



County Government of Kisii & 2 others v Independent Electoral and Boundaries Commission; Monda (Interested Party) (Constitutional Petition E006 of 2024) [2024] KEHC 8477 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION E006 OF 2024**

**TA ODERA, J
JULY 4, 2024**

BETWEEN

COUNTY GOVERNMENT OF KISII 1ST PETITIONER
OFFICE OF THE GOVERNOR, COUNTY GOVERNMENT OF KISII 2ND PETITIONER
ELIJAH OBEBO 3RD PETITIONER

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION RESPONDENT

AND

DR ROBERT MONDA INTERESTED PARTY

JUDGMENT

1. The Petitioners herein filed a constitutional Petition dated 15th May, 2024 against the Respondent herein claiming that the Respondent had violated *the Constitution* as a result of failure to gazette the 3rd Petitioner, Elijah Obebo, as the new nominated Deputy Governor of Kisii County following the impeachment of the Interested Party.
2. Vide a Petition dated 15th May 2024 the Petitioners, the County Government of Kisii, Office of the Governor, County Government of Kisii, and Elijah Obebo seek the following orders namely:
 1. A Declaration does issue to the effect that the Gazettement of duly elected and/or nominated Governors, Deputy Governors, Senators, Woman Representatives, Members of Parliament, and Members of County Assemblies or a vacancy thereof, pursuant to an election and/or nomination is an administrative action, to be undertaken by the Independent Electoral and



Boundaries Commission Secretary/Chief Executive Officer, or any such person occupying the said position at the time, and is not dependent on the composition or quorum of the Independent Electoral and Boundaries Commission.

2. A Declaration does issue that the failure and inaction by the Independent Electoral And Boundaries Commission, to Gazette a Returning Officer for Kisii County; and to Gazette the name of Elijah Obebo as the nominated Deputy Governor County Government of Kisii is contrary to Articles 10; 12 (1); 21; 27, 35; 40; 43; 46; 47; 54; 55; 56; 57; 63; 73; 118; 174; 201; 227; and 232 of *the Constitution* of Kenya, 2010 as read with Sections 4, and 5 of *Fair Administrative Action Act*.
 3. An Order Of Mandamus does issue compelling the Independent Electoral And Boundaries Commission, through the Secretary/Chief Executive Officer or any person occupying the said position, to namely:
 - a. Gazette a Returning Officer for Kisii County for the clearance and gazettement of the Deputy Governor Nominee for County Government of Kisii; and
 - b. Gazette the name of Elijah Obebo, as the Deputy Governor, Kisii County.
 4. An Order awarding costs of the Petition to the Petitioners.
 5. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms.
3. The Petitioners vide the Affidavit sworn by Robert Ombasa on 15th May 2024 claimed that on 14th March, 2024 the Senate passed a Motion impeaching the Interested Party herein, Dr. Robert Monda, as the Deputy Governor Kisii County Government and that Section 32C and 32D of the County Government Act, 2012 provides for the nomination of a Deputy Governor within 14 days from the date of impeachment of a previous Deputy Governor.
4. It was their case that in compliance with the provisions of Section 32C of the County Government Act, the 2nd Petitioner herein, the Office of the Governor, duly nominated one Elijah Obebo as the new Deputy Governor Kisii County and after following due process his nomination was approved as such by the County Assembly of Kisii. That despite full compliance with the law and the statutory timelines thereto, the Independent Electoral and Boundaries Commission has deliberately declined to undertake the required steps for the clearance of the 3rd Petitioner namely, the Gazettement of a County Returning Officer; Issuance of a nomination Certificate, and publication of the nominee's name in the Gazette Notice.
5. They contended that despite various correspondences by the Petitioners and the Orange Democratic Movement Party, the Independent Electoral and Boundaries Commission has deliberately abdicated on its duty and declined to discharge its statutory obligations and that the Independent Electoral and Boundaries Commission has acted and continues to act unreasonably, illegally and unconstitutionally and hence the Petitioners move to this Court seeking its intervention to arrest the ongoing illegality.
6. According to them, the inaction by the Independent Electoral and Boundaries Commission has occasioned inconvenience, hardship and a constitutional crisis as the County Government of Kisii is operating indefinitely without a deputy Governor contrary to Articles 10, 27, 47 and 180 of *the Constitution* of Kenya, 2010, that the actions by the Respondent are discriminatory and contrary to the provisions of Article 27 of *the Constitution* of Kenya, 2010 as the Petitioners are being discriminated against on the basis of their status and occupation among others, as compared to other Government institutions and State Organs, and further that the actions, failures, and inactions by the Independent



- Electoral and Boundaries Commission amount to an infringement of its right to administrative action that is lawful, reasonable and procedurally fair under Article 47 of *the Constitution* of Kenya, 2010 as read with the provisions of the Fair Administrative Actions Act.
7. It was also the Petitioners' case that the Respondent in its actions complained of herein, has failed to uphold the dictates of Article 21 of *the Constitution* of Kenya, 2010 which requires the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and that the Independent Electoral and Boundaries Commission has acted and continues to act illegally and unreasonably and contrary to Sections 4 and 5 of the *Fair Administrative Action Act* which demands that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable, and procedurally fair; and that administrative action affecting the public must be notified to the general public.
 8. The Petitioners while relying on a letter dated 27th March; 2024 contended that the Orange Democratic Movement duly forwarded the name of the 3rd Petitioner, Elijah Obebo, to the Independent Electoral and Boundaries Commission for gazettelement but in its letter of 2nd April; 2024 the Commission declined to take further action on the same. In addition, that in its letter dated 2nd April; 2024, the Commission declined to undertake the Gazettelement of a Returning Officer and the Gazettelement of Elijah Obebo as the new Deputy Governor, County Government of Kisii and noted that it was unable to undertake the foregoing owing to the lack of a Chairperson.
 9. It was their argument therefore that the correspondence by the Independent Electoral and Boundaries Commission has led the Petitioners to a limbo and it has and continues to occasion a constitutional crisis owing to the existing statutory timelines for filing the vacancy in the office of a County Deputy Governor and the uncertainty of a County Government operating without a Deputy Governor.
 10. In support of the Petition, the Petitioners filed written submissions dated 22nd May, 2024 together with a List and Bundle of Authorities of an even date. Mr. Ochieng Oginga highlighted the submissions on behalf of the Petitioners and while reiterating the grounds contained in the Petition, submitted that by virtue of the Supreme Court decision in *In Re Speaker, County Assembly of Embu*, Reference No. 1 of 2015, [2018] eKLR a vacancy in the office of the Governor or Deputy Governor is to be filled within 60 days and hence the office cannot remain vacant indefinitely as the same would negate the spirit and letter of *the Constitution* and devolution.
 11. According to Counsel, by virtue of the provisions of Article 163 (7) of *the Constitution* of Kenya, 2010, the above decision is binding upon this Court and all such organs of the State and Commissions such as the Independent Electoral and Boundaries Commission.
 12. Counsel relied on the decisions in the Supreme Court in the case of *Robert Tom Martins Kibisu vs Republic*, Supreme Court Application No. 3 Of 2014, [2018] eKLR, *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others, Supreme Court Petition No. 6 of 2014*, [2017] eKLR, *Council of Governors vs Attorney General & 7 Others*, Supreme Court Reference No. 2 Of 2017, [2019] eKLR, and *Geoffrey M. Asanyo & 3 Others vs Attorney-General, Supreme Court Petition No. 7 of 2019*, [2020] eKLR for the proposition that this Court is bound by the decisions of the Supreme Court as per Article 163 (7) of *the Constitution*.
 13. Mr Ochieng Oginga submitted on the need for certainty in law and the need to uphold precedent by relying on Benjamin Cardozo's *The Nature of The Judicial Process* (New Haven: Yale University Press, 1921) [P. 48] that: "In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some



of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

And Joel K. Goldstein, in ‘The Nature of The Judicial Process: The Enduring Significance of A Legal Classic’ *Touro Law Review*, Article 12, Vol. 34, No. 1, that: “...constitutional precedents are not clear, judges often decide based on fairness and social policy.... in “well-functioning legal system[s]” most disputes are not litigated, that clear rules govern the few that are, and that precedents restrict the area and outcomes for a judge’s social policy judgments....”

14. On the orders to compel the Independent Electoral and Boundaries Commission to undertake the gazettment, it was the Petitioners’ submission that the requirement for Gazettment is a mere administrative task and duty and is not dependent on the composition of the Independent Electoral and Boundaries Commission. Counsel cited the decision in *Isaiah Biwott Kangwony vs The Independent Elections and Boundaries Commission and Another*, Nairobi High Court Petition No. 212 of 2018, and further the decision in the case of *Wachira James Maina & 12 Others vs Celestine Chepchirchir Mutai and Others*; Eldoret High Court Election Petition Appeal No. E002 of 2023, where the Court issued orders of mandamus for the Commission’s Chief Executive Officer to gazette the names of duly nominated Members of the County Assembly as a result of a vacancy in the composition of the Commission.
15. It was the Petitioners’ other submission that constitutional timelines could not be halted as held in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR by the Supreme Court of Kenya and that they had made out a case to warrant the grant of the orders sought and an order compelling the Independent Electoral and Boundaries Commission to act in order to cure the existing injustices as was appreciated by the Court of Appeal in the case of *Republic vs. Kenya National Examinations Council Ex Parte Gathenji & Others, Civil Appeal 266 of 1996*, [1997] eKLR.
16. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 24th June, 2024 by Chrispine Owiye, its Director of Legal Services, and written submissions dated 24th June, 2024.
17. Mr. Owiye averred that the Petition is an abuse of the court process, scandalous, frivolous, fundamentally incurable and fatally bad in law, an abuse of the court process, misconceived, defective, vexatious and intended to embarrass the court and the legal process and should be dismissed with cost to the Respondent. He added that the facts and/or grounds upon which the Petition is anchored and/or premised are a spurious assembly of crafted falsehoods that the Petitioner has choreographed to suit his narratives for the grant of the orders sought.
18. According to the Respondent, the Petition as drawn is wanting both in form and substance and does not attempt even in the remotest scenario to satisfy the parameters on constitutional petitions as set out in the celebrated case of *Anarita Karimi Njeru* and that the Petitioners have veered off the facts without pointing out with specificity how the Respondent has singularly and/or jointly and/or severally violated their rights.
19. The Respondent maintained that following the nomination of Elijah Obebo, it is mandated to gazette a County Returning Officer, who shall receive his nomination papers for scrutiny as to whether the same meet the threshold and standard required and subsequently issue a nomination certificate and thereafter gazette his name.



20. Mr. Owiye deposed that the Commission is unable to gazette both a Returning Officer who shall subsequently issue a nomination certificate and Mr. Elijah Obebo as it is not constituted in accordance with Article 250 (4) of *the Constitution* and Section 5 of the *Independent Electoral and Boundaries Commission Act* which provide for the composition of the Commission. He pointed out that the Chairman, Mr. Wafula Chebukati's term expired on 17th January, 2023 after completing his six year's term; Vice Chair, Juliana Cherere resigned on 6th December, 2022; Commissioner Abdi Guliye's term expired on 17th January, 2023; Commissioner Boya Molu's term expired on 17th January, 2023; Commissioner Francis Mathenge Wanderi's resigned on 6th December, 2023; Commissioner Justus Nyang'aya resigned on 6th December, 2023; while Commissioner Irene Masit was removed by a Tribunal upon being found guilty of gross misconduct on 14th February, 2023.
21. The Respondent contended further that the Commissioners are the linchpin of the Commission with the secretariat assisting in the discharge of its functions and as such, the gazettelement cannot be done by the secretariat. Furthermore, that the Chief Executive Officer is not a member of the Commission as contemplated under Article 250 (1) of *the Constitution* but it's employee. As such, it averred that the process leading up to and the conduct of elections and/or nomination must be authorized and sanctioned by the Commissioners who are required to exercise oversight over the secretariat and to give strategic direction.
22. Mr. Owiye further averred that the existence of commissioners is the foundation for the powers and functioning of the secretariat and hence in the absence of a quorate Commission no such gazettelement can be undertaken as the same cannot be undertaken by the secretariat.
23. In its Written Submissions, and as also highlighted by Miss Owuor for Counsel the Respondent reiterated its averments in the Replying Affidavit and while relying on the decision in Michael Sistu Mwaura Kamau vs Ethics and Anti-Corruption Commission and 4 Others, 2017 submitted that the existence of Commissioners is the foundation for the powers and functioning of the secretariat of the Independent Electoral and Boundaries Commission. The Respondent further relied on the case of John Harun Mwau vs Peter Gastrow and 3 Others [2014] eKLR for the proposition that *the Constitution* only ought to be invoked when there is no other recourse for disposing of the matter and therefore urged the court to dismiss the Petition with cost.
24. The Interested Party did not participate in the proceedings.

Analysis And Determination

25. I have considered the Petition before me, the Affidavit sworn in support thereof, the Response by the Respondent as well as the submissions filed by the parties including the oral submissions made by the respective Counsel before me. The main issue for determination is whether the Petitioners have made out a case to warrant the grant of the orders sought in the Petition as set out herein above.
26. Before I delve into the analysis of the main issue, I must consider the preliminary issue raised by the Respondent being that the present 'Petition as drawn is wanting both in form and substance and does not attempt even in the remotest scenario to satisfy the parameters on constitutional petitions as set out in the locus classicus of Anarita Karimi Njeru".
27. Firstly, the import of *Anarita Karimi Njeru vs Republic, Miscellaneous Criminal Application No. 4 of 1979*, [1979] eKLR, is to the effect that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (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.”

28. Turning to the instant Petition, as can be gleaned at Paragraphs 15, 16, 17, 42 to 59 of the Petition as read together with the Supporting Affidavit therein, the Petitioners have pleaded the nature of their grievance and cited specific provisions of the law the claim to have been contravened by the Respondent. The argument by the Respondent must therefore fail. Notably, precision is not coterminous with exactitude and 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. This was the position restated by the Court of Appeal in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012*, [2013] eKLR, where it was held that:

“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.”

29. I shall now turn to the main issue in the Petition which is whether the Petitioners have made out a case to warrant the grant of the orders sought. It is not in dispute that there is a vacancy in the office of the Deputy Governor, Kisii County and that on 14th March, 2024 the Senate passed a Motion impeaching the Interested Party herein, Dr. Robert Monda, thus removing him from office. It is also not in dispute that the County Governor nominated one Elijah Obebo whose name was subsequently approved by the County Assembly of Kisii. The major contention in the present case is the failure by the Independent Electoral and Boundaries Commission in action by failing to gazette the name of the said Elijah Obebo as the new Deputy Governor of Kisii County in order to pave way for his swearing in and taking oath of office. The propriety of these proceedings is also not in dispute as the Commission itself in its letter dated 2nd April; 2024, authored by one Marjan Hussein Marjan, the Commission’s Secretary/Chief Executive Officer, indicated that it would only act on the basis of a court order. To wit:

“It is noteworthy that in terms of the Constitutional prescription and the IEBC Act, it is the Commission Chairperson who executes gazette notices on behalf of the Commission. However, noting the absence of the Chairperson of the Commission, we wish to inform you that the Commission is not in a position to appoint through gazettment, the County Returning Officer and subsequent to gazette the Deputy Governor approved by the County Assembly.

In the premises, we advise that you invoke judicial intervention and obtain court order requiring and/or directing the Commission Secretary to undertake the appointment and gazettment as required.

Kindly be advised that the Commission can only act pursuant to a Court Order.”



30. What then is the procedure for filing a vacancy in the office of the Deputy Governor? The procedure of filing a vacancy in the office of the Deputy Governor is outlined under Section 32D of the County Governments (Amendment) Act, 2020, No. 11 of 2020, which provides as follows:
1. Where a vacancy arises in the office of a deputy governor as provided for under section 32C, the governor shall –
 - a. Within fourteen days, nominate the deputy governor; and
 - b. With the approval of the county assembly, appoint a deputy governor.
 2. A person nominated for appointment as deputy governor under subsection (1) shall be a person eligible for election as governor.
 3. The county assembly shall –
 - a. Consider a motion for approval for the appointment of the deputy governor, within fourteen days, and resolve whether to approve the motion; and
 - b. Be deemed to have approved the motion for the appointment of the deputy governor upon the lapse of fourteen days and having failed to make a resolution.
 4. A motion for the approval for appointment of a deputy governor shall be supported by a majority of the members of a county assembly.
 5. ...
31. Flowing from the above, it follows that the law contemplates a period of fourteen days upon which the Governor and the County Assembly shall take steps towards the filing of a vacancy in the office of the Deputy Governor whenever such a vacancy arises. The Supreme Court in the case of *In Re Speaker, County Assembly of Embu*, Reference No. 1 of 2015, [2018] eKLR addressed the question of filing a vacancy in the office of the Deputy Governor. The court held that such a vacancy ought to be filled within 60 days. The Court reasoned as follows:

“

47. It is beyond dispute that there exists a lacuna in law, with regard to the filling of a vacancy in the office of Deputy Governor. *The Constitution* is silent on what happens to that office, should a vacancy occur in terms of Article 182(2).
48. *The Constitution*, of which it is the Supreme Court’s first duty to give effect, is inadvertently reticent on the manner in which it is to be given effect, on a vital question of governance—namely, the uninterrupted occupancy of the office of Deputy County Governor. Yet *the Constitution* is ever to bear intent, purpose and direction. The ultimate task of interpreting *the Constitution* falls to this Court, which bears the mandate to do so in a manner that “promotes its purposes, values and principles” (Article 259(1)(a)); that “advances the rule of law...” (Article 259(1)(b)); that “permits the development of the law” (Article 259(1)(c)); and that “contributes to good governance” (Article 259(1)(d)).
52. The progressive elements of Kenya’s Constitution of 2010 revolve around sets of safeguards for the people’s social, economic and political rights, that incorporate the mechanisms of devolved government conducted through the stewardship of County Governors and Deputy County Governors. It is a



relevant question in that context, whether *the Constitution* contemplates that the position of Deputy Governor should remain vacant, upon the current Deputy Governor assuming the substantive office of County Governor, pursuant to Article 182(2) of *the Constitution*.

53. It is the position, under *the Constitution*, that an incoming Deputy Governor is nominated by a person vying for the position of County Governor; and upon the candidate for Governor being elected in that position, the IEBC declares the nominee as Deputy Governor, in accordance with the provisions of Article 180(5) and (6).
54. The Office of Governor and that of Deputy Governor are therefore so intimately linked, that the latter is dependent upon the election of Governor. *The Constitution* also expressly dispenses with the detached election for a Deputy Governor who assumes office upon the election of the Governor that nominated him or her. Hence the supposition that, *the Constitution* does not contemplate the filling of a vacancy in the office of Deputy Governor through a direct election to that office.
55. Further, upon a vacancy occurring in the office of Governor, Article 182(2) provides that the Deputy Governor shall assume office as County Governor, for the remainder of the term of the County Governor. The only time when an election can be held for the position of County Governor is where a vacancy occurs in the office of County Governor and that of Deputy County Governor simultaneously, or if the Deputy County Governor is unable to serve in an acting capacity (Article 182(4)). In such an eventuality, the Speaker of the County Assembly shall act as County Governor for a period of sixty days, during which time an election to the office of County Governor shall be held.
56. Does *the Constitution* contemplate a situation in which the office of Deputy County Governor would remain vacant indefinitely, as suggested by learned counsel, Mr. Onyiso? From the position that *the Constitution* accords priority to the Deputy County Governor as the candidate to assume the office of Governor, in the event of a vacancy in the Governor's office, would the same Constitution be contemplating a vacuum in such a vital office in the governance structure of County Government?
57. Under the provisions of Article 179(1), (4) and (5) of *the Constitution*, as read together with Section 32 of the County Government Act, the Deputy County Governor is the Deputy Chief Executive of the County; is a member of the County Executive Committee; and acts as the County Governor, in the absence of the Governor. So crucial are these roles to the operations of County Government, it is inconceivable that, constitutionally, they could remain fallow until the next cycle of a general election. We are, therefore, of the definite opinion that the office of Deputy County Governor ought not to remain vacant until the next general election as submitted by Mr. Onyiso. A differing interpretation, in our perception would be inconsistent with the vital objects of *the Constitution*, which we have to uphold.



58. It is apposite to draw an analogy with the provisions of *the Constitution* relating to the office of Deputy President, as principal assistant to the President. Article 180(5) thus provides:

“Each candidate for election as County Governor shall nominate a person who is qualified for nomination for election as County Governor as a candidate for Deputy Governor.”

Likewise, Article 148. (1) of *the Constitution* provides that:

“Each candidate in a presidential election shall nominate a person who is qualified for nomination for election as President, as a candidate for Deputy President.”

59. *The Constitution* is explicit on the mode of filling the position of Deputy President. Article 149 thus provides:

“(1) Within fourteen days after a vacancy in the office of Deputy President arises, the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it.”

60. We would adopt the observations of this Court in earlier advisory opinions, regarding the requisite approach to constitutional interpretation, in view of the provisions of Article 259 of *the Constitution*. Article 259 (3) provides that:

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

61. The foregoing principle calls for a reading of Article 182 of *the Constitution* alongside Article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in Article 149 of *the Constitution*, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by *the Constitution*, i.e death, resignation or impeachment.”

32. This Court is bound by the decision of the Supreme Court as read with Article 163 (7) of *the Constitution* and as such, a vacancy in a constitutional office, such as the present one, ought to be filled as soon as possible within the required statutory timelines. In the instant case, as already noted, the Governor and the County Assembly have duly discharged their mandate as per the law and the Independent Electoral and Boundaries Commission has failed to gazette the name of Elijah Obebo as the new nominee. According to the Respondent, in its letter dated 2nd April, 2024 the Commission cites a lack of a Commission as the main reason, as also confirmed in its Replying Affidavit filed herein,



as to its failure to gazette the name of Elijah Obebo. In the aforesaid letter, the Independent Electoral and Boundaries Commission asserts as hereunder;

“It is noteworthy that in terms of the Constitutional prescription and the IEBC Act, it is the Commission Chairperson who executes gazette notices on behalf of the Commission. However, noting the absence of the Chairperson of the Commission, we wish to inform you that the Commission is not in a position to appoint through gazette, the County Returning Officer and subsequently to gazette the Deputy Governor approved by the County Assembly...”

33. Whereas the Independent Electoral and Boundaries Commission may have a genuine concern as to why it cannot gazette the nomination for absence Commissioners, it is notable that in the same letter the commission advised that they required a court order to effect the gazette. Failure to fill the position would be contrary to the provisions of *the Constitution* and the values thereunder under Article 10 on the rule of law and good governance. I hold so because, *the Constitution* did not anticipate that the office of Deputy Governor would be vacant indefinitely and the people of Kisii County would operate as such without any representation. I reckon that the Deputy Governor is the immediate assistant to the Governor and who is also a representative of the people.
34. Similarly, the architecture of Section 32D of the County Government (Amendment) Act, 2020 is such that it is a detailed self-executing process outlined in law in regard to filing a vacancy in the office of a deputy governor and it is peculiar because it does not anticipate processes undertaken during the normal electoral process. It will be noted that under the said Section, the law does not for instance anticipate campaigns and rallies by persons nominated for the position; print of campaign posters and materials, submission of campaign time-table and schedule to the Independent Electoral and Boundaries Commission, direct voting through secret-ballot, tallying, and announcement of results, among others. The process commences at the Office of the Governor and ends at the County Assembly, and the law even anticipates scenarios whereby the County Assembly fails to make a resolution on the nomination.
35. I reckon that the High Court sitting in Eldoret was confronted with a similar dilemma whereof Wachira James Maina & 12 Others vs Celestine Chepchirchir Mutai and Others; Eldoret High Court Election Petition Appeal No. E002 of 2023, the Court, per Nyakundi J., rendered Judgment on the question of the role of Gazette by the Independent Electoral and Boundaries Commission as follows:

“Guided by the foregoing discussion, this court is called upon to grant a relief that will effectively cure the violation as a way of enforcing *the constitution* and strike a blow to any future incentives for any state organ, state officer or public officer to violate, infringe and or frustrate a legitimate constitutional or legal process.

I have taken note of the 4th Respondent has allegedly cited incapacity as a reason for not complying with the court’s order. That the 4th Respondent is not properly constituted and as such it is unable to comply. It then triggers the next issue for determination.

Whether Gazette is such a fundamental step to an election process.

The next issue I shall consider is whether the issue of Gazette is such a fundamental step in the election process that it can keep an elected or nominated aspirant from assuming office. The provisions of Article 259 require *the Constitution* to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights fundamental freedoms and that permits the development of law and good governance.



In the present circumstances, IEBC has not been properly constituted. Any further delays would then mean that the Applicants' rights will be put on hold until such a time when the commission will be constituted. Will such an approach breathe life into the Constitution, being a living document?

In my view, when parties suffer a constitutional violation, they quite naturally turn to the courts for relief. The function of the courts then is to assist in fashioning a legal system which is effective and responsive to individual demands for an orderly and expeditious resolution of issues.

Therefore, while this court appreciates the fact that the Constitution of Kenya 2010, did not envisage such a lacuna where there are no IEBC Commissioners, thereby holding all its functions in abeyance, the court is also aware of its mandate to fashion appropriate remedies to the aggrieved party. To this end, the court cannot then sit back and watch the applicant suffer a glaring prejudice for reasons that a properly constituted commission doesn't exist.

Why Gazette? Is it mandatory legal requirement?

While I appreciate the importance of Gazettement in the election process, I insist on realizing the Applicants' constitutional rights who equally have a legitimate expectation to be sworn in as Members of the County Assembly having exhausted the available avenues in pursuing their cause.

...

From the foregoing cited provisions, it is safe to conclude that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. It then implies that a Gazette notice is an official communication or a formal expression of the existence of the notice or law.

...

The 4th Respondent's reasons as put forth by the applicants that it is unable to comply with the court's orders for lack of a quorate commission, is therefore untenable and an attempt to take advantage of the lacuna created by the absence of the Commissioners, an issue that is out of control of the Applicant.

My reading and understanding of the above provisions is that once members of the County Assembly are nominated and/or elected, it is the IEBC's role to publish their names in the Kenya Gazette to inform the public of the prospective office holders. It is noteworthy that there is no mandatory provision to the effect that an MCA can only be sworn in after Gazettement. Gazettement only serves as an avenue to formally inform the public of the successful candidates and as such closing the election process.

In the exercise of discretion, the rule of law dictates that like cases are treated alike. In the sense there should be a degree of predictability and certainty that such individuals in the position of petitioners can benefit from the application of the law and remedies provided therein to plan their lives in reference to a particular legitimate administrative decision. From a more practical point of view holding back the gazettement of the petitioner denies their constituency right of representation in the County Assembly. Therefore, the argument being advanced by the petitioners is a valid one particular circumstances change in the composition of IEBC should be prohibited for that change impairs their civil and political rights. The failure to generate the necessary instruments leading to them taking oath of office as members of County Assembly is unjust and causes unfairness. A case in point is where the



statutory framework is crystal clear as to the procedure to be adopted. Here the appropriate test is for the chief executive officer to find ways and means to give this matter the weight it deserves and the implications of not fulfilling the letter and spirit of the law. There is an overriding public interest which transcends the individual rights in this litigation.

From the facts of this petition the measures adopted by the state organ of not processing the procedural legal instruments in favour of the petitioners largely infringes their fundamental rights and freedoms and the objective which was intended to be achieved by their nomination as occasioned severe prejudice and injustice to the communities/groups designated to be represented by them in the County Assembly I may unhesitatingly remark that this limitation on the petitioners enjoyment of their right is of a nature beyond their individual interest and rights. This is about the interest of the public. This action in a democratic society fails to meet the objectives of the legitimate expectation.

Lastly the emerging scope of this petition cannot escape an illumination on the remedies available under Art. 23 93) (f) of *the Constitution* on judicial review. This is meant to redress any threats to or actual violation of any right or freedom including by private persons. In Art. 47 (1) of *the Constitution* it guarantees a right to fair administrative action that does not violate or threaten to infringe any fundamental rights or freedoms. In this unprecedented petition due to the lack of establishment and operationalization of IEBC as a critical organ of state in matters to do with election management I invoke the writ of mandamus to compel the chief executive officer to execute the tasks in favour of the petitioners within the limitations of the law.”

36. The above decision emanates from a court of concurrent jurisdiction which is not binding on this court but I however find it to be persuasive. The question of gazette is therefore aimed at notifying the members of the public, which I note is not a requirement under Article 88 of *the Constitution* which outlines the specific role of the Independent Electoral and Boundaries Commission. Gazette is just but one of the processes within the chain of activities in an election which in my view is not dependent on the composition of the Commission. The same is neither a question of quorum as at no point will the members of the Commission be called upon to vote on whether a matter ought to be gazette or not. Gazette flows directly from a particular action undertaken for instance whereby a nomination process or an election process has concluded.
37. In the instant case, none of the parties has cited the provision of the law requiring the gazette of the Deputy Governor whereas Section 32D is silent on the same. The Commission itself has not cited the specific law which requires the gazette of a nominee for the position of a deputy governor pursuant to Section 32D of the County Government (Amendment) Act, 2020. That notwithstanding, I am in agreement with the reasoning by Odunga J (as he then was) in the case of *Director of Public Prosecutions vs Samuel Kimuchu Gichuru & another*, Criminal Revision No. 926 of 2011, [2012] eKLR where the Learned Judge pointed out as follows:

“In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazette, the gazette is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment. I also agree with Mwilu, J’s decision in *Alice Muthoni Wabome vs. James Maina Kamau & Others Nairobi High Court Election Petition No. 20 of 2008* that where there is no requirement for gazette, a reference in a gazette notice to an incorrect provision of the law under which a power is exercised does not invalidate the action.”



38. This Court is also persuaded by the decision of Okwany J. in Nyamira Constitutional Petition No. E005 of 2023; Michelle Kemuma Omwoyo vs Independent Electoral & Boundaries Commission & another (Petition E005 of 2023) [2023] KEHC 24521 (KLR) (31 October 2023) (Ruling) where the Court held that:

“67. The reasoning by the Supreme Court was that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and that gazette only serves the purposes of notifying the public of the outcome of the nomination. It is my view that the process of gazette is merely an administrative task arising from an already concluded legal process. I find that gazette cannot vitiate the status of a person who has been duly elected or nominated during an election process. This is the position that was adopted by Odunga J. (as he then was) in *Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another* (supra), when he held thus: -“... In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazette, the gazette is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment.”

70. I have, in the same vein, considered the fact that as a court of equity, this Court should consider the peculiarity of the circumstances that the parties find themselves in where, for some unexplained reason, there is no properly constituted IEBC, and draw reference from the equity maxim which states that; “Equity sees as done that which ought to have been done”. The Respondents herein have not disputed that the Applicant would have been gazetted if the 1st Respondent was properly constituted. Indeed, the Applicant would have been gazetted immediately upon the determination of the suit in the Chief Magistrate’s Court on 11th January 2023 in which the nomination of Dolphine Nyang’ara was nullified. The lower court’s decision was upheld on appeal. I therefore find that there is no impediment or barrier to the Applicant’s swearing in and assumption of office. This Court takes the view that, in the interest of justice and in circumstances of this case, the issue of gazette, which is not a legal prerequisite but an administrative formality/directive, may be by-passed or be deemed to have been done. I find that nothing should further stand in the way of the Applicant, who has been vigilant in pursuing her cause, from assuming her rightful place in office as an MCA. My finding is bolstered by the provisions of Article 177 of *the Constitution* which limits the term of an MCA to 5 years.”

39. By parity of reasoning, I also note that there is no mandatory provision to the effect of the gazette of a nominated deputy governor and, as I have noted, none has been cited by the parties before this Court. Just like in the case of the Members of the County Assembly, the gazette, as a matter of practice, only serves to inform the public of the successful aspirants/nominees thereby marking the close of an election process. In the instant case, neither the Respondent nor the Interested Party have contested or raised a doubt that Mr. Elijah Obebo would have been gazetted should the Independent Electoral and Boundaries Commission have been properly constituted.

40. Having held that gazette is a mere administrative formality and directive as also appreciated by Lady Justice Okwany in the Michelle Kemuma Omwoyo Petition (Supra), it follows therefore that



Mr. Elijah Obebo was presumed by law to have been nominated and elected as the Deputy Governor within sixty days, from the date of nomination and approval by the County Assembly of Kisii.

41. Furthermore, it is greatly prejudicial to the people of Kisii County to continue operating without a deputy governor which post has strict statutory and constitutional timelines and procedures upon which action is to be undertaken. Any action that negates the foregoing provisions is thus contrary to the law and unconstitutional as it repudiates the principles and values underpinning *the Constitution* and our representative democracy.
42. Article 23 (3) of *the Constitution* of Kenya, 2010 grants this Court the powers to craft such appropriate reliefs to ensure the ends of justice are met. It provides that:

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

–

- a. A declaration of rights;
 - b. An injunction;
 - c. A conservatory order;
 - d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e. An order for compensation; and
 - f. An order of judicial review.
43. The law does not define what constitutes an appropriate relief but grants the discretion to the Court to fashion such relief in order to meet the ends of justice. In the case of *EWA and 2 Others vs Director of Immigration and Registration of Persons & another* (2018) eKLR the court defined “appropriate relief” as a relief that is required to protect and enforce *the Constitution* thus:

“... a declaration of rights, an interdict, mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced”

44. The same position was held in the South African case of *Fose vs Minister of Safety and Security* (CCT 14/96) 1997, ZACC 6, 1997 thus:

“[Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...In our context an appropriate remedy must mean an effective remedy”

45. While guided and applying the foregoing, in this case, the law does not anticipate that the office of the Deputy Governor shall remain vacant indefinitely for whatever reason. Having so held that gazettelement is a mere administrative formality, and taking into consideration the circumstances of the instant case whereby nomination and approval by the County Assembly of Kisii was undertaken way back in April, 2024, it would be unconstitutional to further delay and postpone indefinitely the filing



of the vacancy in the office of the Deputy Governor, County Government of Kisii. The Supreme Court in *Re Speaker, County Assembly of Embu*, (Supra) underscored as much when it held as follows:

- (56) Does *the Constitution* contemplate a situation in which the office of Deputy County Governor would remain vacant indefinitely, as suggested by learned counsel, Mr. Onyiso? From the position that *the Constitution* accords priority to the Deputy County Governor as the candidate to assume the office of Governor, in the event of a vacancy in the Governor's office, would the same Constitution be contemplating a vacuum in such a vital office in the governance structure of County Government?
- (57) Under the provisions of Article 179(1), (4) and (5) of *the Constitution*, as read together with Section 32 of the County Government Act, the Deputy County Governor is the Deputy Chief Executive of the County; is a member of the County Executive Committee; and acts as the County Governor, in the absence of the Governor. So crucial are these roles to the operations of County Government, it is inconceivable that, constitutionally, they could remain fallow until the next cycle of a general election. We are, therefore, of the definite opinion that the office of Deputy County Governor ought not to remain vacant until the next general election as submitted by Mr. Onyiso. A differing interpretation, in our perception would be inconsistent with the vital objects of *the Constitution*, which we have to uphold.

46. I am duly guided by the above cited authorities and in the exercise of discretion pursuant to Article 23 (3) of *the Constitution* of Kenya, 2010, the rule of law dictates that like cases are treated alike and underscoring the need for adhering to precedent and predictability, the Court cannot shut its eyes to a looming continuing constitutional crisis arising from the vacancy in the Independent Electoral and Boundaries Commission. The withholding of gazette of the new nominated Deputy Governor denies the people of Kisii the right of representation and the legitimate expectation to be represented and to have a fully-fledged constitutional office pursuant to Article 180 of *the Constitution* of Kenya, 2010.

47. Having held that the issue of gazette is not a legal prerequisite but an administrative formality and considering that this is a public interest litigation which is of paramount importance. It is trite law that "justice delayed is justice denied".

48. I do find that the instant Petition dated 15th May, 2024 is merited and I therefore proceed to grant the following reliefs namely;

1. A Declaration does issue to the effect that the Gazette of duly elected and/or nominated Governors, Deputy Governors, Senators, Woman Representatives, Members of Parliament, and Members of County Assemblies or a vacancy thereof, pursuant to an election and/or nomination is an administrative action, to be undertaken by the Independent Electoral and Boundaries Commission Secretary/Chief Executive Officer, or any such person occupying the said position at the time, and is not dependent on the composition or quorum of the Independent Electoral and Boundaries Commission.
2. A DECLARATION does issue that the failure and inaction by the INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, to Gazette a Returning Officer for Kisii County; and to Gazette the name of ELIJAH OBEBO as the nominated Deputy Governor County Government of Kisii is contrary to Articles 10; 12 (1); 21; 27, 35; 40; 43; 46; 47; 54; 55; 56; 57; 63; 73; 118; 174; 201; 227; and 232 of *the Constitution* of Kenya, 2010 as read with Sections 4, and 5 of *Fair Administrative Action Act*.



3. An Order Of Mandamus does issue compelling the Independent Electoral And Boundaries Commission, through the Secretary/Chief Executive Officer or any person occupying the said position, to, within SEVEN (7) DAYS, from the date of this Judgment, namely:
 - c. Gazette a Returning Officer for Kisii County for the clearance and gazettement of the Deputy Governor Nominee for County Government of Kisii; and
 - d. Gazette the name of Elijah Obebo, as the Deputy Governor, Kisii County.
4. In the event of failure by the Independent Electoral and Boundaries Commission to comply with the orders of Gazettement herein as per Order (3), Elijah Obebo, shall be immediately sworn into office as the Deputy Governor, Kisii County.
49. Owing to the public interest in the instant matter and the weighty complex constitutional issues raised in the Petition and the role of the Independent Electoral and Boundaries Commission in the scheme of the election of a Deputy Governor, it is in the interest of justice that each party bears their own cost.
50. It is so ordered.

DATED AT KISII THIS 4TH DAY OF JULY 2024.

T.A ODERA

JUDGE

4. 7.24

Delivered virtually Via Teams Platform in the presence of:

Oigo- Court Assistant

Ochieng Oginga for Petitioners

Miss Owuor for Respondent

Ochieng Oginga: I seek a copy of the judgment given the timelines issued by the court.

Order: A copy of the judgment be supplied to both counsel herein.

