Gachagua & 7 others v Speaker, National Assembly & 5 others; Law Society of Kenya & another (Interested Parties) (Petition 565 (Nrb), E013 (Kerugoya), E014 & E015 of 2024 (Consolidated)) [2024] KEHC 13752 (KLR) (Constitutional and Human Rights) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 565 (NRB), E013 (KERUGOYA), E014 & E015 OF 2024 (CONSOLIDATED)

EKO OGOLA, AC MRIMA & FG MUGAMBI, JJ

OCTOBER 23, 2024

BETWEEN

HE RIGATHI GACHAGUA ..... 1ST PETITIONER

THOMAS KIMOTHO MAINGI ..... 2ND PETITIONER

HON JANE NJERI MAINA ..... 3RD PETITIONER

HON DAVID MUNYI MATHENGE ..... 4TH PETITIONER

PETER GICHOBI KAMOTHO ..... 5TH PETITIONER

GRACE MUTHONI MWANGI ..... 6TH PETITIONER

CLEMENT MUCHIRI MURIUKI ..... 7TH PETITIONER

EDWIN MUNENE KARIUKI ..... 8TH PETITIONER

AND

SPEAKER, NATIONAL ASSEMBLY ..... 1ST RESPONDENT

NATIONAL ASSEMBLY OF KENYA ..... 2ND RESPONDENT

SPEAKER, SENATE ..... 3RD RESPONDENT

SENATE OF KENYA ..... 4TH RESPONDENT

HON ATTORNEY GENERAL ..... 5TH RESPONDENT

HE WILLIAM RUTO ..... 6TH RESPONDENT

AND

THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY

PROF KITHURE KINDIKI ..... INTERESTED PARTY

The Deputy Chief Justice had the constitutional power to empanel a High Court judge bench.
The applicants challenged the Deputy Chief Justice's (DCJ) decision to empanel a bench at night, alleging bias and selective case handling. They argued that prior cases had not warranted such urgency and that the process favored the government. The court held that the DCJ could deputize the Chief Justice in judicial functions, including empanelment under article 165(4). It found no impropriety in the issuance directions outside official hours, citing evolving judicial practices and real-time case management. The court dismissed the application, granted leave to appeal, and emphasized the need for clearer practice directions on virtual and urgent judicial proceedings.

Reported by Robai Nasike Sivikhe

Constitutional Law *– judiciary – function of the Deputy Chief Justice – the scope of the powers of the Deputy Justice - power of the Deputy Chief Justice to empanel a High Court bench – whether the function of the Chief Justice could be performed by the Deputy Chief Justice – whether the Deputy Chief Justice could exercise the power of assigning and empanelling expanded benches of the High Court – Constitution of Kenya, articles 161, 163, 165 (4) and 171.*

Constitutional Law *– interpretation of the Constitution – principles of interpretation of the Constitution – application of the principles of interpretation in determining the scope of the functions of the Deputy Chief Justice – Constitution of Kenya, articles 20 (4), 259 (1) and 259 (3) (b).*

Civil Practice and Procedure *– orders – orders and directions of the court - orders issued outside the normal working hours of the court – where the e-filing system allowed real-time operations – where applications could be processed almost in real-time – the discretion of the court to issue orders or directions without the attendance of advocates or parties – whether the High Court sat and considered an application by the respondent on a Saturday, outside official court hours – High Court Practice Directions, 2022, Practice Direction 19(a).*

Words and phrases *– definition – administrative act – an act made in management capacity; esp., an act made outside the actor's usual field (as when a judge supervises court personnel)– Black's Law Dictionary, 9th Edition.*

Words and phrases *– definition – judicial power – the authority vested in courts and judges to hear and decide cases and make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it – Black's Law Dictionary, 9th Edition,*

Words and phrases *– definition – sitting – a formal occasion when the court convenes to conduct its business – Black's Law Dictionary.*

Brief facts

The primary issue in the application stemmed from the decision of the Deputy Chief Justice (DCJ) to empanel a bench to determine the substantial constitutional questions raised within the matter. According to the applicant, it was unconstitutional for the DCJ to appoint a bench at night, especially given that, in past cases involving abductions, the Chief Justice had not appointed benches during the night or authorized judicial proceedings to take place on weekends. Furthermore, the applicants contended that other cases filed earlier than the instant matter, had been excluded, with no bench empanelled to hear them. They deposed that the selective empanelling suggested bias on the part of the DCJ, who, they alleged, favoured the Government of Kenya, the Attorney General, the National Assembly, and the Senate. The applicants argued that such bias undermined the impartiality of the judicial process and contravened the principles of fairness enshrined in the Constitution.

Issues

i. Whether the functions of the Chief Justice could be performed by the Deputy Chief Justice.
ii. Whether the Deputy Chief Justice could exercise the power of assigning and empanelling expanded benches of the High Court.

iii. Whether the High Court sat and considered an application by the respondent on a Saturday, outside official court working hours.

iv. Whether the issuance of orders by the High Court outside official court working hours was legally permissible.

Held

1. The Constitution provided for its own theory of interpretation, in articles 20(4) and 259(1). Article 20(4) required courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) commanded courts to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance.
2. The Constitution directed that it shall be interpreted in line with the doctrine of living constitutionalism. The doctrine held that a constitution was a living document meant to evolve over time to reflect societal changes, contemporary realities, and shifting values. It further recognized that the law was dynamic and adaptable to evolving circumstances, often encapsulated in the maxim that "the law is always speaking." It underscored that constitutional provisions were not static or frozen in time but had to be understood as applying to current circumstances, regardless of their original context. The interpretive approach ensured that the Constitution remained relevant and effective in guiding the governance and legal frameworks of a modern, dynamic society.
3. The doctrine that "the law is always speaking" aligned with the purposive approach to constitutional interpretation, as endorsed by courts in various jurisdictions. Under that approach, courts were required to interpret constitutional provisions in a way that gave effect to their underlying purpose and objectives, rather than adhering to a rigid or literal reading. Further, courts had emphasized the need for a flexible and forward-looking interpretation of the Constitution to meet the needs of a modern state.
4. The constitutional mandate of the Chief Justice could be judicial, administrative or political. The constitutional mandate exercised by the Chief Justice under article 165(4) of the Constitution was a constitutionally administrative function.
5. Article 161 of the Constitution established the office of the Chief Justice as the Head of the Judiciary and that of the DCJ as the Deputy Head of the Judiciary. Article 163 of the Constitution created the Supreme Court and designated the Chief Justice as the President of the Court. The DCJ served as the Deputy to the Chief Justice and was also the Vice-President of the court. Article 171 of the Constitution then established the Judicial Service Commission (JSC) as one of the Chapter 15 Commissions. The Chief Justice was the Chairperson of the Commission. In that scenario, and unlike the constitutional architecture in articles 161 and 163, the DCJ was not the Vice Chairperson of the Commission.
6. There was a deliberate scheme by the drafters of the Constitution for the DCJ to deputize the Chief Justice as Deputy Head of the Judiciary and as the Vice-President of the Supreme Court, but not in the Commission. There was an emphasis on the various manifestations of the constitutional duties bestowed upon the Chief Justice and the DCJ. As such, the prevailing legal position was that the DCJ could deputize the Chief Justice in discharging judicial functions and in the administration of the Judiciary, as an arm of Government, but could not do so in the Commission.
7. Article 259(3)(b) of the Constitution established three tiers through which constitutional functions could be exercised: by the substantive office holder, by an individual acting in that capacity, or by a person otherwise performing the duties of the office at a given time. In line with the doctrine of continuity in governance, the drafters of Kenya's Constitution were deliberate in ensuring that the administration of duties and application of constitutional provisions remained uninterrupted. They recognized the necessity of maintaining the functions of public offices, even

during transitions or exceptional circumstances and ensuring administrative efficiency so that all constitutional responsibilities were carried out seamlessly without disruption. That interpretation avoided technicalities, absurdities, or gaps that could hinder the functioning of State offices or public institutions. It ultimately promoted administrative efficiency and upheld the principles of good governance, accountability, and constitutional integrity.

8. The functions in article 165(4) in as far as the same related to the office of the Chief Justice also included the DCJ acting in the capacity of the office of Chief Justice or discharging its functions in an interim, acting, or auxiliary role. The Chief Justice empaneled the instant bench on October 14, 2024 to deal with six constitutional petitions that *inter alia* challenged the 1st petitioner's impeachment process in the National Assembly. The petitions were still pending. On October 18, 2024, the DCJ empanelled the same bench to deal with constitutional petitions challenging the impeachment of the 1st petitioner in the Senate.

9. It was beyond peradventure that the DCJ could assign Judges under article 165(4) of the Constitution whenever he/she was discharging any of the constitutional functions on behalf of the Chief Justice. In the instant case, there was no fault in the DCJ assigning Judges to sit in the instant bench, more so when the Chief Justice had not raised any red flag.

10. An issue was raised concerning the directions issued by the three-judge bench and transmission of the files in Nairobi Petition E565 of 2024, Kerugoya Petitions E013 and E014 of 2024 (consolidated) and E015 of 2024. The High Court took great exception to the petitioner's conduct that when favorable to the petitioners, orders issued outside the normal working hours of the court raised no concern. However, when the same court acted in an instance where it had been properly moved by other parties and likewise proceeded to deal with an application at hand in the same vein, the petitioners showed their indignation.

11. Petition E015, was filed on October 18, 2024. Following the directions issued by the court, the instant bench was empanelled on October 18, 2024, to hear all the three petitions, that was (E 565/2024; E013/2024; E014/2024 and E015/2024). It was evident that the real-time interaction between counsel and the courts was not a new development but a well-established practice that counsel was accustomed to. The Case Tracking System (CTS) continued to enable both counsel and the courts to transcend traditional time limitations, allowing for real-time operations. With the advent of CTS, it was increasingly common for courts to issue directions within hours of an application being filed, or even outside regular working hours, when necessary. That evolution in court practice had continued to enhance judicial efficiency and ensure timely access to justice.

12. In raising the issue of improper sitting, the applicants omitted a crucial fact which was that the court had been moved by the respondents in petitions E565/24 and E015. As such, the court did not convene *suo motu*, but rather in response to the applications before it. The applicants repeatedly referred to that convening as a 'sitting' of the court, a term that required clarification and demystification. It was a matter of judicial notice that since the onset of the COVID-19 pandemic and the introduction of the CTS, the tradition of dealing with certificates of urgency had evolved. That was reflected in Practice Direction 19(a) of the High Court Practice Directions of January 11, 2022.

13. While the Practice Directions also stipulated that the applications filed after 12:00 pm could be considered on the next working day, the full adoption of the e-filing system across the judiciary had largely rendered that provision obsolete. Applications could be processed almost in real-time, a fact well known to the justice users across the country. Furthermore, Practice Direction 19(b) conferred discretion upon the court power to issue orders or directions without the attendance of advocates or parties.

14. The issue had been raised that the High Court allegedly sat and considered an application by the respondent on a Saturday, outside official court hours. No such formal sitting occurred. No evidence or proceedings had been presented before the court to support the claim that a formal sitting took place.

The bench merely conferred and issued directions electronically, in line with established practice and the procedural rules as expressly permitted under Practice Direction 19(b). That was markedly different from a court session in which the bench was convened to hear and determine a matter. Accordingly, it was only fair and reasonable for the parties to dispel any notion that the instant bench convened to hear arguments from any party *ex parte* before issuing directions.

15. The High Court recommended that the current Practice Directions and relevant statutes such as the High Court Administration and Organization Act be amended so as to` provide the much-needed further clarity on that subject. Moreover, out of all the prayers sought, by the applicants, including a prayer to be heard outside of the ordinary office hours of the court, only prayer (i), which sought to have the matter certified as urgent, was granted. No other reliefs were granted at that time.
16. The High Court was fully cognizant of both the urgency of the matter and the potential repercussions that granting any further *ex parte* orders could have had on the prevailing *status quo.* With that understanding, and in an effort to balance the scales of justice, the bench issued the directions that were being challenged, so as to give an opportunity for both parties to be heard on the applications. There was nothing unconventional in the manner in which the bench dealt with the two applications filed under certificate of urgency.
17. The arguments by the applicants appeared to insinuate that the bench ought to have retained the dates. For clarity purposes, that date had been given prior to the empanelment of the bench. However, upon empanelment of the bench, applications under certificate of urgency were filed, which applications were dealt with and rightly so. Being seized of the matter, the bench retained the discretion to issue appropriate directions, depending on developments and in light of its mandate, as it did, having been moved by parties.
18. With respect to the claim of discriminatory transmission of files to the bench, it must be emphasized that the bench had no role or control in the administrative processes that occurred prior to its empanelment. Concerns were raised about delays in the transmission of certain files, but it was crucial to clarify that 'transmission' might not necessarily refer to the physical transfer of documents.
19. In the context of modern judicial processes, particularly with the advent of digital systems, transmission might very well refer to the electronic movement or assignment of cases filed within the judiciary's digital infrastructure. CTS, all filed documents were available in real-time across the judiciary, eliminating the need for physical file movement. Practice Direction No. 41(a)(ii) provided that advocates and litigants shall have access to the court information electronically. While the court could not speculate on the causes of any delays in file transmission, there was no basis for concluding that such delays amounted to any form of procedural omission on the part of the bench, as no such evidence had been presented.
20. The applicants attempted to cast aspersions on the proceedings of the High Court, in their submissions. One of the Senior Counsels went further by intimating that an exercise akin to the 'radical surgery' could be forthcoming, a statement which the High Court perceived as a veiled attempt at intimidation. Coming from a Senior Counsel, such remarks were regrettable and wholly inappropriate and irrelevant in the proceedings. The bench remained firm in its duty and could not be swayed or influenced by any form of intimidation, regardless of its source.
21. The petitioners appeared to have selectively focused on aspects that favored their position, while conveniently disregarding the fact that the same petitioners were benefiting from final conservatory orders issued by the High Court and which the bench upon conferring found it wise to maintain. Notably, there was a pending application by the respondents seeking to lift those conservatory orders, which further underscored the urgency and significance of the proceedings.
22. Having obtained the conservatory orders, it was apparent to the bench that the petitioners no longer perceived the urgency in the matter. Instead, they sought to cast aspersions on the High Court for addressing the matter with the necessary expedition. Such conduct was contradictory and undermined

the very urgency the petitioners initially invoked. The issues raised in the application and the other petitions had, on various occasions and before different Judges, consistently been certified as urgent and as involving substantive constitutional questions. That underscored the gravity and significance of the matters at hand.

23. It was insinuated that the bench was part of a conspiracy to violate the petitioners' rights to a fair hearing under article 50 of the Constitution. Those submissions were without foundation and wholly without merit. The court had not issued any rulings or directions that would suggest such an intent. The High Court remained fully committed to upholding the Constitution and the rule of law. The accusations made by the petitioners against the bench were entirely without merit.

24. There was a close twining of the functions of the Deputy President with those of the President. The 1st petitioner had been impeached under article 145 of the Constitution, marking the first instance of such an event in Kenya's history. The impeachment of the petitioner had garnered significant public interest, and the court proceedings represented a direct challenge to that impeachment. The legal proceedings were of paramount concern to the citizens of the country. To suggest, as the applicants had, that the matter lacked urgency and did not warrant prompt adjudication was disingenuous and dismissive of its far-reaching implications.

25. A matter was of public interest if the holding on law affected a considerable number of people in the society; if the holding of law involved government and/or government agencies; if the holding of law affected the proper functioning of public institutions of governance, of the court's scope for dispensing redress; and if the holding of law affected the mode of discharge of duty by public officers.

26. The proceedings raised enormous public interest and it was in the interest of that public that those proceedings were heard and finalized most expeditiously. Therefore, the aspersions cast by the applicants concerning the directions for the hearing of the applications before the court on October 22, 2024 lacked basis. They were dismissed.

27. There was a pressing need for clear practice directions regarding the procedure and process for handling virtual and online directions and proceedings. The High Court directed the Deputy Registrar of the Division to transmit a copy of the ruling to the Chief Justice. The bench, acting in fidelity to its oath of office and in strict adherence to the dictates of the Constitution, remained resolutely committed to the fair and just determination of the issues before it.

Application dated October 22, 2024, was disallowed.

Orders

i. *Leave to appeal was granted.*

ii. *Certified copies of the proceedings and the Ruling shall be availed upon payment of the requisite court fees as the case may be.*

iii. *Costs in the Cause.*

Citations

Cases

Kenya

1. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14 ,14A,14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)
3. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR) - (Explained)
4. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)

5. *Kenya Medical Research Institute v Attorney General & 3 others* Petition 31 of 2013; [2014] KEELRC 757 (KLR) - (Explained)
6. *Leina Konchellah & others v Chief Justice & President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties)* Petition E291, E300 of 2020; [2021] KEHC 12609 (KLR) - (Mentioned)
7. *Munya v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 - (Explained)
8. *Ndii & others v Attorney General & others* Petition E282, 397, E400, E401, E402, E416 & E426 of 2020; [2021] KEHC 9763 (KLR) (Consolidated) - (Explained)
9. *Okoiti v Judicial Service Commission & another; Mwilu & another (Interested Parties)* Constitutional Petition E408 of 2020; [2021] KEHC 421 (KLR) - (Explained)
10. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
11. *Steyn v Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)

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South Africa

S v Acheson 1991 (2) SA 805 - (Explained)

United Kingdom

Royal Aquarium and Summer and Winter Garden Society v Parkinson [1892] 1QB 431 - (Explained)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Constitution of Kenya articles 1 19 20(4); 21; 23; 25; 27; 47; 48; 50 (1); 74; 131; 145; 147; 161(2); 163(1)(b); 165(4); 259(1),(3)(b); 260 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 3- (Interpreted)
3. High Court (Organisation and Administration) Act (cap 8C) section 10(7) - (Interpreted)
4. High Court Practice Directions, 2022 (cap 8 Sub Leg) sections 19(a)(b); 41(a)(iii) - (Interpreted)
5. Judicial Service Act (cap 8A) section 5(4)(5) - (Interpreted)
6. Supreme Court Act (cap 9B) In general - (Cited)

Advocates

RULING

I. Background and Introduction

1. For determination is the application dated October 22, 2024. The petitioners pray for the following orders:-

    i. Spent;

    ii. That the honorable court be pleased to find that the Deputy Chief Justice has no power under article 165(4) of the *Constitution* to assign a panel of judges to hear and determine the subject matter certified for empanelment;

iii. That an order be issued to quash the decision of the Deputy Chief Justice to assign the hearing and determination of 3 out of 10 of the cases referred to them by various judges touching on the impeachment proceeding against the Depity President to assign to the Honourable Judges, E Ogola, Mrima, and Lady Justice W. Mugambi;

iv. That the honourable court be pleased to find that the deputy Chief justice violated article 25, 27, 47, 48, 50(1) and 260 of the *Constitution* in assigning this honourable bench to hear and determine only 3 out of 10 of the cases referred to them by various judges touching on the impeachment proceeding against the Deputy President.

v. That the invalid assignment of the 3 cases out of the 10 cases to this honourable bench comprising of Justice E Ogolla, Justice A.C Mrima and Lady Justice Freda Mugambi whose impartiality has been questioned by the petitioners will violate the petitioners' rights under article 1,19, 20, 21,23, 25, 27, 47 and 50 of the *Constitution*.

vi. That an alternative to prayer (d) above, the honourable court be pleased to find that the Deputy Chief Justice must take of oath of office as the acting Chief Justice before she can exercise the powers under article 165(4) as provided for article 74 of the *Constitution* read together with article 259(3)(b) of the *Constitution* and section 5(4), and 5(5) of the *Judicial Service Act*.

vii. That costs of this application be provided for.

II. The Application

2. The application is premised on the grounds set out therein and the supporting affidavit of David Munyi Mathenge. The primary issue in this application stems from a previous application filed on October 18, 2024 before the Kerugoya High Court. In that earlier instance, the court certified the matter as urgent and determined that it raised substantial constitutional questions, thereby warranting the empaneling of a bench in accordance with article 165(4) of the *Constitution*.

3. On October 19, 2024, a Saturday, the applicants received directions from this bench scheduling the inter partes hearing of their application, dated October 18, 2024, for October 22, 2024. However, the applicants had expected to be directed to attend a mention before the hearing, which in their view was in line with the usual court procedure.

4. On October 22, 2024, when the applicants appeared before this court, the bench confirmed that the files had been assigned to them on the night of 18th October by the Honorable Deputy Chief Justice (hereinafter referred to as the Hon DCJ). The applicants objected, claiming that this action violated article 165(4) of the *Constitution*.

5. Their position is that it was unconstitutional for the Hon. DCJ to appoint a bench at night, especially given that, in past cases involving abductions, the Hon Chief Justice has not appointed benches during the night or authorized judicial proceedings to take place on weekends.

6. Furthermore, the applicants contended that other cases filed earlier than the present matter, have been excluded, with no bench yet empanelled to hear them. They deposed that this selective empanelling suggested bias on the part of the Hon DCJ, who, they alleged, favoured the Government of Kenya, the Attorney General, the National Assembly, and the Senate. The applicants argued that such bias undermined the impartiality of the judicial process and contravened the principles of fairness enshrined in the *Constitution*.

7. According to the deponent, there were no urgent or special circumstances in the respondents' application that would have warranted the Hon. DCJ directing or authorizing the bench to sit on

a Saturday to hear the government's grievances. The applicants argued that the current bench was empaneled immediately after the respondents filed their application, and it is clear, in their view, that the bench was specifically constituted to set aside the conservatory orders issued in the related cases. This, they claim, raises concerns about judicial impartiality and the fairness of the proceedings.

8. The applicants further argued that the only urgency prompting the prioritization of the three applications by the respondents is the government's intent to expedite the swearing-in of Hon Kindiki Kithure, bypassing the petitions challenging the impeachment proceedings. They claimed that this urgency is driven by political considerations rather than any genuine legal or procedural necessity, and that such prioritization threatens to undermine the right to a fair hearing and due process for those contesting the impeachment.

9. The applicants deposed that the files from the Kerugoya High Court still bear their original file numbers and have yet to be assigned new file numbers by the Nairobi Registry. They argued that this mishandling has raised legitimate concerns about the impartiality of the proceedings, citing the orders granted in Petition E015 of 2024 as evidence.

10. The applicants pointed out that the bench unexpectedly convened on Saturday, October 19, 2024, to preside over a matter that had been referred to the Hon Chief Justice for directions. In view of these irregularities and to safeguard the integrity of the judicial process, the applicants submitted that the honourable judges should themselves due to the perceived bias.

III. The Response

11. The 6th respondent opposed the application *vide* Grounds of Opposition in which it was averred that the counsel acting for the petitioners lacks *locus* having ceased to act in the matter *vide* a notice of change of advocates dated October 21, 2024 in favour of Prof Migai Akech & Associates Advocates.

12. It further was contended that the application is conceived on a fatal misapprehension of law as the function of empanelment of a bench to hear and determine a matter is an administrative function capable of being delegated by the Hon Chief Justice to the Hon DCJ as per the decision in High Court Constitutional Petition No E291 of 2021, *Leina Konchella & others v Chief Justice & President of the Supreme Court & others*.

13. The 6th respondent also contends that the doctrine of exhaustion of remedies obligates the applicants to proceed and finalize the dispute resolution mechanism they have initiated to preclude multiplicity of proceedings on the same subject matter before different institutions, processes or mechanisms; and that the application seeks final declaratory orders at an interlocutory stage.

IV. The Submissions

14. Counsel for the applicants reiterated in submission that the Hon. DCJ does not have the power to appoint a bench of judges to hear any matter. Counsel argued that such power belongs to the Hon Chief Justice and that the same cannot be delegated to the Hon. DCJ. It was therefore submitted that the Hon DCJ usurped the powers of the Hon. Chief Justice.

15. Learned counsel Mr Kibe Mungai in addition to this also submitted that this is not a matter of public urgency and it seems like there is a conspiracy to defeat justice. Counsel argued that the Hon Chief Justice could have very well appointed the bench electronically from anywhere where she was sitting.

16. Learned counsel Mr Ndegwa added that the duties under article 165(4) of the *Constitution* are exclusively delegated to the Hon. Chief Justice. He also questioned the circumstances under which the Hon Chief Justice delegated those powers to the Hon DCJ. The same was supported by Learned

Counsel Mr Elisha Ongoya who argued that there are no substantial grounds for the Hon. Chief Justice to have delegated the authority to the Hon DCJ.

17. Learned counsel Mr Paul Muite submitted that it was a gross irregularity for Petition 015/2024 to be taken from Kerugoya High Court to Nairobi without any communication to the parties and that the bench should recuse itself.

18. Learned counsel Mr Khaminwa submitted that while judges can hear matters at odd hours, in this case, the magnitude of the issues involved required that parties be given sufficient time and be heard in the open.

19. In response SC Prof Githu Muigai submitted that the Hon Attorney General, which Office he represents, was enjoined in the proceedings to safeguard the public interest. That the public interest is in favour of expeditious disposal of matters which involve public issues. He submitted that the *Constitution* must be interpreted so as not to create absurdity. It must be construed to protect the State, to promote the rule of law, and to protect human rights.

20. Learned counsel further submitted that the Hon DCJ can swear in a President to office, and appoint a Tribunal to remove the President from office. Given the nature of these functions, Counsel wondered why the Hon DCJ could not assign a bench. On the transmission of files, Counsel added that the transmission of the files from Kerugoya High Court to Nairobi may have been done through the judiciary online portal, justifying the same being done at night.

21. Senior Counsel Prof. Ojienda also opposing the application submitted that article 163(1)(b) of the *Constitution* and section 5 of the *Judicial Service Act* provides that the Hon. DCJ shall deputize the Hon. Chief Justice. Counsel submitted that the application does not meet the threshold for recusal of the bench as the bench was properly constituted.

22. Learned counsel Mr Nyamodi further submitted that the Hon. Chief Justice occupies three distinct offices; that of the head of the judiciary, the President of the Supreme Court, and the Chairperson of the Judicial Service Commission. The Hon DCJ deputizes the Hon. Chief Justice in all save for the Chairperson of JSC. He submitted that this court should be persuaded by the decision in *Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties)* [2021] eKLR.

23. Learned Counsel, Mr Gumbo, posed the question of whether, in the event the Hon. Chief Justice is unable to perform her duties under article 165(4), the *Constitution* of benches would be stalled. He argued that such an interpretation would lead to an absurd result, as it would effectively paralyze the judicial process. According to Counsel, constitutional interpretation should avoid outcomes that disrupt the administration of justice or hinder judicial efficiency.

24. Learned counsel, Mr. Wanyama, submitted that it is not unusual for the court to issue orders on a Saturday or outside regular working hours. He referred to rule 3 of the *Mutunga Rules*, which emphasizes the need for orders to be made expeditiously, particularly in constitutional matters. Counsel argued that timely judicial intervention is critical in preserving rights and ensuring that justice is not delayed, which justifies the issuance of orders even outside normal court hours.

25. By way of rejoinder, learned counsel Mr Kibe Mungai submitted that when the Hon. Chief Justice empanels a bench, she is exercising her judicial powers and not her administrative powers. If it is a judicial function, then the Hon DCJ must take an oath before empaneling a bench.

26. Counsel Mr Ongaya submitted that section 10(7) of the *High Court (Organisation and Administration) Act* does not allow the court to sit at any time and in any place. Mr Khaminwa

submitted that the three files before the court should be returned to the Hon Chief Justice for reconstitution. Learned counsel Mrs Theresia Kimotho submitted that she had not been served with the notification of the empanelment or the mention notice stressing the necessity of proper service to ensure all parties are duly informed and the process remains fair.

V. Analysis and Determination

27. Having carefully considered the pleadings, submissions and evidence on record, we consider the following issues as arising for determination: -

    i. What are the prevailing constitutional and statutory interpretation methods of the *Constitution*;

    ii. Whether the Hon. DCJ can assign Judges pursuant to article 165(4) of the *Constitution*:

    iii. Other issues raised

i. What are the prevailing constitutional and statutory interpretation methods;

28. the *Constitution* is a document sui generis. It is the grund norm; the foundational source of law that holds supremacy over all other legal norms. As the supreme law, its interpretation must reflect and uphold its dominant position, ensuring that all other laws comply with its provisions.

29. The court in *S v Acheson* 1991(2) SA 805 captured the centrality of the *Constitution* as follows: -

> "…. the *Constitution* of a nation is not simply a statute which mechanically defines the structure of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and aspiration of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the *Constitution* must therefore preside and permeate the processes of judicial interpretation and judicial discretion".

30. In this matter, the High Court has, once again, been called upon to address the issue as to whether the Hon DCJ can exercise the power of assigning and empanelling expanded Benches of the High Court. As such, the interlink between articles 161(2), 163(1) and 165(4) of the *Constitution* as well as section 5 of the *Judicial Service Act* come to play. Accordingly, it becomes crucial to briefly examine the principles guiding the interpretation of the *Constitution* and statutes.

31. As a starting point, the *Constitution* itself provides for its own theory of interpretation. That is in articles 20(4) and 259(1). Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) commands courts to interpret the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

32. In hailing the *Constitution* of Kenya as a highly transformative one, courts have over time developed various cannons of interpretation.

33. In *David Ndii & others v Attorney General & others* [2021] eKLR (famously referred to as 'the BBI case'), the Learned High Court Judges dealt with four constitutional interpretive principles being that the *Constitution* must be interpreted holistically; that the *Constitution* does not favour formalistic approaches to its interpretation and it must not be interpreted as one would a mere statute; the

Constitution has provided its own theory of interpretation to protect and preserve is values, objects and purposes and that in interpreting Constitution, non-legal considerations are important to give its true meaning and values.

34. The Supreme Court of Kenya in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR thus (at paragraph *26*) answered the question as to what holistic interpretation of the *Constitution* means. The court stated as follows: -

> "But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting the *Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances".

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

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

36. On the tenet that the *Constitution* does not favour formalistic approaches to its interpretation and that it must not be interpreted as one would a mere statute, the Supreme Court pronounced itself in *Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

> "The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). the *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the *Constitution* has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts".

37. In expounding the principle that the *Constitution* has provided its own theory of interpretation to protect and preserve is values, objects and purposes, the Retired Chief Justice (Dr) Willy Mutunga had the following to say in his concurring opinion in *In Re the Speaker of the Senate & Another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR (paragraphs 155-157):

> "In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai& 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the *Constitution*, 2010 and the *Supreme Court Act*, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I

provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

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

38. The Supreme Court also expounded on the incorporation of non-legal considerations and their importance in constitutional interpretation in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR as under: -

> " We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the *Constitution* that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163".

39. We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

> "...References to *Black's Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.
>
> It is possible to set out the ingredients of the theory of the interpretation of the *Constitution*: the theory is derived from the *Constitution* through conceptions that my dissenting and concurring opinions have signaled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the *Supreme Court Act*, that introduce non-legal phenomena into the interpretation of the *Constitution*, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the

norm of the *Constitution* has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the *Supreme Court Act*, is to "facilitate the social, economic and political growth of Kenya".

40. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal also dealt with the subject of constitutional interpretation and laid out the very principles discussed above. The court further recounted the nexus between the principles of constitutional interpretation and the principles of statutory interpretation in the following manner: -

> "These principles [on constitutional interpretation] are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise..... The court as an independent arbiter of the *Constitution* has fidelity to the *Constitution* and has to be guided by the letter and spirit of the *Constitution*".

41. On our part, we wish to re-emphasize that the *Constitution* directs that it shall be interpreted in line with the doctrine of living constitutionalism. The doctrine holds that a constitution is a living document meant to evolve over time to reflect societal changes, contemporary realities, and shifting values. It further recognizes that the law is dynamic and adaptable to evolving circumstances, often encapsulated in the maxim that "the law is always speaking." It underscores that constitutional provisions are not static or frozen in time but must be understood as applying to current circumstances, regardless of their original context.

42. This interpretive approach ensures that the *Constitution* remains relevant and effective in guiding the governance and legal frameworks of a modern, dynamic society.

43. Moreover, the doctrine that "the law is always speaking" aligns with the purposive approach to constitutional interpretation, as endorsed by courts in various jurisdictions. Under this approach, courts are required to interpret constitutional provisions in a way that gives effect to their underlying purpose and objectives, rather than adhering to a rigid or literal reading. Further, courts have emphasized the need for a flexible and forward-looking interpretation of the *Constitution* to meet the needs of a modern state.

44. With the above interpretive principles in mind, we will now deal with the issues posed in the application under consideration.

ii. Whether the Hon DCJ can assign Judges pursuant to article 165(4) of the *Constitution*;

45. There is no doubt that this was the most contested issue in the subject application. Article 165(3) and (4) of the *Constitution* provides for empanelment of benches of uneven number of Judges as follows: -

(3) Subject to clause (5), the High Court shall have-

a. unlimited original jurisdiction in criminal and civil matters;

b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;

d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under article 191; and

v. any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

46. In dealing with the above issue, courts have taken two diametrically-opposite positions. One of them being that the assignment of Judges is a constitutional duty which can only be undertaken by the Hon. Chief Justice. As such, the Hon DCJ cannot assign Judges under article 165(4) of the *Constitution*. The other position posits that although the duty to assign Judges is provided for in the *Constitution*, its implementation is administrative and that duty can be undertaken by the Hon DCJ.

47. In *Kenya Medical Research Institute vs Attorney General & 3 others* [2014] eKLR a three-judge bench of the High Court held as follows: -

> " Therefore, by empaneling this Bench, the Chief Justice was carrying out his constitutional mandate as opposed to similar functions under the former Constitution which were not hinged on the constitutional provisions and were merely administrative".

48. In *Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties)* [2021] eKLR, a five-judge bench of the High Court held as under: -

> " The court in Kenya Medical Research Institute vs. Attorney General & 3 others [2014] eKLR, described the role of the Chief Justice under Article 165(4) as constitutional as opposed to a merely administrative function. It is also our view that a constitutional mandate of the Chief Justice can be judicial, administrative or political, and the current

Constitution does indeed state that the Chief Justice is the Head of the Judiciary which embodies all these functions".

49. The learned judges then found that the constitutional mandate exercised by the Chief Justice under article 165(4) is an administrative function. The court also elaborately dealt with the issue as to whether such an administrative function could be undertaken by the Hon DCJ and in the end the Court rendered thus:

> " It [sic] therefore our finding that the constitutional function of the Chief Justice to assign benches under article 165(4) being an administrative function, can be performed by the Deputy Chief Justice when the Chief Justice is for good reason, unable to perform".

50. The petitioners also cited the decision in *Okoiti v Judicial Service Commission & another; Mwilu & another (Interested Parties) (Constitutional Petition E408 of 2020)* [2021] KEHC 421 (KLR) as buttressing the position that the assignment of Judges is a constitutional mandate and the sole preserve of the Hon. Chief Justice. The decision was delivered by Hon Mrima, J who is part of this expanded bench.

51. We have carefully considered the said decision. One of the issues therein which may be said to have a bearing on this matter was whether the Hon Chief Justice could rely on section 5(4) and (5) of the *Judicial Service Act* to authorize the Hon DCJ to serve as the Acting Chief Justice when the Chief Justice was proceeding on leave pending retirement until when a succeeding Chief Justice was appointed.

52. As the matter did not deal with the aspect of assigning of Judges, but rather the constitutionality of the actions by the Chief Justice who was exiting service, we respectfully find that the issue is not at par with what is under consideration in the instant application. The said decision is, hence, distinguishable.

53. Returning to the matter at hand, it is imperative to look at what the terms 'administrative act' and a 'judicial act' mean.

54. The *Black's Law Dictionary*, 9th Edition defines an 'administrative act' as 'an act made in management capacity; esp, an act made outside the actor's usual field (as when a judge supervises court personnel).' It also defines 'Judicial power' as 'the authority vested in courts and judges to hear and decide cases and make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it'.

55. The court in *Royal Aquarium and Summer and Winter Garden Society v Parkinson* 1892 1QB 431 defined the term 'judicial' as follows: -

> " The word 'Judicial' has two meanings. It may refer to discharge of duties exercisable by a judge or justices in court or administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind that is a mind to determine what is fair and just in respect of matters under consideration. Justices for instance act judicially when administering the law in court, and they also act judicially when determining their private rules what is right and fair in some administrative matter before them".

56. From the above discourse, we do not find any difficulty in affirming the position that a constitutional mandate of the Hon Chief Justice can be judicial, administrative or political. We further find and hold the constitutional mandate exercised by the Hon. Chief Justice under article 165(4) of the *Constitution* is a constitutionally- administrative function.

57. We shall now consider whether the function of the Hon. Chief Justice under article 165(4) of the *Constitution* can be performed by the Hon DCJ. Article 161 of the *Constitution* establishes the office of the Chief Justice as the Head of the Judiciary and that of the Hon. DCJ as the Deputy Head of the Judiciary.

58. Article 163 of the *Constitution* creates the Supreme Court and designates the Hon. Chief Justice as the President of the court. The Hon DCJ serves as the Deputy to the Chief Justice and is also the Vice-President of the court.

59. Article 171 of the *Constitution* then establishes the Judicial Service Commission (hereinafter referred to as 'the JSC' or 'the Commission') as one of the Chapter 15 Commissions. The Hon Chief Justice is the Chairperson of the Commission. In this scenario, and unlike the constitutional architecture in articles 161 and 163, the Hon DCJ is not the Vice Chairperson of the Commission.

60. Running alongside the foregoing are the functions of the Chief Justice and the Hon DCJ as provided for in section 5 of the *Judicial Service Act*. The provision states as follows: -

Part II – Administration of the Judiciary

61. Functions of the Chief Justice and the Deputy Chief Justice:

i. The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.

ii. Despite the generality of subsection (1), the Chief Justice shall-

(b) assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary;

(3) As the Deputy Head of the Judiciary and the Vice-President of the Supreme Court, the Deputy Chief Justice shall be responsible to the Chief Justice in the exercise of the functions and duties of the office.

62. The decision in *Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya* (supra) also dealt with the definitions and types of deputies and ultimately rendered itself in the following manner: -

> " It has been canvassed before us that where the *Constitution* intends the Deputy Chief Justice to act on behalf of the Chief Justice, it has expressly stated so. Specific examples cited were articles 141(1), 144(4) and 148(4). These provisions fall under Chapter 9 of the *Constitution* that deals with the Executive. This chapter does not have a general provision as regards the deputisation of the Chief Justice by the Deputy Chief Justice, as is provided for in article 161(2)(b) in Chapter 10 of the *Constitution* on the Judiciary. Hence the provision for the deputisation of the Chief Justice in Chapter 9. A holistic and purposeful interpretation of article 161(2)(b) of the *Constitution* and section 5 of the *Judicial Service Act* leads us to the conclusion that the Deputy Chief Justice substitutes the Chief Justice when necessary". (emphasis added)

63. In the end, the Learned Judges found and held that the constitutional function of the Hon. Chief Justice to assign benches under article 165(4) of the *Constitution* being an administrative function, can be performed by the Hon. DCJ when the Hon Chief Justice is for good reason, unable to perform the functions.

64. On our part, we have equally addressed our minds to the issue. We find that there was a deliberate scheme by the drafters of the *Constitution* for the Hon DCJ to deputize the Hon Chief Justice as Deputy Head of the Judiciary and as the Vice-President of the Supreme Court, but not in the Commission.

65. Such was an emphasis on the various manifestations of the constitutional duties bestowed upon the Hon Chief Justice and the Hon DCJ. As such, the prevailing legal position is that the Hon DCJ can deputize the Hon Chief Justice in discharging judicial functions and in the administration of the Judiciary, as an arm of Government, but cannot do so in the Commission.

66. Our attention has been further drawn to the provisions of article 259(3)(b) of the *Constitution* which states as follows: -

Construing this Constitution:

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things-

b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time; (emphasis added)

67. The above provision establishes three tiers through which constitutional functions may be exercised: by the substantive office holder, by an individual acting in that capacity, or by a person otherwise performing the duties of the office at a given time. (emphasis added)

68. In our view, and in line with the doctrine of continuity in governance, the drafters of our Constitution were deliberate in ensuring that the administration of duties and application of constitutional provisions remain uninterrupted. They recognized the necessity of maintaining the functions of public offices, even during transitions or exceptional circumstances and ensuring administrative efficiency so that all constitutional responsibilities are carried out seamlessly without disruption.

69. This interpretation avoids technicalities, absurdities, or gaps that could hinder the functioning of State offices or public institutions. It ultimately promotes administrative efficiency and upholds the principles of good governance, accountability, and constitutional integrity.

70. For this reason, the functions of article 165(4) in our view, in as far as the same relate to the office of the Chief Justice also includes the Hon. DCJ acting in the capacity of the office of Chief Justice or discharging its functions in an interim, acting, or auxiliary role.

71. At this point in time, we also wish to point out that the Hon. Chief Justice empaneled this very bench on October 14, 2024 to deal with six constitutional petitions that inter alia challenged the 1st petitioner's impeachment process in the National Assembly. The said petitions are still current. On October 18, 2024, the Hon DCJ empaneled the same bench to deal with constitutional petitions challenging the impeachment of the 1st petitioner in the Senate.

72. To us, it is beyond peradventure that the Hon DCJ can assign Judges under article 165(4) of the *Constitution* whenever he/she is discharging any of the constitutional functions on behalf of the Hon. Chief Justice. In this case, we do not find any fault in the Hon. DCJ assigning Judges to sit in this bench more so when the Hon. Chief Justice has not raised any red flag.

iii. Other issues raised

73. Besides the issue of the bench's empanelment by the Hon. DCJ, several other issues were raised in submissions. The bench has addressed these issues so as to ensure both the completeness of the record and finality of the same.

74. An issue was raised concerning the directions issued by the three-judge bench and transmission of the files in Nairobi Petition E565 of 2024, Kerugoya Petitions E013 and E014 of 2024 (consolidated) and E015 of 2024. A review of the judiciary Case Tracking System (hereinafter the CTS) confirms that the petition in E565/2024 was filed on October 18, 2024 at 8:00 a.m. Later that same day, approximately five hours later, at 1:51 p.m., Learned Justice Chacha Mwita dealt with an application filed under Certificate of Urgency, which had been submitted alongside the petition.

75. By 5:33 p.m., roughly three hours after the earlier application, a notice of motion application dated October 1, 2024 was filed, this time by the respondents, seeking the following orders:-

    i. Thatthe application herein be certified as urgent and service of the application be dispensed with in the first instance.

    ii. Thatpending the hearing and determination of this application inter—partes this honorable court be pleased to set aside, vary and/or review the orders issued on 18th day of October 2024.

    iii. Thatin the alternative this honourable court be pleased to set aside, vary or discharge the ex—parte orders issued on 18th day of October 2024.

    iv. Thatthis honourable court do issue any other orders it deems fit in the interest of justice.

76. Following its empanelment on October 18, 2024 and having received directions from the Office of the Hon. DCJ, the Bench convened to deliberate on the appropriate directions to be issued. On October 19, 2024 at 12:20 p.m., the Bench issued the following directions: -

    > 'Thatin light of the urgency of the matter and the weighty issues raised therein, we direct that the application be served and responded to forthwith, for hearing inter-parties on Tuesday October 22, 2024 at 11.00 a.m in open court no.18'.

77. Petition E013 on the other hand was filed on September 25, 2024, at 8:33pm, while Petition E014 was filed on October 2, 2024, at 7:07pm, both past the official working hours of the court. The CTS shows that an application in Petition E013 was filed on September 30, 2024, and directions were issued the same day, though the matter was not certified as urgent.

78. Subsequent directions and a ruling delivered on October 11, 2024 resulted in the consolidation of Petitions E013 and E014, followed by an order for empanelment. As the record on CTS will further show, the directions issued by the court in E014/2024 on October 2, 2024, were issued at 18:22pm, also outside of the court official working hours. This, we believe, was due to urgency demonstrated in the application which sought orders relating to the (then) ongoing public participation process.

79. Backed by this sequence of events, we take great exception to the petitioner's conduct that when favorable to the petitioners, orders issued outside the normal working hours of the court raise no concern. However, when the same court acts in an instance where it has been properly moved by other parties and likewise proceeds to deal with an application at hand in the same vein, the petitioners show their indignation.

80. Moving on to Petition E015, the same was filed on October 18, 2024 and again, following the directions issued by the Court, this Bench was empaneled on October 18, 2024, to hear all the three petitions, that is (E 565/2024; E013/2024; E014/2024 and E015/2024).

81. From this sequence of events, it is evident that the real-time interaction between counsel and the courts is not a new development but a well-established practice that counsel are accustomed to. The CTS continues to enable both counsel and the courts to transcend traditional time limitations, allowing for real-time operations. This further demonstrates that with the advent of CTS, it is increasingly common for courts to issue directions within hours of an application being filed, or even outside regular working hours, when necessary. This evolution in court practice has continued to enhance judicial efficiency and ensure timely access to justice.

82. Moreover, in raising the issue of improper sitting, the applicants omitted a crucial fact which is that the court had been moved by the respondents in petitions E565/24 and E015. As such, the court did not convene suo motu, but rather in response to the applications before it.

83. The applicants have repeatedly referred to this convening as a 'sitting' of the court, a term that requires clarification and demystification. It is a matter of judicial notice that since the onset of the COVID-19 pandemic and the introduction of the CTS, the tradition of dealing with certificates of urgency has since evolved. This is reflected in Practice Direction 19(a) of the *High Court Practice Directions* of January 11, 2022, which states that:-

> 'Applications filed under certificate of urgency shall be considered by the Judge at the earliest opportunity'. (emphasis added).

84. While the Practice Directions also stipulated that applications filed after 12:00 pm may be considered the next working day, the full adoption of the e-filing system across the judiciary has largely rendered this provision obsolete. Applications are now processed almost in real-time, a fact well known to the justice users across the country and which we have demonstrated with respect to this petition.

85. Furthermore, Practice Direction 19(b) confers discretion upon the court to issue orders or directions without the attendance of advocates or parties. The relevant provision reads as follows: -

> 'The court may in its discretion, issue orders/directions without the attendance of the advocates or parties'.

86. In this case, the issue has been raised that this court allegedly sat and considered an application by the respondent on a Saturday, outside official court hours. The ordinary definition of a 'sitting,' as provided in the *Black's Law Dictionary*, is a formal occasion when the court convenes to conduct its business. In this instance, no such formal sitting occurred. No evidence or proceedings have been presented before the court to support the claim that a formal sitting took place.

87. Rather, the bench merely conferred and issued directions electronically, in line with established practice and the procedural rules as expressly permitted under Practice Direction 19(b). This is markedly different from a court session in which the bench is convened to hear and determine a matter. Accordingly, it is only fair and reasonable for the parties to dispel any notion that this bench convened to hear arguments from any party ex parte before issuing directions.

88. We do however recommend that the current Practice Directions and relevant statutes such as the *High Court Administration and Organization Act* be amended so as to` provide the much-needed further clarity on this subject.

89. Moreover, and for the avoidance of doubt, out of all the prayers sought, by the applicants, including a prayer to be heard outside of the ordinary office hours of the court, only prayer (i), which sought to have the matter certified as urgent, was granted. No other reliefs were granted at that time.

90. It is therefore evident that the court was fully cognizant of both the urgency of the matter and the potential repercussions that granting any further *ex parte* orders could have had on the prevailing status quo. With this understanding, and in an effort to balance the scales of justice, the bench issued the directions that are now being challenged, so as to give an opportunity for both parties to be heard on the applications. We therefore find and hold that there is nothing unconventional in the manner in which this bench dealt with the two applications filed under certificate of urgency.

91. As regards the argument that directions had already been issued by the respective courts for a mention before the bench on the 24th of October, 2024, the arguments by the applicants appear to insinuate that the bench ought to have retained the dates. For clarity purposes, this date had been given prior to the empanelment of this bench. However, upon empanelment of the bench, applications under certificate of urgency were filed, as we have already stated, which applications were dealt with and rightly so. Being seized of the matter, it is our view that the bench retains the discretion to issue appropriate directions, depending on developments and in light of its mandate, as it did, having been moved by parties.

92. With respect to the claim of discriminatory transmission of files to the bench, it must be emphasized that this bench has no role or control in the administrative processes that occur prior to its empanelment. Concerns have been raised about delays in the transmission of certain files, but it is crucial to clarify that 'transmission' may not necessarily refer to the physical transfer of documents. In the context of modern judicial processes, particularly with the advent of digital systems, transmission may very well refer to the electronic movement or assignment of case files within the judiciary's digital infrastructure.

93. We say this on the strength of the fact that with the CTS, all filed documents are available in real-time across the judiciary, eliminating the need for physical file movement. Practice Direction No. 41(a)(ii) provides that Advocates and litigants shall have access to the court information electronically.

94. While this court cannot and will not speculate on the causes of any delays in file transmission, it finds no basis for concluding that such delays amount to any form of procedural omission on the part of the bench, as no such evidence has been presented.

95. The applicants have equally, in their submissions, attempted to cast aspersions on the proceedings of this court. That this court was convened on a Saturday; stating that there is no urgency in this matter and so there was no need to convene the hearings on October 22, 2024; that this matter is being given priority over many other Petitions which have been filed; an insinuation that the bench is part of a conspiracy to infringe the petitioner' article 50 right to fair hearing; and that the transmission of the files from Kerugoya High Court took place with supersonic speed.

96. One of the Senior Counsels went further by intimating that an exercise akin to the 'radical surgery' may be forthcoming, a statement which we perceive as a veiled attempt at intimidation. Coming from a Senior Counsel, such remarks are regrettable and wholly inappropriate and irrelevant in these proceedings. This Bench remains firm in its duty and will not be swayed or influenced by any form of intimidation, regardless of its source.

97. As we have stated earlier, the petitioners appear to selectively focus on aspects that favor their position, while conveniently disregarding the fact that the same petitioners are presently benefiting from final conservatory orders issued by this court and which this bench upon conferring found it wise to

maintain. Notably, there is a pending application by the respondents seeking to lift those conservatory orders, which further underscores the urgency and significance of these proceedings.

98. Having obtained the conservatory orders, it is now apparent to the bench that the petitioners no longer perceive the urgency in this matter. Instead, they seek to cast aspersions on this court for addressing the matter with the necessary expedition. Such conduct is contradictory and undermines the very urgency the petitioners initially invoked. It is also worth noting that the issues raised in this and the other petitions have, on various occasions and before different Judges, consistently been certified as urgent and as involving substantive constitutional questions. This underscores the gravity and significance of the matters at hand.

99. Counsel also insinuated that this bench is part of a conspiracy to violate the petitioners' rights to a fair hearing under article 50 of the *Constitution*. These submissions are without foundation and wholly without merit. This Court has not issued any rulings or directions that would suggest such an intent. It is apparent that this argument was made for the gallery, and we find it unnecessary to address it further, save to reaffirm that this court remains fully committed to upholding the *Constitution* and the rule of law.

100. In conclusion, we find and hold that the accusations made by the petitioners against this bench are entirely without merit

101. Finally, an issue arose as to whether this matter raises issues of public interest which require expeditious disposition. The petitioners have urged that the applications before the court are not urgent, and they loudly wondered why it was necessary to give directions for its hearing on October 22, 2024.

102. For context, the bench considered the functions of the Office of the President and Deputy President under articles 131 and 147 respectively and how these functions intertwine. For the avoidance of doubt, the functions of the Deputy President are as follows:

    i. The Deputy President shall be the principal assistant of the President.

    ii. The Deputy President shall be the principal assistant of the President and shall deputise for the President in the execution of the President's functions.

    iii. The Deputy President shall perform the functions conferred by this Constitution and any other functions of the President as the President may assign.

    iv. Subject to article 134, when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President.

103. As can be seen, there is indeed a close twining of these functions with those of the President. The 1st petitioner has been impeached under article 145 of the *Constitution*, marking the first instance of such an event in Kenya's history. The impeachment of the said petitioner has undoubtedly garnered significant public interest, and these court proceedings represent a direct challenge to that impeachment. It goes without saying that these legal proceedings are of paramount concern to the citizens of this country. To suggest, as the applicants have, that this matter lacks urgency and does not warrant prompt adjudication is disingenuous and dismissive of its far-reaching implications.

104. The *Black's Law Dictionary* defines public interest as:

> "...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies governmental regulation".

105. The Supreme Court of Kenya in *Steyn v Ruscone* (Application 4 of 2012) [2013] KESC 11 (KLR) (Civ) (23 May 2013) (Ruling) equally defined public interest as follows:-

> " ...an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government...
>
> From the research material availed to this court, it is clear that a matter of general public interest may take different forms: as instances, an environmental phenomenon involving the quality of air or water may not affect all people, yet it affects an identifiable section of the population; a statement of law may affect considerable numbers of persons in their commercial practice, or in their enjoyment of fundamental or contractual rights; a holding on law may affect the proper functioning of public institutions of governance, or the court's scope for dispensing redress, or the mode of discharge of duty by public officers."

106. From the foregoing, a matter is of public interest if the holding on law affects a considerable number of people in the society; if the holding of law involves government and/or government agencies; if the holding of law affects the proper functioning of public institutions of governance, of the court's scope for dispensing redress; and if the holding of law affects the mode of discharge of duty by public officers.

107. These proceedings raise enormous public interest and it is in the interest of that public that these proceedings are heard and finalized most expeditiously. Therefore, the aspersions cast by the applicants concerning the directions for the hearing of the applications before the court on the 22nd day of October, 2024 lack basis. They are dismissed.

VI. Disposition

108. Having carefully considered the application, we are satisfied that the prayers sought herein must fail. Nonetheless, as indicated in our ruling, there is a pressing need for clear practice directions regarding the procedure and process for handling virtual and online directions and proceedings. We commend the applicants, as this application has illuminated the necessity for such guidelines and made the issue more apparent.

109. As such, we hereby direct the Hon. Deputy Registrar of this Division to transmit a copy of this ruling to the Hon. Chief Justice.

110. Before we conclude, the bench wishes to once again emphasize its unwavering commitment to objective neutrality in this matter. We assure all parties that their right to a fair hearing remains fully safeguarded. The bench, acting in fidelity to its oath of office and in strict adherence to the dictates of the *Constitution*, remains resolutely committed to the fair and just determination of the issues before it.

111. Our final orders are that the application dated October 22, 2024 is disallowed with costs in the cause. Leave to appeal is hereby granted. Certified copies of these proceedings and the ruling shall be availed upon payment of the requisite court fees as the case may be.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF OCTOBER 2024

E.O. OGOLA

JUDGE

A. MRIMA

JUDGE

DR. F. MUGAMBI

JUDGE