REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 657 OF 2016

(AS CONSOLIDATED WITH JUDICIAL REVIEW MISC. APPLICATION NO. 647 OF 2016)

IN THE MATTER OF AN APPLICATION BY THE COALITION FOR REFORM AND DEMOCRACY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF AN APPLICATION BY ARTICLES 1, 2, 3, 4, 10, 27, 38, 47, 81, 82, 83, 86, 88, 93, 94, 95, 96, 109, 110, 115, 116, 117, 118, 124, 129 AND 131 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE STANDING ORDERS OF THE SENATE AND THE NATIONAL ASSEMBLY

AND

IN THE MATTER OF THE ELECTIONS ACT 2011, THE ELECTION LAWS (AMENDMENT) ACT 2016 AND THE ELECTION LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 3 OF 2015)

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE

ACTION ACT 2015

BETWEEN

REPUBLIC ……..……..…….APPLICANT

AND

SPEAKER NATIONAL ASSEMBLY…….....1ST RESPONDENT

NATIONAL ASSEMBLY…….……....2ND RESPONDENT

SPEAKER SENATE……....3RD RESPONDENT

SENATE……..…….……..4TH RESPONDENT

ATTORNEY GENERAL……..….....…5TH RESPONDENT

EX-PARTE - COALITION FOR REFORM AND DEMOCRACY (CORD)

JUDGEMENT

Introduction

1. This Judgement is in respect of two Judicial Review Applications being Nos. 647 of 2016 and 657 of 216 which were on 16th January, 2017 consolidated by this Court.

2. By an amended Motion on Notice dated 13th January, 2017, the *ex parte* applicant herein, **Coalition for Reform and Democracy (CORD)**, seeks the following orders:

> **1. An order of certiorari to move into this Court and quash the decision of the First Respondent to appoint days for Special Sittings of the National Assembly on 20th and 22nd December 2016 and to proceed to conduct the proceedings and to transact business of the House during the said sittings.**
>
> **2. An order of certiorari to move into this Court and quash the decision of the Second Respondent to hold Special Sittings of the National Assembly on 20th and 22nd December 2016 and to amend the Elections Act 2011.**
>
> **3. An order of certiorari to move into this Court and quash and annul the amendments made by the National Assembly to the Elections Act 2011 on 20th and 22nd December 2016 and/or any subsequent and consequential amendments by the Senate or Parliament.**
>
> **4. An order certiorari to move into this Honourable Court and quash the decision of the Third Respondent to appoint a day for a Special Sitting of the Senate on 28th December 2016.**
>
> **5. An order of prohibition to prohibit any further proceedings, business, transactions or decisions including sittings, debates, parliamentary mediation, approval and assents to Bills concerning or affecting the Elections Act 2011 and the Election Laws (Amendment) Bill (National Assembly Bill No 3 of 2015) as contained in the Orders of Business or the Day of the Special Sittings of the National Assembly on 20th and 22nd December 2016 and the Senate on 28th December 2016.**
>
> **6. A declaration be made that the decisions, actions, sittings and proceedings of the Respondents are unconstitutional, illegal, unprocedural and procedurally unfair, influenced by an error of law, made in bad faith, unreasonable, irrational, taken with ulterior motive and purpose and constitute an abuse of discretion and power and have not taken into account relevant considerations of fact and law.**
>
> **7. The Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.**
>
> **8. The costs of this application be provided for.**

Applicant's Case

3. According to the applicant, the First Respondent herein, The Speaker of the National Assembly, convened Special Sittings of the National Assembly on 20th December 2016 and 22nd December 2016 by instrument of a Gazette Notice No. 10582 published in the Kenya Gazette Vol. CXVIII – NO 161 on 20th December 2016 and Gazette Notice published by instrument of Gazette Notice published in the Kenya Gazette prior to the Special Sittings on 20th December 2016.

4. On both occasions it was averred that the National Assembly transacted business which were not properly and lawfully contained in the Gazette Notices and were therefore held and conducted in breach of the Standing Orders. Based on legal advice the *ex parte* applicant averred that the Special Sittings were not convened in accordance with the Standing Orders of the National Assembly and in particular Standing Orders 29, 30 and 61.

5. It was the ex parte applicant's case that the business transacted at the Special Sittings did not qualify to be business for Special Sittings of the National Assembly hence the First and Second Respondent acted in breach of the Standing Orders in the purported exercise of Standing Order 136 by deciding to re-commit in the Committee of the Whole House the ***Election Laws (Amendment) Bill (National Assembly Bill No. 3 of 2015)*** and consideration thereto of the amendments to the ***Elections Act 2011***.

6. The applicant's position was that the Constitution of Kenya requires that Parliament in the exercise of its legislative powers follows the procedures for enacting legislation which includes compliance with Standing orders of the Houses of Parliament as provided in Articles 109, 118 and 124(1) of the Constitution of Kenya, and in breach of the Standing Orders the First and Second Respondents contravened the said provisions of the Constitution. It was further alleged that the First and Second Respondents contravened Article 118(1) of the Constitution of Kenya in failing to provide opportunity or facilitate public participation and involvement in the legislative and other business of the National assembly in regard to proposed amendments to the ***Elections Act, 2010*** and in particular as relates to the use of technology in the electoral system.

7. To the applicant, elections are matters of fundamental importance to the people, the citizenry and the electorate and therefore the widest possible public participation was required after the enactment of the ***Election Laws (Amendment) Act 2016*** which had involved a wider of spectrum of society and stakeholders, political parties, faith based organizations, non-state actors, the Executive, the Judiciary and independent offices and commissions including the Attorney General, Director of Public Prosecutions, Independent Electoral and Boundaries Commission, Kenya National Commission for Human Rights, Ethics and Anti-Corruption Commission, the Commission on Administrative Justice and the Council of Governors.

8. It was disclosed that during the Special Sittings the National Assembly in contravention of Article 118 of the Constitution of Kenya did not conduct its business in an open manner and its sittings were not held in public or sessions thereof and on the 22nd December 2016 the National Assembly excluded the public and media from its sittings and the record of the proceedings do not show that the Speaker had determined that there were justifiable reasons for the exclusion.

9. The applicant averred that following the establishment of the Joint Parliamentary Committee on matters relating to the Independent Electoral and Boundaries Commission which was a committee of both Houses as provided in Article 124(2) of the Constitution of Kenya debate and business relating to ***Election Laws (Amendment) Bill (National Assembly Bill No 3 of 2015)*** was stopped and proposals contained in the said Bill discarded and rejected.

10. It was therefore the applicant's contention that the National Assembly acted unreasonably, irrationally, capriciously and oppressively by introducing proposals that were rejected in the enactment of the ***Elections Laws (Amendment) Act*** and in any case before the expiry of the six months or at the end of session and/or term.

11. The applicant disclosed that on all the Special Sittings of the National Assembly on 20th December

2016 and 22nd December 2016 all routes to Parliament along Parliament Road, Harambee Avenue and City Hall Way were barricaded thus impeding the access to Parliament Buildings for the Members of Parliament, the public and media personnel. Further, there were acts of violence inside the chamber of the National Assembly at all the Special Sittings thus contaminating its proceedings which was compounded by the consequent lack of decorum, order and dignity in the proceedings. Because of the disorder in the national Assembly during the Special Sittings, it was contended that the Speaker was unable to preside over the proceedings effectively in accordance with the Constitution and the law the right of freedom of speech and debate in Parliament as provided in Article 117(1) of the Constitution.

12. It was deposed that on 23rd December 2016 the Third Respondent, the Speaker of the Senate, through Gazette Notice No 10682 appearing in the Special Issue of the Kenya Gazette Vol. CXVIII – No 164 called for a Special Sitting of the Senate purportedly pursuant to Standing Order No. 29 of the Standing Orders of the Senate. To the applicant, the qualifications for Special Sitting have not been met by the Third Respondent and in particular as read with Standing Order 59 of the Standing Orders of the Senate.

13. It was contended that the business to be transacted during the Special Sitting on 28th December 2016 included business which do not qualify to be dealt with during a Special Sitting and the ***Election Laws (Amendment) Bill (National Assembly Bill No 3 of 2015)*** also does not qualify to be business that can be transacted under Standing Order 29 as read with Standing Order 59 of the Standing Orders of the Senate.

14. The applicant asserted that the Third and Fourth Respondents being State offices and organs must act in accordance with the Constitution and that the Respondents contravened Articles 1, 2, 3, 4, 10, 93, 94, 96, 109, 118 and 124 of the Constitution of Kenya.

15. The applicant's case was that the consideration of the ***Kenya Laws (Amendment) Bill (National Assembly Bill No. 3 of 2015)*** was being driven in a rushed manner and it was evident that the Senate would not be able to subject the Bill to public participation. It was further contended that the passing of the ***Kenya Laws (Amendment) Bill (National Assembly Bill No. 3 of 2015)*** and its consideration by the Senate was irrational oppressive, unreasonable and capricious and the same was being carried out with an improper motive and in bad faith as it disregarded the following;

> ***a) Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007 also known as the Kriegler Report.***
>
> ***b) Report of the Commission of Inquiry into Post Election Violence following the General Elections held on 27th December 2007, also known as the Waki Commission.***
>
> ***c) Report of the Joint Parliamentary Committee on matters relating to the Independent Electoral and Boundaries Commission and its approval by parliament.***
>
> ***d) Election offences Act 2016 and the Election Laws (Amendment) Act 2016.***

16. It was averred that the Applicant is a coalition of political parties which sponsored candidates in the general elections held on 4th March 2013 and intendeds to do the same in the next general elections. In its view, political parties are an integral part of the framework and structure of our democracy as the Republic of Kenya is declared to be a multi –party democratic state and political parties sponsor the majority of candidates who win and participate in elections at the national and county levels. In its view, whereas the law requires that political parties be consulted or involved in decision making or processes that relate to elections, it was evident that Independent Electoral and Boundaries Commission and Parliament were not involving political parties in the opposition, including the Applicant, in the legislative and other business of Parliament for ulterior and improper motive particularly when considering the process leading to the enactment of the Election Laws (Amendment) Act 2016.

17. The applicant insisted that it and many Kenyans had a legitimate expectation that the ***Election Laws (Amendment) Act 2016*** would remain in full force in its entirety for purposes of having free and fair

election as it is a product on which a majority of Kenyans invested their hopes and had created public confidence in the electoral system in Kenya.

18. The ex parte applicant lamented that it is only the judiciary that can protect, uphold and defend the constitutional democracy in Kenya which limits the hegemony of a majoritarian rule by ensuring that the will of the majority can only prevail if asserted and enforced in accordance with the Constitution through the values and principles of the Constitution such as national unity, rule of law, participation of the people, patriotism, human dignity, equity, social justice, inclusiveness, human rights, non-discrimination, protection of the marginalized, sharing of resources, devolution, good governance, transparency and accountability.

19. It was contended that judicial intervention in accordance with the Constitution and the law can be invoked to protect the Constitution, the people, democratic institutions, system of electoral democracy and in particular in circumstances where peace and national unity, the rule of law and protection of the Bill of Rights is at stake and the Republic is breaking at its seams.

20. The applicant's case was that the National Assembly failed to recognize that the use of technology in our electoral system is supposed to be secure and safe and it is an integrated and seamless process that envisages a technology based back-up that has inbuilt technical solutions and integrity. To the applicant, a break up of the integrated technology that consists of biometric voter registration, electronic voter identification and electronic transmission of results would be definitely be compromised by introducing a manual procedure or component. The backup system should be technology based in order to create synergy and congruence with other equipment and assets.

21. In its submissions the ex parte applicant relied on Articles 2(1), 2(4) and 3(1), 93, 94(3) of the Constitution and concluded that Kenya is a constitutional democracy. The doctrine of the separation of powers is a pillar in our constitutional architecture. But the doctrine does not supersede the boundaries marked out in the form of visible beacons erected by the Constitution. The first beacon is that whereas the legislative authority is delegated by the people to Parliament and the legislative assemblies in the county governments, Articles 1(3), 2(2), 93(2), 95(3), 96(2) and 109 of the Constitution makes it plain that Parliament must act in accordance with Constitution. Whereas Parliament can make or unmake laws, the principle of the Rule of Law which is enunciated in Article 10(2) of the Constitution obligates Parliament to obey and comply with the law.

22. It was therefore submitted that Parliament is not sovereign in Kenya nor does the legislative authority delegated to it by the people enthrone the legislature to a pedestal which is higher than the Constitution. This is no longer the norm even in parliamentary democracies. England is often celebrated as the citadel of parliamentary democracy where Parliament is considered sovereign. But since Magna Carta Parliament has never had the audacity to oust core values of the Charter. Instead Magna Carta was turned it into an essential foundation for the contemporary powers of parliament and the base for the legal principles such as habeas corpus. It influenced the formation of the American Constitution in 1787. It was submitted that **Lord Denning** described the Charter as **"the greatest constitutional document of all times – the foundation of freedom of the individual against arbitrary authority of the despot".**

23. According to the applicant, Part 4 of Chapter Eight of the Constitution which deals with the procedures for enacting legislation and expresses the manner in which Parliament is required to exercise legislative power provides in Article 109. It was submitted that this Article is related to Article 124(1), and therefore when the Constitution directs Parliament to enact legislation in accordance with the Constitution of Kenya and the Standing Orders as it does in Article 109(3) and (4) then the question of whether or not there is compliance becomes a constitutional question. If Parliament does not do so, then the breach constitutes both a contravention of the Constitution and a contravention of Standing Orders. This is in contradistinction to, for example, the procedure to remove the President on grounds of incapacity or by impeachment. The Constitution does not impose compliance with Standing Orders of either Houses of Parliament although as a matter of fact the basic procedure set out in the Constitution is replicated in the Standing Orders of both Houses.

24. It was submitted that Parliament cannot ignore and violate Standing Orders arbitrarily. Standing Orders are rules of Parliament made by powers donated by the Constitution and bind the legislature. Standing Orders fall within the constitutional scheme and mosaic. In this respect the applicant relied on the Advisory Opinion Reference No 2 of 2013 - **The Speaker of the Senate and Another vs. Attorney General and Others**, **Prof J. Oloka Onyango and Others vs Attorney General Petition No 8 of 2014** and the Supreme Court of Zimbabwe in the case of **Tendai Laxton Biti and Another vs. The Minister of Justice, Legal and Parliamentary Affairs and Another, Civil Application No 46 of 2002.**

25.In the context of the Standing Orders the discussion of other legislation as against the Constitution in regard to the interpretation of Constitution, the ex parte applicant relied on the decisions of the Supreme Court of Kenya in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and Others [2014] eKLR** and **Fredrick Otieno Outa vs Jared Odoyo Okello and Others [2014] eKLR** and submitted that both the Senate and the National Assembly did not act in accordance with Article 109 of the Constitution of Kenya which require that they must follow the procedure set out in Part 4, and in particular, in relation to Bills, Parliament can only pass Bills in accordance with the Standing Orders. In this respect the applicant relied on the Advisory Opinion No 2 of 2013 - **the Speaker of the Senate and Another vs Attorney General and Others**.

26. According to the ex parte applicant, it is a fundamental duty of the State and every State organ, including parliament, to observe, respect, protect, promote and fulfill the rights and freedoms in the Bill of Rights. This submissions was based on the judgment **Hlophe, J** in **De Lille and Another vs Speaker of the National Assembly 1998(3) SA 430** where it was held that all branches of the government are subject to the scrutiny by the courts, and that:

> **"The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights".**

27. It was submitted that on 20th December 2016 the First Respondent, the Speaker of the National Assembly, convened special sittings of the National Assembly on 22nd and 23 December 2016 by Gazette Notice No. 10582 contained in a Special Issue of the Kenya Gazette of 20th December 2016 – Vol CXVIII-No 161. The First Respondent specified and notified the members of the place, date and time appointed for the special sittings of the National Assembly, the Second Respondent. The First Respondent, in compliance with the Standing Orders specified the business to be transacted which were;

> ***a) Re-committal in Committee of the Whole House of the Election Laws (Amendment) Bill (National Assembly Bill No 3 of 2015) and consideration thereto of amendments to the Elections Act 2011 and the Election Campaign Financing Act 2013, to commence from the debate interrupted on 20th December 2016; and***
>
> ***b) Third Reading of the Election Laws (Amendment) Bill (National Assembly) Bill No 5 of 2015.***

28. According to the applicant, business that qualify a Special Sitting can only relate to the matters specified under Standing Order 61 (Special Motions) or other urgent and exceptional business as the Speaker may allow. In this case it was submitted that the business contained in the Gazette does not relate to matters enumerated under PART XIII of the Standing Orders of the National Assembly and more specifically, Standing Order 61, which defines Special Motions. It was further the ex parte applicant's view that the business was neither urgent nor exceptional. The Bill, it was submitted, was old business that had been carried over from a previous session of the National Assembly in 2015. During its pendency in the fourth session of the National Assembly it had been withdrawn and was superseded by the ***Election Laws (Amendment) Bill 2016*** which enacted an elaborate and meticulous bipartisan process that included the establishment of a Joint Parliamentary Committee. The business was also not exceptional as it involved the amendments to the ***Elections Act*** which had been dealt with in the ***Elections Laws (Amendment) Bill 2016***.

29. It was further submitted that the First Respondent fell foul of the *ejusdem generis* rule because

Standing Order 29 of the National Assembly does not give the First Respondent an absolute discretion. To propose otherwise would defeat the purpose of the Standing Order. The only business the First Respondent can allow under the Standing Order is restricted to business that may involve the same type or class of business as those contained in Standing Order 61. The Special Motions defined under Standing Order 61 are all anchored on various Articles of the Constitution and require the intervention of the National Assembly. The only motion in relation to enactment of legislation is provided in Standing Order 61(b) (iii) which relates to amending or veto of a special Bill passed by the Senate. A special Bill is defined in Article 110(2) (a) of the Constitution.

30. It was further submitted that the business that may also qualify for a Special Sitting is a Special Motion seeking the resolution of the House to approve an appointment or re-appointment in accordance with Part XI of the Standing Orders. If the First Respondent is to be given an absolute discretion to determine business that can be transacted during a Special Sitting it would defeat the whole purpose of the constitutional scheme of the law including the Standing Orders.

31. It was further submitted that the Orders of the Special Sitting and the Orders of Business on Tuesday, 20th December 2016 included other business that were not specified in the Gazette Notice and included the following;

- ***Motion on the Report of the Committees of the whole House on the County Governments (Amendment) Bill (Senate Bill No. 4 of 2016);***
- ***Motion on Adoption of the Report on Investigation into the Ownership of Mombasa Cement Limited land in Kilifi;***
- ***Adoption of the Report on Ratification of the Agreement between the Government of the Republic of Kenya and the United States; and***
- ***Motion of the Report of the Committee of the Whole House on the Election Laws (Amendment) Bill National Assembly Bill No 3 of 2015.***

32. It was submitted that the First and Second Respondents subsequently made a vain and misguided attempt to introduce the additional business by publishing a Notice Paper of Tentative business for Tuesday (Afternoon), December 20, 2016 purportedly pursuant to Standing Order 38(1). The Notice Paper was however undated and most probably was produced together with the Orders of the Day Special Sitting, Tuesday, 20 2016 at 9:30am. It should be noted that the Notice Paper and Orders of the Day specify different times for the Special Sitting. But more significantly all the business transacted did not qualify to be transacted at a Special Sitting. In support of its submissions the ex parte applicant relied on the decision of **Mutunga, CJ** in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR.**

33. It was submitted that the Third Respondent, the Speaker of the Senate, also convened a Special Sitting of the Senate on 20th December 2016 through Gazette Notice number 10682 contained in a Special Issue of the Kenya Gazette published on 23rd December 2016, Vol. CXVIII- No 164. The said Notice was signed on 23rd December 2016. In the ex parte applicant's view, the Third Respondent was guilty of the same contraventions as the First Respondent and is faulted on the same grounds. It is therefore the Applicant's case that the Respondents were all in breach of Article 109 of the Constitution and the relevant Standing Orders.

34. To the applicant, the debate in both Houses of Parliament were in contravention of Article 117 of the Constitution regarding freedom of speech and debate in Parliament and the orderly conduct and effective discharge of the business of Parliament. Free speech cannot be exercised without order and decorum in the chambers of the Houses of parliament. The Hansard report of the debate and proceedings in the Houses of Parliament attest to the fact there was more than a deficiency in the debates and the proceedings overall. Article 117 of the Constitution should be read together with Article 10, 73, 94, 95, 96 of the Constitution. Article 94(4) imposes the duty on Parliament to protect the Constitution and to promote the democratic governance of the Republic. It must demonstrate respect to the people and bring honour to the nation and dignity to the institution of the National Assembly and the Senate. In this respect the applicant relied on **Twinobusingye Saverino vs Attorney General, Petition No 47 of 2011**.

35. In this case, it was submitted that the proceedings contravened the freedom of speech of members and the orderly conduct of business contrary to Article 117 of the constitution. The centrality of freedom of speech in parliamentary debate cannot be gainsaid. It enjoys special constitutional protection both in terms of the ***National Assembly (Power and Privileges) Act*** and Article 33 of the Constitution. Indeed in the Ugandan case a part from the questions of order and decorum the Court found nothing wrong or unconstitutional with the resolution to demand a high moral standard from members of parliament.

36. It was submitted that the National Assembly did not allow public participation in regard to the new provisions which had been introduced to enact a new section 44A of the ***Elections Act 2011***.This was a major change considering the fact that the ***Election Laws (Amendment) Act 2016*** had established a major shift in our system of elections from a manual one to an integrated electronic electoral system that mainstreamed the use of technology. The ***Election Laws (Amendment) Bill 2015***, now ***Election Laws (Amendment) Act 2017*** made major and significant changes to the ***Election Laws (Amendment) Act 2016*** which was a culmination of bipartisan parliamentary process. ***The Election Laws (Amendment) Act 2016*** was approved, both content and form, by stakeholders, political parties and a majority of Kenyans. It was submitted that the 2015 Bill was brought to parliament through the backdoor as it had been withdrawn or put aside to give way to the ***Election Laws (Amendment) Bill 2016***. And this took place within a month and before the expiration of six months as contemplated by the Standing Orders and the procedure of the British Houses of Parliament. In this respect the applicant relied on ***Erskine May on Parliamentary Practice*** – 21st Edition and submitted that this principle also applies to motions to the effect that a motion or an amendment which is the same, in substance, as a question which has been rejected during a session may not be brought forward again during that same session. ***The Election Laws (Amendment) Bill***, it was submitted, was in effect rejected, withdrawn and placed aside because of the introduction of the ***Election Laws (Amendment) Bill 2016***. Standing Order No 1(2) state,

> **"The decisions made in paragraph (1) shall be based on the Constitution of Kenya, statute law and the usages, forms, precedents, customs, procedures and traditions of the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya".**

37. In this case it was submitted that the report of the Hansard for the material days demonstrate that the business of both the National Assembly and the Senate were not conducted in an open manner and in public and more particularly excluded the media and members of the public from the Special Sittings. In what was an aberration to our history and parliamentary business and the operations of both Houses the precincts of Parliament were barricaded by the police and paramilitary security forces. It tarnished and tainted the image of Parliament as a people's democratic institution with elected representatives of the people enjoying the power and privileges of parliament.

38. It was therefore submitted that the Respondents' decisions and conduct and the proceedings of Parliament were irrational, unreasonable, unfair, arbitrary and capricious and were tainted with bad faith, ulterior and/or improper motive, impropriety, oppression and procedural unfairness. The notices of the sittings were inadequate and insufficient and the time allocated for debate was restrictive and restricted for a major piece of legislation. It was coming in the wake of the enactment of a legislation which was substantially the same in content and form. The debates were held during a major Holiday season when not conducive to the debate. Parliament owes the citizenry the duty to act reasonably, rationally and fairly. In this respect the applicant relied on the decision of **Greene, MR** in **Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223, at 229** in which the judge stated **(as cited in Twinobusingye Severino vs Attorney General case, Constitutional Petition No. 47 of 2011** by the Constitutional Court of Uganda) that:

> **"If any authority misdirects itself in law or acts arbitrarily on the basis of considerations which lie outside statutory powers, or unreasonably that its decisions cannot be justified by any objective standard of reasonableness, then it is the duty and functions of the courts to pronounce that such decisions are invalid and when these are challenged by any one aggrieved by them and who has the necessary *locus standi* to do so".**

39. The applicant also relied on **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR.**where it was held that:

> **"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution".**

40. According to the applicant, elections are the pillars of democracies. Electoral laws affect the manner and the extent to which citizens can enjoy the political rights under Article 38 of the Constitution. Citizens had legitimate expectations that matters election will be dealt with in an inclusive and bipartisan manner in order to generate public confidence in the preparation for and the conduct of the general elections to be held on 8th August 2017. The rush, the exclusivity and expediency of a Special Sittings eroded this expectation. Their expectation to have a system of election which is simple and coherent has been frustrated. In doing so the right of Kenyans, individually and collectively to a fair administrative action has also been violated. The Respondents have not acted lawfully and reasonably and in a procedurally fair manner. The action of the Respondents were not explained in public or in the addresses during the debates in both Houses of Parliament. The Applicant is substantially affected as a major political coalition with three constituent political parties.

41. The Applicant therefore prayed that the judicial review orders and other orders prayed for in the Notice of Motion dated 30th December 2016 be granted together with costs.

42. In his oral address to the Court, **Mr. Muchemi**, learned counsel for the applicant disclosed that apart from prayers 3 and 6 of the amended motion, the other prayers had been overtaken by events. In his oral address to the Court, **Mr. Muchemi**, learned counsel for the applicant disclosed that apart from prayers 3 and 6 of the amended motion, the other prayers had been overtaken by events. In his oral address to the Court, **Mr. Muchemi**, learned counsel for the applicant disclosed that apart from prayers 3 and 6 of the amended motion, the other prayers had been overtaken by events. He however submitted that the business that was to be conducted did not qualify under Part VIII of the Standing Orders hence the Speaker exercised his discretion on the grounds that the motion was urgent or exceptional without specifying why he found so. In the learned counsel's submission, since the Bill was an old Bill it did not qualify as either urgent or exceptional having been carried over from the previous session in 2015.

1st and 2nd Respondents' Case

43. The application was opposed by the 1st and 2nd Respondents.

44. According to them, on 9th December 2016, the Leader of Majority in the National Assembly wrote to the Speaker of the National Assembly requesting for a special sitting of the National Assembly pursuant to Standing Order 29(1) of the National Assembly Standing Orders. On 13th December 2016, the Leader of Majority in the National Assembly wrote to the Speaker of the National Assembly requesting for the inclusion of two items in the business of the House during the special sitting of the National Assembly on 20th December 2016.

45. It was disclosed that the Speaker of the National Assembly having approved both requests and recalled the National Assembly for a special sitting, on 15th December 2016 requested that the notification of the special sitting be published in the Kenya Gazette. Accordingly, the notice of the special sitting to be held on 20th December 2016 was published in Kenya Gazette Notice No. 10371 dated 13th December 2016. In addition to the notice published in the official Gazette, an internal memo dated 15th December 2016 was circulated to all Members of the National Assembly informing them of the special

sitting to be held on 20th December 2016 as well setting out the business to be transacted by the House at that sitting.

46. It was averred that on 20th December 2016, the Leader of Majority in the National Assembly wrote to the Speaker of the National Assembly requesting for a special sitting of the National Assembly pursuant to Standing Order 29(1) of the National Assembly Standing Orders. Which request the Speaker of the National Assembly approved requested that the notification of the special sitting to be held on 22nd December 2016 which was published in the Kenya Gazette of 20th December 2016.

47. It was contended that the Speaker's approval was in line with standing Orders 29.

48. The said Respondents averred that the National Assembly carried out public participation on the the ***Election Laws (Amendment) Act, 2016*** and the ***Election Laws (Amendment) Bill (National Assembly Bill No. 3 of 2015)***.

49. Contrary to the allegations made by the applicant that the period of notice for the special sittings was too short, it was averred that the members of the National Assembly attended the special sittings in large numbers and the House was able to garner the quorum required by the Constitution. In their view, it is the constitutional duty of Members of Parliament to legislate and the members were simply being recalled to undertake their constitutional roles. The said Respondents averred that since the Parliamentary Service Commission, a constitutional commission established under Article 127 of the Constitution, facilitates Members of Parliament to travel to Parliament to and from their constituencies for purposes of transacting parliamentary business, the allegation that the notice was too short therefore does not hold.

50. The 1st and 2nd Respondents averred that Parliament is an important state organ and is always under tight security, with security being enhanced depending on the threat level detected. The security of Parliament however, does not prevent Members of Parliament, the press or the general public from accessing the precincts of Parliament to follow debate. The said Respondent averred that they were not aware of any person who was impeded from accessing Parliament. Indeed, there was the requisite quorum to transact business on both the 20th and 22nd of December 2016.

51. The said Respondent further denied knowledge of any violence inside the chamber during the proceedings of the National Assembly on either 20th or 22nd December 2016 that "contaminated" the proceedings. They were however aware that some Members of Parliament tried to impede the Honourable Speaker of the National Assembly from entering the chamber on 20th December 2016 by blocking his access to the chamber, but the Speaker was subsequently able to enter the chamber and the business of the day was transacted.

51. Based on legal advice, the 1st and 2nd Respondents believed:

1) That the Application seeks orders which, if granted, would be a breach of Article 124 of the Constitution which provides for Parliament to establish its committees and make Standing Orders for the orderly conduct of its proceedings.

2) That the orders sought by the Applicant violate the provisions of Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers and privileges of its committees.

3) That the Application herein is premature as the matters in question are under consideration by Parliament and the orders sought, if granted, will restrain Parliament from performing its legislative mandate.

4) That the Application lacks any basis in law as the orders sought violate the constitutional power granted to Parliament to regulate its internal rules of procedure as well as the provisions of the *National Assembly (Powers and Privileges) Act*.

5) That parliamentary privilege which underpins the independence of the legislature does not allow for decisions of either House or its Speaker to be questioned by any court and therefore this Application violates the principle set out by the Court of Appeal in Civil Appeal No. 157 of 2009; **John Harun Mwau vs. Dr. Andrew Mullei & Others.**

6) That the orders sought in the Application violate the principle of separation of powers as they seek for this Honourable Court to interfere with the internal management of Parliament.

7) That Parliament is the sole institution mandated by Article 94 of the Constitution to make provision having the force of law.

8) That the decision whether to enact or amend legislation is the sole prerogative of Parliament hence this Court should decline from interfering with this mandate.

9) That each of the three arms of Government ought to be allowed to conduct its affairs without undue interference from the other arms of Government and the present Application is a violation of the principle of separation of powers as it seeks for the court to delve into matters of internal procedure of the Legislature.

10) That the National Assembly conducts its affairs in accordance with the Constitution, its Standing Orders and its customs and traditions of procedure. The National Assembly makes its Standing Orders and can by resolution of a majority of members suspend, either temporarily or permanently, the application of any particular Standing Order.

11) That the Applicant has not demonstrated to this Honourable Court that the grounds, upon which judicial review can be sought, have been met and therefore this Honourable Court ought to decline to exercise its powers of judicial review.

12) That the jurisdiction of this Honourable Court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and there has been no violation of the constitution.

53. It was submitted on behalf of the 1st and 2nd Respondents that the actions that are the subject of this Application are matters relating to the internal procedures of Parliament and that the essence of this Application goes to the internal procedures of how business of the house is conducted. However, Parliament of Kenya and indeed legislatures all over the world are mandated to exercise control over its internal proceedings and the legislature ought to be allowed to regulate its own affairs without undue interference. This right is firmly rooted in the Constitution under Articles 117 and 124.

54. The said Respondents further submitted that the privilege of Parliament is also protected by statute under the ***National Assembly and Senate (Powers and Privileges) Act***, Cap 6, Laws of Kenya, which Act has since been repealed and replaced by the ***Parliamentary Powers and Privilege Act of 2017***. To the said Respondents, the privilege of Parliament is bestowed upon the legislature to protect Parliament in the discharge of its functions as a representative of the people and as an oversight body that provides checks and balances in line with the principle of separation of powers. It was submitted that parliamentary privilege which underpins the independence of the legislature does not allow for decisions of either House or its Speaker to be questioned by any court and therefore this Application violates the principle set out by the Court of Appeal in Civil Appeal No. 157 of 2009; **John Harun Mwau vs. Dr. Andrew Mullei & Others.**

55. The Respondent also relied on the New Zealand case of **Prebble vs. Television New Zealand Limited [1995] 1 AC 32** and **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR.**

56. It was further submitted that the principle of separation of powers requires that there be mutual respect between the courts and the legislature. In the present matter, the 1st and 2nd Respondents submitted that in the absence of a violation of the Constitution that would invoke the jurisdiction of the

High Court under Article 165, the orders sought in the present Application are a violation of the principle of separation of powers. The orders sought in the Application as against the 1st and 2nd Respondents violate the principle of separation of powers as they seek for this Honourable Court to interfere with the internal management of Parliament.

57. In this respect reference was made to the High Court of Kenya in the case of the **Commission for the Implementation of the Constitution vs. Senate of Kenya & 2 Others [2013] eKLR**, which upheld the words of **Ackermann, J** in the South African case of **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99**, **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR**, **Patrick Ouma Onyango & 12 others vs Attorney General and 2 Others [2005] eKLR** and **Blackburn vs. Attorney General [1971] 1 WLR 1037**.

58. It was contended that it is trite law that in order for this Honourable Court to invoke its jurisdiction to inquire into acts of the Parliament pursuant to its powers and obligations under Chapter Eight of the Constitution, the Petitioners must establish that there is a violation or threatened violation of the Constitution and for this reliance was placed on **Speaker of the Senate & another vs. Attorney-General & 4 Others [2013] eKLR**.

59. To the said Respondents, the ex-parte Applicants have not demonstrated to this Honourable Court, that there has been any violation of the Constitution. Further, Parliament's business was conducted in an open manner and there is no evidence to the contrary. In the circumstances, there is no basis to invoke the jurisdiction of this Honourable Court under Article 165 of the Constitution. In their view, the ex-parte Applicants, having failed to approach this Honourable Court within the provisions of Article 165 of the Constitution and having failed to demonstrate that the ingredients prescribed thereunder have been met, this Honourable Court ought to down its tools for lack of jurisdiction and decline to interfere with the internal management of the legislature. In this respect reliance was placed on **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1,** and it was submitted that the *ex-parte* Applicants seek orders which, if granted, would be a breach of Article 124 of the Constitution which provides for Parliament to establish its committees and make Standing Orders for the orderly conduct of its proceedings. It was further submitted that the orders sought by the *ex-parte* Applicants also violate the provisions of Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers and privileges of its committees.

60. Based on the foregoing, the 1st and 2nd Respondents urged this Court to exercise judicial restraint and decline to violate the principle of separation of powers by interfering with the internal workings of Parliament as sought by the Ex-parte Applicants herein.

61. According to them, Parliament has a constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed by the Constitution. Based on Articles 82(a) and 94 of the Constitution, it was submitted that **t**he 2nd Respondent was exercising its legislative authority hence the Court ought not to interfere.

62. As regards public participation, it was submitted that contrary to the Applicant's assertions, the Departmental Committee on Justice and Legal Affairs to which the Bill was committed by the National Assembly invited the Public through the *Daily Nation* of 17th February, 2016 to make representations on the Bill by way of memoranda and that memoranda were subsequently received and were considered by the National Assembly. In this respect reference was made to the Court of Appeal decision in **Civil Application No. 97 of 2014 (UR No. 80/2014) Kiambu County Government & 3 Others vs. Robert N. Gakuru & Others (2014) eKLR** and the High Court decision in the **Law Society of Kenya vs. The Attorney General and 10 Others Petition No. 3 of 2016** where the Court held as follows with respect to public participation:

> **"The law is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the court will**

not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified."

63. Further reliance was placed on **Commission for the Implementation of the Constitution vs. The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012,** where the Court held that:

"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public"

64. According to the said Respondents, not all amendments to a Bill must be undertaken through public participation and in this respect reliance was placed on **The Institute of Social Accountability and Another vs. National Assembly Petition No.71 of 2013,** where the Court stated:

"We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances, we find and hold that the amendment bill did not violate the principle of public participation."

65. It was therefore submitted that from the foregoing, ***Elections Laws (Amendment) Act, 2015*** were subjected to adequate public participation and therefore, they complied with the Constitution.

66. As regards the issue whether the respondents had the power/jurisdiction to appoint days for special sittings of the National Assembly on 20th and 22nd December, 2016, it was submitted that the Speaker's approvals were in line with the Standing Orders 29(1) of the ***Senate Standing Orders*** under which the Speaker has powers to convene a Special Meeting of the Senate if the Speaker is satisfied that *the business proposed to be transacted relates to the matters specified under Standing Order 62 (Definition of Special Motions) or* ***other urgent and exceptional business as the Speaker may allow and that t***he Speaker of the Senate is empowered to exercise its discretion on far much broader grounds to include *other urgent and exceptional business as the Speaker may allow.*

67. In this case it was submitted based on Article 86 of the Constitution that enacting of the ***Election Law (Amendment) Bill*** was a matter of public importance and that the Speaker was right and within the law to convene a Special Sitting of the National Assembly. Further, Members of the National Assembly attended Special Sittings in large numbers and the House was able to garner the quorum required by the Constitution. Therefore the allegation by the Applicants that the notice was too short is therefore unfounded.

68. As regards the remedies sought it was submitted that the purpose of Judicial Review is not to look at the merits of the decision made but at the process through which the decision was made and that Certiorari is concerned with the decision making process and only issues when the Court is convinced that the decision under attack was reached without jurisdiction or in breach of the rules of natural justice. However in this case the applicants have not demonstrated that the 1st and the 2nd Respondents acted *ultra vires* of its powers or unreasonably hence have not met the conditions necessary for the grant of the remedy of Certiorari. In support of this position the Respondents relied on **Republic vs. Kenya Power and Lighting Company Ltd & Another (2013) eKLR** for the position that:

In the Case the Court stated that "It is not enough for an Applicant in judicial review

proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

69. As regards prohibition, it was submitted that an order of prohibition cannot quash a decision that has already been made as it can only prevent the making of a contemplated decision. In the case herein the decision to amend the ***Election Laws (Amendment) Bill***. For this submission the Respondents relied on **Kenya National Examination Council vs. Republic (1997) eKLR.**

70. It was therefore submitted that the Application lacks any basis in law and prays that the Application be dismissed. To the Respondents the orders sought violate the constitutional power granted to Parliament to regulate its internal rules of procedure as well as the provisions of the ***National Assembly (Powers and Privileges) Act***. Further, the orders sought in the Application violate the principle of separation of powers as they seek for this Court to interfere with the internal management of Parliament.

71. According to them**,** each of the three arms of Government ought to be allowed to conduct its affairs without undue interference from the other arms of Government and the present Petition is a violation of the principle of separation of powers as it seeks for the court to delve into matters of internal procedure of the Legislature which conducts its affairs in accordance with the Constitution, its Standing Orders and its customs and traditions of procedure. The National Assembly makes its Standing Orders and can by resolution of a majority of members suspend, either temporarily or permanently, the application of any particular Standing Order.

72. It was averred that the jurisdiction of this Honourable Court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and there has been no violation of the constitution.

73. The 1st and 2nd Respondents therefore prayed that the Notice of Motion Application herein be dismissed with costs to the 1st and 2nd Respondents.

74. It was submitted on behalf of the 1st and 2nd Respondents by **Mr Kuyani** that the applicant's averments go to the parliamentary process yet the Constitution expressly permits Parliament to regulate its own affairs. The Court was therefore urged not to interfere with the same.

75. It was submitted that what Parliament did was within its legislative mandate in clarifying the electoral process in the public interest.

3rd and 4th Respondents' Case

76. The application was similarly opposed by the 3rd and 4th Respondents.

77. According to them, on 23rd December 2016, the Leader of Majority in the Senate wrote to the Speaker of the Senate requesting for a special sitting of the Senate on 28th December 2016; pursuant to Standing Order 29(1) of the ***Senate Standing Orders*** which request was accompanied by a list of Senators supporting the same. It was averred that the Speaker of the Senate having approved both requests and recalled the National Assembly for a special sitting, the notice of the special sitting to be held on 28th December 2016 was published in Kenya Gazette Notice No. 10682 dated 23rd December 2016.

78. On 28th December 2016, the Leader of Majority and the Leader of Minority in the Senate wrote to the Speaker of the Senate requesting for a special sitting of the Senate to be held on 4th January 2017 pursuant to Standing Order 29(1) of the ***Senate Standing Orders*** which was similarly approved by the Speaker but for 5th January 2017 and was published in the Kenya Gazette of 30th December 2016.

79. According to the 3rd and 4th Respondents, the Speaker's approval was in line with standing Orders 29.

80. It was averred that the Senate carried out public participation on the the ***Election Laws (Amendment) Act, 2016*** and the ***Election Laws (Amendment) Bill (National Assembly Bill No. 3 of 2015)*** as required by the Constitution by inviting contributions from the public through the media and the Joint report of the Standing Committee on Legal Affairs and Human Rights and the Standing Committee on Information and Technology on the Electoral Laws (Amendment) (No. 3) Bill (National Assembly Bills No. 63 of 2015) in which the Committee received submissions on the Bill from various persons and organizations.

81. It was averred that though the applicant alleged that the period of notice for the special sittings was too short, members of the Senate attended the special sittings in large numbers and the House was able to garner the quorum required by the Constitution. It is the constitutional duty of Members of Parliament to legislate and the members were simply being recalled to undertake their constitutional roles.

82. Apart from the foregoing the 3rd and 4th Respondents' case similar in substance to that of the 1st and 2nd Respondents'.

5th Respondent's Case

83. The 5th Respondent similarly opposed the application.

84. Its case was based on the following grounds of opposition:

> **1. There are no grounds advanced in the statement of facts to warrant the issuance of an order of ~Certiorari against the 5th respondent.**
>
> **2. The application as drawn and taken out as against the 5th respondent is unmerited and ought to be dismissed forthwith with costs.**
>
> **3. The court cannot issue declaration orders under the Law Reforms Act.**

Determinations

85. I have considered the issues raised in this application.

86. Before delving into the issues raised before me in this application, it is important in determining them to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

> **"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."**

87. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. This was the position adopted by the Supreme Court in **The Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012** where it was held that:

> **"A consideration of different constitutions shows that they are often written in different**

styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."

88. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010**:

"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of2010 is dominated by a "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions."

89. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions."

90. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."

91. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in the following terms:

"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."

92. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as "a transformative instrument is the key instrument to

bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

93. This was the position of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it expressed itself as follows:

> **"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on – "*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*" And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism*," *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: "*At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.*"The scholar states the object of this South African choice: "*By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.*" The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".**

94. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

> **"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."**

95. The position was put beyond doubt by **Mutunga, CJ** in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR** when the Learned President of the Supreme Court expressed himself as follows:

> **"The Constitution of Kenya was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden**

and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens…The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order".

96. Under Article 1 of the Constitution, sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution. If anyone is in doubt, Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

97. It is therefore my view that where the Court is convinced that the orders ought to granted, I do not see why the Court should shy away from doing so. On this note I wish to associate myself with the holding of **Mulenga, JSC** in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** to the effect that:

"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."

98. I similarly agree with this Court's decision in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** where it was held that:

"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

99. Therefore while I appreciate the doctrine of the presumption of constitutionality of statutes, I associate with the position adopted in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57,** that the Constitution is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated

In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:

> **"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."**

100. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,**it was held that:

> **"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."**

101. **Nyamu, J** (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

> **"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."**

102. In my view, the doctrine of constitutionality of statutes or legality of parliamentary processes when in conflict with the constitutional obligation of the Court to investigate the constitutionality of a statute must give way to the latter.

103. In my view, when any of the state organs steps outside its mandate, this Court will not hesitate to intervene and this was appreciated **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014**:

> **"this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".**

104. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J** in **R vs. Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** wherein the learned Judge stated that:

> **"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

105. Subsequently, the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR** stated as follows:

> **"Whereas all State organs, for instance, the two Chambers of Parliament, are under**

obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

106. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others [2014] eKLR** where it was held that:

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

107. **Nyamu, J** was even more blunt in his opinion in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

"**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power…This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law…The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."**

108. **Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

"The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."

109. This was the view adopted by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11** the following manner:

"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to

determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."

110. The learned Judge continued:

"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

111. As was appreciated by **Langa, CJ** in **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19** at para 33:

"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

112. I associate myself with the positions adopted in these decisions and dare add that when any of the State Organs or State Officers steps outside its mandate, this Court will not hesitate to intervene. It is therefore my view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this application alleges a violation of the Constitution by the Respondents, it is my finding that the principle of independence of the Legislature does not inhibit this Court's jurisdiction or prohibit it from addressing the Applicant's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.

113. My finding is fortified under the principle that the Constitution is the Supreme Law of this country all State Organs must function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit them to do, they cannot seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.

114. This was the position adopted by this Court in **Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR** where it was held that:

> **"In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic vs. Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530*, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp. vs Anthony Sefu Dar-es-Salaam HCCA No.19 of 1971 [1973] EA*, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law."**

115. In my view the doctrine of independence must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect the Legislature's independence under the Constitution only remains valid and insurmountable as long as it operates within its legislative and constitutional sphere. Once it leaves its stratosphere and enters the airspace outside its jurisdiction of operation, the Courts are then justified in scrutinizing its operations. This was the position in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR,** this Court cited the decision of the Court of Appeal in **Commission for the Implementation of the Constitution vs. The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012** and proceeded to state that:

> **"The position enunciated so succinctly by the Court of Appeal is a position we wish to associate ourselves with. The Constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so. It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the 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;"

116. I subscribe to the notion advanced by **Etienne Mureinik** in ***A Bridge to Where? Introducing the Interim Bill of Rights*** **(1994) 10 SAJHR 32,** that the Constitution instils a culture of justification, "in which *every exercise of power is expected to be justified"*.

117. I wish to associate myself with the holding of **Mbogholi Msagha, J** in **Macharia vs. Murathe & Another Nairobi HCEP No. 21 of 1998 [2008] 2 KLR (EP) 189 (HCK)** where he expressed himself *inter alia* as follows:

> **"The learned counsel cited several authorities from the English jurisdiction to advance his submission that the Courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because ...the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the... [Constitution]. That shows that even when Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense."**

118. In the same vein, **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** pronounced himself as follows:

> **"The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution."**

119. In my view, this holding is even more appropriate in cases where the Court is called upon to uphold the provisions of the Constitution.

120. Having considered the issues raised in this matter, it is my considered view that the following are the issues that fall for determination:

> **(1) What are the circumstances under which a special sitting of parliament is summoned.**
>
> **(2) What are the issues that can be deliberated upon at that sitting and whether fresh issues were introduced.**

(3) Was the said sitting constitutionally and lawfully called?

(4) Whether public participation was required and whether the same was complied with.

(5) Were the proceedings conducted in accordance with the Constitution and the Standing Orders?

(6) What reliefs should the Court issue?

121. As appreciated by the applicant, the only prayers that remain relevant for the purposes of the application are as follows:

> **3. An order of certiorari to move into this Court and quash and annul the amendments made by the National Assembly to the Elections Act 2011 on 20th and 22nd December 2016 and/or any subsequent and consequential amendments by the Senate or Parliament.**
>
> **6. A declaration be made that the decisions, actions, sittings and proceedings of the Respondents are unconstitutional, illegal, unprocedural and procedurally unfair, influenced by an error of law, made in bad faith, unreasonable, irrational, taken with ulterior motive and purpose and constitute an abuse of discretion and power and have not taken into account relevant considerations of fact and law.**

122. The first issue I wish to deal with are the circumstances a special sitting of parliament is justifiably summoned.

123. Standing Order 29(1) of the ***National Assembly Standing Orders*** provides that:

> ***"Special sittings of the House***
>
> ***29. (1) Whenever during a Session the House stands adjourned, whether or not a day has been appointed for the next meeting, the Speaker may, on the request of the Leader of the Majority Party or the Leader of the Minority Party, appoint a day for a special sitting of the House.***
>
> ***(2) The Speaker may allow a request under paragraph (1) if the Speaker is satisfied that the business proposed to be transacted relates to the matters specified under Standing Order 61 (Special motions) or other urgent and exceptional business as the Speaker may allow.***
>
> ***(3) The Speaker shall, by notice in the Gazette, notify the Members of the place, date and time appointed for the special sitting of the House.***
>
> ***(4) Despite paragraph (1), where the proposed business to be transacted by the House requires the action of the Senate, the Speaker of the National Assembly shall, in writing, notify the Speaker of the Senate of the date appointed for the special sitting.***
>
> ***(5) Whenever the House meets for a special sitting under paragraph (1), the Speaker shall specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the House during the special sitting, following which the House shall stand adjourned until the day appointed in the parliamentary calendar."***

124. On the other hand, Standing Order 29(1) of the ***Senate Standing Orders*** provides as follows:

> ***(1) Whenever during a Session the Senate stands adjourned, whether or not a day has been appointed for the next meeting, the Speaker may, on the request of the Senate Majority Leader or the Senate Minority Leader, and in each case with the support of at least fifteen Senators, appoint a day for a special sitting of the Senate.***

(2) The Speaker may allow a request under paragraph (1) if the Speaker is satisfied that the business proposed to be transacted relates to the matters specified under Standing Order 62 (Definition of Special Motions) or other urgent and exceptional business as the Speaker may allow.

(3) The Speaker shall, by notice in the Gazette, notify the Senators of the place, date and time appointed for the Special Sitting of the Senate.

(4) Despite paragraph (1), where the proposed business to be transacted by the Senate requires the action of the Senate, the Speaker shall, in writing, notify the Speaker of the Senate of the date appointed for the special sitting.

(5) Whenever the Senate meets for a special sitting under paragraph (1), the Speaker shall specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the Senate during the special sitting, following which the Senate shall stand adjourned until the day appointed in the Senate calendar."

125. It is clear that a special sitting of Parliament is even from its own name not an ordinary sitting. However it is the discretionary power of the Speaker of either House to decide whether the Leader of the Majority Party or the Leader of the Minority Party has made a case warranting the summoning of a special sitting of the House. Therefore as long as the Speaker complies with the Constitution and the law, the Court is not entitled to interfere simply because had the Court been the one considering the request it would have arrived at a different conclusion. Nevertheless such a decision amounts to an implementation of the law being standing orders and therefore falls within the contemplation of Article 10(1) of the Constitution. This must be so because Article 124(1) which provides for the powers of Parliament to make Standing Orders enjoins Parliament to enact Standing Orders for the orderly conduct of their proceedings. To stress the importance of Standing Orders in our constitutional framework I rely on the decision of the Supreme Court of Zimbabwe in the case of **Tendai Laxton Biti and Another vs. The Minister of Justice, Legal and Parliamentary Affairs and Another, Civil Application No 46 of 2002** in which the Court stated that:

"There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of a club". Standing Orders constitute legislation which must be obeyed and followed".

"Commonsense dictates that Parliament is required to comply with its own laws regarding the enactment of legislation. This principle stems from as far back as the decision in Minister of the Interior & Anor v Harris & Ors 1952 (4) SA 769 (A), in which the Appellate Division struck down legislation passed by the Nationalist Government in South Africa to create a High Court of Parliament to override the Appellate Division's earlier decision in respect of voting rights of non-white persons, see Harris & Ors vs. Minister of the Interior & Anor 1952 (2) SA 428 (A). In other jurisdictions, the courts have applied the principle that legislation which is enacted by a legislative body without compliance with the existing law in respect to the enactment of legislation will be declared void by the courts, even where the Constitution provides for a parliamentary democracy form of government."

126. Our own Supreme Court has dealt with the matter in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR** where it held as follows with regard to the circumstances that necessitate the intervention of the Court in matters of Parliament:

"It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely

because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.

[56] Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in Biti & Another v. Minister of Justice, Legal and Parliamentary Affairs and Another (46/02) (2002) ZWSC10, was called upon to determine the constitutional validity of the General Laws Act, 2002 (Act No. 2 of 2002). It had been claimed that the passing of the said statute was characterized by irregularities that constituted a breach of the Standing Orders as well as the Constitution of Zimbabwe and that, consequently, the statute was unconstitutional. The Court thus held:

"In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament….In Smith v. Mutasa it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens…."

[57] The position is not different in the case of Canada, as emerges from Amax Potash Ltd. v. government of Saskatchewan [1977] 2 S.C.R. 576 [at p.590]:

"A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."

……

<u>If then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislatures, the Constitution, and not such ordinary act, must govern the case to which they both apply</u>." (emphasis ours)

Marbury =Vs= Madison, 5 U.S 137 (1803), the Supreme Court of the United States held:

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they may both apply."

HC Petition No. 227 of 2013 Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 Others [2014] eKLR the High Court held:

" It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the 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;"**

54. This is the mandate we will bear in mind as we seek to find answers to the issues raised

in this petition. In passing the Constitution, Kenyans gave the responsibility of making laws to Parliament. The decision of the people must be respected, so that this Court can only interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution."

127. This is also my understanding of the opinion of the Malawian Supreme Court in **Attorney General vs. The Malawi Congress Party and Others**, **MSCA Civil Appeal No 22 of 1996.**

128. It therefore follows that the Speaker in implementing any of the Standing Orders must be guided by Article 10(2) of the Constitution and this is particularly so where what is being undertaken is not in the ordinary course of sitting but is a special sitting as was the case herein. In that event the Speaker is required to adhere to the values and principles of national governance. He is expected to be transparent and accountable not only to the Members of Parliament but to the public at large. In my view transparency requires that the Speaker in the notice summoning such a special sitting discloses why in his view such a sitting is warranted since that is the only way in which he can be transparent in his finding that the reasons given for such action were satisfactory.

128. The phrase applied in the two Standing Order is "*if the Speaker is satisfied"*. Does this imply arbitrariness is decision-making? I don't believe so. In my view the phrase "if satisfied" falls in the same category as "in the opinion" or "if it appears". In **Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3**, **Lord Denning** expressed himself as follows:

"'If it appears to the Secretary of State'? This, in my opinion, does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong."

129. The word "consider" however has been the subject of judicial determination in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it was held as follows:

"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion..."Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."

130. In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case can only be said to have been considered when the Speaker lays bare what informed his decision to summon the special sitting, otherwise it may be construed as having been an arbitrarily made.

131. Whereas, the decision whether or not the facts disclosed in the request for a special sitting merit such a decision remains that of the Speaker, transparency and accountability demands the he discloses the basis for arriving at such a decision. To hold that the Speaker is the sole judge when it comes to the exercise of such powers and that he is not accountable to anybody when doing so would be to throw the rule of law out of the window and that would amount to whittling away the Constitutional safeguards provided under Articles 10 and 47 of the Constitution. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.

132. That in my view is what **Omolo, JA** had in mind in **Matiba vs. Moi & 2 Others (No 2) [2008] 1**

KLR (EP) 670 when he expressed himself as hereunder:

> **"…the issue whether or not a judge should grant leave to appeal in any particular case is an exercise of judicial discretion. That was agreed on all sides. But being judicial, the discretion had to be exercised according to reason – not capriciously and not according to private likes or dislikes or private opinion. Mr Justice Pall would not, for example, have been at liberty to say: "Mr Matiba is the leader of an opposition party and I do not like opposition parties. I shall accordingly, in the exercise of my judicial discretion, grant President Moi leave to appeal," and more than he could say "President Moi is the leader of the ruling party KANU and because of that, I shall grant to him leave to appeal." These would not constitute valid reasons for the exercise of judicial discretion, as they are all irrelevant matters, based as they are on personal likes and dislikes."**

133. According to **Prof Sir William Wade in his Book *Administrative Law*:**

> **"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"**

134. In this case, it was stated that the respective Leaders of Majority wrote to the respective Speakers of the National Assembly and the Senate requesting for special sittings of the said Houses which requests the Speakers approved. However whereas the Gazette Notices issued pursuant to the said approvals were exhibited, the decisions approving the requests were not exhibited so that no-one can say what factors were considered by the two Speakers in satisfying themselves that the requests for the special sittings were warranted.

135. The applicant's case was that the said Special Sittings of Parliament and the Senate did not meet the threshold for calling the same. I appreciate that under section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya, "*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused**

meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence...The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson At Para 95.**

136. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

137. In this case the facts which the Speakers considered to arrive at their decisions were peculiarly within their knowledge and the principle of transparency required that the same be disclosed. In the absence of such disclosure this Court has no material on the basis of which the Court can find what the said Speakers considered. My position is buttressed by the fact that standing order 61 specifically enumerates what constitute special motions. These are matters seeking resolution of the House to approve an appointment or re-appointment in accordance with part XI of the Constitution with respect to public appointments; matters dealing with extension of state of emergency; extension of the term of Parliament when Kenya is at war; amending or veto of a special bill passed by the Senate; declaration of war; removal of President on grounds of incapacity; impeachment of the President; vacancy in the office of the deputy president; removal of the Deputy President; dismissal of a cabinet secretary; alteration of the boundaries of a county; borrowing by national government; division of revenue; approval of decision to stop the transfer of funds to a State organ or any other public entity; deployment of national forces outside Kenya; deployment of Defence Forces inside Kenya; petition for the removal of a Member of a Commission or a holder of an independent office; and enactment of consequential legislation. It is clear that the matters contemplated must be matters which are time bound or matters of great public importance whose delay in dealing with may plunge the country into a crisis.

138. In this case it was contended on behalf of the 1st and 2nd Respondents that the ***Election Law (Amendment) Bill*** was a matter of public importance and that the Speaker was right and within the law to convene a Special Sitting of the National Assembly. The applicant however contends that following the establishment of the Joint Parliamentary Committee on matters relating to the Independent Electoral and Boundaries Commission which was a committee of both Houses as provided in Article 124(2) of the Constitution of Kenya debate and business relating to ***Election Laws (Amendment) Bill (National Assembly Bill No 3 of 2015)*** was stopped and proposals contained in the said Bill discarded and rejected. It was therefore the applicant's case that as the business contained in the Gazette Notices does not relate to matters enumerated under Part XIII of the Standing Orders of the National Assembly and more specifically, Standing Order 61, which defines Special Motions, the business was neither urgent nor exceptional since the Bill was old business that had been carried over from a previous session of the National Assembly in 2015. During its pendency in the fourth session of the National Assembly it had been withdrawn and was superseded by the ***Election Laws (Amendment) Bill 2016*** which enacted an elaborate and meticulous bipartisan process that included the establishment of a Joint Parliamentary Committee. The business was also not exceptional as it involved the amendments to the ***Elections Act*** which had been dealt with in the ***Elections Laws (Amendment) Bill 2016***.

139. That matter dealing with impending national elections may be urgent cannot be in dispute. To paraphrase the Constitutional Court of South Africa in **Glenister vs. President of the Republic of South Africa [2008] ZACC 19,** it is not necessary in this case to attempt to identify with precision what would constitute "*urgent and exceptional business' for the purposes of the Order* or to formulate in advance in what circumstances they may arise. The question whether they exist depends on the facts of each case and is a matter to be considered on a case-by-case basis. However the circumstances that are alleged to

have constituted the matter as urgent and exceptional business must be laid bare for all to see in the constitutional spirit of transparency, accountability and good governance. Once that is done the Court will be very reluctant to interfere. To paraphrase Uganda Constitutional Court Constitutional Petition [2014] UGCC 14 - **Oloka-Onyango & 9 Others vs. The Attorney General**, Parliament as a law making body should not only set standards for compliance with constitutional provisions and with its own Rules, but must ensure that in its proceedings the spirit of the Constitution is realized. It therefore follows that if any of the crucial stages of its proceedings such as those decreed by the Constitution are flawed, that vitiates the entire process and the product thereof. This was the position in **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR,** where the Supreme Court held that:

> **"In our view, the principle that emerges from the above decisions read together with Article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case."**

140. The Supreme Court of Malawi also considered the question of the role of the court in such matters in the case of **The Attorney General vs. The Malawi Congress Party and Others**, **MSCA Civil Appeal No 22 of 1996.** It opined that:

> **"Our standpoint with regard to SO 27 is simply this. The Courts are not concerned with purely procedural matters which regulate what happens within the four walls of the National Assembly. But the Courts will most certainly adjudicate on any issues which adversely affect any rights which are categorically protected by the Constitution where the Standing Orders purport to regulate any such rights. In the case under consideration, we do not believe that a breach of SO 27 by the Speaker of the House affected any rights guaranteed by the Constitution"..... Stephen J summed up this point very clearly in Bradlaugh v. Gosset, at page 286, We also accept that over their own internal proceedings, the jurisdiction of the National Assembly is exclusive, but, it is also our view that it is for the Courts to determine whether or not a particular claim of privilege fell within such jurisdiction.."** (Emphasis added)

141. In my view, the principle that emerges from the above decisions read together with Article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case. This was the position in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR** at paragraph 62, where it was held that:

> **"Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way."**

142. In this case the circumstances are that the Respondent did not justify their action of calling for a special sitting of the Houses, a process which the Standing Orders clearly takes seriously and is only meant to address grave issues of national interest. In light of the undisputed averments that the debate

surrounding the said business had been shelved, I agree with the applicant that there is no evidence that the business for which Parliament was recalled met the threshold prescribed in Standing Order 29.

143. It was further submitted that the First Respondent fell foul of the *ejusdem generis* rule because Standing Order 29 of the National Assembly does not give the First Respondent an absolute discretion and that to propose otherwise would defeat the purpose of the Standing Order. The only business the First Respondent can allow under the Standing Order is restricted to business that may involve the same type or class of business as those contained in Standing Order 61, under which the Special Motions are all anchored on various Articles of the Constitution and require the intervention of the National Assembly. The only motion in relation to enactment of legislation is provided in Standing Order 61(b)(iii) which relates to amending or veto of a special Bill passed by the Senate. From the discourse hereinabove I generally agree with the applicant save that I cannot rule out the fact that enactment of legislation can under certain circumstances amount to urgent and exceptional business. Each case must be determined on its own peculiar facts.

144. On both occasions it was averred that the National Assembly transacted business which were not properly and lawfully contained in the Gazette Notices and were therefore held and conducted in breach of the Standing Orders. It is clear that pursuant to Standing Order 29(5), the Speaker is obliged to specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the House during the special sitting, following which the House shall stand adjourned until the day appointed in the parliamentary calendar. It is therefore clear that no other business is to be transacted as a special sitting of the House save for the ones specified by the Speaker. From the relevant Gazette Notices it is clear that the only business that was to be transacted by both Houses was the consideration of the ***Election Laws (Amendment) (No. 3) Bill, 2015 (National Assembly Bills No. 63 of 2015)***. y

145. However from the copy of the Hansard Report exhibited the National Assembly on 20th December, 2016 also listed in the Order of Business for that day the Motion on the Report of the Committees of the whole House on the ***County Governments (Amendment) Bill (Senate Bill No. 4 of 2016)***; the Motion on Adoption of the Report on Investigation into the Ownership of Mombasa Cement Limited land in Kilifi and the Motion for Adoption of the Report on Ratification of the Agreement between the Government of the Republic of Kenya and the United States. I therefore find that any other business apart from the one that was expressly specified by the Speaker was irregularly sneaked into the House. However as was held by the Supreme Court of Malawi in the case of **The Attorney General vs The Malawi Congress Party and Others, MSCA Civil Appeal No 22 of 1996**:

> **"Our standpoint with regard to SO 27 is simply this. The Courts are not concerned with purely procedural matters which regulate what happens within the four walls of the National Assembly. But the Courts will most certainly adjudicate on any issues which adversely affect any rights which are categorically protected by the Constitution where the Standing Orders purport to regulate any such rights. In the case under consideration, we do not believe that a breach of SO 27 by the Speaker of the House affected any rights guaranteed by the Constitution".... Stephen J summed up this point very clearly in Bradlaugh v. Gosset,at page 286, We also accept that over their own internal proceedings, the jurisdiction of the National Assembly is exclusive, but, it is also our view that it is for the Courts to determine whether or not a particular claim of privilege fell within such jurisdiction. We conclude by holding that by acting in breach of SO 27, the Speaker of the House did not infringe on any constitutional right which is justiciable before the Courts. The remedy for such breach can only be sought and obtained from the National Assembly itself."** (Emphasis added)

146. It has not been alleged that the "strange" business that was sneaked in the House affected any rights guaranteed by the Constitution. In any case apart from the Motion dealing with the ***County Governments Amendments Bill***, the other two Bills were deferred. Accordingly, I will say no more on that issue.

147. The applicant's position was that the Constitution of Kenya requires that Parliament in the exercise

of its legislative powers follows the procedures for enacting legislation which includes compliance with Standing orders of the Houses of Parliament as provided in Articles 109, 118 and 124(1) of the Constitution of Kenya, and in breach of the Standing Orders the First and Second Respondents contravened the said provisions of the Constitution. It was further alleged that the First and Second Respondents contravened Article 118(1) of the Constitution of Kenya in failing to provide opportunity or facilitate public participation and involvement in the legislative and other business of the National assembly in regard to proposed amendments to the ***Elections Act, 2010*** and in particular as relates to the use of technology in the electoral system.

148. What then is the role of public participation? This Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR dealt with the issue and relied on the South African case of Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, where **Ngcobo, J** who delivered the leading majority judgement expressed himself as follows:

> "**In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy…When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty…The justification for this course is to be found in Article 2(4) of our Constitution which provides as follows:**
>
> > ***Any law, including customary law, which is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*** [Emphasis added].

149. Similarly in the **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR,** the court cited with approval the case of **Kenya Small Scale Farmers Forum & 6 Others vs. Republic of Kenya & 2 Others [2013] eKLR,** in which it was held as follows:

"One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country…"Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people."

150. In **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC** the Constitutional Court of South Africa held that:

"[145] It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process."

151. Public participation is one of the national values and principles of governance enunciated in Article 10 of the Constitution which bind all State organs, State officers, public officers and all persons whenever any of them *inter alia* enacts, applies or interprets any law. One of the principles thereunder is the participation of the people. Dealing with this principle, the Court of Appeal in Nairobi Civil Appeal No. 224 of 2017 – **Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others**, was emphatic in paragraphs 80 and 81 that:

"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

152. In fact Article 118(1) and (2)(b) of the Constitution expressly provides that*:*

Parliament shall—

(1) (a) …..;

(b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees;

(2) ……..

153. The failure to seek the public input cannot therefore be brushed aside. Ngcobo, J dealt with the issue in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**, when he stated:

> "**The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."**

154. It is similarly my view that this Court not only has the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the Constitution and not to just satisfy itself as to the formalities or the motions of doing so.Therefore where the principle of public participation is not inculcated in the process of legislative enactment, the process of such enactment cannot be said to meet the constitutional threshold.

155. The applicants averred that the National Assembly did not allow public participation in regard to the new provisions which had been introduced to enact a new section 44A of the ***Elections Act 2011***.This was a major change considering the fact that the ***Election Laws (Amendment) Act 2016*** had established a major shift in our system of elections from a manual one to an integrated electronic electoral system that mainstreamed the use of technology.

156. The Respondents on the other hand averred that contrary to the Applicant's assertions, the Departmental Committee on Justice and Legal Affairs to which the Bill was committed by the National Assembly invited the Public through the *Daily Nation* of 17th February, 2016 to make representations on the Bill by way of memoranda and that memoranda were subsequently received and were considered by the National Assembly.

157. In other words the Respondents were of the view that public participation having been conducted in February, 2016 there would be no need for a further such process. That position is generally in tandem with the holding in **The Institute of Social Accountability and Another vs. National Assembly Petition No.71 of 2013,**where the Court stated:

> **"We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances, we find and hold that the amendment bill did not violate the principle of public participation."**

158. That Parliament is required to conduct its business according to its Standing Orders is clearly provided in Article 109 of the Constitution which provides that:

(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President;

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

159. The stages through which a bill passes before being enacted are to be found in the National Assembly Standing Orders 120 to 139, which are made pursuant to the provisions of Articles 109 to 113, 119, 122 & 123 of the Constitution and these stages are:

i. The publication of the Bill;

ii. Determination through concurrence of speakers of both houses on whether or not the Bill concerns County Governments;

iii First Reading of the Bill;

iv. Committal of the Bill to the relevant Committee to commit it to the Public Participation;

v. Second Reading of the Bill;

vi. Committal of the Bill to the Committee of the whole house;

vii. Third Reading of the Bill and passage into law

160. It is therefore clear that the public participation takes place between the First Reading and the Second Reading. In this case, it is alleged that new provisions had been introduced to enact a new section 44A of the ***Elections Act 2011***. This allegation was not expressly denied. Whereas I agree that where minor amendments are introduced, it may not be necessary to subject them to public participation, it is my view that substantive amendments to the Bill cannot be introduced at the Committee stage without subjecting them to public participation otherwise nothing would prevent Parliament from purporting to introduce such provisions by amendment in order to defeat the constitutional requirements for public participation.

161. Dealing with similar circumstances, this Court in Constitutional Petition No. 3 of 2016 between the **Law Society of Kenya and the Attorney General and Others** expressed itself as hereunder:

> **"Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input. This position is supported by the views expressed in *Merafong Case* (supra) to the effect that:**
>
> > **'Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to**

be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve…I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid.'

To Sachs, J in the above case:

> **'Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat.'**

…by introducing totally new and substantial amendments to the Judicial Service Act, 2011 on the floor of the House, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution."

162. In ***Robert N. Gakuru & Others vs. The Governor Kiambu County & 3 Others Petition No. 532 of 2013,*** this Court expressed itself as hereunder:

> **"In this case, it is not in doubt that there was an earlier Bill which was tabled before the Assembly which Bill was rejected. According to the respondents there were certain recommendations which were made by the Assembly which recommendations were taken into account in the Bill which gave rise to the Act. The Respondents' position is that there was no necessity for the subsequent Bill to be subject to further public participation. In fact it is not claimed that the said subsequent Bill was so subjected. According to the petitioners who were consulted earlier what was contained in the said subsequent Bill was not what had been agreed upon during the earlier consultation. In my view where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation."**

163. In that decision, the Court cited with approval the opinion of Sachs, J in **Merafong Demarcation**

Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) where the learned Judge expressed himself as hereunder:

> **"Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve….. I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid."**

164. Therefore if Parliament intends to deviate from the draft Bill that was subject to public participation in material respect, the public is entitled to a clarification, if not a justification, for the deviation from what the public had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the public's response. In other words in those circumstances a further public participation regarding the fresh matters is mandatory.

165. It is clear from the Hansard that several amendments were introduced on the floor of the House at the Committee Stage by inter alia **Hon. Aden Duale**, the Leader of Majority Party and **Hon. Chepkonga**, including the reduction of the time for the IEBC to procure equipment, the establishment of a complimentary mechanism for identification of voters, the suspension of the commencement date for the ***Elections Campaign Financing Act*** as well as the suspension of the clause dealing with qualifications for Members of the County Assemblies and Members of Parliament. It is therefore my view that the Bill ought to have been subjected to public participation in light of the new provisions introduced therein.

166. It was disclosed that during the Special Sittings the National Assembly in contravention of Article 118 of the Constitution of Kenya did not conduct its business in an open manner and its sittings were not held in public or sessions thereof and on the 22nd December 2016 the National Assembly excluded the public and media from its sittings and the record of the proceedings do not show that the Speaker had determined that there were justifiable reasons for the exclusion. It was further contended that on all the Special Sittings of the National Assembly on 20th December 2016 and 22nd December 2016 all routes to Parliament along Parliament Road, Harambee Avenue and City Hall Way were barricaded thus impeding the access to Parliament Buildings for the Members of Parliament, the public and media personnel. Further, there were acts of violence inside the chamber of the National Assembly at all the Special Sittings thus contaminating its proceedings which was compounded by the consequent lack of decorum, order and dignity in the proceedings. Because of the disorder in the national Assembly during the Special Sittings, it was contended that the Speaker was unable to preside over the proceedings effectively in accordance with the Constitution and the law the right of freedom of speech and debate in Parliament as provided in Article 117(1) of the Constitution.

167. According to the applicant, the report of the Hansard for the material days demonstrate that the business of both the National Assembly and the Senate were not conducted in an open manner and in public and more particularly excluded the media and members of the public from the Special Sittings. In what was an aberration to our history and parliamentary business and the operations of both Houses the precincts of Parliament were barricaded by the police and paramilitary security forces. It tarnished and

tainted the image of Parliament as a people's democratic institution with elected representatives of the people enjoying the power and privileges of parliament.

168. Article 118(1) and (2)(b) of the Constitution expressly provides that***:***

Parliament shall—

> ***(1) (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and;***
>
> ***(b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees;***
>
> ***(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.***

169. Therefore if the public and any media were excluded from the said sitting without exceptional circumstances justifying such action, such proceedings would amount to a violation of the Constitution and my decision is based on the opinions in **Oloka-Onyango & 9 Others vs. The Attorney General** (supra) and **Tendai Laxton Biti and Another vs The Minister of Justice, Legal and Parliamentary Affairs and Another, Civil Application No 46 of 2002** (supra). Once more it is my view that the Speaker is under a constitutional obligation to give the reasons which in his view warrant such action.

170. Apart from the exclusion of the public and the media, Article 94(4) imposes the duty on Parliament to protect the Constitution and to promote the democratic governance of the Republic. I agree that it must demonstrate respect to the people and bring honour to the nation and dignity to the institution of the National Assembly and the Senate. I therefore associate myself with the decision of the Uganda Constitutional Court in **Twinobusingye Saverino vs. Attorney General, Petition No 47 of 2011** where that Court expressed itself as hereunder:

> **"We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who,** inter-alia **elected them, those who listen to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions. The Speaker, as the head of the House, has a big role to play in guiding parliamentarians not to use unparliamentary and reckless language that may infringe on other people's rights which are entrenched in the Constitution, by calling them to order. Parliament should avoid acts which are akin to mob justice because such acts undermine the respect and integrity of the National Parliament. It is not in keeping with the basic tenets of the Constitution, for example, when an Honourable Member of Parliament advocates for executing people without trial, like Idi Amin did to many Ugandans and this member is not called to order, but is just cheered on by the rest of the House. This happened when Honourable members were deliberating the issues about the Prime Minister and the three other ministers. The manner in which the deliberations of Parliament were conducted during the debate that led to the passing of the impugned resolutions was unfortunate. Consequently, we have ventured to make the above observations so as to ensure that strict observance of decorum in the House is maintained."**

171. The Respondents, on their part averred that Parliament is an important state organ and is always under tight security, with security being enhanced depending on the threat level detected. The security of Parliament however, does not prevent Members of Parliament, the press or the general public from

accessing the precincts of Parliament to follow debate. The said Respondent averred that they were not aware of any person who was impeded from accessing Parliament. Indeed, there was the requisite quorum to transact business on both the 20th and 22nd of December 2016.

172. The said Respondent further denied knowledge of any violence inside the chamber during the proceedings of the National Assembly on either 20th or 22nd December 2016 that "contaminated" the proceedings. They were however aware that some Members of Parliament tried to impede the Honourable Speaker of the National Assembly from entering the chamber on 20th December 2016 by blocking his access to the chamber, but the Speaker was subsequently able to enter the chamber and the business of the day was transacted.

173. I agree and dare add that it is the obligation of the Speaker of the relevant House to ensure that there is order and decorum in the House when the House is in session with very minimal, if any, abridgement or restriction of the rights of the members of the public and the media to be present during the session. The decision to bar the members of the public and the media from the House ought to be taken only in exceptional circumstances where there is real danger to the life and limb of the Members and after all other measures necessary to secure the House have failed, including even an adjournment of the session. My view is supported by Standing Order112(1) which provides that:

> ***In the event of grave disorder arising in the House, the Speaker may, adjourn the House forthwith or suspend any sitting for a period to be determined by him or her.***

174. However the atmosphere in the House ought to be such that the freedom of speech and debate in Parliament as provided in Article 117(1) of the Constitution is not placed in jeopardy by the unnecessary presence of security officers either in the House or within the precincts of the House.

175. According to the minutes of 20th December, 2016, towards the end of the debate in the National Assembly, there was clearly disorder in the House. The record of the Hansard indicates that several Members shouted at each other and blew whistles, Members were pushed while others sang songs prompting the Speaker to decline to take further orders and to adjourn the sitting till 24th January, 2017.

175. However there was another sitting called for the 22nd December, 2016. The Speaker however noted that at the previous sitting some Members had sneaked in pepper sprays and whiles into the House. The minutes however do not show any disorder on that day. Neither is there an indication that the media and members of the public were barred from the Special Sittings. Accordingly, I am unable to make any determination with respect to that issue as there is no deposition from any media house or a member of the public to that effect.

176. According to the applicant, the National Assembly acted unreasonably, irrationally, capriciously and oppressively by introducing proposals that were rejected in the enactment of the ***Elections Laws (Amendment) Act*** and in any case before the expiry of the six months or at the end of session and/or term. It was submitted that the 2015 Bill was brought to parliament through the backdoor as it had been withdrawn or put aside to give way to the ***Election Laws (Amendment) Bill 2016***. And this took place within a month and before the expiration of six months as contemplated by the Standing Orders and the procedure of the British Houses of Parliament. Standing Order 140(1) states as follows:

> ***A Bill, the Second Reading or Third Reading of which has been rejected may be introduced again in the next Session, or after the lapse of six months in the same Session but subject to fresh publication as provided in Standing Order 114.***

177. This position is described in ***Erskine May on Parliamentary Practice*** – 21st Edition pronounces the following at p 524 as follows:

> **"When a bill has been rejected, or lost through disagreement, it shall not, according to the practice of Parliament, be reintroduced in the same session. This follows from the general**

rule that the same question should not be twice offered…The principle was stated by the Lords on 17 May 1606, on the occasion of a second Purveyors Bill being brought from the Commons after their Lords had rejected the first: "When a bill hath been brought into the House, proceeded with all, and rejected, another bill of the same agreement may not be renewed and begun again in the same House, and in the same session where the former bill was begun….".

In the commons it was agreed for a rule on June 1610 that "no bill of the some substance be brought in the same session"."

178. This position applies to our case by virtue of Standing Order No 1(2) state which states that:

"The decisions made in paragraph (1) shall be based on the Constitution of Kenya, statute law and the usages, forms, precedents, customs, procedures and traditions of the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya".

179. With respect to the doctrine of separation of powers I have dealt with the same at the beginning of this judgement. Suffice it to say that where Parliaments' action violate the Constitution, this Court is not only entitled to but is under an obligation to intervene.

180. As regards immunity, **I am aware** that **on 21st July, 2017, the *Parliamentary Powers and Privileges Act*, No. 29 of 2017 was assented to by the President. Under section 38(1) of the said Act the *National Assembly (Powers and Privileges) Act* was repealed. However the commencement date of Act No. 29 of 2017 was indicated as 17th August, 2017.**

181. **Section 23(3)(e) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides that:**

"Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

……..

…….

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

182. **These proceedings were commenced before the commencement date of the said Act. Section 11 of the *Parliamentary Powers and Privileges Act* provides as hereunder:**

No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.

183. **According to *Statutory Interpretation*** by **Francis Benion** (4th Edition):

"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of the law '. . . those who have arranged their affair . . . in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset.

184. **This was the position of the** Supreme Court of Kenya in **Samuel K Macharia vs. Kenya Commercial Bank Limited and Others (Application no. 2 of 2011)** at paragraph 61 where it expressed itself as follows:

> **" As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature."**

185. **It was similarly held in Municipality of Mombasa vs. Nyali Limited (1963) E.A 371** thus:

> **"Whether or not legislation operate retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects the substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary."**

186. The foregoing position got approval in the case of **S.K Macharia & Another vs. Kenya Commercial Bank Limited & Others, SCK Application No.2 of 2011** where the Supreme Court stated that:

> **"A retroactive law is not unconstitutional unless it inter-alia impairs obligations under contracts, divests rights or is constitutionally forbidden. Cited in Overseas Private Investment Corporation & Others vs. Attorney General & Another Petition 319 of 2012 to buttress this, in Kenya Bankers Association & Others vs. Minister of Finance & Another (2002) 1 KLR 61, the Court noted that a statute which takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty in respect of transaction already past, must be presumed to be intended not to have retrospective operation"**

187. **There is no stipulation in the *Parliamentary Powers and Privileges Act* that it was meant to operate retrospectively.**

188. My position is **supported** by the decision in the case of **De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c)** in which the Court stated as follows:

> **"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."**

189. On appeal the **Appellate** Court in **Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999) (ZASCA 50)** rendered itself as follows:

> **"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the**

Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

190. I also rely **on <u>Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12/05)[2006] ZACC 11</u>** at para 38, where the Court held that:

"….Under our Constitutional democracy, The Constitution is the Supreme Law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled" Courts are required by the Constitution "to ensure that all branches of Government Act within the Law "and fulfil their constitutional obligations."

191. **Apart from that sections 11 and 12 thereof provide that:**

(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.

(2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.

(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.

192. **It is clear from the foregoing that section 12 only deals with civil proceedings. These are judicial review proceedings.** It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **<u>Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.</u>**

193. **It is therefore my view and I hold that section 11 of the *Parliamentary Powers and Privileges Act*, No. 29 of 2017, assuming without deciding that the provision is in the first place constitutional, does not apply to these proceedings.**

194. It however suffices to state that in conducting its proceedings, Parliament is bound to adhere to the provisions of the Constitution and where its actions contravene the Constitution; the same is null and void.

<u>Findings</u>

195. The totality of the foregoing brings me to the inescapable conclusion that Parliament did not conduct its proceedings on 20th and 22nd December 2016 and/or any subsequent and consequential proceedings in respect of National Assembly to the ***Elections Act 2011*** procedurally.

<u>Order</u>

196. That brings me to the question of what orders this Court ought to grant.

197. As this Court has held before, a proper constitutional understanding – especially of Articles 1 and

159 of the Constitution as well as the interpretive theory in Article 259 of the Constitution obliges the Court in cases such as this to balance the public interest and the private interest in determining whether to grant orders and in fashioning appropriate remedies. However, balancing between the public interest and the rights of successful litigants before the Court is a fact-intensive inquiry. It must be based on facts and permissible inferences of the likely consequences of granting the orders. It is not enough for a party to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought are granted. A party seeking to rely on this doctrine of public interest to inoculate its otherwise unlawful actions against Judicial Review orders bears a heavy burden to demonstrate that it will burden under the yoke of impossibility if the merited orders are granted. As aforesaid, in balancing the competing aspects, the nature of the right which was breached and its importance in the constitutional scheme of rights must be considered. The starting point however was propounded in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR** thus:-

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."**

198. Therefore a party cannot transgress the law with impunity and then tell the Court that public interest dictates the action should not be reversed. Such posture will be frowned upon by the Court. In other words contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute.

199. However, as appreciated by **Francis Bennion** in ***Statutory Interpretation*****,** 3rd Edition at page 606:

> **"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".**

200. Further, in **Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others [2014] eKLR** it was held that:

"…a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large".

201. As is appreciated in ***Black's Law Dictionary, 9th Edn***. "public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

202. In **Re McBride's Application [1999] NI 299** the Court expressed itself as follows:

> **"…it appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group…it seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity."**

203. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be

administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

204. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

205. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

206. I defer to the case of **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** where the Court of Appeal set out principle of public interest:

> **"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."**

207. With respect to efficaciousness of the remedy in the exercise of discretion, it is not in doubt that the decision whether or not to grant judicial review reliefs is an exercise of discretion which must however be exercised judicially. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant.* In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an***

ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [Emphasis added].

208. In the instant case none of the parties addressed me on the consequences of issuing the orders sought herein which the applicant narrowed down to two substantive reliefs being:

> **3. An order of certiorari to move into this Court and quash and annul the amendments made by the National Assembly to the Elections Act 2011 on 20th and 22nd December 2016 and/or any subsequent and consequential amendments by the Senate or Parliament.**
>
> **6. A declaration be made that the decisions, actions, sittings and proceedings of the Respondents are unconstitutional, illegal, unprocedural and procedurally unfair, influenced by an error of law, made in bad faith, unreasonable, irrational, taken with ulterior motive and purpose and constitute an abuse of discretion and power and have not taken into account relevant considerations of fact and law.**

209. In this case this Court is aware that subsequent to the commencement of these proceedings, the country went through a general election. Those elections gave rise to petitions some of which have been determined. It cannot be ruled out that the impugned provisions could have been applied during the said elections and that some of the petitions may well have been decided in accordance therewith. While that does not bar this Court from making the necessary declaratory orders for the sake of posterity, to issue an order quashing and/or annulling the amendments made by the National Assembly to the ***Elections Act 2011*** on 20th and 22nd December 2016 and/or any subsequent and consequential amendments by the Senate or Parliament may well be reckless. That is a scenario that this Court can neither turn a blind eye nor block its ears to, as to do so, has the potential of breeding chaos. A Court decision, in my view, should, as much as possible, and without abetting illegality and unconstitutionality, be geared towards the sustaining social engineering and order in society rather than chaos and disorder.

210. Therefore while I decline to quash and annul the said amendments, I nevertheless declare that the manner in which the proceedings of the Respondents were conducted was largely unprocedural and contrary to law.

211. In the premises there will be no order as to costs.

212. It is so ordered.

Dated at Nairobi this 5th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Agonga for Senator Orengo, SC for the applicants

Mr Kuyoi for Mr Mwendwa for the 1st and 2nd Respondents and Mr Njoroge for the 3rd and 4th Respondents

CA Ooko