



County Government of Uasin Gishu & 2 others v Independent Electoral and Boundaries Commission (Constitutional Petition E024 of 2024) [2024] KEHC 12338 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E024 OF 2024
RN NYAKUNDI, J
OCTOBER 15, 2024**

BETWEEN

**COUNTY GOVERNMENT OF UASIN GISHU 1ST PETITIONER
THE GOVERNOR, COUNTY GOVERNMENT OF UASIN
GISHU 2ND PETITIONER
EVANS KIPRUTO KAPKEA 3RD PETITIONER**

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

The Chief Executive Officer of the Independent Electoral and Boundaries Commission can gazette a person nominated as Deputy Governor where the Commission is not properly constituted

In the instant case, a vacancy had arisen in the office of the Deputy Governor Uasin Gishu by reason of resignation of the previous occupier of that office. The Independent Electoral and Boundaries Commission (IEBC) cited lack of a commission as the main reason for its failure to gazette the name of 3rd petitioner as the deputy governor. The court held that it was not a requirement for the deputy governor that resigned to tender his resignation to the IEBC and it was practically absolute if the deputy governor tendered his resignation to the governor of a particular county. The court also held that the action of gazetting of the deputy governor by the CEO of the IEBC was a simple administrative one; involving the placing a notice communicating the decision of the court and that such an action did not call for the Commission to sit, deliberate and come up with a decision.

Reported by Kakai Toili

Devolution – county governments – deputy governors – resignation of deputy governors - whether the resignation letter of a deputy governor must be addressed to the Independent Electoral and Boundaries Commission for it to take effect.

Devolution – county governments – deputy governors - procedure for filing a vacancy in the office of a deputy governor - whether the gazetting of a nominated deputy governor was mandatory where the previous



deputy governor had resigned - whether the chief executive officer of the Independent Electoral and Boundaries Commission could gazette the name of a person nominated as deputy governor where the commission was not properly constituted – County Governments Act (cap 265), section 32D.

Constitutional Law – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right of representation - whether the withholding of gazette of a nominated deputy governor denied the people of the concerned county the right of representation and the legitimate expectation to be represented – Constitution of Kenya, articles 1(2), 23(3) and 180.*

Constitutional Law – *constitutional reliefs – judicial review orders – writ of mandamus - nature of the writ of mandamus - what were the essential elements to bring a petition within the purview of the writ of mandamus – Constitution of Kenya, article 23.*

Brief facts

On August 31, 2024, the then Deputy Governor, Uasin Gishu County officially resigned from the post rendering the said seat vacant. With the said seat vacant, the Governor nominated the 3rd petitioner as his deputy. The petitioners main contention was that despite of having nominated the 3rd petitioner to the post of deputy governor, the respondent, the Independent Electoral and Boundaries Commission (IEBC) had negated and or refused to gazette the name of the the 3rd petitioner as the new Deputy Governor of Uasin Gishu County in order to allow him to officially undertake his duties as the new Deputy Governor.

The petitioners sought for among other orders; a declaration 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 was an administrative action, was to be undertaken by the Independent Electoral and Boundaries Commission Secretary/Chief Executive Officer (CEO) and was not dependent on the composition or quorum of the Independent Electoral and Boundaries Commission (the Commission); and an order of *mandamus* be issued compelling the IEBC, through the CEO within seven days, to gazette the name of the 3rd petitioner as the Deputy Governor, Uasin Gishu County.

The respondent argued that the CEO had neither constitutional nor statutory mandate to appoint from the staff a person to be the County Returning Officer for the purposes of clearance of candidates for election and/or confirmation that a person nominated as Deputy County Governor was eligible for election as a county governor, and that he could not perform the functions of the Commission.

Issues

- i. Whether the chief executive officer of the Independent Electoral and Boundaries Commission could gazette the name of a person nominated as deputy governor where the commission was not properly constituted.
- ii. Whether the gazette of a nominated deputy governor was mandatory where the previous deputy governor had resigned.
- iii. What was the procedure for filing a vacancy in the office of a deputy governor?
- iv. Whether the resignation letter of a deputy governor must be addressed to the Independent Electoral and Boundaries Commission for it to take effect.
- v. Whether the withholding of gazette of a nominated deputy governor denied the people of the concerned county the right of representation and the legitimate expectation to be represented.
- vi. What was the nature of the writ of *mandamus* and what were the essential elements that brought a petition within the purview of the writ of *mandamus*?

Relevant provisions of the Law

County Governments Act (cap 265)

Section 32D - Filling of a vacancy in the office of deputy Governor

(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) A person appointed as deputy Governor under subsection (1) shall, for purposes of Article 180(7) of the Constitution, be deemed—
- (a) to have served a full term as county deputy Governor if, at the date on which the person is appointed, more than two and a half years remain before the date of the next regularly scheduled election under Article 180(1) of the Constitution; or
- (b) not to have served a term of office as county deputy Governor, in any other case.

Held

1. The Constitution of Kenya in article 1(10), (19), (20), (22) and (24) provided the anchor and yardstick of interpretation of the Bill of Rights as infused in the values and principle of governance contained in article 10 of the Constitution. It was a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. Otherwise, they were in effect arbitrary and inconsistent with that requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least comply with that requirement. If it did not it fell short of the standards demanded by the Constitution for such action.
2. The founding provisions on electoral law super-entrenched the powers of the IEBC on matters to do with nomination, election and declaration of final results of those candidates who had won various seats at various levels of Government in the Republic of Kenya. The principle of democracy implicit in the several provisions of the Constitution provided that the Republic of Kenya was one sovereign state founded on among others the value of universal suffrage, a national voters roll, regular elections and a multi-party system of democratic government to ensure accountability, transparency, responsiveness and openness. Article 1 and 2 of the Constitution had very specific provisions of governance of that democratic state.
3. The Constitution provided for the formulation of the will of people and also required Government to respond to the will of the people like in article 47 of the Constitution imported the right to fair administrative action.
4. Despite all the structures in both the constitutional provisions and electoral statute laws, the completeness in law making and implementation, failed to legislate on the governance of the Commission in the absence of legally appointed commissioners as provided in the legislative scheme and constitutional model to execute all matters to do with the electoral laws. In some cases, the issues of giving effect to civil and political rights as premised in the various international and regional instruments recognized by the Constitution in article 2(5) and (6) of the Constitution remained moot and limited for lack of a functional IEBC commission.
5. As constitutionally entrenched in article 27, the State shall not deny any person equality before the law or the equal protection of the law within the territory of Kenya. The Constitution was the soul of a nation embodying a set of legal rules for the passing hour. It set out principles for an expanding future



- and was intended to endure for ages to come and consequently to be adopted in the various crises of human affairs. Therefore, a purposive rather than a strict literal approach interpretation should be adopted by the courts in giving effect to the fundamental rights and freedoms in the Bill of Rights.
6. There was sadly little acknowledgement in Kenya on the direct and indirect limitations of the enjoyment of civil and political rights which had been occasioned by virtue of non-establishment or appointment of the IEBC commissioners as an organ of the Constitution to superintend the management of electoral affairs framework. Hence the constitutional goals of equality of opportunity and social justice in achieving civil and political rights as set out in article 2, 81, 82, 83, 84, 85 and 87 of the Constitution for those constituencies/wards with a legitimate expectation to hold a by-election for their representatives remained a pipe dream.
 7. The process of striking inequality by its very nature formed the basis upon which the petitioners approached the court. The fundamental features of article 88 of the Constitution on IEBC in the true sense of terms envisaged by the Constitution in absence of its establishment by the Executive and the Legislature was not capable of providing the components of political justice in real and substantive equality.
 8. There were implied limitations on the power of the secretariat to abrogate itself the powers and functions of the Commission as stipulated in article 88 of the Constitution as read conjunctively with the Independent Electoral and Boundaries Commission Act No. 9 of 2011. The normal process of gazettelement of a qualified deputy governor as it was with the case of Uasin Gishu County, in the event a vacancy arose for reasons of death, an impeachment process or by resignation or as the case may be to trigger the basic gateway for the legal process to take effect for a new officer bearer to be sworn in consonant with the Constitution.
 9. The law expressly required making of certain procedural decisions which would impliedly be within the wider provisions of article 88 of the Constitution, the facets of the Independent Electoral and Boundaries Commission Act and the Elections Act No. 24 of 2011. The concepts of justice, liberty, equality and fraternity though traceable to the French revolution remained to the hallmark of a social, economic and political order both at the national and county level of governance in Kenya.
 10. A purposive interpretation inevitably required a value judgment to be made about which purposes were important and were protected by the Constitution. In that context, while legislating, for the various functions of IEBC, Parliament must have conferred the discretion for the Commission to generate instruments for gazettelement of a declaration of the existence of a vacancy in any of political arena which may have arisen through an election petition, death, an impeachment process or resignation with the object that it should be used to promote the policy and the objects of the Act.
 11. There was an irrefutable presumption in law that at no time did Parliament envisage a vacuum in the office of the electoral commission without maintaining the minimum threshold of three or five commissioners at most as outlined in the statute. The purpose of the express provisions of the Act was discernible as a staggering exit strategy on face out model for institutional governance management. Speaking generally and in a broad way, the relevant prevailing circumstances were not underpinned in the law.
 12. The procedural law upon the subject of resignation of a deputy governor did not provide that the letter must be addressed to the IEBC before it could take effect. It must be considered as practically absolute if the deputy governor tendered his resignation to the governor of a particular county. The IEBC was not the guardian of the rights of the people of the State or for that matter the county government, unless those rights were secured by some constitutional or statutory provisions which came within judicial cognizance.
 13. In filling the vacancy of a new deputy governor, there was no condition precedent for IEBC to conduct some kind of a by-election in Uasin Gishu County to require first the position to be declared vacant. That was not to be the basic feature of the law on matters of resignation of a deputy governor.



14. The equal protection of the laws was a pledge of the Constitution for the protection of its citizens with equal laws. The initial non-declaration of a vacancy by IEBC could not limit the rights of the residents of Uasin Gishu and the right holder being the newly vetted nominee for the Office of the Deputy Governor within the scope of article 24 of the Constitution. The court must look beyond the classification to the purpose of the law. The purpose of the law may be either the elimination of a public mischief or the achievement of some positive public good.
15. Article 23(3) of the Constitution granted the court the powers to craft appropriate reliefs to ensure the ends of justice were met. The procedure of filing a vacancy in the office of the deputy governor was outlined under section 32D of the County Governments (Amendment) Act, 2020, No. 11 of 2020. The law contemplated a period of 14 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 arose. The vacancy ought to be filled within 60 days.
16. A vacancy in a constitutional office, such as the instant one, ought to be filled as soon as possible within the required statutory timelines. In the instant case, the Governor and the County Assembly had duly discharged their mandate as per the law and the IEBC had failed to gazette the name of the 3rd petitioner as the new nominee. The respondent cited a lack of a Commission as the main reason, for its failure to gazette the name of 3rd petitioner.
17. While the respondent raised valid concerns regarding the absence of the commissioners, it would be against the Constitution's principles and values under article 10 of the Constitution on the rule of law and good governance if the post remained unfilled. The people of Uasin Gishu County would not have any representation because the deputy governor position was not intended to remain empty indefinitely according to the Constitution. The deputy governor performed the dual roles of direct assistance to the governor and representative of the people.
18. Section 32D of the County Government (Amendment) Act, 2020 outlined a comprehensive, self-executing procedure for filling a vacancy in the deputy governor's office. The procedure was unique because it did not take into account procedures followed during the regular electoral process. Under section 32D, the law did not, among other things, anticipate campaigns and rallies by candidates; printing of campaign materials and posters; submitting a schedule and timetable for the campaign to the IEBC; direct voting by secret ballot; tallying; or the announcement of results. The procedure ended at the county assembly upon nomination of his candidate by the governor. There were very clear legal protocols on assumption of office by the new nominee to the officer of the deputy governor.
19. The question of gazette was only aimed at notifying the members of the public, which was not a requirement under article 88 of the Constitution which outlined the specific role of the IEBC. Gazette was just but one of the processes within the chain of activities in an election which was not dependent on the composition of the Commission. The same was neither a question of quorum as at no point would the members of the Commission be called upon to vote on whether a matter ought to be gazetted or not. Gazette flowed directly from a particular action undertaken for instance whereby a nomination process or an election process had concluded. There was no mandatory provision to the effect of the gazette of a nominated deputy governor.
20. Gazette was a mere administrative formality and directive, therefore the 3rd petitioner was presumed by law to have been nominated and elected as the deputy governor within 60 days, from the date of nomination and approval by the County Assembly of Uasin Gishu.
21. The provisions of section 5 of the Independent Electoral and Boundaries Commission Act were authoritative as to the composition of the Commission and the basic role of the CEO was to execute the decisions of the Commission and to perform the duties assigned to him/her by the law and Commission. The action of gazette by the CEO was a simple administrative one; placing a notice communicating the decision of the court. Such an action did not call for the Commission to sit, deliberate and come up with a decision.



22. The CEO was neither an independent entity from the Commission nor an alternative to the commissioner. It then meant that the CEO was incapable of assuming the role of the Commission in instances when the Commission was not properly constituted or not constituted at all. However, the Constitution did not envisage the present scenario where strictly speaking, there were no members of the Commission. The Constitution and the Independent Electoral and Boundaries Commission Act were however clear on the steps to be taken to replace commissioners in the event of resignation, retirement and removal.
23. Given the fact that the Commission had not been properly constituted, and to give effect of the court's directions, the CEO could exercise such an administrative duty of communicating the decision of the court to the Government Printer. It would be an injustice to delay further the swearing in of the 3rd petitioner as the Deputy Governor, County Government Uasin Gishu.
24. The availability of constitutional remedies was a matter of jurisdiction as laid down in article 23 of the Constitution. The writ of *mandamus* was a high prerogative writ of a most extensive remedial nature, and was in form, a command issuing from the High Court, directed to any person, corporation or inferior court, requiring him or them to do some particular thing therein specified which appertained to his or their office and was in the nature of a public duty.
25. The purpose of the writ of *mandamus* was to supply defects or justice, and accordingly it would issue to the end that justice may be done, in all cases where there was a specific legal right and no specific legal remedy for enforcing such right and it may issue in cases where although there was an alternative legal remedy, yet such mode of redress was less convenient, beneficial and effectual. *Mandamus* would be appropriate to compel a tribunal to exercise a jurisdiction which it possessed but declined to exercise. The court would as a general rule and in exercise of its discretion, refuse an order of *mandamus* when there was an alternative specific remedy, which was beneficial and effective.
26. The essential elements which brought the petition within the purview of the writ of *mandamus* included the following:
 1. Whether the petitioner had a clear and specific legal right to the relief demanded by him.
 2. Whether there was a duty imposed by law on the IEBC.
 3. Whether such duty was of an imperative ministerial character involving no judgement or discretion on the part of the IEBC.
 4. Whether the petitioner had any remedy other than by way of *mandamus*.
27. The schemes of classification of functions between the Commission and the secretariat could be devised by reference to the character of the decision itself or the function of the decision maker. The nature or the quality of the functions of an authority covered by the rules, the statute, policy, either generally or in relation to some particular occasion may be given a particular distribution to distinguish it from other kinds of functions. The distinction related to the nature of the function not to the character of the body.
28. Broadly, an administrative function was one which dealt with policy and expediency while quasi-judicial function was one which dealt with rights and legalities. The court was concerned with administrative procedural function of dispatch by the secretariat of a gazette notice to the effect that a vacancy had fallen due in the office of the Deputy Governor of Uasin Gishu and for all intents and purpose the legal protocols had been followed leading to the nomination and vetting of the new office bearer within the ambit of the Constitution and enabling statutes.
29. The court was exercising its discretion in accordance with article 23(3) of the Constitution and article 180 of the Constitution which dictated that the people of Uasin Gishu had a right to representation and a genuine expectation of being represented, the withholding of gazettelement of the new nominated deputy governor denied the people of Uasin Gishu the right of representation and the legitimate expectation to be represented. Any further delay of swearing in the nominee of the Office of the Deputy Governor would be in violation or infringement of article 1(2) of the Constitution.



30. The right to equality before the law and freedom from discrimination of the petitioner and the citizens of Uasin Gishu would be violated if there was a stalemate by any constitutional organ which stood on the way by either declining gazettelement or obstructing the swearing in of the new office bearer at the executive office of the Governor.

Petition partly allowed.

Orders

- i. *The court had jurisdiction to adjudicate on the petition.*
- ii. *The petitioner had established and the residents of Uasin Gishu had established a violation of their rights on representation and on their aspirations based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*
- iii. *The Governor and the County Assembly of Uasin Gishu County had complied with the procedural requirements of the law on nomination and vetting of the 3rd petitioner.*
- iv. *A declaration was made that in absence of the duly constituted IEBC Commission in terms of article 88 of the Constitution, the CEO do issue a gazette notice in the name of the 3rd petitioner as the nominated/ appointed Deputy Governor for the County Government of Uasin Gishu with effect from the date of his vetting by the County Assembly within seven days on being served by the Deputy Registrar of the High court with the instant order.*
- v. *An order of mandamus was issued directed to the IEBC's administrative unit headed by the CEO to initiate the instruments to the Government Printer for the name of the 3rd petitioner to be formally entered in the official Kenya Gazette Notice as the newly nominated Deputy Governor Uasin-Gishu County.*
- vi. *In the event of default by the CEO, the Governor as the appointing authority was at liberty to initiate instruments of gazettelement to the Government Printer of the nominee, the 3rd petitioner, to pave way for his swearing and assumption of office with immediate effect.*
- vii. *Costs of the petition to be in the cause. Leave to stay execution of the declarations was denied.*

Citations

Cases

Kenya

1. *County Government of Kisii & 2 others v Independent Electoral and Boundaries Commission; Monda (Interested Party) Constitutional Petition E006 of 2024; [2024] KEHC 8477 (KLR) - (Explained)*
2. *Gandhi, Satya Bhama v Director of Public Prosecutions & 3 others Judicial Review Miscellaneous Application 685 of 2017; [2018] KEHC 6100 (KLR) - (Explained)*
3. *In the Matter of Speaker, County Assembly of Embu Reference 1 of 2015; [2018] KESC 49 (KLR) - (Explained)*
4. *Kangwony, Isaiah Biwott v Independent Electoral & Boundaries Commission & another Petition 212 of 2018; [2018] KEHC 10134 (KLR) - (Explained)*
5. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others Civil Appeal 266 of 1996; [1997] KECA 58 (KLR) - (Applied)*
6. *Maina & 12 others v Independent Electoral and Boundaries Commission & 2 others; Mutai & 2 others (Petitioner) Election Petition Appeal E002 of 2023; [2024] KEHC 208 (KLR) - (Explained)*
7. *Salat v Independent Electoral and Boundaries Commission & 7 others Petition 23 of 2014; [2015] KESC 31 (KLR) - (Explained)*

South Africa

1. *Ex parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (2) SA 674 (CC); 2000 (1) SA 732 (CC) (1999) - (Explained)*
2. *Fose v Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851 - (Explained)*
3. *Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17 - (Explained)*

India



Ashoka Kumar v Thakur (1995) 5 SCC 403 - (Explained)

Canada

R v Big M Drug Mart Ltd [1985] 1 SCR 295 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 1, 2(5),(6);10;12(1); 21; 24; 27,35;40; 43; 46; 47; 50; 54; 55; 56; 57; 63; 73; 81; 82(1)(b);83; 84; 85; 87; 118; 159; 163(7); 168; 174; 180; 201; 227; 232; 250(4) - (Interpreted)
2. County Governments Act (cap 265) sections 32C, 32D - (Interpreted)
3. Elections (General) Regulations, 2012 (cap 7 Sub Leg) regulations 4(1),(3) - (Interpreted)
4. Elections Act (cap 7) sections 17, 85 - (Interpreted)
5. Evidence Act (cap 80) In general - (Cited)
6. Fair Administrative Action Act (cap 7L) sections 4, 5 - (Interpreted)
7. Independent Electoral And Boundaries Commission Act (cap 7C) sections 4, 5, 10(7); 11; 11A - (Interpreted)
8. Interpretation And General Provisions Act (cap 2) sections 5, 69 - (Interpreted)

Advocates

Mr Cheruiyot for the petitioner

Mr Oduor for the respondent

JUDGMENT

Representation

Mr Cheruiyot Advocate for the petitioner

Mr Oduor Advocate for the respondent

1. Before court for determination is the petitioners' petition dated 30/9/2024 wherein the petitioners seek the following prayers:
 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 Uasin Gishu County; and to gazette the name of Evans Kipruto Kapkea as the nominated/appointed deputy governor county government of Uasin Gishu 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* No 4 of 2015.
 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 within 7 days, to namely:



- a. Gazette a Returning Officer for Uasin Gishu County for the clearance and gazette of the Deputy Governor Nominee for County Government of Uasin Gishu; and
 - b. Gazette the name of Evans Kipruto Kapkea, as the Deputy Governor, Uasin Gishu County.
4. In the event of failure by the Independent Electoral and Boundaries Commission to comply with the orders of gazette as per prayer 3 above, Hon Evans Kipruto Kapkea, shall be immediately sworn into office as the Deputy Governor, Uasin Gishu County.
 5. An order awarding costs of the petition to the petitioners.
 6. 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.

The Petitioners' Case

2. The petitioners maintain 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 Evans Kapkae, the Gazette of a County Returning Officer; Issuance of a Nomination Certificate, and publication of the nominee's name in the Kenya Gazette, that despite various correspondences by the United Democratic Alliance (UDA) Party and the petitioners, the Independent Electoral and Boundaries Commission has deliberately abdicated on its duty and declined to discharge its statutory obligations, 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, that inaction by the Independent Electoral and Boundaries Commission has occasioned inconvenience, hardship and a constitutional crisis as the County Government of Uasin Gishu is operating indefinitely without a deputy Governor contrary to articles 10, 27, 47 and 180 of the [Constitution of Kenya, 2010](#).
3. According to the petitioners 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 County Governments, Government institutions and State Organs. It is the petitioners' contention 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 No 4 of 2015](#), 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.
4. The petitioner maintain 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](#), No 4 of 2015 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, that when faced with a similar scenario in Kisii County, the Commission wrote a letter to the said County and declined to undertake the Gazette of a Returning Officer and the Gazette of 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 and that the foregoing scenario shall also be the case in Uasin Gishu County owing to the fact that the Independent Electoral and Boundaries still has no Chairperson.

5. The Petitioners contend that in the circumstances the County Government of Uasin Gishu they shall be left in limbo and the occurrences 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. The petitioners cited this court's decision in *Wachira James Maina & 12 others v Celestine Chepchirchir Mutai and others*; Eldoret High Court Election Petition Appeal No E002 of 2023 and added that effect of the foregoing is that the Gazettement of nominated and/or elected candidates after an election and/or nomination is an administrative act and ought not to be pegged to the composition and/or existence of the quorum or the full Independent Electoral and Boundaries Commission.
6. According to the petitioners the question of gazettement is not a decision to be made by the Commission but rather it is an administrative decision. The Petitioner cited case of *Isaiiah Biwott Kangwony v Independent Elections and Boundaries Commission & another*, Nairobi High Court Petition No 212 of 2018 and added that the failure by the Independent Electoral and Boundaries Commission to gazette the County Returning Officer and the 3rd petitioner's name is an infringement of the Petitioners' and the people of Uasin Gishu's legitimate expectation and due process and furthermore contrary to the provisions and statutory timelines under section 32D of the *County Governments Act*, that the *County Governments Act* No 17 of 2012 anticipates that the nomination of a Deputy Governor shall be undertaken within 14 days from the date of the vacancy and thereafter, the County Assembly is to undertake an approval of the same. Accordingly, it is worth noting that such a nominee is deemed to have been appointed as such, pursuant to section 32D(1) of the said Act and hence the act of gazettement is merely ceremonial and for notification purposes.
7. The petitioners maintain that in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] EKLK the Supreme Court of Kenya underscored the importance of statutory and constitutional timelines on election matters and that the petitioners and their members have in the recent past made concerted efforts in an attempt to have the Independent Electoral and Boundaries Commission address the issue and concerns by the petitioners but their efforts have borne no fruits.

The Respondent's Case

8. The respondent opposed the petition *vide* the replying affidavit sworn by Chrispine Owiye on October 7, 2024, the Director, Legal Services of the respondent.
9. He deposed that article 82(1)(b) of the *Constitution of Kenya* provides that parliament shall enact legislation to provide for the clearance of candidates for election, that section 4 of the *Independent Electoral and Boundaries Commission Act* outlines the functions of the Commission, and notably it provides that the commission shall monitor the compliance with the legislation required by article 82(1)(b) of the *Constitution* relating to nomination of candidates by parties and to clearance of candidates for election, that the provision of section 32D(2) of the *County Government Act* requires a person nominated for appointment as deputy Governor under subsection (1) shall be a person eligible for election as Governor, as such, it is only the respondent who has the constitutional mandate to clear such a person, that the respondent is thus unable to clear the nominated Deputy County Governor due to the fact that the respondent is not properly constituted as required under article 250(4) of the *Constitution* and section 5 of the *IEBC Act* as all commissioners have retired and/or resigned and/or removed from office, the respondent is unable to clear the nominated Deputy County Governor since it is the Commission as a Plenary that has been conferred with responsibility to appoint a County



Returning Officer for the purposes of clearance of candidates for the election of County Governor pursuant to provisions of section 17 of the [Elections Act](#) as read together with regulation 4(1) of the [Elections \(General\) Regulations, 2012](#).

10. He maintained that the role of the Commission is to appoint and gazette the County Returning Officer pursuant to regulation 4(3) of the [Elections \(General\) Regulations, 2012](#) which mandates the Commission Plenary to publish in the Gazette such appointment(s). As such, the Commission Secretary has neither constitutional nor statutory mandate to appoint from the staff a person to be the County Returning Officer for the purposes of clearance of candidates for election and/or confirmation that a person nominated as Deputy County Governor is eligible for election as a County Governor, that the Commission Secretary/Chief Executive Officer of the Commission is not a member of the Commission as defined under section 5 of the [Independent Electoral and Boundaries Commission Act](#) and as such he cannot therefore perform the functions of the Commission, that the functions of the Commission Secretary provided under section 10(7) of the [IEBC Act](#) do not include appointment of County Returning Officer for the purposes of clearance of candidates and conduct of election and that the functions of the Respondent's secretariat under the provisions of Section 11 and 11A of the IEBC Act do not include conduct of elections or clearance of candidates for election as such is a mandate of the Commission Plenary as provided under section 4 of the [IEBC Act](#).
11. He contended that the petitioners have not pointed out or identified any provision in the *Constitution* or the written law, which confers on the Chief Executive Officer the power to appoint and gazette County Returning Officer to clear candidates for the election of County Governor without the actual involvement of the Commissioners, that the Petitioners are seeking for Orders against the Commission Secretary/CEO who is not a party in this matter and as such Orders sought unenforceable and as such this Petition is defective and devoid of merit and thus an abuse of the court process and ought to be dismissed with costs. He cited the case of *Ann Wanbui Mukuru v Independent Electoral and Boundaries Commission and County Government of Taita Taveta & 10 others* and added that he believes to be the right interpretation of law held that the IEBC, and the Chief Executive Officer are two different entities or offices, though related, the IEBC constitutes of the Commissioners, while the Chief Executive Officer is an employee of the IEBC, thus, one cannot sue IEBC and then directly obtain orders against the Chief Executive Officer as suggested in the submissions, if one wanted to get orders in this petition directly against the Chief Executive Officer, then that office should have been joined as a party, hence, the petitioners should not be granted the Orders they are seeking since they have not enjoined the Commission Secretary/CEO.
12. In conclusion, he deposed that it is clear that IEBC has not deliberately refused, declined and neglected to gazette the deputy County Governor nominee, that indeed, the Commission has explained the obtaining circumstances under which it is not legally tenable to process the nominee.

The Submissions

13. The petition was canvassed *vide* written submissions. Both parties filed their respective submissions.

The Petitioners' Submissions

14. In regard to whether the petitioners have made a case to warrant the grant of the orders sought, counsel for the petitioner submitted that from the documents filed in support of the petition and the instant application, they have made out a case to warrant the grant of the orders sought, that despite correspondences by the UDA Party, the Independent Electoral and Boundaries Commission has deliberately abdicated on its duty and declined to discharge its statutory obligations, the Independent Electoral and Boundaries Commission has acted and continues to act unreasonably, illegally and



unconstitutionally and hence the petitioners'/applicants' move to this Court seeking its intervention to arrest the ongoing illegality, that the inaction by the Independent Electoral and Boundaries Commission has occasioned inconvenience, hardship and a constitutional crisis as the County Government of Uasin Gishu is operating indefinitely without a deputy Governor contrary to articles 10, 27, 47 and 180 of the *Constitution of Kenya, 2010*. Counsel cited the case of *In re Speaker, County Assembly of Embu*, Reference No 1 of 2015, [2018] eKLR and added that it follows therefore that the office of the Deputy Governor must be filled within 60 days from the date the Governor nominates such a person and accordingly, the office cannot remain vacant indefinitely as the same would negate the spirit and letter of the *Constitution* and devolution and 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.

15. According to counsel, the petitioners/applicants have on their part and in compliance with the provisions of the sections 32C and 32D of the *County Governments Act, 2012* and in adherence to the aforementioned legal underpinnings have proceeded to nominate a deputy Governor within 14 days from the date of resignation of the former deputy governor, have caused the approval of the said nominee by availing them or themselves for vetting and have duly forwarded the name through the UDA party to the respondent for gazette.
16. On the prayer to compel the independent electoral and boundaries commission to gazette a county returning officer in the interim, counsel submitted that the requirement for Gazette is a mere administrative task and duty and is not dependent on the composition of the Independent Electoral and Boundaries Commission. Counsel cited the case of *Isaiah Biwott Kangwony v Independent Elections and Boundaries Commission & another, Nairobi High Court Petition No 212 of 2018* (supra) and this court's decision in *Wachira James Maina & 12 others v Celestine Chepchirchir Mutai & others*; Eldoret High Court Election Petition Appeal No E002 of 2023 (supra) and further submitted that the effect of the foregoing is that the Gazette of nominated and/or elected candidates after an election and/or nomination is an administrative exercise and ought not to be pegged on the composition and/or existence of the quorum or the full Independent Electoral and Boundaries Commission. Counsel added that when faced with a similar predicament as the instant one, the High Court of Kenya in Kisii granted the orders sought by the County Government of Kisli to compel the Independent and Electoral Boundaries Commission to gazette the Deputy Governor Nominee for Kisii County, Justice Odera in *County Government of Kisii & 2 others v Independent Electoral and Boundaries Commission; Monda (Interested Party)* (Constitutional Petition No E006 of 2024) [2024] KEHC 8477 (KLR).
17. Applying the foregoing to the instant case, counsel urged that the failure by the Independent Electoral and Boundaries Commission to gazette the County Returning Officer is an infringement of the Petitioners' and the people of Uasin Gishu's legitimate expectation and due process and furthermore contrary to the provisions and statutory timelines under section 32D of the *County Governments Act*, that the *County Governments Act* anticipates that the nomination of a Deputy Governor shall be undertaken within 14 days from the date of the vacancy and thereafter, the County Assembly is to undertake an approval of the same and accordingly, it is worth noting that such a nominee is deemed to have been appointed as such, pursuant to section 32D (3)(b) of the said Act and hence the act of gazette is merely ceremonial and for notification purposes. Counsel cited the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 others* [2014] eKLR and urged that in the present case, the court will further note 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 even initiating it by appointing and gazing a County Returning officer for purposes of clearing the 3rd petitioner namely, the Gazette of a County Returning Officer; Issuance of a Nomination Certificate.



18. According to counsel, 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. The continued inaction by the Commission has and continues to occasion inconvenience, hardship and a constitutional crisis as the County Government of Uasin Gishu is operating indefinitely without a deputy Governor contrary to articles 10, 27, 47 and 180 of the *Constitution of Kenya, 2010*.
19. Counsel maintained that the actions by the respondent are further 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 County Governments and that it is the petitioners'/applicants' contention that the actions, failures, and inactions by the Independent Electoral and Boundaries Commission amount to an infringement of their 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.
20. Counsel urged that 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 actions of the Independent Electoral and Boundaries Commission has left the petitioners/applicants in 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.
21. In the end, counsel submitted that is the petitioners'/applicants' submission that they have made out a case to warrant the grant of the orders sought herein and a compelling order for 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 v Kenya National Examinations Council ex parte Gathenji & others*, Civil Appeal 266 of 1996,(1997) eKLR.

The Respondent's Submission's

22. In regard to whether the respondent has failed to gazette a County Returning Officer for Uasin Gishu County for purposes of clearing the nominee appointed as Deputy Governor and if, so whether the respondent can then be compelled to appoint the County Returning Officer for that purpose, Counsel for the respondent submitted that the petitioners want this court to believe that the respondent failed to act on a request to gazette the 3rd petitioner. Counsel maintained that this court has not been presented with a situation where the respondent has failed to act so as to invite the court's intervention. Counsel added that the facts speak for themselves in this regard, in the letter dated 13/9/2024 by UDA, it is clear that what UDA asked for was guidance. Paragraph 3 of the said letter is relevant: "Given the above developments, we kindly request your guidance on the next course of action to facilitate the formal recognition of the new Deputy Governor, Mr Evans Kipruto Kapkea, by the IEBC. We would appreciate any necessary steps or documentation required to ensure compliance with all legal and procedural requirements. We look forward to your prompt response and guidance on this matter." Counsel urged that there is nowhere in the letter where UDA has requested either the gazette of a CRO for Uasin Gishu or the name of the 3rd Petitioner as the duly appointed Deputy Governor, all that UDA wanted was guidance on the next steps forward-a sort of an advisory opinion on what to do next and in that regard, the CEO of the respondent provided the necessary guidance vide his letter dated 19th September, and that it was prompt and detailed. Counsel added that the letter provided the



steps that needed to be followed to ensure that the appointment was in itself valid and further informed UDA of the constitutional and legislative bottlenecks that bogged the respondent in a quest to seek an exercise of its mandate regarding the appointment of the 3rd petitioner as Deputy Governor. According to Counsel, the next logical thing that should have happened was to present the respondent with an opportunity to refuse to act, such as for instance demanding that the respondent gazettes a CRO for Uasin Gishu County or that it gazettes the 3rd petitioner as duly appointed Deputy Governor and this did not happen. Counsel submitted that UDA asked for one thing in its letter, but is now before court asking for a completely different thing altogether. Counsel further submitted that what the court is being asked to do is to review a non-decision, that these petitioners are unfairly and/or prematurely imploring this court to sit on a Judicial Review guised as a present petition on an issue that is yet to navigate the respondent's processes. Counsel cited the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR.

23. According to counsel the present petition serves as a great example of an abuse of the court in the sense that the enforcement action sought from court is not the same action that was sought from the respondent.
24. In regard to whether in view of the absence of the Chairperson and Commissioners, the respondents can be compelled to act through its CEO or any other person acting in that position to do acts that are otherwise within the constitutional and statutory remit of the respondent, Counsel submitted that the functions of the Secretary to the Commission as envisaged under section 10(7) of the *IEBC Act* do not include gazettelement of County Returning Officers, inf act section 5 of the *IEBC Act* provides that the Chief Executive Officer is not a member of the Commission and therefore, he cannot perform the functions of the Commission as that will be tantamount to usurping the role of the Commission. Counsel cited the case of *Ann Wambui Mukuru v Independent Electoral and Boundaries Commission and the County Government Taita Taveta and 1 Other*. Counsel maintained that directing an employee of the respondent to undertake constitutional and statutory obligations of another entity is a road down a slippery slope, if today orders are directed at the CEO, what happens if the CEO is for some reason not present, say by resignation, or dismissal. According to Counsel it means the court will have to go further down the list of employees ordering to perform functions that are really not theirs. Counsel submitted that while they acknowledge the lacuna that the law presents them with, they do not deem it constitutionally sound to clothe persons with a mandate that is actually preserved for other institutions.
25. In regard to whether petitioners met the constitutional and statutory threshold for action to be taken to validate the nomination and appointment of the 3rd petitioner to the position of Deputy Governor, Counsel submitted that assuming they are wrong on the 1st issue, even if UDA presented a request that was denied, the process that culminated in that request was null and void in the first instance. Counsel added that as explained in the CEO's letter of 19/9/2024, the procedure for filling up the vacancy of a Deputy Governor is laid out in the County Government Act. Counsel added that in the present case, the petitioners have presented a nominee who has already been vetted and approved by the County Assembly, without clearance by the IEBC. According to counsel in the circumstances, a key step was skipped by the petitioners in that the clearance by the CRO was neither sought, nor obtained, the vetting process was irregular and illegal in that the nominee had never been petitioner, after vetting by the County Assembly, in other words, to sanitize an illegal process and that it is trite a purposive manner, that power does not extend to cleaning up a party's illegal actions.



Analysis and Determination

26. Having appreciated the petition before me, the affidavit sworn in support thereof, the response by the respondent as well as the submissions filed by the parties. 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”
27. There are a number of things to note about this petition. The first is that the court drives this authority and power as stipulated in article 159 & 168 of the *Constitution* to sustain the rule of law requirement, that parliament and other constitutional actors are also mandated by the same constitution and other constitutional actors or organs to exercise their power rationally. Rationally means non- arbitrariness, tested by seeking a rational connection between and action and achievement of a legitimate purpose. Secondly, this petition is also to be tested on the requirement of general rationality considerations with the test of a violation of article 27(1) & (4) of the *Constitution* on the equality clause and freedom from non-discrimination on any of the grounds detailed in this provision as a measure of a guaranteed and protected right. Thirdly, simply in the context of the law and government conduct in this regard to bear in mind both the procedural and substantive components which forbid arbitrary decision making to bring into operation a mistaken decision on the basis of erroneous advice which by its very nature is not consistent with the tenets of the *Constitution*.
28. The *Constitution of Kenya* in article 1(10) (19)(20) (22) & (24) provides the anchor and yardstick of interpretation of the Bill of Rights as infused in the values and principle of governance contained in article 10 of the Constitution. The task of determining the questions of interpretation and limitation of fundamental rights and freedoms as it relates to this petition, is one which must be tested within the threshold set out by the constitutional court in South Africa in Pharmaceutical Manufacturers Association of SA: in Re-ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC). In its dicta the court remarked as follows: It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decision s must be rationally related to the purpose for which the power was given. Otherwise, they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least comply with this requirement. If it does not it falls short of the standards demanded by our constitution for such action.
29. This goes to explain whether the sequence of analysis which would follow shortly that demonstrate that the petitioner has reached out to the courts pursuant to various articles of the *Constitution* just to mention but a few of the relevant enactments being article 22, 23, 24, 27, 28, 48 & 50 of the *Constitution*. Therefore, as it will be seen shortly, the founding provisions on electoral law super-entrenched the powers of the Independent Electoral and Boundaries Commission (IEBC) on matters to do with nomination, election and declaration of final results of those candidates who have won various seats at various levels of government in the Republic of Kenya.
30. The principle of democracy implicit in the several provisions of the *Constitution* provide that the Republic of Kenya is one sovereign state founded on among others the value of universal suffrage, a National voters roll, regular elections and a multi party system of democratic government to ensure accountability, transparency, responsiveness and openness. It is of significance to take note that article 1 & 2 of the *Constitution* have very specific provisions of governance of this democratic state: (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution (2) The people may exercise their severing power either directly or through their democratically elected representatives.



31. the *Constitution* does not stop there. It provides for the formulation of the will of people but also requires government to respond to the will of the people like in article 47 of the *Constitution* imports the right to fair administrative action in the following words: (1) Every person has the right to administrative action that is expeditious, efficient lawful, reasonable and procedurally fair (2) If a right of fundamental freedom of a person has been or is likely to be adversely effected by administrative action, the person has the right to be given written reasons for the action
32. It suffices to say that whatever the outer boundaries of separation of functions as between the commission and the secretariat of IEBC as defined in the Act is eventually which has brought this petition to the domain and heartland of the judicial power and jurisdiction. Despite all the structures in both the constitutional provisions and Electoral Statute Laws, the completeness in law making and implementation, failed to legislate on the governance of the commission in absence of legally appointed commissioners as provided in the legislative scheme and constitutional model to execute all matters to do with the electoral laws. In some cases, the issues of giving effect to Civil and Political Rights as premised in the various International and Regional instruments recognisable by our constitution in article 2(5) & (6) of the Constitution remains moot and limited for lack of a functional IEBC commission.
33. As constitutionally entrenched in art. 27, the state shall not deny any person equality before the law or the equal protection of the law within the territory of Kenya. In the comparative case law from the Supreme Court of India, in *Ashoka Kumar v Thakur* (1995) 5 SCC 403. The court made the following observations on this doctrine of equality as a constitutional imperative

“Equality is a multi-coloured concept incapable of a single definition, as is also the fundamental rights. The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity.”
34. On the one hand, the Constitution is the soul of a nation embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach interpretation should be adopted by the courts in giving effect to the fundamental rights and freedoms in the Bill of Rights.
35. There is sadly little acknowledgement in Kenya on the direct and indirect limitations of the enjoyment of Civil and Political Rights which have been occasioned by virtue of non-establishment or appointment of the IEBC Commissioners as an organ of the Constitution to superintend the management of electoral affairs framework. Hence the Constitutional goals of equality of opportunity and social justice in achieving Civil and Political rights as set out in art. 2, 81, 82, 83, 84, 85 and 87 for those Constituencies/wards with a legitimate expectation to hold a by-election for their representatives remains a pipe dream as of now.
36. This process of striking inequality by its very nature forms the basis upon which the petitioners approached this court. The fundamental features of our art. 88 on IEBC in the true sense of terms envisaged by our Constitution in absence of its establishment by the executive and the legislature is not capable of providing the components of political justice in real and substantive equality.
37. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of the secretariat to abrogate itself the powers and functions of the commission as stipulated in art 88 as read conjunctively with the IEBC *Act No 9 of 2011*. It is evident that the normal process of gazettment of a qualified Deputy Governor as it is with the case of Uasin Gishu County, in the event



a vacancy arises for reasons of death, an impeachment process or by resignation or as the case may be to trigger the basic gateway for the legal process to take effect for a new officer bearer to be sworn in consonant with the Constitution.

38. Apparently, the law expressly requires making of certain procedural decisions which will impliedly be within the wider provisions of art. 88 of the Constitution, the facets of the IEBC Act and the *Elections Act* No 24 of 2011. The concepts of justice, liberty, equality and fraternity though traceable to the French revolution remain to the hallmark of a social, economic and political order both at the national and county level of governance in Kenya.
39. That takes us to the question of whether the legislative objective of concentrating the powers of gazettment of such like nominees as the Deputy Governor of Uasin Gishu by the electoral commission is sufficiently important to justify any delegation to an equally subsidiary organ of the state so as not to limit the scope of Human Rights classified as Civil and Political Rights. For a better understanding of this tapestry of rights the court in *R v Big M Drug Mart Ltd* 1985 18 DLR remarked as follows:
- “The meaning or 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 interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the charter (of rights and freedoms) itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter. The interpretation should be A generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charter’s protection.”
40. In fact, it follows that a purposive interpretation inevitably requires a value judgment to be made about which purposes are important and are protected by the Constitution. In this context, while legislating, for the various functions of IEBC, Parliament must have conferred the discretion for the Commission to generate instruments for gazettment of declaring existence of a vacancy in any of the Political arena which may have arisen through an election petition, death, an impeachment process or resignation with the object that it should be used to promote the policy and the objects of the Act. There is therefore an irrefutable presumption in law that at no time did parliament envisage a vacuum in the office of the electoral commission without maintaining the minimum threshold of three or five commissioners at most as outlined in the statute. The purpose of the express provisions of the Act is discernible of a staggering exit strategy on face out model for institutional governance management. Speaking generally and in a broad way, the relevant prevailing circumstances are not underpinned in the law.
41. In the case before this court, a vacancy has actually arisen in the office of the Deputy Governor by reason of resignation of the previous occupier of that office. All that we need to say is whether from the preceding and succeeding discussion, the newly appointed Deputy Governor by His Excellency the Governor of Uasin Gishu, shall be confirmed and sworn into office without the effect of a Gazette notice initiated by the IEBC Commission.
42. The background leading to the present petition is that on August 31, 2024 the then Deputy Governor, Uasin Gishu County, Honourable John Barorot officially resigned from the said post rendering the said seat vacant. With the said seat vacant, the Governor, Honourable Jonathan Bii then nominated Tembelio Ward Member County Assembly, Honourable Evans Kapkae, the 3rd petitioner herein as his deputy. The petitioners main contention in the present case is that despite of having nominated the



3rd petitioner herein to the said post the respondent has negated and or refused to gazette the name of the said Evans Kapkae as the new Deputy Governor of Uasin Gishu County in order to allow him to officially undertake his duties as the new Deputy Governor.

43. The procedural law upon this subject of resignation of a Deputy Governor does not provide that the letter must be addressed to the IEBC before it could take effect. It must be considered as practically absolute if the Deputy Governor tenders his resignation to His Excellency, the Governor of a particular County. The IEBC is not the guardian of the rights of the people of the state or for that matter the County Government, unless those rights are secured by some Constitutional or statutory provisions which comes within judicial cognizance. In the ultimate analysis, it is beyond doubt that in filling the vacancy of a new Deputy Governor, there is no condition precedent for IEBC to conduct some kind of a by-election in Uasin Gishu County to require first the position to be declared vacant as canvassed by learned counsel for the respondents. I treat this as not to be the basic feature of the law on matters of resignation of a Deputy Governor.
44. The equal protection of the laws is a pledge of the Constitution for the protection of its citizens with equal laws. In tackling this paradox, the court has to look at the legislative scheme and the demand for equality for the guaranteed fundamental rights within the arena of Civil and Political Rights as stipulated in the ICCPR being one of the key milestone convention as provided for in art 2(5) & (6) of the the *Constitution*. The question then is, can the initial non-declaration of a vacancy by IEBC limit the rights of the residents of Uasin Gishu and the right holder being the newly vetted nominee for the Office of the Deputy Governor be limited within the scope of art 24 of the *Constitution*. In my view, the answer is in the negative for the answer to the question is that the court must look beyond the classification to the purpose of the law. I am of the considered view that the purpose of the law may be either the elimination of a public mischief or the achievement of some positive public good
45. Before I delve in to the merits or otherwise of this petition, it is important to briefly highlight that this court is aware of its duty to give effective remedies for purposes of enforcing the Constitution, human rights and the rule of law. In *Fose v Minister of Safety and Security* [1997] (3) SA 786(CC)1997(7) BCLR 851 Ackermann, J, writing for the Court, stated that;
- “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.”
46. In *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; Ngcobo, J put the position thus;
- “(45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore,



in determining appropriate relief, "we must carefully analyze the nature of the constitutional infringement, and strike effectively at its source".

47. 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.
48. 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.
49. 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, ie death, resignation or impeachment.”

50. This court is guided 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 Evans Kapkae as the new nominee. The respondent cites a lack of a Commission as the main reason, as to its failure to gazette the name of Evans Kapkae.

51. While appreciating that the respondent raises valid concerns regarding the absence of the Commissioners it is also important to also note that it would be against the Constitution's principles and values under article 10 on the rule of law and good governance if the post remained unfilled. I maintain this position because the people of Uasin Gishu County would not have any representation because the Deputy Governor position was not intended to remain empty indefinitely, according to the Constitution. The deputy governor, in my perspective, performs the dual roles of direct assistance to the governor and representative of the people.
52. Section 32D of the County Government (Amendment) Act, 2020 outlines a comprehensive, self-executing procedure for filling a vacancy in the deputy governor's office. What makes this procedure unique is that it does not take into account procedures followed during the regular electoral process. It should be noted that under the aforementioned Section, the law does not, among other things, anticipate campaigns and rallies by candidates; printing of campaign materials and posters; submitting a schedule and timetable for the campaign to the Independent Electoral and Boundaries Commission; direct voting by secret ballot; tallying; or the announcement of results. The procedure ends at the County Assembly upon nomination of his candidate by His Excellency the Governor. There are very clear legal protocols on assumption of office of the new nominee to the officer of the Deputy Governor.
53. In respect to this requirement, the Court in the case of Wachira James Maina & 12 others v Celestine Chepchirchir Mutai and others; Eldoret High Court Election Petition Appeal No E002 of 2023, rendered judgment on the question of the role of Gazettement 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 Gazettement is such a fundamental step to an election process.

21. The next issue I shall consider is whether the issue of Gazettement 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.
22. 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?
23. 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.

24. 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 a mandatory legal requirement?

25. 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 a Members of County Assembly having exhausted the available avenues in pursuing their cause.
26. In explaining the purpose of a Gazette notice, the Court of Appeal in *Nderitu Gachagua vs Dr Thuo Mathenge & 2 others* Civil Appeal No 14 of 2013 (Nyeri) held as follows: -“The Gazette is an official document of the Government of Kenya in which official matters including official notices by the government are published. Any notice published in the Gazette is deemed as notice to the general public and one is barred from pleading ignorance of the same.”
27. Section 69 of the *Interpretation and General Provisions Act*, chapter 2, Laws of Kenya provides: -“The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the government printer shall be *prima facie* evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.’
28. Section 85 of the *Evidence Act* provides as follows: -85.Gazette, etc., to be prima facie evidence. The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be *prima facie* evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.
29. 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.
30. In *Director of Public Prosecutions vs Samuel Kimuchu Gichuru & another* [2012] eKLR Odunga J (as he then was) considered the import of Gazettement and held thus: -“What this implies is that, in absence of proof to the contrary, the Gazette notice becomes a formal expression of the existence of the notice or law itself but rather the official announcement of its existence or coming into force. Such that the validity or otherwise of a law or notice is not resident in the Gazette but the persons or bodies tasked with the responsibility to make such



laws or issue such notices in accordance with the law and the Constitution. The Gazette merely confers a seal of authority or officialdom to existence of the notice or the law”

31. 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.
32. I shall then proceed and consider the process of assumption of office of Members of the County Assembly. Section 7A of the County Government Act provides as follows: -7.County Assemblies to be duly constituted at first sitting A(1)county assembly shall not be fully and duly constituted for the first sitting after a general election unless all the members provided for under paragraphs (b) and (c) of article 177(1) of the *Constitution* have been duly nominated and their names published in the Gazette.(2)sub-section (1) shall not apply where the nomination of a member of a county assembly under paragraphs (b) and (c) of article 177(1) of the *Constitution* is the subject of a court order stopping or otherwise pending the nomination of the member. (3)Despite sub-section (1), a county assembly shall be deemed to be fully and duly constituted for first sitting notwithstanding the death, on or before the date of the first sitting of the county assembly, of a member nominated under paragraphs (b) and (c) of article 177(1) of the Constitution.
33. My reading and understanding of the above provision 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 officer 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.
34. The Supreme court considered the issue of Nomination for county Assembly and the duty of the IEBC in the Gazettement of nominees in the case of *Moses Mucigi & 14 other vs Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR as follows: -[104]Section 36(7)(8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:“(7)For purposes of article 177(1)(b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.(8)For purposes of article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party. (9)The allocation of seats by the Commission under article 177 (1) (b) and (c) of the *Constitution* shall be proportional to the number of seats won by the party under article 177(1)(a) of the Constitution.”[105]It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required



to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazetting of the nominees’ names by the IEBC, as an integral part of the election process.[106] The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.[107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the election courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.

35. The Supreme court in the above decision reasoned that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and gazetting only serves as a notification to the public of the outcome of the nomination. I agree with the court’s reasoning in total and that of the High court in Nyamira Constitutional Petition No E005 of 2023; *Michelle Kemuma Omwoyo v IEBC & another*, that the process of gazetting is merely an administrative task arising from an already concluded process. That gazetting cannot vitiate the status of a person who has been duly elected or nominated during an election process. It was the position adopted by Odunga J (as he was then) in *Director of Public Prosecutions v 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 gazetting, the gazetting is merely directive and the failure to gazette the appointment does not necessarily the appointment.”
36. In making its finding, the learned judge in the above cited case made reference to the decision by the Court of Appeal of Tanzania in *Catholic Diocese of Moshi vs Attorney General* [2000] 1 EA 25 (CAT), where it was held that: -“The requirement that administration and remission orders made by the Minister under the statutory provisions section 7(1) of the Customs Tariff Act of 1976 (Act 12 1976), and section 28(1) of the Sales Tax Act of 1976 (Act 13 of 1976), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.”
37. Having considered the above cited provisions of the law, I agree with my sister Hon WA Okwany in Nyamira Constitutional Petition No E005 of 2023; *Michelle Kemuma Omwoyo v IEBC & another* that it would be a travesty of justice to continue barring the applicants from assuming the office that they



were validly nominated to serve in on account of the pending reconstitution of the IEBC whose timelines are currently unknown and/or indefinite.

The doctrine of legitimate expectation.

38. Once the applicants exhausted the available legal remedies, they legitimately expected to be sworn in. The requirements for the existence of such an expectation were restated in *National Director of Public Prosecutions v Philips*. These include: -i. That there must be a representation which is “clear, unambiguous and devoid of relevant qualification, ”ii. That the expectation must be reasonable in the sense that a reasonable person would act upon it,iii. That the expectation must have been induced by the decision-maker and iv. That it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it.
39. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty. Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law. Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: - (See CF Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB LJ 238, 242-244 (1988).)
40. Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”
41. 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 gazettelement of the petitioners 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 the County Assembly is unjust and causes unfairness. A case in point is where the statutory frame work 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. The principle of proportionality, was delved into by the supreme court of India in *Kumar vs Union of India* [2001] 2 SCC 386 in which the court explained By proportionality, we mean the question whether while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the



legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order as the case maybe.

42. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties of interest of persons keeping in mind the purpose which they were intended to serve.
43. 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 rights is of a nature beyond their individual interest and rights. This is about the interests of the public. This action in a democratic society fails to meet the objectives of the legitimate expectation.
44. In my final analysis and in considering the peculiar nature of the present circumstances, nothing stops the applicants, who have a valid court order and who have been vigilant in seeking legal remedies from being sworn in to office. I take note of the provisions of article 177 of the Constitution which limit the term of an MCA to 5 years. Given that the general elections were held in August 2022, it then means that as at present almost 1 year and 5 months have lapsed from the period that the applicant is supposed to be serving as an MCA. The court is mandated to ensure that the applicant receives appropriate remedies. Their rights cannot be delayed further.
45. Lastly the emerging scope of this petition cannot escape an illumination on the remedies available under art 23(3)(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 the 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. While it may seem difficult for the speaker of the County Assembly to assemble the petitioners for purposes of administering the oath of office it is too clear that the petitioner's rights ripened upon nomination and on the strength of the doctrine of exhaustion of all the pending litigations within our legal system. The jurisdiction of the speaker of the County Assembly in the premises therefore, is not questioned. There will be no ground of attack in the manner of the exercise of that jurisdiction. Citizens who suffer loss as a result of unfair administrative action feels and express often in a colourful language a very strong sense of injustice in our legal system over the difficulty and frequently the inability to obtain appropriate remedies for the loss, cause of action, claim, tort, in contract and infringement or violations of their fundamental rights



and freedoms. The bitterness is more so compounded on being told there is a lacuna in the law in connection with the remedy being sought in realization of their rights. For months the petitioners have been searching for an answer on the potential direct route to be sworn as members of the County Assembly. It is the premise for making the following declarations.

54. Looking at court's dicta in the aforementioned case, it is without a doubt that the question of gazette is therefore only 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. There is no mandatory provision to the effect of the gazette of a nominated deputy governor.
55. Having held that gazette is a mere administrative formality and directive, it follows therefore that Mr Evans Kapkae 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 Uasin Gishu.
56. The provisions of section 5 of the *Independent Electoral and Boundaries Commission Act* are as follows:

Composition and appointment of the Commission

- (1) The Commission shall consist of a chairperson and eight other members appointed in accordance with article 250(4) of the *Constitution* and the provisions of this Act.
- (2) Subject to section 35, the chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the first schedule.
- (3) The procedure set out in the first schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission.
- (4) The chairperson and members of the Commission shall perform their functions as provided in the Constitution, and the secretariat shall perform the day-to-day administrative functions of the Commission.

The functions of the Chief Executive Officer are provided for under section 10 (7) of the IEBC Act as follows: -

- (e) responsible for: -
 - (i) executing decisions of the Commission
 - (ii) Assignment of duties and supervision of all employees of the Commission;
 - (iii) Facilitating, coordinating and ensuring execution of Commission's mandate;
 - (iv) Ensuring staff compliance with public ethics and values; and
 - (v) The performance of such other duties as may be assigned by the law and Commission.



57. The foregoing provisions are authoritative as to the composition of the Commission and the basic role of the CEO is to execute the decisions of the Commission and to perform the duties assigned to him/her by the law and Commission. In Eldoret Election Petition Appeal No E001 of 2023, this court presided by Justice Anthony Charo Mrima gave orders directing the CEO, Marjan Hussein Marjan or any other officer occupying the said office to cause to be published in the Kenya Gazette a Corrigendum to Gazette Notice 10712 of 2022. The Court in its ratio decidendi adopted the approach that the action of gazettelement by the CEO is a simple administrative one; placing a notice communicating the decision of the court. That such an action does not call for the commission to sit, deliberate and come up with a decision. I couldn't agree more.
58. In my considered view, true, the CEO is neither an independent entity from the Commission nor an alternative to the Commissioner. It then means that the CEO is incapable of assuming the role of the commission in instances when the Commission is not properly constituted or not constituted at all. However, the *Constitution of Kenya 2010* did not envisage the present scenario where strictly speaking, there are no members of the Commission. the *Constitution* and the IEBC Act are however clear on the steps to be taken to replace commissioners in the event of resignation, retirement and removal. In sum, given the fact that the Commission has not been properly constituted, and to give effect of this court's directions, it is my finding that the Respondent's CEO can exercise such an administrative duty of Communicating the decision of the court to the Government printer. It will be an injustice to delay further the swearing in of the 3rd petitioner as the Deputy Governor, County Government Uasin Gishu.
59. The question of remedies for this petition requires much more a pragmatic approach than that adopted in any other stages of right of litigation. The availability of constitutional remedies is a matter of jurisdiction as laid down in article 23 of Constitution. Broadly formulated for this petition is a prerogative writ of mandamus. The law in Kenya as it is in England, has summed up in *Halsbury's Laws of England* Vol ix 744 provides that "The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects or justice, and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right and it may issue in cases where although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual. Mandamus will be appropriate to compel a tribunal to exercise a jurisdiction which it possesses but declines to exercise and gain Halsburny says, "The court will as a general rule and in exercise of its discretion, refuse an order of mandamus when there is an alternative specific remedy, beneficial and effective.
60. The essential elements which brings this petition within the purview of the writ of mandamus include the following:
- i. Whether the petitioner has a clear and specific legal right to the relief demanded by him.
 - ii. Whether there is a duty imposed by law on the respondent
 - iii. Whether such duty is of an imperative ministerial character involving no judgement or discretion on the part of the respondent
 - iv. Whether the petitioner has any remedy other than by way of Mandamus See the principles in *Republic vs Principal Secretary, Ministry of Internal Security* & another ex- parte *Schon Noorani*



61. The schemes of classification of functions between the commission and the secretariate can be devised by reference to the character of the decision itself or the function of the decision maker. The nature or the quality of the functions of an authority covered by the rules, the statute, policy, either generally or in relation to some particular occasion may be given a particular distribution to distinguish it from other kinds of functions. From the perspective of the respondents submissions, the particular function of gazettment is a preserve of the IEBC commission. This kind of arguments imports words such as legislative, administrative, ministerial, executive, judicial and quasi-judicial in the interpretation of distributive functions of the secretariate and the commission as provided for in the IEBC Act. In my considered view the distinction relates to the nature of the function not to the character of the body. Broadly, an administrative function is one which deals with policy and expediency while judicial-quasi function is one which deals with rights and legalities. We are here concerned with administrative procedural function of dispatch by the secretariat of a gazette notice to the effect that a vacancy has fallen due in the office of the Deputy Governor of Uasin Gishu and for all intents and purpose the legal protocols have been followed leading to the nomination and vetting of the new office bearer within the ambit of the Constitution and enabling statutes.
62. With that said, I am exercising my discretion in accordance with article 23 (3) of the Constitution of Kenya, 2010 and article 180 of the 2010 Kenyan Constitution which dictates that the people of Uasin Gishu have a right to representation and a genuine expectation of being represented, the withholding of gazettment of the new nominated Deputy Governor denies the people of Uasin Gishu the right of representation and the legitimate expectation to be represented. For emphasis purposes, any further delay of swearing in the nominee of the Office of the Deputy Governor will be in violation or infringement of art. 1(2) of the Constitution. This court therefore holds that the right to equality before the law and freedom from discrimination of the Petitioner and the citizens of Uasin Gishu will be violated if there is a stalemate by any constitutional organ which stand on the way by either declining gazettment or obstructing the swearing in of the new officer bearer at the executive office of the Governor. Following from the analysis of this instant petition and after hearing both parties on the matter, the following declarations shall abide:
- a. That the court has jurisdiction to adjudicate on this petition
 - b. That the petitioner has established and the residents of Uasin Gishu have established a violation of their rights on representation and on their aspirations based on the essential values of Human Rights, equality, freedom, democracy, social justice and the rule of law.
 - c. That the Governor and the County Assembly of Uasin Gishu County have complied with the procedural requirements of the law on nomination and vetting of Hon. Evans Kipruto Kapkea.
 - d. That a declaration be and is hereby made that in absence of the duly constituted IEBC commission in terms of art 88 of the Constitution, the Chief Executive Officer Mr Marjan Hussein Marjan do issue a gazette notice in the name of Evans Kipruto Kapkea as the nominated/appointed Deputy Governor for the County Government of Uasin Gishu with effect from the date of his vetting by the County Assembly within seven days on being served by the Deputy Registrar of the High court with this order.
 - e. That an order of *mandamus* be and is hereby issued directed to the respondent administrative unit headed by Mr Marjan Hussein Marian to initiate the instruments to the government printer for the name of Hon. Evans Kipruto Kapkea to be formally entered in the official Kenya Gazette Notice as the newly nominated Deputy Governor Uasin-Gishu County.



f. That in the event of default by the Chief Executive Officer, His excellency the Governor as the appointing authority be at liberty to initiate instruments of Gazettement to the Government Printer of the nominee Hon Evans Kipruto Kapkea to pave way for his swearing and assumption of office with immediate effect.

g. That costs of this petition be in the cause. Leave to stay execution of these declarations is denied.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF OCTOBER, 2024

.....

R. NYAKUNDI

JUDGE

