REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO 399 OF 2016

In the matter of Articles 19, 20, 21, 22, 23, 36, 38, 47, 48,

50, 88, 201, 258 and 259 of the Constitution of Kenya

And

In the matter of the Elections Act, Chapter 7 of the Laws of Kenya

And

In the matter of the Election Laws (Amendment) Act, 2016

And

In the Matter of the Elections (General) Regulations, 2012

Between

Mugambi Imanyara.....1st Petitioner

Collins Kipchumba Tallam.....2nd Petitioner

And

Hon. Attorney General.....1st Respondent

The National Assembly.....2nd Respondent

The Senate.....3rd Respondent

Independent Electoral and Boundaries Commission.....1st Interested Party

Coalition for Reforms and Democracy.....2nd Interested Party

Jubilee Party.....3rd Interested Party

JUDGEMENT

This judgement relates to two consolidated petitions, namely petition number **399** of 2016 filed by **Mugambi Imanyara** (hereinafter referred to as the first petitioner) and petition number **415** of 2016 filed by **Collins Kipchumba Tallam** (hereinafter referred to as the second petitioner). On 25th October 2016, the Hon. Justice Onguto having looked at the two petitions concluded that they raise substantially the same issues and ordered that the two petitions be consolidated and that the two be heard and determined together.

Both petitioners challenged the constitutionality of several provisions of the Elections Laws (Amendment) Act, 2016[1] which amended some provisions of the Elections Act[2] but during the during the pendency of these proceedings, the first interested prepared a briefing to the Justice and Legal Affairs Committee (JLAC) of the National Assembly, entitled Implications of the Election Laws (Amendment) Act 2016 and Preparedness for the 2017 General Elections.[3] The said briefing is annexed to a supplementary affidavit filed on 11th November 2016 by the first petitioner and in the said briefing the first interested party raised several concerns among them time lines set for the necessary preparations for the elections, the apparent failure to factor in the process of resolving disputes arising from party primaries, but suggested that political parties be encouraged to carry on their primaries "much earlier than set out in the law." The interested party also raised concerns on the omission by the new law to require political parties to finance party primaries in the event that they request the commission to conduct the primaries and suggested that parliament provides clarity on the issue. They also stated that Gazettement of candidates after the primaries will involve costs which were not factored under the new law. The first interested party concluded by suggesting some amendments to the said Act so as to address the concerns they raised in the briefing in question.

During the pendency of these two petitions and possibly to address the concerns raised y the first interested party, Parliament passed The Election Laws (Amendment) Act 2017[4] in which several amendments to the 2016 amendments were made. Both petitioners admitted that the Election Laws (Amendment) Act 2017[5]addressed to a large extent the challenged provisions. The first petitioners' counsel submitted that the 2017 amendments was an admission on the part of the Respondents' that the issues raised in the petitions were genuine.

However, both petitioners maintain that the 2017 amendments left out some provisions which they submit are unconstitutional. The first petitioner invited this court to make a determination on the constitutionality or otherwise of the following provisions.

> *a. The constitutionality or otherwise of the provisions of section 10 (2) of The Elections (Amendments) Act, 2016**[6]** which provides that "The Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections for presidential, parliamentary or county elections in accordance with Articles 88 of the constitution.*
>
> *b. The constitutionality or otherwise of financing political party primaries from the exchequer.*
>
> *c. The constitutionality or otherwise of the time frames set for the necessary preparations for the elections, that is party primaries and the apparent failure to factor in the process of resolving disputes arising from party primaries, and whether or not the time lines laid down under The Elections (Amendments) Act, 2016**[7]** may lead to a candidate being denied the constitutionally guaranteed right to participate in an election.*

The second petitioner was clear that the Election Laws (Amendment) Act 2017[8] referred to above substantially resolved all the issues raised in his petition except one issue, namely:-

> *a. whether or not the requirement that the first interested party engages a reputable professional for the purposes of auditing the registered voters and updating the register is unconstitutional in that it means the first interested party will cede its constitutional mandate to another party.*

On behalf of the second interested party is the affidavit sworn by Norman Magaya Amugira in which he

avers *inter alia* that the enactment of the questioned legislation brought to an end political contestations, public demonstrations, destruction of property and loss of life and that the legislation in question was a product of politically negotiated process, and that political parties must complete their nomination process and names of their respective candidates must be submitted to the first interested party in good time to facilitate the necessary preparations.

It is also averred that political parties are at liberty to invite the first interested party to conduct their nominations provided that the party meets the costs associated with the process and that the petitioners are inviting the court to superintend the work of parliament.

The first interested party filed grounds of objections on 15th November 2016 stating that this court is mandated to determine which provisions of the questioned legislation violate the constitution, are unworkable, would impact negatively on the electoral process, unsustainable and ambiguous and arrive at a determination that will enable the creation of a sustainable and viable electoral process and system that will ensure and guarantee efficient and fair elections. However, the said affidavit was filed before the enactment of the Election Laws (Amendment) Act 2017[9] which substantially addressed the provisions which had been challenged in this petition.

Counsels for all the parties filed written submissions and also highlighted them orally in court. Counsel for the first petitioner submitted that The Election Laws (Amendment) Act 2017[10] corrected most of the mistakes complained about in the first petitioners' petition, an admission on their part that the earlier enactment was unconstitutional. However, counsel insisted that section 2 which defines the nomination day to be 60 days to the nomination was not amended and reiterated that an aggrieved candidate would be denied the opportunity to have his dispute resolved by IEBC owing to the time frame provided because in his view it that does not provide for time for resolution of disputes arising from party primaries. Counsel also submitted that section 10 (a) which mandates IEBC to conduct nominations on behalf of political parties is unconstitutional because the same IEBC is mandated to resolve nomination disputes and further for IEBC to use money from the exchequer to undertake party primaries is unconstitutional. Counsel cited several authorities in support of his position among them *Francis Gitau Parimei vs The National Alliance Party & Another*[11]*and David Muriuki Ndwiga vs The Hon. Bishop Dr. Robert Mutemi Mutua & Others****[12]*** and maintained that the amendments in question violate provisions of the constitution.

Counsel for the second petitioner submitted that The Election Laws (Amendment) Act 2017[13] addressed most of the provisions the second petitioner had challenged except the section that requires IEBC to engage a reputable professional to audit the register of voters for purposes of updating the register. In counsels submission, under Article 88 (4) of the constitution this mandate is placed on IEBC only, hence the first interested party cannot cede its constitutional mandate to another person.

Counsel for the first Respondent submitted that the petition offends the doctrine of presumption of constitutionality of an act of parliament and the court must have regard to the purposes and effect of the legislation. On his part, counsel for the second and third Respondent adopted the first Respondents grounds and submitted that the petitioners must demonstrate how the legislation will affect their rights.

Counsel for the first interested party stated that their grounds of objection filed in court be treated as their submissions and insisted that the petition was overtaken by the 2017 amendments. Counsel for the second interested party's submissions essentially reiterated the contents of the affidavit filed in court on behalf of the second interested party, while counsel for the third interested party adopted their replying affidavit.

Determining the issues raised by the petitioners will involve interpreting the various sections that are alleged to be unconstitutional and also the relevant provisions of the Constitution that are alleged to be offended by the sections complained of. To effectively address the said issues, it is important to bear in mind the relevant guiding principles. These are:-[14]

> *i. Under Article **259** of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights*

*and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution.*

*ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.**[15]** (The court should start by assuming that the Act in question is constitutional).*

iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.

iv. The constitution should be given a purposive, liberal interpretation.

*v. That the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.**[16]***

Also relevant are the words expressed in the Namibian case of *State vs Acheson***[17]** that *'……The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.'* The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.[18]The privy council in the case of *Minister for Home Affairs and Another vs Fischer*[19] while interpreting the Constitution of Bermuda stated that:-

"a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation… It is important to give full recognition and effect to those fundamental rights and freedoms….."

Lord Wilberforce, while delivering the considered opinion of the court in the above case observed:-

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms….."

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony RithoMwangi and another vs The Attorney General*[20] where the court stated:-

"Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law."

Ringera J put it more succinctly in *Njoya and Others vs Attorney General***[21]**when he observed that the Constitution is a living document and not like an Act of Parliament when he observed that:-

"the Constitution is the supreme law of the land; it's is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles"

In the celebrated case of *Ndyanabo vs Attorney General*[22]**Samatta CJ** had this to say:-

"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows; ***first,*** *the Constitution of the Republic of Tanzania is a living instrument, having 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. As* ***Mr. Justice E.O Ayoola,*** *former Chief Justice of Gambia stated…. "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."* ***Secondly,*** *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 democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed."*

Courts must be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. In this regard, I endorse fully the presumption of Constitutionality which was powerfully expressed by the Supreme Court of India in the case of *Hamdarddawa Khana vs Union of India Air*[23] where the respected Court stated:-

"In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

This court has been called upon to determine the Constitutionality or otherwise of some sections of The Election Laws (Amendment) Act 2016[24] and The Election Laws (Amendment) Act 2017[25] and as a basis for so doing I wish to state some crucial guiding principles. First, statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.

b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.

c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain

language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

> *"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."* ***[26]***

The implication is that when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation. The Supreme court of India in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others* ***[27]*** observed that:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.[28]

In addition to being guided by rules of statutory interpretation, one key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.[29] The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change.[30] And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

The other issue for this court to satisfy itself is the question of jurisdiction. Article **165 (3) (d) (i) & (ii)** of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of purported statutes.

I now examine the relevant provisions complained about by the first petitioner. First is section 10 (2) of The Election Laws (Amendment) Act, 2016[31] which provides as follows:-

(2) The Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the constitution.

Article 88 (4) of the constitution provides that:-

88. (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters' roll;

(c) the delimitation of constituencies and wards;

(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

(f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

This court cannot deviate from its own duty of determining the constitutionality of an impugned statute. In my view, every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of this power of judicial review, as explained by Indian nine-judge bench of the Supreme Court in the case of *Advocates on Record Association & Others vs Union of India***[32]**is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the "will" of the legislature as declared in the statute, stands in opposition to that of the people as declared in the constitution-the "will" of the people must prevail.

I associate myself with the words of the Supreme Court of India in the case of *Namit Sharma vs Union of India***[33]** where the court had this to say:-

"An enacted law may be constitutional or unconstitutional. Traditionally, this court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of the constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened....."

A law which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the "*direct and inevitable effect*" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. The Act in question was the product of negotiations arrived at after violent demonstrations agitating for electoral reforms and that the legislation passed through the two houses of parliament without any amendments. Thus any interpretation of these provisions should bear in mind this history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.[34]

The constitutionality or otherwise of involvement of IEBC in party primaries brings to light the provisions of Article **88 (4)** of the constitution cited above which provides that the "*The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for— (d) the regulation of the process by which parties nominate candidates for elections; (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*

Article **88 (4)** of the constitution is clear on the mandate of the commission. In my view, the words "*and any other elections as prescribed by an Act of Parliament'* can and ought to be construed to mean elections provided for under section 10 (2) of The Election Laws (Amendment) Act[35]and further Article 88 (4) (d) provides:-

> *(d) the regulation of the process by which parties nominate candidates for elections;*
>
> *(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*

The above provision are clear on the mandate of the commission. When the wordS used are clear as the above provisions, judicial inquiry is complete, this first cannon becomes the last.

The first petitioner fears that since the commission is also mandated to hear and determine disputes arising from the nominations, it cannot competently resolve disputes arising from a process it has presided. Unfortunately, Article 88 (4) reproduced above is clear and I find nothing unconstitutional on the provisions of section 10 (2) of the Election Laws (Amendment) Act[36] because it gives effect to the said constitutional provision.

Since the constitution provides that IEBC will be responsible for conducting party primaries and also settlement of electoral disputes including disputes relating to or arising from nominations, one can validly pose the question whether or not such scenario poses a legal problem and therefore lead to "an unconstitutional process" in that IEBC may be called upon to preside over a dispute emanating from a nomination it presided.

Before I address the said question, I am aware, a constitution cannot be unconstitutional for lack of another constitution against which alleged unconstitutionality must be construed. Yes, the constitution guarantees a fair trial in Article 50 cited by counsel for the first petitioner. Yes, the same constitution contains Article 84 discussed above. However, I must assert that some constitutional clauses cannot be said to be superior to others. The fallacy lies in the question whether or not compliance with a

constitutional provision can result in "unconstitutionality." I do not think so.

To begin with, the Constitution of Kenya, 2010, as all other constitutions, affirms its place as the supreme law of the land[37] and in Article 2(3) it states: "The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ".

Therefore, even if one felt that a clause of the constitution is somewhat unconstitutional or illegal, there would be no forum before which to challenge it, and nobody to make that declaration of unconstitutionality.

The above position is very well illustrated by the case of *Rwanyarare and Haj Badru Wegulo vs. Attorney General.**[38]*** The petitioners had moved to court alleging that certain articles of the Constitution of Uganda were inconsistent with other articles of the same Constitution, and constituted threats and infringements to the inherent rights and freedoms therein. The petitioners sought to have the offending clauses declared unconstitutional.

The petition was dismissed as incompetent, with the court holding that it did not have jurisdiction to construe parts of the Constitution as against the rest of the Constitution. Justice Kato said: *"This court has no power to declare one article of the Constitution inconsistent with another, but could deal with the question as to whether or not correct procedure was followed when the (amendment) Act was passed."*

In *Paul Ssemogerere and Others vs. The Attorney General**[39]*** for instance, it was held that "it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole."

Likewise in the case of *Smith Dakota vs. North Carolina**[40]*** the Supreme Court of the United States pronounced itself thus: "It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument."

From the foregoing, no constitutional clause is superior or inferior to another. Constitutional clauses are complementary. Thus, the constitution mandates IEBC to conduct party primaries. The same constitution mandates IEBC to resolve disputes arising from party primaries.

Professor Githu Muigai, Kenya's Attorney-General, in highlighting the challenges of interpreting the Constitution, has observed that the Constitution being a political charter and a legal document, makes its interpretation a matter of great political significance, and sometimes controversy. He writes:-[41]

> *"The constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. At times, the Constitution is vague or imprecise or has glaring lacuna and the courts are called upon to provide the unwritten part…"*

It is acknowledged that, while a Constitution may have (and always has) its imperfections, there will be clauses that do not seem in tandem with the "norms" or principles underpinning the Constitution, and no one is really saying otherwise. However, to construe those imperfections as amounting to unconstitutionality is jurisprudentially unsound and only creates needless confusion. The above being the clear provisions of the constitution leaves one possible and viable legal option, that is, an affected party may legally object to IEBC presiding over such a dispute and seek remedy in court or alternatively, IEBC may opt to recuse itself from resolving a dispute arising from a process it has presided over.

The first petitioner also states that it would be unconstitutional for public funds to be utilized to finance party primaries. I find nothing in the provisions in question or the constitution to suggest that party

primaries ought to be funded from the exchequer and in my view any such funding will not be backed by the law and would be illegal.

In any event funding of political parties is provided under part III of the Political Parties Act.[42] Section 26 clearly stipulates the purposes which the moneys allocated to political parties will be used which includes covering the election expenses of political parties.

Thus, my interpretation of the law is that the only funding provided for political parties is pursuant to the provisions of the Political Parties Act[43] cited above and to me there is no provision under the contested amendments of the Election laws providing for funding of party primaries from the exchequer or from public funds.

The first petitioner avers that the nomination period will disfranchise would be candidates because the time frame provided under the law may not allow ample time for resolution of the disputes that may arise after the primaries. I find nothing in the law to bar political parties from undertaking their primaries sufficiently early to enable IEBC to effectively carry on the election process.

The second petitioner argues that the amendment created by section 8A (1) of The Election Laws (Amendment) Act[44] is unconstitutional in that it creates a scenario whereby the IEBC is required to cede its constitutional mandate to another body. The challenged amendment provides that:-

> *"the commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of-*
>
> *a) verifying the accuracy of the Register;*
>
> *b) recommending mechanisms of enhancing the accuracy of the Register; and*
>
> *c) Updating the register.*

It is the second petitioner view that the above provision creates a scenario whereby IEBC will cede its constitutional mandate to another person or body. However, the clear provisions of Article 88 (5) of the constitution appears to have been ignored while advancing this argument. The said article provides that:-

> *(5) The commission shall exercise its powers and perform its function in accordance with this constitution and national legislation.*

By engaging a professional reputable firm as prescribed by the said provision, IEBC will in my view be acting inconformity with the constitution and the relevant national legislation referred to above. I find nothing unconstitutional in the said clear provision.

In *Francis Mbugua vs Commissioner of Police & 2 others*[45] the court expressing agreement with previous decisions held that:-[46]

> *"Whereas every person has right to the protection of the Constitution, it is not in all cases that orders as prayed should be granted. I say so because the petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. ....."*

In view of my findings as enumerated above, and save for my finding that there is no requirement under the law for political party primaries to be funded from the exchequer, I decline to grant the reliefs prayed in the two consolidated petitions. The upshot is that I hereby order as follows:-

> *a. **That** a declaration be and is hereby issued that except for the funding of political parties provided under part 111 of the Political Parties Act,**[47]**there is no legal requirement under constitution of Kenya 2010, or Elections Act for political party primaries/nominations to be funded from the exchequer or by public funds.*

*b. **That** all the other reliefs/declarations sought in the two consolidated petitions be and are hereby dismissed.*

*c. **That** no orders as to costs.*

Orders accordingly

Dated at Nairobi this **16th** day of **February** 2017

John M. Mativo

Judge

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[1] Act No. 36 of 2016 which came into force on 4 October 2016

[2] Chapter 7, Laws of Kenya

[3] Report dated 18 October 2016

[4] Act No. 1 of 2017

[5] Ibid

[6] Supra

[7] Ibid

[8] Supra

[9] Act No. 1 of 2017

[10] Ibid

[11] Pet. No. 356 of 2012

[12] Pet No. 497 of 2014

[13] Supra

[14] See The Institute of Social Accountability & others vs The National Assembly & Others, Pet No. 497 of 2014

[15] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[16] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[17] {1991} 20 SA 805, Cited in Petition no 71 of 2013, see note 7, supra

[18] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[19] {1979} 3 ALL ER 21

[20] Nairobi Criminal Application no. 701 0f 2001

[21] {2004 } 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)

[22]Ndyanabovs A. G of Tanzania {2001} E. A. 495

[23] {1960} 554

[24] Supra

[25] Act No. 1 of 2017

[26] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction

should not be followed "when application would be tantamount to a formalistic disregard of congressional intent." Rice v. Rehner, 463 U.S. 713, 732 (1983).

[27] {1987} 1 SCC 424

[28] K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another {1999} 4 SCC 135

[29]Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, Kansas Law Review, {1954} Vol 3 at page 8-9

[30] Ibid page 9

[31] Supra

[32] {1993} 3SCC 441

[33] Writ Petition (Civil) No. 210 of 2012

[34] See Article 1 of the Constitution of Kenya 2010

[35] Supra

[36] Ibid

[37] See Article 2 (1)

[38] Constitutional Petition No. 5 of 1999[unreported])

[39] Constitutional Appeal no. 1 of 2002) [2004] UGSC10)

[40] 192 US 268(1940)

[41] *https://abacus.co.ke/newsfeed/a-constitution-cannot-be-unconstitutional/*

[42] Act No. 11 of 2011, See sections 23, 24 and 25

[43] Ibid

[44] Ibid

[45]Pet. No. 79 of 2012

[46]See Elory Kraneveld vs AG & 2 Others Pet No.153 of 2012

[47] Act No. 11 of 2011, See sections 23, 24, 25 and 26