REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 271 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 27, 28, 29(D), 33, 38, 43, 47, 53, 54, 55, 56, 57, 73, 75, 159, 165, 174, 176, 184(1), 185, 196, 232, 255, 257, 258, 259 AND THE FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA, 2010;

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

UNDER ARTICLES 27, 28, 29(D), 33, 38, 43, 47, 53, 54, 55, 56, 57, OF THE CONSTITUTION OF KENYA, 2010;

IN THE MATTER OF ALLEGED CONTRAVENTION OF CONSTITUTIONAL PRINCIPLES OF LEADERSHIP AND GOVERNANCE IN ARTICLE 1, 2, 3, 10, 174, 175, 184, 185, 196, 232 OF THE CONSTITUTION OF KENYA 2010;

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015;

IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012;

IN THE MATTER OFSTATUTORY INSTRUMENTS ACT, NO. 23 OF 2013

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

IN THE MATTER OF PUNGUZA MIZIGO (CONSTITUTIONAL AMENDMENT) BILL OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY ASSEMBLY OF KIRINYAGA.....1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY

OF KIRINYAGA.....2ND RESPONDENT

EX-PARTE :

KENDA MURIUKI

THIRDWAY ALLIANCE KENYA

JUDGMENT

Introduction

1. Kenda Muriuki is a Kenyan citizen resident in, and registered as a voter of Kirinyaga County and specifically from Wamumu Ward (hereinafter the 1st Applicant). Third Way Alliance is a duly registered political party and the promoter of the Punguza Mizigo (Constitutional Amendment) Bill 2019 pursuant to Article 257 of the Constitution (hereinafter "the 2nd Applicant"). The two Applicants brought the instant judicial review proceedings after being aggrieved with proceedings that took place in the County Assembly of Kirinyaga, which is the legislative body of the County of Kirinyaga established under Article 177 of the Constitution, and which they have sued as the 1st Respondent. The Speaker of the said County Assembly who is elected under Article 178 of the Constitution of Kenya is also sued as the 2nd Respondent.

2. The 1st and 2nd Applicants filed the instant judicial review proceedings by way of a Notice of Motion dated 18th September 2019, and are seeking the following orders therein:

a) An Order of Certiorari to remove into this Court for the purposes of being quashed, the 2nd Respondent's decisions of 10th September 2019 ("the impugned decision") declaring that the Punguza Mizigo (Constitutional Amendment) Bill 2019 stood withdrawn;

b) An Order of Mandamus compelling the Respondents to:

i. reintroduce the Bill to the House for debate and voting within five days from the date of this judgment;

ii. table the Bill as per Article 257 of the Constitution and governing laws;

iii. conduct public participation as per the Constitution and enabling laws.

c) A Declaration that the Respondents have breached the Ex parte Applicants' constitutional rights and those of other constituents of Kirinyaga County, inter alia:

i. discrimination contrary to Article 27 of the Constitution

ii. dignity contrary to article 28 of the Constitution

iii. psychological torture contrary to Article 29(d)

iv. expression contrary to Article 33

v. political rights under Article 38

vi. fair administrative action contrary to article 47 of the Constitution;

vii. economic Rights contrary to 43

viii. children's Rights contrary to Article 53

ix. rights of Persons with Disabilities contrary to Article 54

x. rights of the Youth contrary to Article 55

xi. rights of Minorities and marginalized groups contrary to Article 56

xii. rights of the elderly contrary to Article 57;

d) A Declaration is hereby issued that the 1st and 2nd Respondents violated Constitutional Principles on Leadership and Good Governance, *inter alia:*

i. the Sovereignty of the People under Article 1 of the Constitution

ii. the Supremacy of the Constitution under Article 2 of the Constitution

iii. the obligation to defend, respect and uphold the Constitution under Articles 3 and 21 of the Constitution

iv. responsibilities of leadership including respect and service to the people, objectivity and impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices under Article 73 of the Constitution

v. obligation of the County Assembly to legislate under Article 185

vi. public Participation under Articles 10, 174, 196, 201, 232(1) (D)

vii. procedures for Amendment of the Constitution under Articles 255 and 257;

e) A Declaration is hereby issued that the Respondents have breached their statutory obligations under the County Government Act, the Fair Administrative Action Act, No. 4 of 2015, the Statutory Instruments Act, No. 23 of 2013;

f) An Order is hereby issued that Order 2 (b) and (c) above applies in rem, to all the 46 County Assemblies, namely Mombasa, Kwale, Kilifi, Tana River, Lamu, Taita/Taveta, Garissa, Wajir, Mandera, Marsabit, Isiolo, Meru, Tharaka-Nithi, Embu, Kitui, Machakos, Makueni, Nyandarua, Nyeri, Kirinyaga, Murang'a, Kiambu, Turkana, West Pokot, Samburu, Trans Nzoia, Elgeyo/Marakwet, Nandi, Baringo, Laikipia, Nakuru, Narok, Kajiado, Kericho, Bomet, Kakamega, Vihiga, Bungoma, Busia, Siaya, Kisumu, Homa Bay, Migori, Kisii, Nyamira and Nairobi City;

g) The 1st Respondent is condemned to pay the costs of and incidental to these proceedings; and

h) Such other, further, additional, incidental and/or alternative reliefs as the Court shall deem just and expedient.

3. The application is supported by the Applicants' statutory statement dated 16th September 2019, and a verifying affidavit sworn on the same date by the 1st Applicant.

4. The 1st and 2nd Respondents filed a Replying Affidavit sworn on 14th October 2019 by Kamau Aidi**,** the 1st Respondent's Clerk. Due to the urgency of the matter as attested to by the Applicants' advocate, that there is a Constitutional deadline set for the debate of the Punguza Mizigo (Constitutional Amendment) Bill 2019 that is due to expire this month, this Court directed that the instant application be canvassed by way of written submissions. Salisbury's Law Advocates filed submissions dated 3rd October 2019 on behalf of the Applicants, while M.A. Rienye Advocate filed submissions dated 14th October 2019 for the Respondents. The Applicants' and Respondents' respective cases now follow.

The Applicants' Case

5. The Applicants explained that on 22nd July 2019, the Punguza Mizigo (Constitutional Amendment) Bill was submitted to the County Assembly of Kirinyaga, and that in accordance with Article 257 of the Constitution, the County Assembly was required to debate and vote on the Bill within three months of receipt from the Independent Electoral and Boundaries Commission, which period lapses on 22 nd October, 2019. That the 2nd Respondent gazzetted a special sitting scheduled for Tuesday, 10th September 2019, during which the Bill was tabled through a procedural motion by the 1st Respondent's Leader of Majority pursuant to its Standing Order 224(1), to dispense with the requirements of the Notice for the Bill as provided for by Part VIII (Order of Business) of the 1st Respondent's Standing Orders.

6. Further, that after dispensing with the requirement for notice, the Bill was introduced and proposed by the Leader of Majority as a motion for debate, and he asked a member of the 1st Respondent, one Evans Ndege of Murinduku Ward, to second the motion. However, that instead of seconding the motion, Mr. Ndege stood and stated that he 'failed to second the motion'. The Speaker thereupon ruled that the motion stood withdrawn under Standing Order 54 of the 1st Respondent's Standing Orders which states:

"Question proposed after Motion made

(1)The question on any Motion shall not be proposed unless it shall have been seconded and any Motion that is not seconded shall be deemed to have been withdrawn and shall not be moved again in the same Session.

(2) Despite paragraph (1), a Motion made in Committee shall not require to be seconded."

7. According to the Applicants, the Bill ought to have been brought under the 1st Respondent's Standing Order 111, which applies to all public Bills as read together with Standing Orders 121 and 122, and which provide for the first reading of such Bills and the committal of the Bills to Committees and public participation. They contended that the Respondents employed a fatally defective procedure designed to circumvent mandatory constitutional provisions, and orchestrated to ensure Members of the 1st Respondent did not get a chance to debate and vote for the Bill on its merits. It is their contention that the Respondents' actions effectively ousted the Constitutional process for the Bill provided for under Articles 257, 10, 174 (c) and (d),196 (1) (b) and Part 2(14) of the Fourth Schedule of the Constitution, which require the tabling, debating and voting on the Bill, and that public participation is undertaken. That, the unconstitutional, unlawful and illegal process also ousted the County Assembly's own procedure under Standing Orders 111, 121, and 122, and hence deposed the natural result of this legal process anchored in Order 54 (2).

8. The Applicants' case is that had the Bill been taken through the legal process, that is, 1st reading, Committee stage, public participation, 2nd reading, 3rd reading for debate and voting, Order 54(2) would have applied allowing the motion to be debated and voted on according to the Constitution and governing laws, as it would not have required seconding as it would procedurally and legally emanated from the Committee.

9. Therefore, that the Respondents breached their constitutional rights and those of the constituents in Kirinyaga County including women, youth, children, people with disabilities and the elderly. It is contended that neither the Applicants, constituents of Kirinyaga County nor their elected Members of County Assembly were allowed to consider the Bill. This, according to the Applicants, is contrary to Article 1 of the Constitution which bestows sovereign power to the people, to be exercised directly or through elected officials. It is further contended that the 2nd Respondent applied Standing Order 54 (1) which provides that a Bill that fails to be seconded stands withdrawn, yet, the failure to be seconded was due to an unconscionable procedure and importantly, a procedure that in any case does not apply to Public Bills. That therefore, the 2nd Respondent violated Articles 2 and 257 of the Constitution and Standing Orders 111, 121 and 122 of the County Assembly.

10. It is the Applicants' case that the Respondents violated Article 3 of the Constitution which enjoins every person, (natural and artificial, private and Government organs, incorporated and incorporated bodies) to respect, uphold and defend the Constitution. This is attributed to the act of denying the 1st Applicant and other constituents of Kirinyaga County a chance to contribute their views to the Bill, and denying their Members of County Assembly a chance to debate and vote on the Bill under their right to representation anchored in Article 38 of the Constitution, Article 257. Further, that the said actions are an affront to Article 21 of the Constitution, which places a fundamental duty on the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

11. The Applicants further contended that the unconstitutional application of Order 54 excluded the 1st Applicant and constituents of Kirinyaga County from airing their views on the Bill, and the Members of the 1st Respondent's County Assembly from debating and voting on the Bill. This they term as discriminatory and contrary to Article 27, as they will not have the same chance Constituents of other Counties have in making a decision on the Bill. They also cite violation of their right to dignity under Article 28 of the Constitution in the manner in which they as worthy members of society were denied a chance to comment on the Bill. Further, that the 2nd Applicant worked very hard to fulfill the stringent requirements of Article 257 to garner one million supporters for its proposal and to reduce the proposals into the Bill. This hard work was however put to nought by a ruling of less than half a minute, which is an assault on its dignity as a citizen exercising rights under the Constitution.

12. The Applicants stated that since they learnt that the 1st Respondent would not be conducting public participation for the Bill, and that members of the 1st Respondent would not have a chance to debate the Bill, they have suffered psychological torture over the violation of their Constitutional rights. It is their contention that they feel humiliated, distraught, helpless and hopeless, and that the Respondents violated Article 29(d) which guarantees every person the right to freedom and security of the person, including the right not to be subjected to torture in any manner, whether physical or psychological. It is contended that the Respondents, by failing to subject the Bill to public participation, violated Article 33 of the Constitution which provides for the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas. Specifically, that the 1st Applicant's right and that of the constituents of Kirinyaga County to receive the information contained therein was breached.

13. It was also averred that the Applicants' political rights of representation under Article 38 were breached when the members of the 1st Respondent were denied a chance to debate and ventilate on the Bill. It is contended that the Applicants were denied a chance to debate and comment on a Bill whose philosophy is devolving resources to the wards to accelerate provision of basic health, education, food and water. This they term as a violation of their rights under Article 43 which guarantees the right to social and economic rights. It is contended that the rights of children to free and compulsory basic education, basic nutrition, shelter and health care as provided under Article 53 are under threat because the Applicants were denied the right to scrutinize the Bill whose focus is having these basic services actualized at the wards.

14. The Applicants further averred that the Respondents ignored the provisions of Article 54 on the rights of persons with disabilities and denied such a critical group of citizens a chance to interrogate the Bill and have their say. Similarly, that the Respondents violated Article 55 which guarantees the right of the youth to among others, have opportunities to associate, be represented and participate in political, social, economic and other spheres of life. That, the Respondents also violated Article 56 guarantees the right of minorities and marginalized groups to among others, participate and be represented in governance. And, that the Respondents violated Article 57 which provides for the right of the elderly to among others, fully participate in the affairs of society.

15. In conclusion, the Applicants allege that the Respondents' decision to exclude them from participating in a constitutional process affecting their fundamental rights and freedoms without any notice and reasons is unlawful, unreasonable, procedurally unfair, and contravenes Article 47 (1) of the Constitution. The Applicants also contend that the Respondents breached their legitimate expectation by i) denying them a chance for public participation, hence violating their rights to freedom of expression under Article 33; and ii) denying the Members the opportunity to debate and the vote on the Bill hence violating their right to representation under Article 38.

The Respondents' Case

16. The Respondents in response averred that Article 257(5) of the Constitution calls upon the county Assembly to consider a Bill submitted to the Assembly and does not use the words ''debate'' and ''vote'' nor prescribe a procedure to be used by the County Assembly in its consideration. Further, that the 1st and 2nd Respondents complied fully with the standing orders of the 1st Respondent. And that a Member of County Assembly is under no obligation to second a Motion and no Member of County Assembly can be compelled to second a motion. It is averred, in response to ground No. 9 of the Application and paragraphs 10 and 11 of the Supporting Affidavit that the 2nd Respondent complied with its standing orders. It is averred that the 2nd Respondent is bound by Standing Order 54 of the standing orders of the 1st Respondent and compliance with the same is not discretional. It is his averment that all other members of the County Assembly present were at liberty to second the motion and the 2nd Respondent denied none the opportunity to second the motion.

17. It was emphasized by the Respondents that the Punguza Mizigo (Constitution of Kenya Amendment) Bill, 2019 (hereinafter "the Punguza Mizigo Bill") is not the 1st Respondent's Bill, and therefore not subject to the procedure under Order 111 read together with Standing Orders 121 and 122. It is their averment that for an instrument to qualify to be a Bill and therefore subject to standing Orders 121 and 122 it must comply with standing order 118 which reads;

> **"118. No Bill shall be introduced unless such Bill together with the memorandum referred to in Standing Order 114(Memorandum of objects and reasons),has been published in the county Gazette and the Kenya Gazette(as a Bill to be originated in the County Assembly),and unless in the case of a County Revenue Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill, a period of seven days ,and in the case of any other Bill a period of fourteen days ort such shorter period as the County Assembly may resolve with respect to the Bill, has ended."**

18. According to the Respondents, the Punguza Mizigo Bill originated from the 2nd Applicant. Further, that standing order 54(2) applies to motions moved under Standing Order 127 which provides the procedure in Committee of the whole County Assembly on a Bill. It is their deposition that Articles 257, 10, 174(c) and (d) of the Constitution as well as Part 2(14) of the Fourth Schedule of the Constitution do not outline or prescribe any procedure on the consideration of the Punguza Mizigo Bill by the 1st Respondent or any County Assembly. Further, that the Applicants do not set out with precision the manner in which the provisions of Article 257, 10, 174 (c) and (d) and Part 2 (14) of the Constitution are applicable to the present circumstances.

19. It is the Respondents' case that the procedures of the 1st Respondent are regulated by its Standing Orders, and consideration of the Punguza Mizigo Bill is subject to the said procedure. It was deponed that the 1st Respondent's Standing Orders are in full compliance with the Constitution and the County Governments Act. According to the Respondents, the self-regulation by the 1st Respondent of its own internal procedures is a derivative of the principle of separation of powers amongst the three arms of government. Further, that the Punguza Mizigo Bill was subjected to the correct procedure as set out in the 1st Respondent's standing orders, and that Article 257 of the Constitution does not set out a special procedure to be followed by the 1st Respondent in consideration of the Bill. That if the Bill was to be subject to a special procedure, this would require prior amendment of the 1st Respondent's standing orders. It was contended that in any case, the Applicants have not set out with precision and in a step by step manner, the procedure they allege to be correct.

20. The Respondents averred that during the special sitting of the County Assembly of Kirinyaga held on 10th September 2019, the Punguza Mizigo Bill was indeed not rejected. Further, that the 1st Respondent has not made any decision with respect to the Bill, is still seized of the Bill, and has not completed the process of its consideration as required by Article 257(5) of the Constitution. According to the Respondents, what transpired on the 10th September 2019 is an automatic operation of the procedural law of the 1st Respondent and is not a decision which is subject to judicial review. Furthermore, that the 1st Respondent's decisional mandate under Article 257(5) of the Constitution is limited to either approving or rejecting the Bill. Further, that the 1st Respondent cannot amend the Bill in any way and cannot therefore incorporate the views of its Members and the public in the Bill.

21. According to the Respondents, the people may exercise their sovereign power either directly or through their democratically elected representatives pursuant to Article 1 (2) of the Constitution. That in this regard, the 1st Respondent are the democratically elected representatives of the people of Kirinyaga County, hence their continued consideration of the Bill is in compliance with Article 1 of the Constitution. It is averred that the Applicants have not sufficiently demonstrated the alleged violation of the provisions of the said Article and the other Articles alleged to have been violated by the Respondents. It is further averred that no evidence has been adduced by applicants to demonstrate the alleged violation by the Respondents of the supremacy of the Constitution as provided under Article 2. Further, that the Applicants have not laid out the precise manner that the Respondents have allegedly contravened the said Articles.

22. It was contended that the 1st Respondent conducts its business openly, holds all its sittings in public and does not bar the public from attending any of its sittings. In this regard, the special sitting on 10th September 2019 was held in an open manner, in public and with media coverage. It is the Respondents position that sections 4 and 5 of the Statutory Instruments Act apply only to statutory instruments as defined in Section 2 of the said Act, which does not include the Punguza Mizigo Bill. That in any case, the 1st and 2nd Respondents are not the custodians of the process of amending the Constitution by popular review, and that the 2nd Applicant, being the promoters and the drafters of the Punguza Mizigo Bill, cannot claim that they have not participated in their own process. It was averred that the 2nd Applicant have publicized the Bill and invited the public to endorse it as required by Article 257(1) of the Constitution. According to the Respondents, the Bill has at all material times been available for the scrutiny and information of the 1st Applicant and the entire public on the 2nd Applicant's website.

23. Lastly, it was the Respondents' contention that the process of amending the Constitution by popular initiative does not start or end with the 1st Respondent. The Bill may still be considered by Parliament and the public in a referendum, which process the 1st and 2nd Respondent cannot and have not in any way prevented the applicants from participating in. It is deponed that the 1st Respondent has not made any decision with respect to the Bill, hence there exists no decision to warrant judicial review by this Court.

The Determination

24. I have considered the pleadings and submissions made by the parties, and note that the Applicants in their submissions submitted on the issues of this Court's jurisdiction and their *locus standi*, which preliminary issues were to a certain extent also addressed by the Respondents. The Applicants submitted that this Court has inherent, original and unlimited jurisdiction, pursuant to Articles (2)(c), 22(1) & 23, 162(1) and 165 (3) (d) to determine the issues arising from the instant application. It is their submission that the application is based on alleged infringement and/or threatened infringement of fundamental rights and freedoms, and that internal and alternative dispute resolution mechanisms do not oust this Court's jurisdiction as those mechanisms cannot enforce fundamental rights and freedoms. Further, that even where legislation exists for alternative dispute resolution, Courts have outlined conditions to be considered in ousting the jurisdiction of the High Court to determine a matter raised under Articles 22 and 23 of the Constitution. The Applicants cited the case of **Nderitu Gachagua vS**

Thuo Mathenge & 2 Others [2013] eKLR where the Court of Appeal held that the High Court is the correct forum to approach when a litigant is seeking multiple remedies and which the alternative dispute resolution forum cannot grant.

25. The Applicants also relied on the decisions in **Kenya Bureau of Standards vs Powerex Lubricants Limited [2018] eKLR** and **Mohamed Ali Baadi and Others vs Attorney General & 11 Others [2018] eKLR**, for the position that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Reference was also made to the case of **William Odhiambo Ramogi & 2 others vs Attorney General & 6 Others [2018] eKLR** where it was held that where a suit is primarily about enforcement of the rights, the High Court has jurisdiction to determine the matter in the first instance. Lastly, the Applicants submitted that they had *locus standi* to bring the instant application and relied on the decisions in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, [2013] eKLR** and **John Wekesa Khaoya vs Attorney General, [2013] eKLR** to argue that *locus standi* to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution.

26. The Respondents addressed the issue of this Court's jurisdiction in their submissions on whether the orders sought can be granted. Specifically on the order of mandamus, it was submitted that the granting of such an order would violate the doctrine of separation of powers and the power granted to the 1st Respondent to regulate its internal rules of procedure as well as the County Assemblies Powers and Privileges Act. The Respondents urged that the Court be cognizant that although business might be placed before the plenary of the 1st Respondent for consideration, the course which that business takes on the floor of the 1st Respondent falls within the realm of practical politics. For instance, whether there will be quorum in the plenary of a legislature or that a motion will be seconded is outside the scope of this Court's jurisdiction.

27. The Respondents cited the case of **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others, [2014] eKLR,** where it was held that Courts should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies. Reference was also made to the case of **Patrick Ouma Onyango & 12 Others vs Attorney General and 2 Others, [2005] eKLR** where it was opined that the courts must appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters.

28. Likewise on the order sought of certiorari, the Respondents submitted that this remedy pre-supposes the existence of a decision by an administrative authority, which decision must be brought before the court to be quashed. It is submitted that whereas the Applicants allege that the withdrawal of the motion was a decision of the 2nd Respondent, the impugned decision was not a decision of either of the Respondents but a definite prescription and operation of the procedural law of the Respondents. The Respondents cited Standing Order 54(1) of the Standing Orders of the County Assembly of Kirinyaga, and submitted that the 2nd Respondent did not have any power to decide whether the motion should be withdrawn or otherwise, adding that the provisions of Standing Order 54 automatically kicked in the instant the motion was not seconded. It was their submission that the 2nd Respondent was sitting as an impartial arbiter and merely read to the 1st Respondent the relevant provisions of the standing orders. Therefore, there is no decision by the 2nd Respondent that is available to be quashed by this Court

29. It is therefore necessary to affirm this Court's jurisdiction at the outset arising from the foregoing submissions. This Court as a judicial review Court exercises supervisory jurisdiction pursuant to the provisions of Articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body or unfair action by an administrator is alleged, and intervenes to protect and redress the rights of the affected party. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

30. It is notable that in the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the actions of the Respondents arising out of the tabling of the Punguza Mizigo Bill before the 1st Respondent. For such proceedings and/or actions to be amenable to judicial review, they must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions. The impugned actions in the instant application arise out of the exercise of the Respondents' constitutional and statutory powers and functions as legislative bodies, and their decisions clearly affect the Applicants' rights and interests. The Respondents in this respect are therefore amenable to this Court's supervisory jurisdiction to ensure that the exercise of their powers is legal, rational and compliant with the principles of natural justice.

31. I am also in this regard persuaded by the recent decision by the Supreme Court of the United Kingdom in **R (On the application of Miller) vs The Prime Minister and Cherry and Others v Advocate General (2019) UKSC 41** on the justiciability of the exercise of legislative powers, wherein it held as follows at paragraph 35:

> **"35. Having made those introductory points, we turn to the question whether the issue raised by these appeals is justiciable. How is that question to be answered? In the case of prerogative powers, it is necessary to distinguish between two different Page 14 issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The first of these issues undoubtedly lies within the jurisdiction of the courts and is justiciable, as all the parties to these proceedings accept. If authority is required, it can be found in the decision of the House of Lords in the case of Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374. The second of these issues, on the other hand, may raise questions of justiciability. The question then is not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In the Council of Civil Service Unions case, the House of Lords concluded that the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised.**

32. The Supreme Court then proceeded to find as follows in paragraph 36:

"36….As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them."

The constitutionality and legality of the exercise of the Respondents' powers in the consideration and approval of the Punguza Mizigo Bill is in issue in the instant application, and therefore fall within the realm of this Court's constitutional mandate**.**

33. Having found that this Court has jurisdiction to deal with the matters raised by the Applicants, I will proceed to consider the substantive issues raised in this application. There are four substantive issues that require determination, which are as follows:

a) Whether the Respondents' actions in relation to the Punguza Mzigo (Constitution of Kenya Amendment) Bill, 2019 in its sitting on 10th September 2019 were illegal and procedurally unfair.

b) Whether the Respondents' said actions in relation to the Punguza Mzigo (Constitution of Kenya Amendment) Bill, 2019 infringed on the Applicants' constitutional rights.

c) Whether the decision of this Court is capable of operating *in rem* in relation to other County Assemblies.

d) Whether the Applicants merit the relief sought.

34. It is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

35. With the enactment of a new Constitution in 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act, reveals an implicit shift of judicial review to include aspects of merit review of administrative action,** *even though the* **reviewing court has no mandate to substitute its own decision for that of the administrator.**

36. Consequently, there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. These grounds are also now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.

37. It is in the context of the foregoing legal parameters that this Court will proceed to address the issues raised in this application

On whether the Respondents acted illegally and unprocedurally

38. On the first issue as to the legality of the Respondent's decision, it is submitted by the Applicants that the decision in the present case was illegal, unlawful, unprocedural and unconstitutional in nature, and intended to oust a Constitutional process by ensuring the Bill is not tabled for public participation, debate and voting as required by the law. It is submitted that the Respondents did not give sufficient notice and a chance for parties to be heard should they decide to act outside of the set provisions considering the importance of the said decision to the Applicants, the constituents of Kirinyaga County and the general public. That, the Applicants had legitimate expectations to be notified and given a chance to be heard before the Constitutional process was ousted. Accordingly, that the Respondenta failed the procedural fairness criteria, and proceeded to invoke an unconstitutional, unlawful, illegal procedure.

39. Reference was made to the case of **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** where the Court of Appeal in defining the scope of Article 47 held that the right to administrative action in the Bill of Rights subjects fair administrative decisions to the principle of constitutionality rather than to the doctrine of *ultra vires* from which the administrative law under the common law was developed. It is the Applicants' submission that the Respondents' decision to exclude them from participating in a Constitutional Process affecting their fundamental rights and freedoms without any notice and reasons for that decision is unlawful, unreasonable, procedurally unfair and contravenes Article 47 (1) of the Constitution and the provisions of the Fair Administrative Action Act.

40. It was also submitted that contrary to Article 47 (2) which requires a person whose right or fundamental freedom is likely to be adversely affected by administrative action to be given written reasons for the action**;** the Respondents did not give the Applicant and other constituents of Kirinyaga County written reasons for denying them a chance to participate in the process. It is submitted that both Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

41. The Applicants quoted the provisions of Section 4(3) of the Fair Administrative Action Act, and cited the case of **Baker v. Canada (Minister of Citizenship & Immigration*)* 2 S.C.R. 817 [1999].** The Supreme Court of Canada (paras 23-27) therein set out the factors to be considered in determining the degree of procedural fairness in a given case. The Applicants assert that the Respondents used an unconstitutional unlawful, illegal, unprocedural, unorthodox procedure, unknown to the constitution and/or any written law or regulation, practice or custom. Hence, the impugned decision must be declared null and void, and the Respondents compelled to adhere to the Constitution.

42. The Respondents on the other hand submitted that in the instant case, Article 257 of the Constitution does not prescribe the procedure that the 1st Respondent should follow in its consideration of the Bill. To wit, an order of mandamus as prayed by the Applicants would only be efficacious if the Court were to specify how the order should be implemented. On the question of whether there was procedural impropriety, it is submitted that this Court is called upon to determine what the correct procedure should be. The Respondents submit that Article 257 of the Constitution does not prescribe any procedure to be followed by County Assemblies. It is submitted that Article 200 obliges Parliament to enact legislation providing the procedure of County Assemblies. That, Parliament in this regard enacted the County Governments Act, 2012 which provides at Section 14(1) that a County Assembly may make standing orders regulating its procedure, and it is submitted that the 1st Respondent enacted its Standing Orders based on the above provisions of the law.

43. The Respondents referred to the Applicants allegations that the correct standing order is Part XIX which applies to Public Bills. According to the Respondents, this part deals with the procedure of introduction, consideration and enactment of County Assembly Bills and starts with the introduction of a legislative proposal until the assent of the enacted Bill by the Governor. The Respondents submit, that a suggestion that in the instant case, the Punguza Mizigo Bill should have followed the Process in Part XIX, presupposes that the said Bill was a Bill of the 1st Respondent whose process should have led to its enactment as an Act of the County Assembly. According to the Respondents, such a suggestion is misleading and a complete misapprehension of the law.

44. The Respondents contention is that since the Bill is/was not a Bill of the County Assembly, it could only be tabled before the County Assembly as a paper pursuant to Standing Order 37, and the process of its consideration commenced through a motion. It is submitted that for the 1st Respondent to follow the procedure in Part XIX of the standing orders, it would necessitate that the Bill be published as a Bill of the County Assembly in the Kenya Gazette and for it to go through all the processes in the said part.

45. The Respondents also faulted the Applicants for suggesting that the Bill is a statutory instrument pursuant to the Statutory Instruments Act without demonstrating how it qualifies as such under the Act. Based on the foregoing, the Respondents reiterate that they followed the correct and lawful procedures at all material times. It is their submission that the applicants have not demonstrated the alleged correct procedure and are therefore not entitled to the orders sought.

46. I have considered the arguments made by the parties herein, and in determining whether or not the Respondents acted illegally or in error of law, regard is made by this Court to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law.

47. The applicable law in this regard is Article 257 of the Constitution, which provides as follows:

> **"(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.**
>
> **(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.**
>
> **(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.**
>
> **(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.**
>
> **(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.**

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter mentioned in 255 (1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10).”

48. Therefore, an ordinary interpretation of Article 257 is that a Bill to amend the Constitution by popular initiative is required to be approved by majority of the County Assemblies before transmission to Parliament for approval by a majority, or approval by a referendum as the case may be. There is no provision in the said Article as to the procedures for consideration and approval of Bill to amend the Constitution by popular initiative, and it therefore left to the County Assemblies to employ their procedures for consideration and approval of Bills. This is one of the instances where this Court has to restrain itself as regards purposive interpretation, in so far as the intended procedure for consideration and approval would have been, as this is a power and mandate that is specifically given to the legislatures under the Constitution.

49. In this respect, Article 185 of the Constitution provides that a county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Likewise, section 14 (1) of the County Governments Act gives the county assemblies powers to make standing orders consistent with the Constitution and the Act that regulate their procedure, including the proper conduct of proceedings and establishment of committees. Section 21 of the Act also provides for the procedure for the exercise of their legislative powers, which shall be through Bills passed by the county assembly and assented to by the governor. The Bills may be introduced by any member or committee of the county assembly, but a money Bill may only be introduced by the relevant committee.

50. The Applicants have disputed the manner of introduction of the Punguza Mizigo Bill in the 1st Respondent County Assembly. They contend that a wrong procedure, namely the use of the 1st Respondent’s Standing Order 54(1) which introduced the Punguza Mizigo Bill by Motion, and which resulted in the withdrawal of the said Bill as the said Motion was not seconded as required by the Standing Order. That the correct procedure ought to have been Part XIX of the Standing Orders that applies to Public Bills. While the Applicants did not annex a copy of the said standing orders, the same were annexed by the Respondents, who in turn argued that the proper procedure employed.

51. I find that this Court is not in a position to determine which of the two procedures is the correct or wrong procedure, save to state that the 1st Respondent was at liberty to employ the procedure it felt was appropriate in the circumstances in the exercise of its constitutional and statutory mandate. The only findings this Court can make is as regards the propriety and rationality of the procedure employed by the Respondents. The procedure of motions, which are proposals made for the purposes of eliciting a decision by a legislative body is an accepted method of debate and consideration by legislative bodies. **Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament, Twenty Third Edition (2004)** describes the process of decision making in the legislative bodies, and the process of debate by motion, question and decision in chapter 17 of the treatise. He states that the essential stages in obtaining a decision in the process of debate are the moving of a motion, the proposing of a question by the Chair or Speaker, the putting of the question and the collection of voices or division on the motion.

52. Motions are provided for in Standing Orders 43 to 66 and 224 of the 1st Respondent’s Standing Orders. The Applicants in this regard annexed a copy of the 1st Respondent’s Hansard of Tuesday 10th September 2019 as their annexure “KM4” to their supporting affidavit, which shows that such a motion on the Punguza Mizigo Bill was tabled for consideration, it was exempted from notice under Standing Order 224(1), a question on the same put by the speaker, and when the motion was not seconded by any of the county assembly members present before being debated upon, it was deemed to have been withdrawn pursuant to the provisions of Standing Order 54. Therefore, to the extent that motions are an accepted norm and tradition of consideration of matters before legislative bodies and expressly provided for by the 1st Respondent’s standing Orders, this Court cannot make a finding of unconstitutionality or illegality in the procedure employed by the Respondents.

53. It is also notable that the alternative procedure proposed by the Applicants in Part XIX of the 1st Respondent’s Standing Orders deals exclusively with Bills that are generated by the members or committees of the 1st Respondent, and which, in line with Article 185 of the Constitution, are in relation to the functions of the counties. It does not address the circumstances of the Punguza Mizigo Bill or Bills initiated by way of popular initiative. In addition, the procedures of Part XIX of the 1st Respondent’s Standing Orders provide for the main stages of passing of Bills through first reading, second reading, committee stage and the third reading, with one of the main purposes being of debating and making proposals on amendments to the Bills.

54. In the case of a constitutional amendment Bill by way of popular initiative, a gray area is whether any such amendments can be proposed or made during consideration by the County Assemblies, which traditionally is not the case with constitutional amendment bills. This Court therefore finds that the reasons given by the Respondents in not adopting the procedure in Part XIX of their standing orders were rational and had a legal basis.

55. Lastly on the procedure, the arguments were made on the lack of public participation on the Punguza Mizigo Bill by the 1st Respondent, and the Applicants annexed copies of advertisements by other county assemblies on public participation fora on the said Bill. Article 196 of the Constitution does require the 1st Respondent to facilitate public participation and involvement in its legislative and other business, and this would include the Punguza Mizigo Bill. Indeed the whole purpose of a constitutional amendment by popular initiative is to involve public in the decision making on such amendments. The Respondent did not bring any evidence of any public participation initiative it conducted on the Punguza Mizigo Bill, save for stating that its sittings are open to the public.

56. The effect of such lack of public participation can however only be determined upon the conclusion of the process envisaged in Article 257 of the Constitution, given the double decision-making processes that are required to take place at the county assemblies and Parliament, and indeed, will be dependent on whether the majorities required in the county assemblies is met. The prevalence or lack of public participation as a contributing factor to the attainment or otherwise of such majority. It is therefore premature to make a decision as to the effect of such lack of public participation at this stage and in the circumstances of this application. In addition, given the different actors in the promotion and passage of a bill to amend the constitution by popular initiative, it may be necessary to consider the cumulative efforts at public participation before deciding on its sufficiency or otherwise.

57. In conclusion, this Court also needs to make a comment that although it has found that the procedure employed by the 1st Respondent was provided for in its Standing Orders, and was one of the procedures it could employ in the consideration of the Punguza Mizigo Bill, it is not a procedure that should be encouraged in light of the democratic and good governance values enshrined in our Constitution, and the legal and political objectives of an amendment to the Constitution by popular initiative as a means of direct democracy.

58. While it is not the place of this Court to prescribe what procedures should be adopted by the legislative bodies, it in this regard considers it prudent to recommend that since the passage of a constitutional amendment by popular initiative is a national exercise that affects the Independent Electoral and Boundaries Commission, all County Assemblies, and Parliament, the national Parliament needs to develop and enact a law to ensure uniformity in the procedures of consideration and approval by County Assemblies of bills to amend the Constitution by popular initiative, and to ensure the inclusion and insulation of key constitutional and democratic requirements and thresholds in the said procedures. This law should also address the other procedural aspects demanded by Article 257 of the Constitution.

On whether the Respondent's Infringed on the Applicants' Rights

59. The arguments by the Applicants on this issue were that application of Order 54 of the 1st Respondent's Standing Orders excluded the Applicants and other constituents of Kirinyaga County from airing the views, and the and the members of the 1st Respondent from debating and voting the Bill, hence denying them equal chance as other Counties in the decision making on the Punguza Mizigo Bill, and violating various other constitutional rights in the process. Therefore, it is evident that the alleged violations are dependant and pegged on a finding that Order 54 was the wrong procedure that was utilized by the Respondents. Since this Court has found that the procedure in the 1st Respondent's Standing Order 54 was properly utilised despite its outcome, it follows that this ground fails.

60. This Court however again reiterates its recommendation for a law to ensure that procedure employed in the process of consideration and approval of Bills to amend the Constitution by popular initiative promotes and protect the rights that are enshrined in the Constitution.

On whether this judgment should operate in rem

61. In support of the prayer that this judgment operates *in rem*, the Applicants submitted that the Supreme Court of Kenya in **Hemanus Philipus Steyn v Giovanni Gnecci Civil Application No. 4 of 2012**, set the test for what amounts to matters of general public importance, namely that either the matter raises a question or questions of law of great public importance or that the matter raises a question or questions of law of general importance**.** Specifically, that the determination of the issues raised transcends the circumstances of the particular case, and has a significant bearing on the public interest. The Applicants also made reference to the case of **Abubakar G Mohamed vs Independent Electoral and Boundaries Commission, [2017] eKLR** where the Court cited the case of **Japheth Nzila Muangi vs Kenya Safari Lodges & Hotels Ltd, [2008] eKLR**, on when a judgment is *in rem*, that is, a judgment which declares, defines or otherwise determines the status of a person or of a thing and the jural relation of the person or thing to the world generally.

62. It was also submitted that the Court dealt extensively with the applicability of orders *in rem* in the case of **Okiya Omtatah Okoiti vs Ministry of Land, Housing and Urban Development & 2 Others, [2017] eKLR** where it held that a decision determining the functions of state organs cannot be said to be restricted to the parties in Court, and therefore applies *in rem* to avoid the desirable consequence of other parties giving effect to what is already declared a nullity. The Applicants submitted that they are apprehensive that other County Assemblies will use the same unconstitutional, illegal, unlawful procedure to defeat a constitutional process as has already happened in Siaya and Nyamira County Assemblies. They submit that whereas there is a multiplicity of suits, the constitutional timeline whose deadline is 22nd October 2019 remains**.** Hence, only an order *in rem* is adequate, sufficient and appropriate for all the forty-six (46) County Assemblies.

63. The Respondents did not make any submissions on this issue.

64. This Court is alive to the fact that a judgment *in rem* determines the objective status of a person or thing. That kind of judgment has a public character that transcends the interests of only the litigating parties. It was in this respect held in **Kamunyu and Others vs. Attorney General & Others ,[2007] 1 EA 116:**

> **"In a suit seeking judgement *in rem,* that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."**

65. Therefore, the mere fact that a person was neither a party to the suit in which a judgment *in rem* is given does not deprive him or her of the benefit of the said order as long as the same was a decision *in rem*. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

> **"It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."**

66. There are certain conditions however, that must be met for a judgment to operate *in rem*. Firstly, is that the Court must have jurisdiction. For a court to have jurisdiction, due process requires that the court has control over the thing that is the subject of the judgment. Secondly, notice is required to be given to persons whose interests are to be so affected, and lastly a hearing must be granted. In the present application, the Applicants want this judgment to apply to all forty-seven County Assemblies. However, the facts giving rise to this Court's judicial review jurisdiction over the said forty-seven County Assemblies are not given by the Applicant. In particular, as this application is about the procedure adopted by the County Assemblies in the consideration and approval of the Punguza Mizigo Bill, it has not been shown if a similar procedure as that adopted by the 1st Respondent was adopted by all the forty-seven County Assemblies, and indeed what procedure was adopted by the other County Assemblies.

67. Secondly, it is also not evident that the said County Assemblies apply the same standing orders as the 1st Respondent to regulate their procedure, and the said standing orders were not brought in evidence. Lastly, even though this Court directed that the said County Assemblies be served with notice of this application, due to the constitutional time limits explained in the foregoing that specifically applied to the 1st Respondent, it was not possible to give a hearing to all the County Assemblies.

68. For these reasons, this Court finds that this is a judgment that only applies to the Applicants and Respondents herein, as it is based on the demonstrated actions of the Respondents, and shall not operate *in rem* to all the forty-seven County Assemblies.

Whether the Applicant is entitled to the relief sought

69. The last issue is that of the remedies sought by the Applicant. The Court of Appeal held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge, (1997) e KLR** *inter alia* as follows as regards judicial review orders of mandamus and certiorari sought by the Applicants:

> **"…The order of *mandamus* is 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 tribunal, 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 remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

70. The remedy of a declaration is on the other hand normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a body's powers and duties, and the rights of individuals or the law on a particular issue.

71. This Court has found that the Respondents did not acted illegally or irrationally in applying the procedure in Standing Order 54 of its Standing Orders in its consideration of the Punguza Mizigo Bill, and given that there is no specific procedure set out for the consideration and approval of the Punguza Mizigo Bill that it was required to follow in this regard. The Applicants are therefore not entitled to the orders sought of certiorari to quash the actions by the Respondents, or of mandamus and declarations sought for this reason. The lack of public participation has also been found not to vitiate the Respondents actions for the reasons given herein.

72. I accordingly find that the Applicant's application by way of the Notice of Motion dated 18th September 2019 is not merited, and is hereby dismissed. In light of the public interest nature of the application, and the lacuna in the law that has been observed by the Court, I order that each party shall meet its own costs of the application. I also order the Deputy Registrar of this Court to forward a copy of this judgment to the Speakers of the National Assembly and Senate, for noting of the recommendations on enactment of appropriate legislation on the procedures for transmission, consideration, approval and enactment of bills to amend the Constitution by popular initiative under Article 257 of the Constitution.

73. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF OCTOBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 22ND DAY OF OCTOBER 2019

J.M. MATIVO

JUDGE