foregoing, Eliud Karanja Matindi, the Petitioner herein, requested the 1st Respondent for a copy of the contract, for information purposes, as entitled under the [Access to Information Act](#), 2016.
3. In view of the urgency of the request and since it concerned elections, the Petitioner copied the Commission on Administrative Justice, the Interested Party herein.
4. The Petitioner was aggrieved, among other things, that the 1st Respondent neither acknowledged receipt of the request nor supplied it with the requested information.

The Petition:

5. Through the Petition dated 22nd April 2022, supported by the Affidavits of the Petitioner deposed to on a similar date and 26th May 2022 respectively, the Petitioner claimed various statutory and constitutional infractions by the Respondents.
6. The Petitioner averred that whereas section 8A of the [Elections Act](#) requires the 1st Respondent to engage a professional reputable firm to conduct an audit of the Register of Voters at least six months before a general election, the 1st and 2nd Respondents had no lawful basis to enter into the claimed contract on 7th April 2022 for the audit of the Register of Voters, approximately one hundred and twenty-five (125) calendar days and sixty-two (62) working days before 9th August 2022, the date scheduled for general election.
7. The Petitioner contended that at least six months before 9th August 2022 was 9th February 2022 and as such, the 1st Respondent had no legal basis to enter into the purported contract on 7th April 2022, and that no lawful action could flow from the outcome of the claimed audit.
8. The Petitioner pleaded that The National Assembly, 2nd Respondent herein, nullified the draft Elections Campaign and Financing Regulations on the recommendations of its Committee on Delegated Legislation for, among other reasons, that the 1st Respondent had failed to observe the time-line set out in Section 5(a), [Election Campaign Financing Act](#), 2013.
9. The Petitioner pleaded further that in addition to outsourcing work outside constitutional and statutory timelines, the Section 8A (6), [Elections Act](#), 2011, is unconstitutional, null and void as its purpose and/or effect is to compromise the independence of the 1st Respondent by requiring it to implement the recommendations made by the 2nd Respondent upon the claimed audit of the Register of Voters.
10. The Petitioner averred that the duty of the 1st Respondent as per section 8 of the [Elections Act](#) is to maintain an updated Register of Voters. It was its case that despite the audit and recommendations done ahead of the general election of 8th August 2017, the 1st Respondent had not demonstrated how, after implementing those recommendations, it was necessary for the same Register of Voters to be still audited, to address the same issues, more so outside the time stipulated in law.
11. The Petitioner further pointed out that by the time the impugned audit is completed and the report of the outcome of the audit is submitted, any voter adversely affected by the actions taken by the 1st Respondent, in the implementation of those recommendations, will have no recourse to any effective remedy as continuous voter registration will have been suspended as per section 5(1) of the [Elections Act](#).



12. As a consequence of the foregoing, the Petitioner averred that by purporting to enter into the impugned contract, was gross threat to and violation of Articles 21, 38, 35, 47, 81, 83, 88,156, 201, 249 and 259 of the Constitution.
13. On the foregoing legal and factual background, the Petitioner prayed for the following reliefs: -
 - a. The contract entered into between the 1st and 2nd Respondents on 07.04.2022 pursuant to Section 8A, Elections Act, 2011, for the 2nd Respondent to undertake an audit of the Register of Voters, was invalid and unlawful and, therefore, unconstitutional, null and void.
 - b. Section 8A (6), Elections Act, 2011, is unconstitutional and, therefore, null and void.
 - c. The 1st Respondent violated Article 35 of the Constitution, as read together with the Access to Information Act, 2016, by refusing to supply the information requested by the Petitioner.
 - d. The 1st Respondent should be compelled to recover, and the 2nd Respondent should be compelled to refund, any public money given and received pursuant to the unconstitutional and unlawful contract entered between the two parties on 07.04.2022 supposedly pursuant to Section 8A, Elections Act, 2011.
 - e. The Respondents should, jointly and severally, pay the Petitioner' costs for this suit.
14. The Petitioner further prayed for the following Orders: -
 - a. Quashing the contract entered into between the 1st and 2nd Respondents on 07.04.2022 for the 2nd Respondent to undertake an audit of the Register of Voters to ascertain it accuracy.
 - b. Compelling The 1st Respondent to recover, and the 2nd Respondent to refund, any public money given and/or received pursuant to the unconstitutional and unlawful contract entered between the two parties on 07.04.2022.
 - c. Compelling the 1st Respondent to supply the information requested by the Petitioner.
 - d. Compelling the Respondents, jointly and severally, to pay the Petitioner's costs for this suit.
 - e. Such other orders or reliefs that this Honourable Court may deem appropriate, fit and just to meet the requirements of the Constitution of Kenya, 2010.

The Submissions:

15. In his written submissions dated 24th June 2022, the Petitioner reiterated that the impugned contract was unconstitutional, and as such null since it was not based on any law as it was signed after the statutory deadline by when such an agreement should have been entered into as provided by Section 8A (1), Elections Act.
16. To fortify his case, the decision in Equitable Party & 2 others -vs- Independent Electoral and Boundaries Commission [2022] eKLR was referred to where it was successfully argued that Equitable Party could not participate in the elections scheduled for 9th August 2022 as it had missed the statutory deadline for submission to the 1st Respondent of its nomination rules as provided by Section 27, Elections Act, 2011.
17. Further to the foregoing, the Petitioner submitted that hasty certification of the Register of Voters, based on preliminary audit findings rather than the recommendations of the audit report after consideration of the report's recommendations, vitiated the constitutional and legal validity of the certified Register of Voters, thereby compromising its validity for the purposes the general election.



18. It was his case that though the 1st Respondent had up to thirty days from 18th June 2022, when they received the audit report to implement it, the 1st Respondent could have used the time to publicise the names of the voters it wished to remove from the Register, but the 1st Respondent implemented in full and without any further questions. That was so despite the preliminary findings by the 2nd Respondent indicating that entries 246 and 465 in the Register were persons who had died.
19. In submitting on constitutionality of section 8A (6) of the *Elections Act*, which requires the Commission to implement the recommendations of the audit report within a period of thirty days of its receipt and submit its report to the National Assembly and the Senate, the Petitioner asserted that as per the dictates of Article 249(2)(b) of *the Constitution*, the 1st Respondent, as an independent constitutional commission, is independent and not subject to direction or control by any person or authority. For the purpose of implementing the recommendations following an audit of the Register of Voters under Section 8A (1), *Elections Act*, 2011, the impugned Section 8A(6), *Elections Act*, 2011, places the 1st Respondent at the direction and control of the 2nd Respondent.
20. The Petitioner claimed that since neither the duty to implement the recommendations after audit of the Register of Voters nor the time frame for implementation of such recommendations is provided for in *the Constitution*, Section 8A(6), *Elections Act*, 2011, is unconstitutional and, therefore, null and void.
21. The Petitioner claimed the need to maintain independence of the IEBC. It referred to *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, where the Supreme Court observed;

... Therefore, “independence” is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance
22. In submitting on the 1st Respondent’s failure to divulge information regarding the impugned contract, the Petitioner submitted that its right under Article 35 of *the Constitution* was violated. It was its case that the 1st Respondent responded to his letter dated 22nd April 2022 on him on 5th May 2022 refusing the information sought on the basis of *Public Procurement and Asset Disposal Act*.
23. Based on the claim that the contract between the 1st and 2nd Respondent was illegal, the Respondent submitted that 1st Respondent should be compelled to recover, and the 2nd Respondent compelled to refund, any public money given and/or received.
24. The Appellant drew support from the decision in *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR where it was observed;

45(b) ...It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law.



25. In the end, the Petitioner urged the Court to allow the Petition as prayed, and being a public interest litigation, prayed that costs, in the event he was unsuccessful not to be awarded and in the event of success to be borne by the 1st Respondent.

The 1st Respondent's case:

26. The IEBC responded to the Petition through the Replying Affidavit of Chrispine Owiye, the Director Legal Services, deposed to on the 20th May 2022.
27. It was its case that pursuant to section 8(1) of the *Elections Act* the Commission invited and advertised a request for proposal through tender No. IEBC/RFP/21/03/2021-2022 for the audit of the Voter Register.
28. That, on evaluation of the proposals received, the Commission found that all of them were unresponsive and, therefore, re-advertised the Request on 3rd February 2022.
29. He deposed that on or about 9th March 2022 KPMG Advisory Services Limited was awarded the tender and a contract executed on 7th April 2022.
30. From the foregoing, the 1st Respondent deposed that the process of retaining an eligible firm commenced in December 2021 within the timelines provided in law.
31. Based on the foregoing, the 1st Respondent stated that it had not entered into a contract with the 2nd Respondent in relation to the Audit of the Register of Voters.
32. As regards the claim that there was no response to the Petitioner's request to see the contract, the 1st Respondent deposed that the Petitioner made the request on 17th April 2022 and under the Access to Justice Act, it had 21 days within which to respond. Essentially, the 21 days were to terminate on 8th May 2022 and since the Petition was instituted on 22nd April 2022, it was filed prematurely and thus the orders sought based on alleged failure under the *Access to information Act* are premature and unjustified.
33. Mr. Owiye further deposed that the Petitioner had not demonstrated the limitation imposed on voters by the contract for audit or the unconstitutionality of the implementation of the recommendations out of the audit of the voter register.
34. It was his case that the Petitioner's claims of alleged anticipated removal of registered voters, expunging of records and deletion of registered voters' details were unfounded.
35. The deponent accused the Petitioner of approbating and reprobating by stating that an audit of the Register of Voters would verify, enhance the accuracy and update the register while at the same time vilify the process.
36. It was his further case that contrary to the Petitioner's averments, the process of auditing the Register was not taking place at the same time as the continuous registration of voters. He deposed that the registration was suspended from May 2022 to 13th March 2023 vide Gazette Notice No. 4955 as required under section 5 of the *Elections Act*.
37. The 1st Respondent claimed that according to section 8A (6) of the *Elections Act* there is a requirement that once audit is done and recommendations implemented, the Commission is mandated to submit its final report to the National Assembly and the Senate. It was its position that Parliament has oversight before the final Register is published.



38. The 1st Respondent asserted that the Register of Voters is an integral part of a fair and transparent elections under Article 81 of *the Constitution* and under Article 88(4) the Commission is responsible for amongst others the regular revision of the Voters roll.
39. It was its position that the Petition failed to demonstrate the manner in which section 8A(6) of the *Elections Act* 2011 breaches Articles 81 and 88(4) of *the Constitution*.
40. In conclusion, Mr Owiye deposed that it was in public interest that the Orders sought are not granted. It was his case that nullification of the an audit process would interfere with the Commission's constitutional obligation including the obligation to ensure and supervise the regular revision of the voter's roll.

The Submissions:

41. The 1st Respondent filed written submissions dated 5th July 2022.
42. As regards the propriety of the joinder of the 2nd Respondent herein, the 1st Respondent submitted that it had only entered into a contract with KPMG Advisory Services Limited (Consultant) and as such, the Petitioner being aware after the 1st Respondent filed its response, ought to have amended the Petitioner in order to cure the misjoinder and bring before this Court the correct party.
43. In the premises, the 1st Respondent submitted that the Petitioner, having failed to amend the Petition, he was bound by his pleadings and as such the Court had no jurisdiction to preside over the matter. The decision in *Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission* (2012) eKLR was relied upon where the Supreme Court of Nigeria was quoted when it observed as follows;

... It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to excise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.
44. On the issue of the audit of the Register of Voters, the 1st Respondent submitted it has an obligation under Section 8(1) and (2) of the *Elections Act* 2011 to maintain an updated Register of Voters and it shall do so, by amongst others regularly revising the Register of Voters and updating the Register of Voters by deleting the names of deceased voters and rectifying the particulars therein.
45. It was its case that the Register of Voters is a key component to an election and the credibility and accuracy of the Register of Voters is the backbone of the election process. To fortify its position, the Supreme Court decision in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR was referred to where it was observed;

(251) To guarantee the credibility of the voter register, the agency entrusted with responsibility (IEBC) for voter registration must ensure as follows:

 - (a) all those who turn out to register are qualified to be registered, in accordance with the constitutional and legal requirements;
 - (b) all those who turn out to register are actually registered and their particulars accurately captured;



- (c) the administrative arrangements put in place to facilitate the registration process are simple, transparent and accessible;
 - (d) the public and political actors are kept informed of the various steps in the register-preparation process;
 - (e) the resultant register is verifiable.
46. In challenging the Petitioner's position that the 1st Respondent ought not to subject its processes to an external body as it is an independent body, it was its case that section 8A(6) refers to the term 'recommendation' and the term shall in the said section is in reference to the timeline of thirty days, not an obligation to implement the recommendations as alleged by the Petitioner.
47. It was its case that a legal provision requiring that something be done within a certain timeline does not automatically make the said legal provision unconstitutional.
48. In urging the Court to find the Petitioner responsible for costs of the suit, the 1st Respondent submitted that his failure to bring the proper parties before the Court ought not be visited against it.

The 2nd Respondent's case:

49. KPMG East Africa Limited opposed the Petition through Grounds of Opposition dated 9th May 2022.
50. It was its case that it is wrongly sued and the Orders sought cannot be maintained against it since the agreement to audit the register was between the 1st Respondent and KPMG Advisory Services Limited.
51. It further was its case that the Petition falls short the requirement of specificity as set out in the Court of Appeal decision in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others*.
52. It was its case that it is unable to know which allegations specifically concern it and how to respond and that the Petition does not disclose any violations of the Petitioner's rights and fundamental freedoms.
53. Further, the 2nd Respondent claimed that the impugned contract entered into pursuant to section 8A(1) of the [Elections Act](#) is not a constitutional issue.

The submissions:

54. In its submissions dated 4th May 2022, the 2nd Respondent stated that the Petition could not be sustained because there was no prayer in the Petition challenging the validity of the impugned contract.
55. It reiterated the claim that since no order could issue against it for having been improperly sued, on that basis alone, the Petition ought to fail.
56. It was its case that noting in the contract was illegal and if anything, the audit of the register was in the public interest.
57. It submitted that the purport of the timeline was not to create an illegality but to provide a guideline for the activities to be undertaken.
58. The 2nd Respondent stated that KPMG had performed the contract and is entitled to a fair remuneration for work done pursuant to the doctrine of quantum meruit.
59. It urged that the Petition be dismissed with costs.



3rd Respondent's case:

60. The National Assembly challenged the Petition through the Replying Affidavit of Samuel Njoroge, the Director of Legislative and Procedural Services, deposed on 13th June 2022.
61. To rebut the claim that it was interfering with the independence of the 1st Respondent, he deposed that the process of enacting section 8A(6) of the *Elections Act* was subjected to due process where all stakeholders were involved. It was its case that eventually the Joint Committee recommended amendment of the *Elections Act* to enable the Commission to audit the register to verify its accuracy, update it and recommend mechanisms to enhance accuracy of the Register.
62. It was its case, therefore, that the provision does not serve to compromise the independence of the 1st Respondent but rather to enhance confidence of the public on its ability to conduct free and fair elections.

The Submissions:

63. The 3rd Respondent filed submissions dated 4th July 2022.
64. It was its case that the Petitioner had not rebutted the presumption of constitutionality of section 8A(6) of the *Elections Act*. It submitted that the said section was introduced through the Election laws (Amendment) Act, No. 36 of 2016, which originated as a Bill emanating from the recommendations of the Joint Parliamentary Select Committee on Matters Relating to the Commission.
65. It was its submission that the Joint Committee recommended legal, policy and institutional reforms to strengthen the IEBC and improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner.
66. In emphasizing on the importance of the process undertaken by the Joint Committee, the 3rd Respondent submitted that it observed that the voter register must meet high-level standards of accuracy, completeness, comprehensiveness, accuracy and reliability. A credible voter register enhances voter confidence and trust in the electoral system and the processes that follow. Where voter registration is not managed well, this has the potential of tainting the electoral processes that follow, potentially leading to electoral disputes and chaos.
67. It was submitted that accordingly, the Joint Committee recommended that the *Elections Act* be amended to enable the Commission to conduct an audit of the Register of Voters for the purpose of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register.
68. On the foregoing, the 3rd Respondent submitted that the Petitioner had adopted a misleading interpretation of the provisions of section 8A(6) of the *Elections Act* whose purpose is to effect the oversight role of Parliament as provided for under Article 95(5)(b) of *the Constitution*.
69. To temper with the foregoing position, the Supreme Court of Kenya Advisory Opinion in the Matter of Interim Independent Electoral Commission [2011] eKLR was referred to where it was observed;
 60. ...These Commissions or independent offices must, however, operate within the terms of *the Constitution* and the law: the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate,



and performance of their functions as prescribed in *the Constitution* and the law. For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name *the Constitution* has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead “independence” as an end in itself; for public governance tasks are apt to be severely strained by possible “clashes of independences”.

70. The 3rd Respondent submitted further that a holistic reading of section 8A shows that the purpose and intent of sub section 6 is to ensure that any recommendations that are to be implemented should be done within thirty days and that a report be submitted to Parliament.
71. The 3rd Respondent further referred to the decision in the Court of Appeal in *County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu* [2015] eKLR where it was observed;
... Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the Court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.
72. In the end, the 3rd Respondent stated that the Petition lacked merit and ought to be dismissed with costs.

The 4th Respondent’s case:

73. The Senate responded to the Petition through the Affidavit of Jeremiah Nyegenye, its Clerk, sworn to on 10th June 2022.
74. The 4th Respondent urged its case as the 3rd Respondent. It asserted that the Joint Committee received submissions from Transparency International, The Office of the Registrar of Political Parties, The Ethics and Anti-Corruption Commission and the Kenya Law Reform Commission on the verification of and scrutiny of the Register of voters calling for the scrutiny of the voter register before use in the 2017 General Election.
75. Mr. Nyegenye deposed that after conducting engagements with stakeholders’ and the public the Joint Committee resolved that it was necessary to have a provision for verification and scrutiny of the Register.
76. It was its case that the Petition is devoid of merit an outright abuse of Court process and ought to be dismissed.
77. The 5th Respondent and the Interested Party did not participate in the proceedings.



Analysis:

78. Having comprehensively appreciated the factual and legal foundation of the dispute as pleaded and submitted by the parties herein, the issues that arise for determination are;
- i. Whether the suit can stand as against KPMG East Africa Limited, 2nd Respondent herein.
 - ii. Constitutionality of section 8A (6) of the *Elections Act*.
 - iii. Whether the Petitioner's right to information was violated or infringed upon.
79. This Court will hence consider the issues sequentially.
- a. Whether the suit can stand as against KPMG East Africa Limited:
80. Both the 1st and the 2nd Respondents contested the propriety of joinder of the 2nd Respondent in this Petition. It was their case that KPMG East Africa was not contracted to conduct the audit, rather it was KPMG Advisory Services Limited a separate and distinct entity.
81. It is, therefore, necessary to appreciate who a 'Respondent' is for the purposes of a Constitutional Petition.
82. Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (otherwise referred to as "The Mutunga Rules") defines the term 'Respondent' to mean: -
- a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right to fundamental freedoms.
83. Both the Mutunga Rules and the Civil Procedure Rules provide for joinder and misjoinder of parties.
84. Rule 5 of the Mutunga Rules elaborately provide as follows: -
- Addition, joinder, substitution and striking out of parties.
- The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—
- a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties
 - b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
 - c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
 - d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
 - i. order that the name of any party improperly joined, be struck out; and



- ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
 - e. Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents
85. Order 1 Rule 7 of the Civil Procedure Rules provides as follows;
- When plaintiff in doubt from whom redress to be sought [Order 1, rule 7]
- Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.
86. The Civil Procedure Rules anticipates misjoinder and non-joinder of parties in suits. It provides in Order 1 Rule 9 as follows;
- Misjoinder and non-joinder
- No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
87. The power of the Court to substitute a party or add a party necessary for determination of the real matter in dispute is provided for in Order 1 Rule 10 of the Civil Procedure Rules in the following terms;
- Substitution and addition of parties [Order 1, rule 10]
- (1)
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added
88. In this matter, the fact that the Petitioner had instituted the Petition against a wrong party was brought to its attention and to the attention of the Court timeously by both the 1st and 2nd Respondents. However, the Petitioner did not appropriately move the Court for an amendment. Conversely, the Court did not also direct that the proper party be enjoined.
89. The Petitioner herein inter alia challenged the constitutionality of a contract between the Commission and a third party. Contracts attach specific rights and obligations. Therefore, the correct party to a contract must always, and in line with Article 50(1) of *the Constitution*, be accorded an opportunity to be heard in a matter where the contract is, for whatever reasons, challenged.
90. Further, one of the reliefs sought in the Petition is for a refund of the contract sum. How then would a non-party to a contract be ordered to make any refunds? Conversely, how will a party who received payment under a contract be ordered to refund the sums without being heard? Therefore, given the



nature of the Petition herein and the prayers sought, it was incumbent that the correct parties to the contract be enjoined.

91. This matter is, hence, not one of those where public interest would override the issue of misjoinder and call upon the Court to proceed to render itself wholly on the case.
92. Having held as such, the 2nd Respondent is hereby struck out of the Petition.
93. In view of the foregoing finding, and in keeping within the fidelity of *the Constitution* and the law, this judgment will, therefore, not interrogate any of the contents of the contract between the IEBC and the said KPMG Advisory Services Limited.
 - b. The constitutionality of section 8A (6) of the *Elections Act*:
94. The Petitioner's contention of unconstitutionality of section 8A (6) of the *Elections Act* stems from the fact that it allows the 1st Respondent to outsource auditing service, a position, in his view, compromises the independence of the Commission since it would be in control of the 2nd Respondent.
95. For ease of understanding the impugned provision, a look at the entire Section 8A of the *Elections Act* is important. The provision states as follows: -

8A. Audit of the register of voters

- (1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—
 - (a) verifying the accuracy of the Register;
 - (b) recommending mechanisms of enhancing the accuracy of the Register; and
 - (c) updating the register.
- (2) The Kenya Citizens and Foreign Nationals Management Service established by section 3 of the *Kenya Citizens and Foreign Nationals Management Service Act* (Cap. 171) shall make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit under subsection (1).
- (3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—
 - (a) verifying the accuracy of the Register;
 - (b) recommending mechanisms of enhancing the accuracy of the Register; and
 - (c) updating the register.
- (4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.
- (5) The Commission shall, within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.
- (6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.



96. Before this Court deals with whether the impugned provision is constitutional or otherwise, a look at how *the Constitution* ought to be interpreted becomes paramount.
97. As regards the interpretation of *the Constitution*, suffice to say that *the Constitution* itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).
98. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
99. Courts have also rendered how *the Constitution* ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011 in In the Matter of Interim Independent Electoral Commission [2011] eKLR discussed the need for Courts, while interpreting *the Constitution*, to favour a purposive approach as opposed to formalism. The Court stated as under: -
- (86) The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
- (87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
- (88) Article 10 states clearly the values and principles of *the Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
- (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation.



100. The Court of Appeal in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR gave meaning of the term purposive by referring to the decision in the Supreme Court of Canada in *R -vs- Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

102. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is 'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'

103. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S -vs- Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

104. The Supreme Court embellished the need to pay attention to legal history while interpreting not only *the Constitution* but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting *the Constitution*, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

105. The above purposive approach in constitutional interpretation is what is provided for in Articles 20(4) and 259(1) of *the Constitution*.

106. There is also another way in which *the Constitution* may be interpreted. It is referred to as the principle of holistic interpretation.

107. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating thus:

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit.

108. The meaning of holistic interpretation of *the Constitution* was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012*; [2014] eKLR. The Court at paragraph 26 stated as follows: -

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



109. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the Court was of the firm position that the Constitution should be read as an integrated whole. The Court observed as follows: -

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

110. The Court of Appeal in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* case [supra], summed up the various principles of constitutional interpretation as follows: -

(21) Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

- that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

111. With the above guidance on how the Constitution ought to be interpreted, the focus now turns to the manner in which a statute or a provision thereof ought to be determined to be constitutional or otherwise.



112. In the event the contention is on the unconstitutionality relates to limitation of a right or fundamental freedom, then Article 24 of *the Constitution* comes to play. In dealing with the said limitation, a Court may also refer to the criterion developed in R. vs. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.
113. In the present case, the unconstitutionality of the impugned provision rested on the contention that the outsourcing of the auditing services by the Commission erodes its independence since the Commission would be in control of the audit firm; in this case the 2nd Respondent.
114. Since the impugned provision does not directly relate to any of the rights and fundamental freedoms in the Bill of Rights, then the invocation of Article 24 of *the Constitution* does not become necessary.
115. What this Court is to look at is how the term ‘independence’ of a Constitutional Commission has been defined to mean.
116. The Supreme Court in Re The matter of Interim Independent Electoral Commission [2011] eKLR had the following to say about independence: -

(59) It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under *the Constitution*, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in *the Constitution* as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individuals.

The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”.

118. In Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 others [2014] eKLR the Supreme Court again spoke to the independence contemplated by *the Constitution* as follows: -

‘[I]ndependence’ is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

“How is the shield of independence to be attained” In a number of ways. The main safeguard is *the Constitution* and the law. Once the law, more so *the Constitution*, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain ‘independence’ in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body.



However, none of these ‘other safeguards’ can singly guarantee ‘independence’. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence”.

119. The foregoing, therefore, lays down the parameters of the term ‘independence’ as intended to be applied in *the Constitution* and the law.
120. There is no doubt that the IEBC is one of the Constitutional Commissions in *the Constitution*. It was established in Article 88 of *the Constitution*.
121. The role of the IEBC was provided for in Sub-article 4 as being 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.
122. In doing so, the IEBC is called upon to undertake the following: -
 - (a) the continuous registration of citizens as voters;
 - (b) the regular revision of the voters’ roll;
 - (c) the delimitation of constituencies and wards;
 - (d) the regulation of the process by which parties nominate candidates for elections;
 - (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
 - (f) the registration of candidates for election;
 - (g) voter education;
 - (h) the facilitation of the observation, monitoring and evaluation of elections;
 - (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
 - (j) the development of a code of conduct for candidates and parties contesting elections; and
 - (k) the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.
123. In buttressing the aspect of independence further, sub-article 5 provides that the Commission shall exercise its powers and perform its functions in accordance with *the Constitution* and national legislation.
124. Therefore, IEBC is specifically sanctioned by *the Constitution* to ensure that there is regular revision of the voters’ roll or register. It is on that background that Parliament came up with the impugned provision.
125. Section 2 of the *Elections Act* defines the ‘Register of Voters’ in the following manner: -

“Register of Voters” means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically.
126. The phrase ‘current register’ in the foregoing definition is telling. It means that the Register must be an up-to-date reflection of ‘persons entitled to vote’. It must contain the latest information or changes in accord with the realities of the day. Therefore, where persons are deceased or have attained eligible



- age of voting and are registered as voters under Section 5 of the *Elections Act*, the Register of Voters must accurately capture those changes.
127. Article 81 of *the Constitution* sets out the general principles for the electoral system in Kenya. The system must inter alia ensure that the freedom of citizens to exercise their political rights under Article 38 is always upheld, that universal suffrage based on the aspiration for fair representation and equality of vote is guaranteed, there is free and fair elections, the elections are transparent; and are administered in an impartial, neutral, efficient, accurate and accountable manner.
 128. The constitutional principles in Article 81 of *the Constitution* can be described as the irreducible minimum which must guarantee, among others, that the Register of Voters is always a true and accurate account of the voters, hence, the need for periodic update of the Register.
 129. The process of maintaining a current Register of Voters is two pronged. Firstly, it involves registering new voters. Article 83 of *the Constitution* allows for the foregoing process if, among other factors, a person is an adult citizen. Secondly, ridding the register of deceased persons and ensuring that there are no errors such as double registration of voters.
 130. As such, and cumulatively therefore, the purpose of the impugned provision is to ensure that, through its application, the Commission would yield a Register of Voters that is always up-to-date. In other words, the impugned provision is aimed at achieving the constitutional imperative of free and fair elections which are transparent and are administered in an impartial, neutral, efficient, accurate and accountable manner.
 131. Section 8A of the *Elections Act* comprehensively provides for the process of ensuring that the Register of Voters is updated. After the Commission engages a professional reputable firm to conduct an audit of the Register, the firm submits its recommendations in a report to the Commission. The Commission must formally adopt the report and then submit it to the National Assembly and the Senate. These are the two institutions which exercise oversight over Constitutional Commissions pursuant to Articles 95(5)(b) and 96 of *the Constitution* respectively. Thereafter, IEBC implements the recommendations in the report.
 132. Guided by the Supreme Court decisions in *Re The matter of Interim Independent Electoral Commission case [supra]* and *Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 others case [supra]* on the independence clause, this Court does not see how the provision is a threat to the independence of IEBC.
 133. The role of the professional audit firm is well cut out in law. It is to audit the register of voters. Once the audit firm carries out its mandate and makes recommendations, IEBC must own the recommendations by formally adopting them since it is IEBC which has the constitutional mandate to deliver transparent, impartial, neutral, efficient and accurate elections. IEBC even has powers to decline to adopt some of the recommendations on reasons to be accorded. Pursuant to Article 249(2) of *the Constitution*, IEBC must always maintain its independence and fidelity to *the Constitution* and the law.
 134. In other words, in passing the impugned provision, Parliament did not amend *the Constitution* through a back door in order to transfer the constitutional responsibility on the IEBC on managing elections to the audit firms. The back stops with IEBC.
 135. To this Court, therefore, the impugned provision is harmless. In fact, it builds into enabling IEBC render its mandate and not otherwise.
 136. Having said as much, this Court finds that the impugned provision, that is Section 8A (6) of the *Elections Act*, to be constitutional.



- c. Whether the Petitioner's right to information under Article 35 of *the Constitution* was violated:
137. This Court will not belabour this issue. There is no doubt the Petitioner is a Kenyan and is guaranteed the right to information under Article 35 of *the Constitution*.
138. The right to information is, however, limited under the *Access to Information Act*. Further, that right is guided by the provisions of the *Commission on Administrative Justice Act*.
139. Section 9 of the *Access to Information Act* prescribes the time within which an application for access to information shall be processed. It states as follows: -
- 9.(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application.
140. Section 10 deals with instances where an application for access to information is transferred to another institution.
141. It is common ground that Petitioner requested the 1st Respondent for information on 17th April 2022. Five days later, the Petitioner instituted the instant Petition and sought for the information.
142. The 1st Respondent replied to the Petitioner's request on 7th May, 2022. That was within the statutory timelines provided for under Section 9 of the *Access to Information Act*. That decision is not part of this Petition.
143. However, even if the was not satisfied with the response, still he would have to pursue the avenue provided under the *Commission on Administrative Justice Act* and not to access this Court before then. The reason is that under the doctrine of Constitutional Avoidance or the doctrine of exhaustion, the Petitioner must adhere to the avenue provided for by a statute unless he demonstrates any of the exceptions thereof. Since there was compliance on the part of the 1st Respondent and the response is not part of the instant Petition, then the redress sought by the Petitioner is unavailable and the matter rests there.

Conclusion:

144. The Petitioner was, hence, not lucky in his pursuit for constitutionalism in public interest in this matter. This Court all the same appreciates the Petitioner's endeavour to ensure that public institutions are governed within the four corners of *the Constitution* and the law.
145. Be that as it may, this Court hereby makes the following conclusions, that: -
- i. The name of the 2nd Respondent herein, KPMG East Africa Limited, is hereby struck out of the Petition.
 - ii. Section 8A (6) of the *Elections Act* is constitutional.
 - iii. The Petitioner's right to information was not violated.

Disposition:

146. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that the Court file was among those that were misplaced during the Court's transfer from the Division which involved movement of so many files within quite a short time. Apologies galore.
147. In the end, the following orders hereby issue: -



- a. The Petition dated 22nd April 2022 is hereby dismissed.
- b. As the matter is a public interest litigation, each party shall bear its own costs.

148. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF JUNE, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Eliud Karanja Matindi, Petitioner in person.

No appearance for Counsel for the 1st Respondent.

Mr. Mwendwa, Counsel for the 2nd Respondent.

No appearance for Counsel for the 3rd Respondent.

No appearance for Counsel for the 4th Respondent.

Chemosop/Duke – Court Assistants.

