REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 637 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, 38, 81, 86, 88, 227, 232 AND 249 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ELECTIONS ACT AND ELECTION LAWS (AMENDMENT) ACT 2016

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT

BETWEEN

REPUBLIC…….....…APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……...……..1ST RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD…….....……2ND RESPONDENT

AL GHURAIR PRINTING AND

PUBLISHING COMPANY LIMITED…….....1ST INTERESTED PARTY

PAARL MEDIA (PTY) LIMITED…...…….. 2ND INTERESTED PARTY

EX PARTE APPLICANT

COALITION FOR REFORM AND DEMOCRACY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th December, 2016, the ex parte applicant herein, Coalition for Reforms and Democracy, (hereinafter referred to as "CORD") seeks the following orders:

> **1) THAT an order of certiorari do issue quashing the decision of the First Respondent to award Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited of Dubai.**
>
> **2) THAT an order of mandamus do issue compelling the First Respondent to restart the tender process in respect of Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers and the same be done in compliance with the provisions of the Public Procurement and Asset Disposal Act and the Election Laws (Amendment) Act 2016.**
>
> **3) THAT an order of prohibition do issue prohibiting the First Respondent from executing a contract or any transaction in respect to Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers with Al Ghurair Print and Publishing Company Limited of Dubai or any other company or body.**
>
> **4) THAT an order of certiorari do issue quashing the decision of the Second Respondent contained in the decision or judgement delivered and issued by the Second Respondent in *Application Number 93 of 7th November 2016 Paarl Media (Pty) Limited vs Independent Electoral and Boundaries Commission* on 28th November 2016.**
>
> **5) THAT the Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.**
>
> **6) THAT the costs of this application be provided for.**

2. The applicant in this application, the **Coalition for Reform and Democracy** (CORD), is a duly registered coalition of political parties comprising of the Orange Democratic Movement (ODM), the Wiper Democratic Movement Party of Kenya (Wiper) and the Forum for the Restoration of Democracy – Kenya (FORD – KENYA).

3. The 1st Respondent, the **Independent Electoral and Boundaries Commission** (IEBC), a constitution commission under the Constitution tasked with the conduct of general elections in the Republic of Kenya.

4. The 2nd Respondent, the **Public Procurement Administrative Review Board** (the Review Board), is a statutory Tribunal established under the provisions of the ***Public Procurement and Asset Disposal Act***.

5. The 1st Interested Party is **Al Ghurair Print and Publishing Company Limited** of Dubai in the United Arab Emirates (UAE) (hereinafter referred to as "Ghurair) while the 2nd Interested Party is **Paarl Media (PTY) Limited**, a printing and publishing company based in Johannesburg, Republic of South Africa (hereinafter referred to as "**Paarl**").

Ex Parte Applicant's Case

6. According to the applicant, it participated in the last General Elections held on 4th March 2013 (hereinafter referred to "the last general election") by forming and constructing a framework and political structure in which ODM, WIPER and FORK –KENYA had a nomination strategy for sponsoring candidates by the respective parties in the said elections including the presidential election. It was averred that the general elections were supposed to be conducted with the use of technology for purposes of biometric identification of voters and the electronic transmission of election results but those systems including the electronic voter identification devices largely failed despite the expenditure of large sums money by the Government in 2012 and 2013.

7. It was further contended that the procurement of technologies and other election materials have also been a matter of great contestations and was faulted by the Public Procurement Administrative Review Board in the application Numbers 59 of 2012 of 19th November 2012, 61 of 2012 of 20th November 2012 and 62 of 21st November 2012 between **Avante International Technology and Others vs. Independent Electoral and Boundaries Commission** and was questioned by the Supreme Court in case of **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission (IEBC) and Others Supreme Court of Kenya Election Petition Number 5 of 2013**.

8. The applicant's case was that the internal audit by the IEBC also revealed massive failure in many respects including the poll registers and election systems that adversely affected the said last general elections. It was the applicant's case that the decision of the IEBC as a procurement entity breached section 58(2) of the ***Public Procurement and Disposal Act*** and Article 227(1) of the Constitution as the tender documents used did not contain sufficient information to allow fairness, equitability, transparency, competitiveness and cost effectiveness.

9. It was averred that the Applicant was joined as an interested party in Public Procurement Administrative Review Board Review Number 93 of 2016 of 7th November 2016 - ***Paarl Media Pty Limited vs Independent Electoral Boundaries Commission***, in which the Second Respondent (hereinafter referred to as "the Review Board") dismissed the request by **Paarl** for review. It was the contention of the Applicant that the Review Board did not adhere to the rules of natural justice and its decision was violative of the ***Election Laws (Amendment) Act, 2016***, (also referred to as "***the Amendment Act***") which was assented to on 13th September 2016 and whose commencement was 4th October 2016, the Constitution and the ***Public Procurement and Asset Disposal Act*** (also referred to as "***the Procurement Act***").

10. The Act, according to the applicant, establishes in Kenya an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results and requires that the use of technology be simple, accurate, verifiable, secure, accountable and transparent. The ***Procurement Act*** further required the acquisition and disposal of information and communication technology assets and systems be transparent to be done in a transparent manner. It was averred that the provisions of section 17(8) of the ***Amendment Act*** stipulate the establishment of a technical committee to oversee the adoption of technology in the electoral process and to implement the use of such technology. To the applicant, the participation of the public including stakeholders such as political parties is critical in the implementation of the law including the making of regulations which have not been made, published and approved by Parliament since the date of the commencement of the Act.

11. According to the applicant, under the law as it now stands there is only one single register of voters which must capture biometric identifiers or attributes of voters to be maintained in a public portal and available for inspection by members of the public. It was disclosed that section 14(1C) of the ***Amendment Act*** in pursuance of the provisions of the ***Elections Act*** and the Constitution states that the tabulated results as announced at each and every polling station be transmitted electronically, in the prescribed form, to the constituency and national tallying centres in respect of a presidential election and that the poll result forms be published on an online public portal.

12. However, on 17th August 2016 the IEBC published an invitation to tender No. IEBC/01/2016 – 2017

for supply and delivery of ballot papers for elections, election results declaration forms and poll registers on as and when required basis for a period of two years (2016 – 2018). In the tender documents the specification for poll registers included an item code IEBC 131:2015 described as a **"Principal Register of Voters".** It was however the applicant's contention that there is no such register under the ***Elections Act*** or the ***Amendment Act***. It was further revealed that in the Annex C (informative) which is an illustration of the page layout of the IEBC Principal Register of Voters there are no features required to demonstrate that there shall be biometric data in regard to the identifiers or attributes of each and every voter and which is capable of being read by an electronic device to identify individual voters either on inspection of the register or at the time of voting. In addition, there is no evidence to demonstrate that the **"Principal Register of Voters"** is capable of being maintained on a public web portal in a format that can be inspected or verified for accuracy and can exhibit the biometric data of voters.

13. It was the applicant's case based on sections 2, 4, 5, 6, 7, 14, 17 and 26 of the ***Amendment Act*** that the poll registers including the Principal Register of Voters cannot meet the statutory requirements in the enumerated provisions and are not implementable and applicable on the integrated electronic electoral system, and in particular, in relation to biometric data required to be in the Register of Voters. Its functionality with the system of electronic identification of voters and compatibility with accountability imperatives and security features is therefore in doubt.

14. The applicant contended that under item code IEBC 20:2015 the election forms are specified as form 34 used by IEBC officials for declaration of presidential results at the polling station; form 35 for Governor, Senator, National Assembly member, County Woman Member of the National Assembly and County Assembly member; form 36 for declaration of results at ward/constituency/county/national elections; form 37 a certificate of results of presidential elections; and form 38 a certificate of results of Governor, Senator, National Assembly member, County woman member of the National Assembly and County Assembly member. Specimens for the said forms are described and shown as Annex A, B, C, D, F, G and H respectively in the tender documents. It was however contended that the ***Amendment Act*** states in section 17(5) (b) that the regulations be made for telecommunication network for voter validation and result transmission which fortifies the new legal regime that establishes an integrated electronic electoral system. In relation to statutory and mandatory provisions that results of the presidential election be electronically transmitted in the prescribed form, the applicant asserted that the statutory forms currently in use are inconsistent with the substantive provisions of the ***Amendment Act*** and the specifications thereof must await new regulations as contemplated in section 17(5) of the Act.

15. It was therefore the applicant's case that the procurement of the polls register, ballot papers and election result forms as specified in Tender IEBC/01/2016 – 2017 are unlawful and irrational in view of the changes and reforms in the law regarding elections. In the applicant's view, since the tender is worth more than Kshs. 2.5 billion which is a large sum of money to be derived from tax revenue or even in terms of loans and grants from donors or financial institutions is not a prudent or responsible use of public money. To the contrary it constitutes an unreasonable and irrational expenditure of public revenue.

16. It was averred that the establishment of an integrated electronic electoral system directly entails the use of register of voters and result transmission forms that are compatible, responsive and functional in an integrated electronic system in which it is possible to achieve the following:

> a) use of bar coded ballot papers with security features that confines the use of specific ballot papers to specific polling stations;
>
> b) bar coded electronic result transmission forms with security features that confine the use of specific forms to specific polling stations; and
>
> c) the digitized registers, electronic identification of voters and the electronic transmission of results can check and account for every activity at the polling station in real time because of the integrated use of technology.

17. It was therefore averred that it was unreasonable and irrational to order for the supply of poll registers,

ballot papers and result transmission forms without securing or specifying the devices to be used for identification of voters and transmission of results. In the applicant's view, since the ***Amendment Act*** was enacted because of the dissatisfaction with the electoral law and process, it is unreasonable and irrational and unlawful for a procurement to be validated based on a legal framework that has been repealed, amended or reformed. It was therefore the applicant's case that the procurement of the polls register, ballot papers and election result forms as specified in Tender IEBC/01/2016 – 2017 are unlawful and irrational in view of the changes and reforms in the law regarding elections.

18. It was the applicant's case that the membership of the IEBC had not been constituted or established in accordance with section 31 of the ***Amendment Act*** that provides for a chairperson and six other members of the Commission and the process of appointment of the members was still ongoing as the Selection Panel established under the law was still in the middle of conducting interviews. It was however the applicant's case that the secretariat of the Commission cannot undertake major activities of the body without the existence of the legitimate members of the Commission who can hold and exercise substantive constitutional and statutory authority and power of the Commission.

19. In the applicant's view, nine members of the Commission who were in office before their voluntary resignation and exclusion by dint of the ***Amendment Act*** were unlawfully conducting the business and affairs of the Commission despite the grievances of lack of credibility and integrity pronounced against them which resulted in their removal.

20. In a rejoinder to the averments made on behalf of the IEBC, it was explained by CORD that the President of the Republic of Kenya declared the vacancies of the offices of the Chairperson and members of the Commission on 5th October 2016 and published a Gazette Notice to that effect on 6th October 2016 through Gazette Notice No 8113 contained in Special Issue of the Kenya Gazette Vol. CXVIII – No. 121. Having declared the vacancies the President of the Republic of Kenya appointed a Selection Panel consisting of nine members for purposes of selecting nominees for appointment of Chairperson and members of the Independent Electoral and Boundaries Commission which appointments were made on 10th October 2016 and published in a Special Issue of the Kenya Gazette, Vol CXVIII – No 124 through Gazette Notice No. 8312.

21. It was therefore reiterated that there existed vacancies in the offices of the Chairperson and members of the Independent Electoral and Boundaries Commission and the former members could not lawfully and validly claim to be still the lawful occupants of the offices that ha been declared vacant. This must be so because there were no transitional provisions or authority in law that could enable them to continue being in office in acting or any other capacity.

22. The applicant disclosed that it had exchanged correspondence with **Mr. Ezra Chiloba**, the CEO of the IEBC raising issues with him on several matters including the operationalisation of the ***Amendment Act*** touching on the question of the appointment of the technical committee to be established under section 17(8) thereof and the imperative of regulations and the making thereof in accordance with section 17(5) of the said Act but the 1st Respondent dealt with these concerns in a casual and dismissive way. The applicant therefore took the position that the 1st Respondent cannot be trusted with the conduct of procurement as required under the Constitution and the ***Procurement Act*** and attain the level of transparency and openness stipulated in section 17(4) of the ***Amendment Act***.

23. To support this position the applicant referred to a contract awarded to supply equipment for 2013 general elections which was the subject of an application before the Public Procurement Administrative Review Board in ***Review No. 59/2012 of 19th November, No 61/2012 of 20th November and 62/2012 of 21st November 2012 – Avante International Technology and Others vs the Independent Electoral and Boundaries Commission***, where the Public Procurement Administrative Review Board in its decision rendered on 11th December 2012 castigated the 1st Respondent for acting with impunity and waving the card of public interest as its defence in the various breaches of the procurement law. To the applicant, it is now in the public knowledge that the devices for the Electronic Voter Identification Devices (EVID) which were subject matter of the tender award in the case above collapsed and failed and the original

tender sum was USD 12,357,000 and the fruits of the tender award obviously did not give Kenya value for money.

24. It was submitted on behalf of the applicant, which submissions were highlighted by **Hon. J B Orengo, SC**, its learned counsel that Applicant participated in the last general elections held on 4th March 2013 in which it constructed a framework for its constituent parties ODM, WIPER and FORD – KENYA to participate in the said elections. The parties, under the umbrella of CORD, jointly sponsored candidates, where agreed, in the name of any one of the parties. There were areas where the parties were not able to agree on a joint ticket for particular seats in the general elections. However for the presidential elections the parties jointly sponsored **Rt Hon. Raila Amolo Odinga** and **H.E Stephen Kalonzo Musyoka** as the candidates for President and Deputy President of the Republic of Kenya.

25. It was contended that the presidential elections held in 2007, whose results were disputed, generated violence and political instability that were unprecedented and inevitably attracted international intervention and mediation leading to the political settlement which created the Grand Coalition Government based on a National Accord that became part of the Constitution and law of Kenya. Before the inception of the Grand Coalition Government the Independent Review Commission on the General Elections was established under the Chairmanship of **Judge Kriegler**. The ***Kriegler Commission*** found fault with every aspect of Kenya's electoral system and process including the registers and registration of voters, identification of voters, voting and counting of votes and the transmission and tallying of results. Overall the report of the ***Kriegler Commission*** recommended the use of technology in our elections. Since then the IEBC has made attempts and trials in adopting technology systems, albeit by instalments and by twists and turns rather than progressively.

26. It was submitted that the presidential elections of 2013 was hotly contested and ended up in a petition filed and argued in the Supreme Court – **Raila Odinga v IEBC and Others.** Since then public debate on the performance of IEBC and the problems bedeviling Kenya's electoral system has not abated. This debate and campaigns for electoral reforms led to the formation by resolutions of the National Assembly and the Senate of a Joint Parliamentary Select Committee on matters concerning the Independent Electoral and Boundaries Commission. The Report of Joint Parliamentary Committee was approved by both Houses of Parliament and found legislative authority in the enactment of ***Amendment Act*** which Act ended the debate and controversy on the framework and structure of Kenya's electoral system, thus restricting the manual processes and components of Kenya's electoral system. Section 17 of the Act which amended section 44 of the ***Elections Act 2011*** states *inter alia* as follows:

> ***(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.***

27. It was submitted that the ***Amendment Act*** at section 33 thereof also changed the composition of IEBC and enabled the President to publish a notice of a vacancy in the Gazette on the occurrence of any vacancy which included circumstances in which the chairperson or a member of the Commission resigns from office by notice in writing addressed to the President. Section 31 of the Act which amended section 5 of the ***Independent Electoral and Boundaries Commission Act, 2011*** enacted provided that:

> ***"5(1) The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act".***

28. It was therefore submitted that the numerical strength of the members of the Commission was accordingly reduced from the previous nine members including the chairperson to seven members including the chairperson. The date of assent and the date of commencement of the ***Amendment Act*** respectively are 13th September 2016 and 4th October 2016 and the Act was published in the Kenya Gazette as required under Article 116(1) of the Constitution of Kenya on 20th September 2016.

29. The applicant submitted that on 17th August 2016 the IEBC invited tenders through Tender Ref No: IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election results

declaration forms and poll registers which tender was finally awarded to **Al Ghurair Printing and Publishing Company Limited**, the 1st Interested Party herein. **Paarl Media (Pty) Limited** the 2nd Interested Party made a request for review in Application No 93 of 7th November 2016 to the Public Procurement Administrative Review Board against the IEBC as the procuring entity in which proceedings the Applicant and the **Jubilee Party** were joined as interested parties. It was submitted that on 28th November, 2016, the Board made its decision and the IEBC now purports to have signed the contract with the 1st Interested Party on 30th November 2016.

30. According to the applicant, this application was filed on 20th December 2016, and contrary to the proposition made by the IEBC in its Grounds of Opposition and Notice of Notice of Preliminary Objection, the application is not in the nature of a review or appeal filed under ***the Procurement Act***.

31. With respect to the issue whether the application is statute barred having been filed outside the fourteen days allowed for filing judicial review proceedings in the High Court in accordance with section 175(1) of the ***Procurement Act,*** the applicant relied on Article 165(3) of the Constitution of Kenya 2010 which provides as follows:

> ***"Subject to clause (5), the High Court shall have –***
>
> > ***a) unlimited original jurisdiction in criminal and civil matters.***
> >
> > ***b) …***
> >
> > ***c) …***
> >
> > ***d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –***
> >
> > > ***i. the question whether any law is inconsistent with or in contravention of this Constitution;***
> > >
> > > ***ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
> > >
> > > ***iii. …***
> > >
> > > ***iv. …***
> >
> > ***(4) …***
> >
> > ***(5) The High Court shall not have jurisdiction in respect of matters –***
> >
> > > ***a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or***
> > >
> > > ***b) falling within the jurisdiction of the courts contemplated in Article 162(2)***

32. To the applicant, in plain language there is no ouster of the jurisdiction of the High Court save for matters reserved for the exclusive jurisdiction of the Supreme Court and those falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution. The courts contemplated in Article 162(2) are courts with the status of the High Court which the Public Procurement Administrative Review Board is not. And the courts are those envisaged to hear and determine disputes relating employment and labour relations and the environment and the use and occupation of, and title to, land. The Review Board is neither.

33. In support of this position the applicant relied on **Coalition for Reform and Democracy and Others vs Republic of Kenya and Others, Nairobi High Court Petition No. 628 and 630 of 2014**, which decision was based on the holding of **Mulenga, JSC** in **Habre International Co. Ltd vs Kassam and Others [1999] 1 EA 125** According to the applicant, it is instructive to note that **Mulenga JSC** was dealing with provisions of the Constitution of Uganda which are similar to the provisions of the Constitution of Kenya. Article 169(1) of the Constitution of Kenya creates subordinate courts which may include any other court or local tribunal as may be established by an Act of Parliament other than the courts established by Article 162(2) of the Constitution of Kenya. It is also significant that under Article 165(6) of the Constitution of Kenya the High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising judicial, or quasi – judicial function, but not over a superior court. This is a jurisdiction donated by the Constitution itself and cannot be taken away by statute such as the Procurement Act, the applicant submitted. It is not an appellate jurisdiction or a statutory review by way judicial review as provided by section 175(1) of the ***Procurement Act*** nor does it relate to the availability of judicial review orders under the ***Law Reform Act***.

34. It was submitted that the provisions of section 175(1) of the ***Procurement Act***, is confined to the Applicant requesting the review and the procuring entity and/or the successful bidder. The applicant's case was that this section is to be read together with sections 167(1) and (2) and 175(2) of the ***Procurement Act***. First and foremost the Applicant cannot be described as an aggrieved party because the section 167(1) only speaks of a candidate or tenderer as the person who may seek administrative review and such candidate or tenderer must demonstrate that he or she has suffered or risks to suffer loss or damages due to the breach of a duty imposed by the Act, or the Regulations. The Applicant was not a candidate or tenderer. The words "candidate" and "tenderer" are defined in section 2 of the Act. Section 175(2) of the Act requires the aggrieved party to pay a percentage of the contract value as security fee and a literal and purposive interpretation of these provisions removes the Applicant from the application thereof and hence the applicant cannot in any circumstances be defined or viewed as an aggrieved party.

35. It was further contended that as the matters raised by the Applicant were not heard and determined on merits by the Review Board, the same could only be barred in subsequent proceedings if the Review Board was seized of the matters and considered them as matters within its jurisdiction and competence. The Applicant can only be stopped by dint of statutory limitation and effluxion of time or for that matter on a proper application of the principle of *res judicata* or on account of non compliance with mandatory statutory provisions if there was a decision or final judgment on merit in respect of the complaints submitted by the Applicant. It was disclosed that the Board expressed itself thus:

36. It was submitted that the provisions of section 175(1) of the Procurement Act, is confined to the Applicant requesting the review and the procuring entity and/or the successful bidder.

37. According to the applicant, the Board then made some commentary about delivery of ballot papers, election results declaration forms and the poll registers as materials not offending the requirements of the introduction of technology in the electoral process but resisted further commentary out of the exercise of abundant caution. The Board therefore resisted consideration of the substantive issues raised by the Applicant. In this respect the applicant relied on **Republic vs. The Public Procurement Administrative Review Board and Another – Ex parte Selex Setemi Integrati [2008] e KLR**.

38. It was the applicant's contention that the Court's jurisdiction cannot be ousted expressly or impliedly on account of the expiry of time within which an aggrieved person may seek judicial review by the High Court, to wit fourteen days. By definition and consideration of applicable provisions already enumerated and discussed it is doubtful that in law or fact the Applicant can be considered as an aggrieved party on a strict and narrow interpretation of all the relevant provisions of the ***Public Procurement and Asset Disposal Act***. It was further submitted that the grounds on which relief is sought in this application as set out in the application for leave as contained in the Chamber Summons, the Statutory Statement and the Notice of Motion speak of violations and contraventions of the Constitution which are causes of action amenable to judicial review and the exercise of the High Court's jurisdiction under Article 165(3) and (6) of the Constitution of Kenya. There are questions of illegality and contraventions of Statutes set out which include the ***Elections Act 2011***, ***Election Laws (Amendment) Act 2016*** and the ***Independent***

Electoral and Boundaries Commission Act quite apart from the ***Public Procurement and Asset Disposal Act***. The enabling statutes for purposes of this application is the Constitution and the ***Law Reform Act***. To the applicant, the jurisdiction conferred on the High Court by the Constitution and the ***Law Reform Act***, being substantive law cannot be ousted by operation of section 175(1) of the ***Public Procurement and Asset Disposal Act***.

39. The applicant therefore asserted that this Court has jurisdiction and the application is not incompetent nor statute barred.

40. According to the applicant, it is in the public domain that the Chairperson and members of the Commission resigned from office. In any case the President of the Republic of Kenya in exercise of the President's powers conferred by section 7A(2) of the ***Independent Electoral and Boundaries Commission Act*** declared vide a declaration dated 5th October 2016 and contained in Gazette Notice No 8113 published in the Special Issue of the Kenya Gazette Vol. CXVIII – No 121 of 6th October 2016, a vacancy in the positions of the Chairperson and six members of the Independent Electoral and Boundaries Commission. In furtherance of the said Gazette Notice the President appointed a Selection Panel in exercise of powers conferred on him by paragraph 1 of the First Schedule to the ***Independent Electoral and Boundaries Commission Act, 2011*** for purposes of selecting nominees for appointment as Chairperson and members of the Independent Electoral and Boundaries Commission under section 5 of the Act which appointment was made on 10th October 2016 and the names published in the Special Issue of the Kenya Gazette Vol. CXVIII – No. 124 on 11th October 2016 and contained in the Gazette Notice No. 8312.

41. It was therefore evident, according to the applicant, that as of 5th October 2016 there were no members of the IEBC including the Chairperson as vacancies were already declared. There were no provisions, including transitional provisions enabling the previous nine members of the IEBC to remain in office awaiting the appointment of new members. In any event the composition of the IEBC had changed and the membership could not exceed six members and one Chairperson as enacted by the ***Election Laws (Amendment) Act 2016***. Article 250(1) of the Constitution provides that each commission shall consist of at least three members, but not more than nine members. In furtherance of the constitutional provisions the ***Independent Electoral and Boundaries Commission Act***, as amended restricts, the composition of the membership of IEBC to seven members.

42. While the IEBC continued to state that there is no vacuum in the Commission and the previous nine members are still in office and are in charge of decision making, including on policy matters as regards the conduct of the affairs of IEBC, the applicant took the view that this was plainly unconstitutional and illegal and in contravention of statute. It was contended that the making decisions including the giving authority to the Chief executive Officer to sign the contract between IEBC and the First Interested Party for the supply and delivery of ballot papers for elections, election results declaration forms and poll registers by the former Commissioners amounted illegal and unconstitutional actions and conduct and offend Articles 2(1) and (2), 3(1) and 10(1) of the Constitution of Kenya. In this respect the applicant cited some passages in the case of **Eng. Michael Kamau and Others vs Ethics and Anti-Corruption Commission and Others Nairobi (Milimani) High Court Petition No 230 of 2015.**

43. In the circumstances, it was submitted that there was no proper and lawful Commission constituted in accordance with Article 250(1) of the Constitution and section 5 of the ***Independent Electoral and Boundaries Commissions Act, 2011***, vacancies having been declared by the President under section 7A of the same Act. To the applicant, this is a matter of great significance that cannot be gainsaid and the views of the judges in the ***Michael Kamau and Others vs Ethics and Anti – Corruption Commission and other***s go beyond the isolated consideration of Article 250 of the Constitution and section 5 of the ***Independent Electoral and Boundaries Commission Act***.

44. It was contended that the Constitution of Kenya addresses the question of vacancies in the offices of the President and Vice President and who can act in those offices when vacated in Articles 139, 146 and 149 of the Constitution of Kenya. Under Article 103 of the Constitution when the office of a member of

parliament becomes vacant there are no provisions for another person to act as a member of parliament. The same is the case with independent offices. The offices of the members of the Commission once vacant cannot be occupied on an acting capacity. To the applicant, the Commissioners while in office have a security tenure to safeguard their independence, neutrality and impartiality and an acting member of the Commission would cease to enjoy such protected tenure. In those circumstances members of the Commission cannot be able to fulfill the mandate of the Commission in terms of Article 249 of the Constitution which provides,

"249 (1) The objects of the commissions and the independent offices are to,

a) protect the sovereignty of the people;

b) secure the observance by all state organs of democratic values and principles; and

c) promote constitutionalism.

(2) The commissions and holders of independent offices-

a) are subject only to this Constitution and the law; and

b) are independent and not subject to direction or control of any person or authority.

45. The applicant further relied on he decision of the Constitutional Court of Uganda in **Hon. Gerald Kafureeka Karuhanga vs. Attorney General – Petition No. 0039 of 2013**.

46. The applicant reiterated that there are no enabling provisions in the Constitution of Kenya that would allow members of the Commission who have resigned from office to retrieve and extend tenure in any shape of form. In the instant case since the President of the Republic had declared the offices vacant, the power and authority delegated to the members of the Commission cannot be exercised in an acting capacity in circumstances where the Constitution has not donated or granted the mandate or competence.

47. It was submitted that Parliament made a decision through unanimous resolutions of both Houses on Tuesday 5th July 2016 and 6th July 2016 to establish a Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission to inquire into the allegations against the Commission and the Secretariat and on the basis of the findings recommend mechanisms for the vacation from office of the commissioners in accordance with the Constitution. The legal mechanism was the ***Election Laws (Amendment) Act 2016*** which made it possible for vacation of office by the members of the Commission through resignation as found in the provisions of section 33 of the Act. The Motions tabled, introduced and debated in both the Senate and the National Assembly recognized that sections of the Kenyan society had raised issues on the credibility, impartiality, integrity and independence of the Independent Electoral Boundaries Commission, the electoral processes and the electoral law. Evidence was adduced and presentations made to the Committee dealing with issues of credibility, impartiality, integrity and independence. Even if a verdict was not returned on these issues as against the Chairperson and members of the Commission the universal call was for them to vacate office. It would therefore be irrational and unreasonable for the said impugned Commissioners by contrivance of what is seen to be a lacuna in the law, or the need to ostensibly eliminate or remove a vacuum, that they should continue to act in their respective offices and on the face of it plan and organize the general elections to be held in August this year. The members of the Commission have not resigned in honour or in the public interest but out of an orchestrated campaign to remove them by some sections of the people of Kenya and by the desire of others that the Commissioners be removed for not being beyond reproach. It is also irrational and unreasonable that the discredited former commissioners to arrogate the responsibility and decision on how to spend Kshs. 2.5 billion for the supply and delivery of ballot paper for elections, election result declaration forms and poll registers. It speaks of bad faith and improper motive.

48. Section 44(5) of the ***Election Laws (Amendment) Act 2016***, it was submitted, requires that regulations be made in consultation with relevant agencies and stakeholders including political parties for

purposes of the implementation of the section which talks about the use of technology in elections. It is further directed by section 44(8) of the Act, for purposes of giving effect to section 44, that a technical committee be established consisting of members and officers of the Commission and other relevant agencies and stakeholders. The same Committee is the organ that would oversee the adoption of technology in the electoral process and implement the use of such technology. The IEBC has completely ignored these provisions and has purportedly put in a place a cabal of sorts which masquerades as the committee established under section 44(8) of the Act. The IEBC has not undertaken this process in a transparent, impartial, neutral, credible and accountable manner. The actions in this regard are in the first place illegal. Secondly the IEBC has acted in an arbitrary and unfair manner and considering the law regarding the establishment of the committee and making regulations, the IEBC is guilty of procedural impropriety.

49. The applicants averred that the sovereign power of the people is exercised through their democratically elected representatives and that the IEBC conducts elections which is the medium through which the people elect their representatives. Decisions affecting elections must therefore be made strictly in accordance with the Constitution, the supreme law of the Republic which the people have adopted and enacted. The former commissioners were therefore accused of being pretenders to the offices in the IEBC and their previous powers and authority had been extinguished and spent.

50. The applicants relied on section 44 of the ***Elections Act 2011*** which establishes an integrated electronic electoral system in Kenya that is anchored on biometric voter registration, electronic voter identification and electronic transmission of results. In 2013, it was submitted the IEBC contracted experts to conduct an independent ICT evaluation of the IEBC and in particular to assess the performance, management capacity, environment and successes/failures of technology for the Kenya 2013 Presidential and General Elections. The experts noted that the interface and integration requirements for the BVR and EVID Systems were not clearly defined. The EVID system is designed to provide a portable device to enable and implement biometric verification and authentication of voters. The EVID devices are required to upload and store the biometric data of each voter and to have the ability to retrieve the data or unique biometric identifiers and attributes. The **ICT Evaluation Kenya Report,** it was submitted observed that:

> ***"The EVID devices would flag each voter when authenticated and notify the operator of any attempts at multiple voting. The EVID device includes reporting functions to provide statistics including the number of voter's authenticated for voting on Election Day".***

51. It was further noted the lack of clarity in respect of "the relationship between EVID and printed voter list and the role of EVID in results tally process". According to the applicant, the voters registers, if in print form, the election results transmission forms, and the ballot papers for that matter, cannot be procured, supplied and delivered in isolation and without consideration of other relevant components, mechanisms and electoral processes as they will be fed and integrated in the election data at some point. An examination of the specifications for the ballot papers, election results transmission forms and the poll registers show clearly that the documents will not cohere or integrate with the systems and mechanisms stipulated in ***Election Laws (Amendment) Act 2016***. The applicant cited Regulations 82 of the ***Elections (General) Regulations, 2012*** and averred that Regulation 79(1) and (2) states that the presiding officer, the candidates or agents shall sign the declaration in respect of the elections and for that purpose the presidential election results shall be in the form as set out in the Schedule. These provisions, according to the applicant contradict and are inconsistent with section 39(1A) (1B) and (1C) of the ***Elections Act 2011.***

52. In the applicant's view, the tabulated results of an election for the president must be contained in the prescribed form. Accordingly it is this prescribed form containing the tabulated results that is electronically transmitted. Under Regulation 82 of the ***Elections (General) Regulations, 2012*** it is not the prescribed form but the results that are submitted in an electronic form in such manner as the Commission may direct. And it is not the results or actual results that are transmitted but provisional results. Regulation 83(2) of the ***Elections (General) Regulations 2012***, it was therefore contended is inconsistent with Article 86(b) and (c) of the Constitution of Kenya. According to the Constitution the votes cast are

counted, tabulated and the results announced promptly by the presiding officer at each polling station and that the results from the polling station are openly and accurately collected and promptly announced by the returning officer. Yet Regulation 83(2) provides that the results of presidential election in a constituency shown in Form 34 shall be subject to confirmation by the Commission after a tally of all votes cast in the election. Form 34 therefore does not serve the purpose of the prescribed form containing tabulated results contemplated in Section 39(1C) of the ***Elections Act*** and it is therefore, to that extent, inconsistent with the plain and clear provisions of the Constitution and the ***Elections Act***. Form 34, although a statutory document, it is a creature of a subsidiary legislation which cannot override and supersede the provisions of the Constitution and an Act of Parliament or substantive legislation.

53. Based on section 2 of the ***Statutory Instrument Act*** as read with section 24(2) thereof as well as section 31(b) of the ***Interpretation and General Provisions Act***, it was contended that Regulations 79 and 82 being inconsistent with ***Elections Act, 2011*** as amended by the ***Election Laws (Amendment) Act 2016*** are therefore void to the extent of inconsistency and reliance was placed on **Kenya Bus Owners Association and Others vs. Cabinet Secretary for Transport and Infrastructure and Others, Nairobi Judicial Review Case No. 2 of 2014.**

54. Similarly, Regulation 82 of the ***Elections (General) Regulations*** is inconsistent with Article 86(b) of the Constitution to the extent it requires the Presiding Officer to submit provisional results in an electronic form whereas Article contemplates only one set of results which once tabulated must be announced promptly. On the other hand Regulation 82 envisages two sets of results which are designated as provisional results and actual results. Regulation 83(2) is also inconsistent with the Constitution in that it gives the Commission power to interrogate and confirm the results of the presidential election in a constituency as shown in Form 34. Form 34 is therefore an instrument which can be used to alter the results of the presidential election as announced by the presiding officer as provided by Article 86(b) and (c) of the Constitution. Section 39 (1C) of the ***Elections Act*** protects the integrity and finality of the results as announced by the presiding officers at polling stations in respect of a presidential election.

55. It was submitted that the IEBC has contracted for the supply and delivery of poll registers including the principal register of voters. Sections 2, 3, 4, 6, 7, 17(7) and 26 of the ***Election Laws (Amendment) Act 2016*** speaks of a single register of voters and the Act repealed the provisions relating to the Principal Register of Voters. This was intended to remove the mischief of having several registers or components thereof which in the past have been described as the black or green book and included other registers as revealed by the report of the **ICT Evaluation Kenya** found on Page 36 of Volume 1 of the Applicant's application. It states that it is not clear under which legal framework these registers were prepared. The five different categories of the final registers, according to the applicant are enumerated in the report as follows:

i. Principal register – complete with biometric details.

ii. Principal register without biometric

iii. Duplicate register

iv. Exceptions register

v. Register of voters in the diaspora

56. It was submitted that the register is the primary basis of any election and it is imperative that the register maintained by IEBC comprehensively contains all the information and data stipulated by the law. It must also be in the form provided by the law. It follows that the authentic and genuine register must capture the biometric data whose unique identifiers or attributes are set out in section 2 of the ***Election Laws (Amendment) Act 2016*** and can be uploaded in a public web portal for purposes of inspection by members of the public. It is a reasonable proposition that any print versions of the register such as those sought by IEBC from the First Interested Party must exhibit the features or characteristics of a biometric register which is contemplated in the Act. But such versions cannot be the lawful and complete register.

The register is biometric. Annex C IEBC 131:2015 which is an illustration of the page layout of IEBC Principal Register of Voters is a clear indication that the IEBC intends to use the poll registers subject matter of the tender as the primary basis for the identification of voters which goes against the new legislation.

57. It was submitted that it is unreasonable for the IEBC to order for the supply of ballot papers in the middle of an exercise of defining and establishing the electoral system. The infrastructure of the election, its hardware must be well set before specifications of secondary material and documents are defined and enumerated. In view of the nature of the regulations required to be made under section 44(5) of the ***Elections Act***, including data storage and information security, data retention and disposal and development and implementation of a disaster recovery and operations continuity plan, ballot papers may now need to have security features and bar codes as is the case in other jurisdictions. This is a process that must await regulations required to be made under the Act, an exercise, which is ongoing.

58. It was therefore unreasonable and irrational to order for the supply and delivery of ballot papers whose specifications have been given without setting up comprehensively and conclusively systems and processes that will ensure that elections are administered in an efficient, accurate, accountable verifiable, secure, credible and transparent manner.

59. In the circumstances the Applicant prayed to the Court to grant orders of judicial review in the nature of certiorari, mandamus and prohibition and costs as set out in the Notice of Motion dated 19th December 2016. It is further prayed that the Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.

1st Respondent's Case

60. In response to the application, the 1st Respondent, the IEBC, averred that it is is a Constitutional Commission established under Article 88 of the Constitution of Kenya 2010, as the Commission responsible for conducting and supervising referenda and elections to any executive body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. Article 88 of the Constitution of Kenya 2010 sets out particular responsibilities of the 1st Respondent within its said Constitutional mandate and these include *inter alia*:

a. Continuous registration of citizens as voters, and

b. Regular revision of the voter's roll

61. It was averred that Parliament legislated the ***Independent Electoral and Boundaries Commission Act No. 9 of 2011*** pursuant to Articles 88 of the Kenya Constitution 2010 to operationalize the Independent Electoral and Boundaries Commission within its powers and as an independent Commission under Article 249 (2) (b) of the Constitution of Kenya, 2010. The ***Elections Act*** was also legislated pursuant to Article 82(1) to make provision for delimitation of electoral boundaries, and the conduct of referenda and elections among other matters. The 1st Respondent is therefore not subject to direction or control by any person or authority in the performance of its constitutional mandate. The Commission is nevertheless always obliged to honour, respect, uphold and defend the Constitution and to comply with the law of Kenya within the said Constitutional framework.

62. According to the IEBC, it is lawfully constituted and its decisions are legal and valid and there is no lacuna in the Commission. There are Commissioners properly in office as they have not been replaced, while its Secretariat is vibrant in execution of the its mandate. Under the ***Public Procurement and Disposal Act 2015*** the Chief Executive Officer is the Accounting Officer of the IEBC as a procuring entity. It was averred that Article 81 of the Constitution of Kenya, 2010 requires that the electoral system in Kenya complies with the principles of universal suffrage and fair representation and free and fair elections that are transparent and administered in an impartial, neutral efficient, accurate and accountable manner. Article 86 of the Constitution of Kenya, 2010 requires the 1st Respondent to ensure at every

election that:

(a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) The votes cast are counted, tabulated and results announced promptly by the Presiding officer at each polling station;

(c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

63. The IEBC averred that on matters of procurement of goods and services, it is obliged to observe Article 227 of the Constitution of Kenya, 2010 by procuring the same in accordance with a system that is fair, equitable, transparent, competitive and cost effective. It asserted that it undertakes procurement of goods and services in accordance with the best procurement practices. It was disclosed that pursuant to Article 227 (2) of the Constitution of Kenya, 2010, Parliament legislated the ***Public Procurement and Assets Disposal Act, 2015*** which prescribes a framework within which policies relating to procurement and asset disposal is to be implemented and that IEBC relies upon and complies this Act on matters of procurement.

64. The IEBC averred that it is in the process of preparing for General elections scheduled to be held on 8th August 2017 in accordance with the provisions of Articles 101 (1), 136 (2)(1), and 180 (1) of the Kenya Constitution 2010. In so doing it advertised for Tender No. IEBC/01/2016-2017 for the supply and delivery of ballot papers for Elections, Election Result Declaration Forms and Polls Register with closing date of the 7th September 2016. These preparations entail the training and mobilization of personnel and the acquisition election material and equipment in accordance with a program for this purpose. Pursuant to the foregoing, it received tenders from the Nine (9) bidders which were subjected to a preliminary evaluation on the basis of evaluation criteria set out in the tender document to confirm that the bids conformed to all eligibility and mandatory requirements set out in the tender documents. The contract was a framework contract with indefinite quantities, details of the constituencies and County details, and necessary artworks would be prepared and provided as and when required.

65. It was averred that the bid submitted by the 2nd Interested Party-**Paarl Media (PTY) Ltd**, which was allocated bid No. 3 was procedurally determined to be non - responsive in the following respects:

a. ISO 27001 (ISM) not submitted

b. Tender Security not submitted

c. Confidential Business Questionnaire submitted but not filled, signed or dated

d. No Audited Accounts submitted but management reports submitted instead

e. Inadequate samples submitted, No Samples for Senator and Member of National Assembly ballot papers submitted

66. According to IEBC, a total of 5 bidders for the tender were determined to be non - responsive, while 4 bidders were responsive and therefore proceeded to technical and financial evaluation and comparison on the basis of criteria set out in the tender documents in a process in which the 2nd Interested Party was determined to be substantially responsive and therefore the successful tenderer. The contract award was to the successful tenderer pursuant to clause 2.27.4 of the tender document. It was averred that the successful tenderer was duly notified of Award of Tender and simultaneously the unsuccessful tenderers

were also notified that they had not been successful and details of the successful tenderer disclosed on 18th October 2016.

67. To IEBC, it complied with the provisions of the Constitution, the ***Public Procurement and Asset Disposal Act, 2015*** and upheld the principles of natural justice, the rule of law and the legal imperatives of public participation, consultations, good governance, integrity, transparency and accountability and did nothing that was inconsistent with the Constitution or the law.

68. Being aggrieved by the result of the above procurement, the 2nd Interested Party filed a request for review under section 167(1) of the ***Public Procurement and Asset Disposal Act 2015*** in ***Public Procurement Administrative Review Board Application No. 93 of 7th November 2016 Paarl Media (pty) Limited vs Independent Electoral and Boundaries Commission*.** The request for review was specifically in respect of Tender Number IEBC/01/2016-2017 for the supply of and delivery of ballot papers for elections, election results declaration forms and poll registers. Procurement of electronic technologies was not relevant to the matter before the Review Board but wholly extraneous to it and in the IEBC's opinion, the Review Board lacked jurisdiction to entertain an application or considerations other than those presented before it in the request for review.

69. It was averred that the Review Board heard the request for review and made its Judgment on 28th November 2016 through which the request for review was dismissed paving way for the 1st Respondent to continue with the procurement. IEBC's view was that the Review Board remained faithful to its powers and mandate and avoided acting outside or in excess of its jurisdiction and that the said judgment was well reasoned objective and focused on the public interest.

70. It was averred that on 30th November 2016 IEBC executed a contract with the successful tenderer, **Al Ghurair Printing and Publishing Company Ltd**, which is the 1st Interested Party. To IEBC, under section 175(1) of the ***Public Procurement and Asset Disposal Act*** No. 33 of 2015 a person aggrieved by a decision of the review board may seek Judicial Review by the High Court within 14 days from, the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding on both parties.

71. It was averred that the Ex parte Applicant, Coalition for Reforms and Democracy (CORD) and the Jubilee Party applied and were enjoined in the proceedings before the Review Board and as parties under section 170(d) of the ***Public Procurement and Asset Disposal Act, 2015***, which gives the Review Board discretion for inclusion of parties. All the parties were duly heard and submitted before the Review Board. At the said hearing the Ex Parte Applicant however raised matters relating to the ***Election Laws (Amendment) Act 2016*** and the integrated electronic electoral system, which were beside and or extraneous to the request for review under litigation.

72. It was averred that under section 175 (1) of the said Act the Applicant herein ought to have sought Judicial Review by the High Court on or before 13th December 2016 even in the most liberal interpretation giving allowance for the fact that 12th December 2016 was a national holiday.

73. In IEBC's view, a reading of the Notice of Motion dated 19th December 2016 together with the Supporting Affidavit does not show in any way that the Review Board's decision was unreasonable, outrageous, or in defiance of logic. To the Commission, the ***Election Laws (Amendment) Act 2016*** does not amend the ***Public Procurement and Asset Disposals Act 2015***, but the IEBC has a program for full compliance with that Act bearing in mind that the use of technology in elections is required to be introduced progressively and the same is subject to the discretion of the IEBC. It was averred that section 44 (4) of the ***Election Laws (Amendment) Act 2016*** obligates the 1st Respondent to procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections, hence the delays through Court litigation are likely to adversely affect the statutory timelines set by that law.

74. The IEBC asserted that orders of Judicial Review are discretionary and are not guaranteed, and the Honourable court may decline to grant the same in the public interest, in this case the need to hold the next General Elections by 8th August 2017 failure to do which is likely to expose the country to serious injury and loss akin to that of the 2008 Post Election Violence.

75. The IEBC reiterated that the application for Judicial Review herein was filed on 19th December 2016, which is outside the mandatory statutory timeline for commencement of Judicial Review of the Review Board's decision and that the same is therefore statute barred and otherwise overtaken by events as the Review Board's decision has not only become final and binding upon the parties but also the 1st Respondent has since signed a contract with the successful tenderer. It was averred that this Court's jurisdiction to hear and entertain an application for Judicial Review under the ***Public Procurement and Asset Disposal Act, 2015*** is limited to applications filed within the statutory timelines set by that statute and it is not proper in law or public policy for the honourable court to entertain an application filed in contravention of statute.

76. To the IEBC, an Application for the judicial Review of the decision of the Review Board to the High Court can only question the legal soundness of such decision and is not a medium for agitation of matters extraneous to that decision. To it, while the Application for Judicial Review fails to establish grounds to sustain orders in the nature of Judicial Review of the said decision by the High Court, the results of procurement proceedings by a procuring entity are not under the law amenable to an appeal or review by the High Court and in this connection the application for judicial review is actually an appeal disguised as an application for judicial review.

77. The IEBC further averred that the statutory statement filed by the Ex parte Applicant herein and specifically the Grounds on which Relief is sought and observe that the allegations of contravention of statute, illegality and unconstitutionality (all which I deny) are made against the IEBC and not against the Review Board. However, in an application for Judicial Review to the High Court it is the Review Board's decision that is under scrutiny and not the procurement outcome *per se*. The Applicant, it was contended is duty bound to demonstrate the manner in which the Review Board's decision or judgment qualifies for review. It was further averred that no grounds of an application for judicial review may be relied upon except the grounds and relief set out in the statutory statement accompanying the application for leave to apply for orders of judicial review.

78. The IEBC asserted that in the Application for Judicial Review of the Review Board's decision the irrationality, unreasonableness, bad faith and improper motive that is material and required to sustain an application for Judicial Review is that which is ascribable to the Review Board as the decision maker and not its subject bearing in mind the fact that the Review Board cannot legally usurp the power of a procuring entity and the honourable Court ought not act as an appellate Court.

79. The IEBC insisted that it has never acted irrationally, unreasonably in bad faith or with improper motive, but only in accordance with the law and the Constitution of Kenya 2010 hence it is wholly inappropriate to question its modus operandi and choice of procurement method through an application disguised as a Judicial Review from the decision of the Review Board. It was therefore averred that the Application for judicial review is an abuse of the process of Court and ill conceived.

80. According to the IEBC, the misconception of the Ex parte Applicant is that the General Election to be held on 8th August 2017 will be wholly electronic. The said election shall however be substantially manual in the sense that physical ballot papers are still required for the exercise. Election result declaration forms and Poll registers are still necessary in terms of providing records of the IEBC. It was averred that the goods subject to the procurement in point do meet the tender requirements and statutory standards and prescriptions.

81. The IEBC disclosed that the Voter Register currently in use is electronically generated using the Biometric Voter Registration (BVR) kits and that the the actual voting registers are the result of use of BVR which is used to capture the details of the voter. It was averred that the ***Elections Laws (Amendment) Act*** amended section 44 of the ***Elections Act*** establishing an integrated electronic electoral

system that enables biometric voter registration, electronic voter identification and electronic transmission of results. By section 44 (2) the IEBC is obligated to develop a policy on the progressive use of technology in the electoral process.

82. On behalf of the IEBC, it was submitted by its learned counsel, **Mr. Lubullelah**, that Parliament legislated the Independent Electoral and Boundaries Commission Act No. 9 of 2011 pursuant to Articles 82 (1) and 88 of the Kenya Constitution, 2010 to operationalize the Independent Electoral and Boundaries Commission within its powers and as an independent Commission under Article 249 (2) (b) of the Constitution of Kenya, 2010. The IEBC is therefore not subject to direction or control by any person or authority but is nevertheless always obligated to honour, respect, uphold and defend the Constitution and to comply with the law of Kenya within the said Constitutional framework. The IEBC is currently lawfully constituted and its decisions are legal and valid.

83. It was submitted that there are Commissioners of the IEBC properly in office, as they have not been replaced, while its Secretariat is vibrant in execution of the IEBC's mandate. Under the ***Public Procurement and Disposal Act, 2015*** the Chief Executive Officer is the Accounting Officer of the IEBC as a procuring entity.

84. According to learned counsel, Article 81 of the Constitution of Kenya, 2010 requires that the electoral system in Kenya complies with the principles of universal suffrage and fair representation and free and fair elections that are transparent and administered in an impartial, neutral efficient, accurate and accountable manner and conducted by an independent body. Further, Article 86 of the Constitution of Kenya, 2010 requires the 1st Respondent to ensure at every election that;

> (a) Whatever method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
>
> (b) The votes cast are counted, tabulated and results announced promptly by the Presiding Officer at each polling station;
>
> (c) The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer; and
>
> (d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

85. However, the Constitution of Kenya, 2010 does not prescribe the use of either manual or electronic electoral system and this is left to the IEBC's discretion subject to legislation. Pertinent to this is the ***Elections Act, 2011*** which makes provision for the conduct of elections and referenda and dispute resolution within that context.

86. It was averred that on matters of procurement of goods and services, the IEBC is obliged to observe Article 227 of the Constitution of Kenya, 2010 by procuring goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 5 of the ***Public Procurement and Asset Disposal Act, 2015*** is unequivocal that where there is any inconsistency between the Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services, the Act prevails.

87. It was noted that the application before the Court is not under Articles 22, 23 and 165(6) of the Constitution of Kenya, 2016 which are the Constitutional provisions under which orders of judicial review can be granted. The same however cannot be read into the application before Court without the risk of the Court descending into the arena of litigation. This does not of course mean that the Court is constrained not to apply Constitutional benchmarks as it is obligated to do in every case.

88. It was reiterated that all the prayers in the Notice of Motion except prayer (d) are directed towards the

IEBC. Those prayers must be subjected to the principles governing Judicial Review proceedings in order to determine whether the same are merited or are otherwise sustainable. The argument that the application is not in the nature of a review or appeal filed under the ***Public Procurement and Asset Disposal Act, 2015***, in the IEBC's view is designed to allow the Applicant to escape from the difficulties it faces in not complying with the provisions of Section 175 (1) of the ***Public Procurement and Asset Disposal Act, 2015***. The Notice of Motion is clearly indicated to be ***"In the matter of the public Procurement and Asset Disposal Act"*** and is invoked under ***"Order 53 of the Civil Procedure Rules and Section 8 of the Law Reform Act."*** These are the provisions under which the High Court's Supervisory jurisdiction is invoked. Prerogative Orders are issued in the name of the Republic. The Application herein is clearly brought in the name of the Republic and is properly intituled as required of an application for prerogative orders of judicial review. In the IEBC's view since the Applicant has adopted a procedure under the ***Public Procurement and Asset Disposal Act, 2016***, the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules*** in order to challenge the IEBC's procurement decision and the 2nd Respondent's judgment, the Applicant cannot therefore run away from its procedure of choice.

89. It was submitted that an application for *judicial review* under Articles 22, 23 and 165 (6) of the Kenya Constitution, 2010 is different from an application for *judicial review* under section 175 of the ***Public Procurement and Asset Disposal Act, 2015***. The jurisdiction exercised under the Constitution is quite apart from the jurisdiction exercised pursuant to statute and the ***Civil Procedure Rules***. Parties have a choice to approach the Court under the Constitutional provisions or under Order 53 of the ***Civil Procedure Rules***. As a matter of fact the application herein has nothing to do with ***Article 23 (f)*** or ***Article 165 (3) and (6)*** of the Constitution of Kenya, 2010 that give the High Court original jurisdiction to issue orders of judicial review and jurisdiction to issue such orders under its supervisory jurisdiction respectively. The Application does not even mention the above Articles of the Constitution either in its body or in its title. If there is any doubt about this the Statutory Statement and the subsequent Notice of Motion ought to be looked at and the Applicant cannot be allowed to amend its case through submissions and is bound by its application as filed in Court otherwise the Court would be acting outside its jurisdiction.

90. It was submitted that the exercise of the High Court's jurisdiction under Article 165 (3) (d) of the Constitution of Kenya, 2010 in respect of the interpretation of the Constitution, constitutional powers of state organs, or the constitutionality of any actions or any law are commenced under the ***Mutunga Rules - The Constitution of Kenya (protection of rights and fundamental Freedoms) Practice and Procedure Rules, 2013*** under which no leave of Court is required as a pre-condition for filing the necessary Petition or Application. Under these rules the Application is to be made by Petition disclosing inter alia the provisions of the Constitution violated or infringed and the reliefs sought. In this respect the IEBC relied on **Steven Nyaangi Onsomu & Another vs George Magotia & 7 Others [2014] eKLR** and & **Republic vs National Land Commission Ex parte Fidelity Commercial Bank J.R. No. 74 of 2016**.

91. Whereas the IEBC appreciated that the High Court has unlimited original jurisdiction in criminal and civil matters it submitted that the subject matter of the application before Court is neither criminal nor civil since judicial review proceedings are *sui generis.* The fact that the High Court has unlimited original jurisdiction in criminal and civil matters under the Constitution does not mean that the High Court can ignore its own rules of procedure or statutory timelines in respect of matters upon which it is called upon to adjudicate. In this case the High Court is not called upon to exercise any original jurisdiction, as the Court is not the first point of call for the parties now before it. The Court was therefore urged to decide the application on the basis of the ***Public Procurement and Assets Disposal Act 2015***, Order 53 of the ***Civil Procedure Rules*** and the common law principles upon which orders of judicial review are granted.

92. On the issue of jurisdiction, the IEBC relied on **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011** and **Owners and Masters of The Motor Vessel "Joey" vs Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008]1 EA 367** .

93. While appreciating that theHigh Court has supervisory jurisdiction by dint of Article 165 (6) of the Constitution of Kenya 2010 "*over subordinate courts and over any other person, body or authority exercising a judicial or quasi- judicial function but not over a superior Court*", the IEBC nevertheless

submitted that the jurisdiction to be exercised by the court is dependent upon the applicable law and the matter on which the court is called upon to determine so that whether the High Court has jurisdiction to hear a particular case is dependent upon not only the law but also the facts and circumstances of the case. This is because the general supervisory jurisdiction is not an open cheque for the court to indulge in the determination of any matter without reference to the facts and circumstances of the case. There is therefore an obvious difference between the jurisdiction to entertain judicial review under order 53 of the ***Civil Procedure Rules*** and jurisdiction to entertain an application for judicial review under Articles 22, 23, 159 and 165 of the Kenya Constitution, 2010. This is so because judicial authority is to be exercised subject only to the Constitution and the law. It was therefore submitted that the High Court is not only subject to the Constitution but also to the law which includes the decisions of the Supreme Court, which are binding upon it by dint of Article 163(7) of the Constitution. The law includes legislation or statutes as clearly set out in section 3 of the Judicature Act and judicial activism is not a ground or justification for the Court itself to disobey the law.

94. It was submitted that the Supreme Court of Kenya in **Communications Commission of Kenya -v- Royal Media Services Ltd [2014] eKLR** held that the Constitution of 2010 has elevated the process of Judicial Review to a pedestal that transcends the technicalities of common law and as a result all power of Judicial Review in Kenya is found in the Constitution which requires the Kenyan Courts to go further than ***Marbury -v- Madison*** in exercising its judicial review jurisdiction. Therefore it is no longer tenable to create a two-track system of judicial review one based on the constitution and the other on common law. A bolder finding should perhaps have gone further and said Order 53 of the ***Civil Procedure Rules*** and the common law principles that support judicial review remedies of Certiorari, Prohibition and Mandamus are no longer applicable in view of the supremacy of the Constitution and deemed to have been obliterated by the Constitution. This would have clarified that all judicial review applications must be made under the Constitution. This clarification is necessary in view of the provisions of Article 163 (7) of the Constitution of Kenya, 2010, which obliges all Courts to be bound by decisions of the Supreme Court.

95. To IEBC, there is no conflict between the provision of Order 53 of the ***Civil Procedure Rules*** and the Constitution of Kenya 2010 though if there was any inconsistency or contradiction the same would be resolved in favour of Constitutional provisions and principles. However, the court scorns at the regurgitation of provisions of the Constitution without setting out the required standard of exactitude, the manner in which such provisions of the Constitution have been infringed, if at all *(***Steven Nyarangi Onsomu & Another vs. George Magoha & 7 Others [2014] eKLR).** It was submitted that in this application the Articles of the Constitution cited are not relevant or helpful to the Applicant as the same have not been linked to the application and to the prayers sought therein.

96. It was contended that the ***Public Procurement and Asset Disposal Act, 2015*** in section 167 (1) thereof provided for the manner in which a procurement decision or proceedings may be challenged or questioned and from the said provision it is clear that administrative review is available only to the candidates or tenderers. The Applicant was however neither a candidate nor a tenderer in the subject procurement and it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes. Such parties like the Applicant have no locus before the Review Board. The IEBC relied on **Kimani Wanyoike v Electoral Commission & another [1995] eKLR** which held that where a statute establishes a mechanism or procedure for the challenge of any decision of a legal entity, that mechanism or procedure should be adhered to. In this case a challenge to the Procuring Entity's decision on matters of procurement are required to be settled by the Review Board established by an Act of Parliament pursuant to Article 227 (2) of the Constitution of Kenya, 2010.

97. It was submitted that the Applicant has no legitimate *locus standi* to challenge a procurement decision of the IEBC directly in High Court. Further the Ex-parte Applicant has no right of access to the Review Board in respect of procurement proceedings to which it was neither a candidate nor a tenderer by dint of section 167 of the ***Public Procurement and Asset Disposal Act, 2015***. The Review Board nevertheless included the Ex-Parte Applicant as a party to the review proceedings before it. The IEBC took issue with this Court's decision **Okiya Omutata & Aother vs. National Tansport Authority & 2 Others [2016] eKLR** and submitted that to hold that any person including those who have no *locus standi* has the right

to challenge a Procuring Entity's procurement decision through administrative review, can however do so through a judicial review application to the High Court, whether or not the same is disguised as a judicial review application in respect of the Review Board's decision under section 175 of the Public Procurement and Asset Disposal Act, 2015, makes nonsense of sections 167 and 175 of the ***Public Procurement and Asset Disposal Act, 2015*** and by extension Article 227 (2) of the Constitution of Kenya, 2010. It was submitted that there must be good policy reasons why Parliament legislated that only Candidates and tenderers have locus to challenge a procurement decision and only at the Review Board in the first instance.

98. The Court was urged to find as a fact that administrative review under section 167 of the ***Public Procurement and Asset Disposal Act, 2015*** is concerned with the decision or process of the Procuring Entity to the Review Board, while judicial review under section 175 of the ***Public Procurement and Asset Disposal Act, 2015*** is concerned with the decision or process of the Review Board to the High Court.

99. The IEBC asserted that since the Ex-Parte Applicant was made a party to the administrative review proceedings on its own application and was fully heard on the request for review, the Applicant is therefore not in the category of persons that can be said to be left remediless or otherwise condemned unheard and that the Judgment of the Review Board is binding against the Applicant as a party to the review proceedings.

100. While appreciating that a non-candidate or non-tenderer may access the High Court to question a decision of the Review Board, it was contended that he may not directly challenge the decision of the Procuring Entity and reference was made to section 175 (1) of the ***Public Procurement and Asset Disposal Act, 2015.***

101. The IEBC took issue with the position adopted by the ex parte applicant herein that it is not an aggrieved party and that section 175 (1) of the ***Public Procurement and Asset Disposal Act, 2015*** which is confined to the Applicant requesting for the review and the procuring Entity and/ or the successful bidder. This submission, according to IEBC ignores the provisions of section 169(d) of the ***Public Procurement and Asset Disposal Act, 2015***, which the Applicant had relied upon in its application to be enjoined in the review proceedings. In the IEBC's contention, the Applicant was not satisfied with the judgment of the Review Board and that is what constitutes the Applicant as an aggrieved party. It was argued that the provision gives the locus to apply for judicial review to aggrieved persons whether they were parties to the Administrative review or not and in this case the Applicant was a party to the Administrative review.

102. It was submitted that the Applicant having been made a party to the proceedings at the Review Board was heard and represented at the delivery of judgment on 28th November 2016, the Applicant knew or is in law presumed to have known that an application for judicial review of the decision of the Review Board must, under section 175 of the ***Public Procurement and Asset Disposal Act, 2015***, be filed within 14 days from the date of the Review Board's decision. Therefore as this application was on the face of it filed on 19th December 2016, which is well outside the timeline allowed by Statute, the Court cannot ignore express and mandatory provisions of statute in this case, section 175(1) of the ***Public Procurement and Asset Disposal Act, 2015***, so as to entertain an application, which is statute-barred as this would be to undermine the legislative authority of Parliament.

103. According to the IEBC, although in this case the applicant invokes both Constitutional provisions as well as Order 53 of the ***Civil Procedure Rules,*** the procedure adopted is nevertheless definitely under Order 53 of the ***Civil Procedure Rules*** as the vehicle of choice by the Applicant. While accepting that there are obvious cases where the jurisdiction of the court will be invoked as appreciated by this Curt's decision in **Republic vs. National Land Commission Ex parte Fidelity Commercial Bank J.R No. 74 of 2016;** ***Republic vs Kenya Power and Lighting Company Limited & Another 2013 [eKLR]*** which was cited with approval ***Republic vs National Land Commission*** [supra], according to the IEBC, on he authority of **Republic vs. National Land Commission, Ex Parte Fidelity Commercial Bank , JR NO. 74 of 2016,** where an application is brought under Order 53 Rule 4 (6) of the ***Civil Procedure Rules***, such

application can only be determined based on the grounds or reliefs sought as were set out on the statement accompanying the Chamber Summons application for leave to apply for orders of judicial review and cited **Republic vs. The public Procurement Administrative Review Board Ex-Parte Numerical machining Complex, JR No. 261 of 2015**.

104. It was submitted that whereas the Applicant alleges that the 1st Respondent has contravened the ***Election Laws (Amendment) Act 2016*** by refusing to recognize the system of elections under the Act, section 44 (7) (a) of the ***Elections Act*** as amended by the ***Election Laws (Amendment) act, 2016*** requires that for purposes of the next General Elections to be held on 8th August 2017 the amendment shall be restricted to the process of voter registration, identification of voters and result transmission. Accordingly, the above-mentioned amended provision does not require the use of electronic ballot papers with security features and code bars as suggested by the Applicant. IEBC confirmed that it intended to comply with the ***Elections Act*** as concerns the use of an integrated electronic system for voter registration, identification of voters and results transmission.

105. To IEBC, since the New ***Elections Laws (Amendment) Act*** envisages a manual backup system complimentary to the electronic system for identification and transmission of results, the results declaration forms under the tender have no inconsistency with section 14 (1C) of the ***Election Laws (Amendment) 2016*** and even where an electronic system of elections is used there is need for the IEBC to secure and maintain records of elections, hence results declaration forms are not irrelevant to that system of elections. It was contended that poll registers can be maintained using BVR technology, which is an electronic technology while the contact being a framework contact means details of specification will be given where and as when required.

106. It was submitted that since the ***Election Laws (Amendment) Act, 2015*** came into force on 4th October 2016 almost a month after the closing date of Tender No. IEBC/01/2016-2017 for the supply and delivery of ballot papers for Elections, Election result declaration Forms and poll registers on 7th September 2016, the tender could not have breached a law that did not exist when it was advertised, closed, processed or evaluated and awarded. According to IEBC, the ***Election Laws (Amendment) Act*** did not amend the ***Public Procurement and Asset Disposal Act, 2015***. It was averred that tender was awarded to the 1st Interested Party and a contract signed on the 30th October 2016. The Accounting officer's power under section 63(2) of the PPADA cannot be validly exercised after signing of the contract and any attempt at doing so will attract demands for damages from the 1st interested Party.

107. It was the IEBC's case that it can only be said to have acted unlawfully, illegally or in contravention of the ***Election Laws (Amendment) Act*** based on what it will have done or failed to do in the general elections of 8th August 2017. As of now the Applicant's allegations are speculative and without factual basis as the IEBC is committed to acting within the law in fulfillment of its Constitutional mandate.

108. In IEBC's view, it is not sufficient for an applicant to merely cite Constitutional provisions in the abstract in the hope that the Court will clasp upon the same in allowing the application. A look at the complaint in para.22 of the Statement confirms that the same is speculative, anticipatory, futuristic and without factual basis hence the same should be dismissed or disregarded.

109. As far as Article 86 of the Constitution is concerned it was submitted that the same sets out constitutional principles but does not obligate the IEBC to abide by any particular method of voting provided that the same meets the principles enunciated in the Constitutional provision; the IEBC has a discretion subject to any legislation in this regard. As far as Article 138 (2) of the Kenya Constitution is concerned it is clear that the Constitution requires that if two or more candidates for president are nominated, an election shall be held in each constituency. There is no material or persuasive evidence placed before the court showing that the IEBC will not comply with Article 138 (2) of the Constitution. In fact *prima facie* the process of Tender No. IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election results declaration forms and poll registers is evidence of the IEBC's continued preparation for elections in compliance with Article 138 (2) of the Constitution. There is nothing to show that the IEBC is unwilling or unable to carry out the said elections in each constituency.

As for Article 227 of the Constitution of Kenya 2010, it was submitted that constitutional obligation is created for state organs such as the 1st Respondent, when contracting for goods and services, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective and that the Public Procurement and Asset Disposal Act 2015 was legislated pursuant to Article 227 (2) of the Constitution.

110. According to the IEBC, whereas the Applicant argues that the composition of 1st Respondent is unconstitutional and illegal in the absence of Commissioners, this is not one of the grounds on which relief is sought in the statutory statement and the applicant acknowledged the fact that the Applicant can't argue its case on the basis of grounds not contained in its statutory statement in its written submissions and reliance was placed on this Court's decision in **Republic vs National Land Commission , Ex Parte Fidelity Commercial Bank , JR NO. 74 of 2016.**

111. With respect to the contention that the award of tender was under a legal regime that is otiose, it was the IEBC's case that *prima facie* the award of tender was under the ***Public Procurement and Asset Disposal Act, 2015*** and Article 227 of the Constitution none of which are so to speak otiose. The ***Elections Act*** is not a procurement statute and even if it was then it must conform to the ***Public Procurement and Asset Disposal Act, 2015*** on matters of procurement by dint of Section 5 of the ***Public Procurement and Asset Disposal Act, 2015***. It was therefore submitted that there is no legal vacuum in the 1st Respondent. The appointment of commissioners of the 1st Respondent is beyond the scope of judicial review of the Review Board's decision. To the IEBC, the 1st Respondent's Commissioners were validly in office until and unless they are validly replaced. There has been no legal determination of the unsuitability or lack of integrity on the part of any Commissioners or members of staff of the 1st Respondent. In any event the composition of the 1st Respondent is not one of the grounds upon which relief is sought in the statutory statement. Whether there is a proper and lawful commission is not a matter that can be properly canvassed in the present application as framed and presented to the Court.

112. The applicant was accused of not having detailed or disclosed any legitimate complaints that the IEBC ignored or in which manner this constitutes bad faith or improper motive. The Honourable Court was invited to note that the 1st Respondent cannot accept an invitation to delve into matters of politics and its refusal to do so is neither evidence of bad faith nor improper motive.

113. It was submitted that 1st Respondent has not disregarded or disobeyed any law and while it is one of the 1st Respondent' responsibilities to carry out voter education this will be done within the existing timetable for the general elections and not according to the dictates of the Applicant. In IEBC's view, there was no material placed before the Court to suggest that the IEBC acted or intended to act arbitrarily, capriciously, oppressively or unfairly. The 1st Respondent's preparations for the general elections are what are expected in an open democratic country such as Kenya.

114. With respect to violation of legitimate expectation it was contended that unless one has some warped thinking, procurement of the goods in the said tender must be seen as a step in meeting the citizen's expectations for free and fair elections. The performance of the 1st Respondent should not be prejudged ahead of the general elections of 8th August 2017. It was further contended that the honourable Court is obligated to enquire whether **Tender No. IEBC/01/2016-2017** complied with Article 227 of the Constitution in terms of fairness, equitability, transparency, competitiveness and cost effectiveness. Evidence before the court, the IEBC confirmed that the said tender was an open framework tender openly and publicly advertised and undertaken in compliance with the ***Public Procurement and Asset Disposal Act, 2015*** and the ***Public Procurement Regulations 2006.***

115. According to the IEBC, in summary really the above are the matters to be considered in a Judicial Review application under Order 53 Rule 4 of the ***Civil Procedure Rules***. The grounds upon which the court exercises its judicial review jurisdiction are incapable of judicial listing and relied on **Bahajj Holdings Ltd vs. Abdo Mohammed Bahajj & Company Limited & Ano. Civil. Appl. No. Nai 97 of 1998** and **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Anor [2016]**

116. It was stated that the 2nd Respondent did not commit an error of law or make any mistake by commission or omission, which goes to its jurisdiction. To the contrary, the 2nd Respondent's judgment was well reasoned, rational and made within the 2nd Respondent's jurisdiction and did not exceed the same.

117. The Court's powers, to the IEBC are constitutional, statutory and wide but the Court may not act as a Court of Appeal when exercising its supervisory jurisdiction of judicial review and reference was made to **Republic vs. The public Procurement Administrative Review Board Ex-Parte Numerical Machining Complex, JR No. 261 of 2015** where this Court at para. 68 that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself and that a judicial review Court does not act as a Court of Appeal hence whereas the Court may interrogate the processes in light of such orders as were sought in the Request for Review, it can do no more and reliance was placed on **Chief Constable of North Wales vs. Evans [1982] 1 WLR 1155.**

118. It was urged that the Court is not entitled to substitute its own view for that of the Review Board on Judicial Review in which case the Court finds fault with the Review Board's decision in the same manner as it may do on an appeal. To IEBC, issues in respect of the voting system or the technology to be employed or applied by it, in fulfilment of its constitutional mandate, is an issue that is outside the jurisdiction of the Review Board. Since the ***Election laws (Amendment) Act*** did not amend the ***Public Procurement and Asset Disposal Act***, IEBC opined that it cannot be validly argued that the jurisdiction of the Review Board extends to applying and enforcing non- procurement laws such as the Election laws when in fact under the ***Elections Act*** the Election Court is the High Court and appeals therefrom lie to the Court of Appeal. Such an argument would be an invitation for the Review Board to usurp the powers of the High Court and thereby act in excess of its jurisdiction. It was also submitted that the Review Board would be acting outside its jurisdiction and in contravention of sections 90 and 91 of the ***Public Procurement and Asset Disposal Act, 2015*** if it held itself out as directing an independent Commission such as the 1st Respondent on what and when to procure or the method of procurement to be used.

119. It was however argued that in this case the Court may only consider the orders sought by the 2nd interested party in the Request for Review and there is nothing to show that the IEBC has contravened or threatens to contravene the Constitution of Kenya 2010. There is nothing to constitutionally impeach the tender document. The 2nd interested party requested for clarifications, which were shown to be unnecessary and intended only to delay the procurement and perhaps to set the stage for a legal challenge before the Review Board. In this connection the honourable Court needs to examine the 2nd Interested Party's submissions before the Review Board. Nevertheless the IEBC responded to the requests for clarification of the tender in writing as by law required.

120. The IEBC submitted that the Court is required to exercise caution in the exercise of its jurisdiction under Article 165 of the Constitution to reject the application for Judicial Review for lack of proof and in the public interest. It averred that the General Elections are by Articles 101 (1), 136, 177, & 180 to be held on 8th August 2017 and time is not on the side of the IEBC to prepare effectively for the elections. In support of the submissions relating to public interest, the IEBC relied on **Konway vs. Limmer [1968] 1 All ER 874** and submitted that in this case failure to hold the general elections on 8th August 2017 is an injury so grave that the same cannot be risked by granting the orders sought and made reference to the events of the Post -Election Violence of 2008. According to the IEBC, since section 44 (4) of the ***Election Laws (Amendment) Act 2016*** obligates it to procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections, numerous Court challenges will impede it from carrying out its Constitutional mandate. Whereas, it appreciated that it is obliged to obey any court orders for stoppage of procurements pending the Court's determination, it lamented that any resulting delays or failure to meet constitutional and statutory timelines cannot be reasonably blamed on it when it is just obeying the law. It was argued that the Court also owes Kenyans a duty to ensure that unnecessary obstacles are not permitted to prevent the IEBC from preparing and carrying out the general elections of 8th August 2017. The Court is requested to consider what is likely to

happen if the 1st Respondent does not conduct the general elections on 8th August 2017.

121. It must also be remembered that the Court has the ultimate discretion of granting or refusing to grant remedies of Judicial Review to a successful applicant on grounds of Public Interest (see ***Republic -V- Judicial Service Commission Ex-Parte Pareno [2004]*** **KLR** at 219). We therefore submit with humility that the honourable Court declines to grant the orders sought additionally on the considerations of public interest.

2nd Respondent's Case

122. On the part of the 2nd Respondent, it was submitted, through its learned counsel **Mr. Bitta**, based on various authorities that whereas an application for judicial review is limited to the grounds set out in the statement of facts pursuant to Order 53 rule 4(1) of the ***Civil Procedure Rules***, in this case there were no grounds upon which the ex parte applicant was challenging the 2nd Respondent's decision hence the prayer against the 2nd Respondent had no basis.

123. It was further submitted that Parliament has provided how the 2nd Respondent's decision can be challenged by judicial review or appeal under section 175(1) of the ***Public Procurement and Asset Disposal Act*** which further provides that the failure to move the court within the prescribed time makes the 2nd Respondents decision final and binding. In this case it was however contended that the application was brought outside the stipulated period hence the application ought to be dismissed with costs.

1st Interested Party's Case

124. The application was opposed by the 1st interested party, **Al Ghurair Print and Publishing Company Limited,** through its learned counsel **Mr. Kamau** and **Mr. Kibathi**.

125. On the part of the 1st Interested Party's case it was averred that it is a printing and publishing firm with expertise in digital printing, offset printing, braille embossing, security documents printing, hologram printing and all types of print finishing options. It disclosed that on or about 17th August, 2016, the IEBC advertised the Tender referenced Tender No IEBC/01/2016-2017 for supply and Delivery of Ballot Papers for Elections, Election Result Declaration Forms and Poll Registers (hereinafter "the materials") and in the said tender, the IEBC wished to procure a supplier for the materials and the successful bidder was to subsequently be awarded a framework contract on an "as and when required" basis for a period of two years, between 2016 and 2018. Having studied the Tender Document and having established that it had the requisite capacity to undertake the required services, the 1st interested party elected to participate in the tendering process by way of obtaining the tender document, filling the same as per the terms of the tender and submitting its bid as required.

126. It was averred that upon the evaluation of the submitted tenders, the 1st interested party received a Notification of Award Letter dated 18th October, 2016 from the IEBC informing it that its bid had been accepted and requiring it to thereafter accept the award within fourteen (14) days. It was however thereafter on 7th November, 2016 notified by the Review Board that the 2nd interested party herein had a filed a Request for Review (PPARB Application No. 93 of 2016) before the Board which request was heard and by a ruling rendered on 30th November, 2016 dismissed.

127. Thereafter, the IEBC and the 1st Interested Party therefore proceeded as required under section 135 of the ***Public Procurement and Asset Disposal Act*** to create a contract for purposes of implementation of the subject tender by executing a formal contract on 30th November, 2016. It was the 1st interested party's case that the specifications for the materials under procurement met the applicable legal requirements, and more specifically the relevant provisions of the Constitution of Kenya, the ***Elections Act No. 24 of 2011***, the ***Elections Laws (Amendment) Act No. 36 of 2016*** and the applicable Regulations in that the said materials are intended to fulfil specific legal requirements within the electoral processes. It

was contended that contrary to the assertions by the applicant, the procurement as undertaken does not offend the provisions of ***Election Laws (Amendment) Act of 2016***. In its view, the procured materials are an absolute necessity to the conduct of election and their applicability and usage is still valid within the framework of existing legislation. The 1st interested party asserted that the coming into effect of the ***Elections Laws (Amendment) Act*** of 2016 did not have the effect of nullifying the usage of the materials under the subject Tender and that the employment of technology under the said Act is intended to be used jointly with the materials under procurement and in that way, there is no chance of contradiction, confusion or violation of the law as alluded to by the applicant. The 1st interested party contended that the employment of the materials for the specified purposes within the various electoral activities does not in any way contradict the provisions of the said Act and more specifically, does not offend employment of electronic technology within various electoral activities but instead compliments the quality of election process by ensuring that the same is simple, accurate, verifiable, secure, accountable and transparent.

128. The 1st interested party averred that contrary to the assertions by the applicant, the ballot papers specified under the subject Tender fully met the required legal standards in that they contain the requisite features and are fit for electoral processes and contain among others security features and such other features to ensure accuracy, transparency and accountability. Without prejudice to the foregoing, it is important to note that there is no legal requirement for bar coding and other features requiring integration with electronic systems employed in electoral processes as alleged in the application. To, the 1st interested party, it has the capacity to incorporate a wide range of security features as may be instructed and contended that up to this point no one has questioned the its capacity to deliver its contractual obligations as set out under the framework contract executed with the IEBC which contract is valid and binding for all intents and purposes. In this respect the 1st interested party relied on cause 7.15.2 (ii) of the Special Conditions of Contract it for the provision that the *"agreement cannot under any circumstances be terminated for convenience"*. According to the interested party, it will without doubt pursue redress for any improper termination to safeguard its interests and the consequences of such termination will also interfere with the legally set elections timelines and occasion hefty losses to the Kenyan taxpayer.

129. It was contended that since the IEBC and the 1st Interested Party have already signed a contract based on the orders of the Review Board dismissing the request for review lodged by the 2nd Interested Party, the granting of the orders sought will result in the termination of this contract which will gravely prejudice the 1st Interested Party's legitimate expectations thereby subjecting it to extensive financial losses.

130. According to the 1st interested party, the application as filed has failed to disclose any complaint with regard to the decision making process of the 2nd Respondent but focuses on the merits and demerits of the procurement decisions of the IEBC with regard to the purchase of the materials under the subject tender. According to the 1st interested party the application failed to meet the requisite threshold for consideration by the Court for purposes of judicial review of the decision by the 2nd respondent and granting the orders as prayed in the application. The 1st interested party asserted that by its very nature the IEBC is an independent constitutional commission which must be allowed to execute its constitutional mandate without undue and extraneous interferences and that the present application is a misplaced attempt by the ex parte applicant to use the court process to prescribe how the IEBC ought to go about its constitutional duties.

131. It was reiterated that the subject contract between the IEBC and the 1st interested party is a framework contract by virtue of Clause B thereof whereby the various materials are to be supplied on "as and when required basis" for a period of two (2) years. As such, the IEBC retains substantial discretion as to which materials are to be supplied at what point meaning that the IEBC is at liberty to only place orders for the materials which are strictly required in electoral processes.

132. It was contended that the subject application is irretrievably having been filed on 19th December, 2016 while the prescribed time for filing judicial review proceedings lapsed on 13th December, 2016 and should be therefore not be entertained by the court.

133. The 1st interested party asserted that the applicant's complaints with regard to the usage of materials under procurement alongside the electronic systems to be employed in the electoral processes have been extinguished having been comprehensively addressed by ***Election Laws (amendments) Act of 2017*** on the basis of Article 28 of the Constitution.

Determination

134. I have considered the issues raised in this application. Although the parties in their submissions raised several issues, it is my view that the matter before this Court is whether the award Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers by the IEBC to **Al Ghurair Print and Publishing Company Limited** of Dubai was proper.

135. The parties however, and in my view unnecessarily so, bombarded this Court with such issues as the constitutionality and legality of Regulations 79 and 82 as being inconsistent with ***Elections Act, 2011,*** the Constitution, and the ***Election Laws (Amendment) Act 2016.***

136. That judicial review now has constitutional underpinning is not in doubt. This is necessarily so by the enactment of Article 47 of the Constitution which has elevated the right to fair administrative action as one of the constitutional rights under our Bill of Rights. It is therefore clear that the remedy of judicial review is not merely a common law development or creature. Nor is it just a statutory relief. It is a constitutional remedy. This therefore means that the demarcations between what were formerly considered purely judicial review reliefs and constitutional ones have become blurred. A violation of the principles of the constitution itself is therefore a ground for granting judicial review relief in judicial review applications without necessarily filing a constitutional petition. Under Article 23 of the current Constitution that demarcation has been blurred and in granting remedies in judicial review applications constitutional principles clearly play a crucial part therein. Judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review must be seen in our context. This is my understanding of the decision of **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, it was held that:

> **"Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness."**

137. That judicial review is a constitutional relief has been appreciated in other jurisdiction with similar constitutional framework. Dealing with the issue whether constitutional principles apply to judicial review, the South African Constitutional Court (**Chalkalson, P**) expressed itself on the issue in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)** at para 33 as follows:

> **"The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law**

principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

138. This was the position adopted by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

139. It therefore follows that the the constitutional principles decreed under Article 10 of our Constitution must similarly inform the manner in which judicial review jurisdiction is to be exercised. To attempt to distinguish judicial review under Article 23 of the Constitution from the same jurisdiction under the ***Law Reform Act***, the ***Fair Administrative Action Act*** and Order 53 of the ***Civil Procedure Rules*** is in my view a distinction without a difference. The Constitution itself enjoins this Court in Article Article 20(3)(a) of the Constitution to develop the law to the extent that it does not give effect to a right or fundamental freedom. Therefore the provisions of ***Law Reform Act***, the ***Fair Administrative Action Act*** and Order 53 of the ***Civil Procedure Rules*** must be developed where a strict interpretation thereof does not give effect to a right or fundamental freedom.

140. This however does not mean that the judicial review jurisdiction has taken the shape of an amoeba i.e. that it is shapeless or formless. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

141. The foregoing position reflects the traditional jurisprudence on judicial review. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from

the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

142. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

143. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
>
> **56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or**

make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

144. In my view whereas the Constitution is incremental in its language, care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the *Law Reform Act* and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include a purely merit review which ought to be reserved for the appellate tribunals.

145. I must however appreciate the development of judicial review grounds by consideration of such factors as proportionality and unreasonableness has introduced some element of subjectivity and merit consideration in judicial review proceedings, at least to a limited extent. This Court is however of the view that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In our view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. In other words, the courts will only interfere with the decision of a public authority if it is outside the band of reasonableness.

146. There was a discourse on the extent to which the existence of alternative remedies affects judicial review applications. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less

appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

147. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

148. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. However a useful guide as to whether the existence of alternative remedy precludes a party from seeking judicial review orders was given by the House of Lords in **R vs. Inland Revenue Commissioners, ex parte Mead and Another [1993] All ER** where it was held that:

"The fact that there were alternative remedies in the magistrate's court or the crown court in respect of some matters, did not prevent direct access to the High Court if those remedies did not cover the whole ambit of the jurisdiction in judicial review."

149. Therefore as was by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004**, where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court while citing **A.G vs Ramanoop** stated that:

"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights."

150. As was held by the Court of Appeal in **Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010**:

> **"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge."**

151. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In my view, it would not be fair, convenient or conducive to the proper administration of justice to require a litigant to split his case into two or more causes and file them before different Tribunals when the matter can be dealt with by one Tribunal. In my view the litigant in such circumstances ought to commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought and if it turns out that that Tribunal is the High Court an objection as to the availability of alternative remedy ought not to be sustained.

152. However where the dispute false squarely within the jurisdiction of an alternative Tribunal I agree that the High Court ought not to readily entertain the matter. To do so on occasions has the effect of depriving the litigants of a wrung in the dispute resolution system since in most cases, the determinations of the inferior tribunals are subject to the supervision by the High Court. It is in this context that I understand the decision in **Constitutional Petition Number 359 of 2013 - Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

153. I, also associate myself with **Majanja**, **J**'s his views expressed in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights.

154. That brings me to the jurisdiction of the High Court. In matters of jurisdiction of superior courts, it is my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,**where it was held that:

> **"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."**

155. I associate myself with the position adopted by **Nyamu, J** (as he then was) in **Republic vs. Public**

Procurement Administrative Review Board & Another Ex Parte Selex SistemiIntegrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 to the effect that:

> **"The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."**

156. That the Court's jurisdiction can be restricted by legislation is not in doubt. This in my view is expressed in Article 160(1) of the Constitution that:

> ***In the exercise of judicial authority, the judiciary as constituted under Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.***

157. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

158. However over time there are principles which have been developed by the Courts in determining when the ouster clauses ought to be applied. The starting point in my view in the decision of **Mulenga, JSC** in the Supreme Court of Uganda case in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** in which the learned Judge expressed himself as follows:

> **"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."**

159. It was in the same spirit that **Biron, J** in **Mtenga vs. University of Dar-Es-Salaam, Dar-Es-Salaam HCCC No. 39 of 1971** opined that:

> **"It is trite to observe that a court is, and to has to be for the protection of the public, jealous of its jurisdiction, and will not lightly find its jurisdiction ousted. The legislature may, and often does, far too often, oust the jurisdiction of the Court in certain matters, but for the court to find that the Legislature has ousted its jurisdiction, the Legislature must so state in no uncertain and in most unequivocal terms."**

160. In my view, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In other words where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable.

161. This position was appreciated by the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109** where it pronounced itself as follows:

> **"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is the court's plain duty to give the words of an Act their proper meaning."**

162. Under Article 48 of the Constitution the State is enjoined to ensure access to justice for all persons. Under Article 20(3) and (4) of the Constitution this Court in applying any provision of the Bill of Rights under which Article 47 falls, is enjoined to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In so doing the Court is constitutionally obliged to promote the spirit, purport and objects of the Bill of Rights. Under Article 259 of the Constitution, some of the tools of the interpretation of the Constitution are that it must be interpreted in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights and permits the development of the law. In my view, this is what informed the decision of **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that:

> **"Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, 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."**

163. In **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57** the Court of Appeal expressed itself as follows:

> **"The law 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."**

See **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.**

164. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

165. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of

the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

166. In this case, it is not in doubt that the ex parte applicant herein was a party to the proceedings before the Review Board. The Board however found that:

> **" in matters of election and whether the provisions of the Elections Act and the Election Laws (Amendment) Act 2016, it is only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with jurisdiction to consider such matters. The Board on the other hand is only vested with powers to deal with procurement disputes although in doing so the Board is bound to consider provisions of the Constitution and only other statute in so far as the same relates to procurement".**

167. In its statutory statement, the applicant identified the following as the grounds upon which the application was based:

> **1) The First Respondent has acted unlawfully and illegally and in contravention of the Election Laws (Amendment) Act 2016 by refusing to recognize the system of elections under the Act and in particular the integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.**
>
> **2) The specification of result declaration forms as awarded are not in conformity with the prescribed form of tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre as envisaged and contemplated under section 14(1C) of the Election Laws (Amendment) Act and which has synergy and congruence with the use of technology.**
>
> **3) The specification of the poll registers as awarded are illegal and irregular and do not conform with the description of the Register of Voters as stipulated under the Election Laws (Amendment) Act 2016 and will lack synergy and congruence with the use of technology for the preparation, publication and maintenance of the Register of Voters and in particular as relates to sections 2, 4, 5, 6, 7, 17 and 26 of the Election Laws (Amendment) Act 2016.**
>
> **4) The specifications of the ballot papers do not include security features and code bars consistent with the technology or devices to be used thus contravening the statutory requirements of accuracy, verifiability, accountability and transparency, and to that extent, may not be consistent with the integrated electronic electoral system provided in section 17 of the Election Laws (Amendment) Act 2016.**
>
> **5) The items, documents or materials requisitioned by the First Respondent from the second Respondent cannot meet the conditions under sections 14(1C), 17(3) and (4) of the Election Laws (Amendment) Act 2016,**
>
> > ***a) transparent disposal of information and communication technology assets and systems;***
> >
> > ***b) data storage and information security;***
> >
> > ***c) data retention and disposal; and***
> >
> > ***d) transmission of election results and declaration forms to the High Court.***
>
> **6) There are no regulations in place for the establishment of an integrated electronic system,**

the use of technology and the procurement of technology necessary for the conduct of general election and for the examination, verification and deployment of technology required under section 17 of the Election Laws (Amendment) Act 2016.

7) Political parties have not been consulted in making regulations under section 17(5) of the Election Laws (Amendment) Act 2016.

8) Although the award in respect of Tender Number IEBC/01/2016-2017 is described as or presumed to be a framework contract its specifications or variations thereof cannot achieve the objects of the envisaged regulations within the structure of an integrated electronic electoral system.

9) The First Respondent has not established a technical committee required under section 17(8) of the Election Laws (Amendment) Act 2016.

10) The First Respondent has contravened the general principles for the electoral system and process as set out in Part 1 of Chapter Seven of the Constitution of Kenya including the principles of free and fair elections that promote and achieve transparency, impartiality, neutrality, efficiency, accuracy and accountability.

11) The First Respondent is in violation of Article 86 of the Constitution of Kenya which requires that;

> ***a. the method of voting is simple, verifiable, accurate, secure, accountable and transparent;***
>
> ***b. votes cast are counted, tabulated and results announced promptly by the presiding officer at each polling station.***
>
> ***c. The results from the polling stations are openly and accurately collated and promptly announced by the returning officer.***
>
> ***d. Appropriate structures and mechanism to eliminate electoral malpractice are put in place, including the keeping of the election materials.***

12) The First Respondent has not and will not hold the presidential election in each constituency in accordance with the procedure pronounced in Article 138(2) of the Constitution of Kenya.

13) The First Respondent has not undertaken the procurement in accordance with Article 227(1) of the Constitution of Kenya and the provisions of the Public Procurement and Asset Disposal Act 2015.

14) The award of Tender Number IEBC/01/2016 – 2017 is for cancellation as the same has been overtaken by operation of law, substantial technological change and material governance issues have been detected as stipulated in section 63 of the Public Procurement and Asset Disposal Act 2015.

15) The conduct of the First Respondent is irrational and unreasonable as the First Respondent has insisted on the award under a legal regime which is otiose and a nullity by dint of the Election Laws (Amendment) Act 2016 which repealed and amended certain provisions of the Elections Act.

16) The award will entail an expenditure of more than Kshs. 2.5 billion and the exercise and process necessitates prudence and onerous responsibility in committing public revenue and resources.

17) The decisions in respect of Tender Number IEBC/01/2016 – 2017 is and continues to be in the hands of retired Commissioners who do not qualify to make such decisions as the legality and constitutionality of their being in office and operations are questionable and their conduct elicited public outcry and opprobrium resulting in their removal from office.

18) The First Respondent has exhibited bad faith and improper motive in dismissing legitimate complaints raised by stakeholders including political parties and in particular those in the opposition.

19) The First Respondent through the Chief Executive Officer has made pronouncements to the effect that the implementation and use of technology is not an achievable goal and the First Respondent is carrying out its activities in defiance of the Election Laws (Amendment) Act.

20) It is irrational and unreasonable to let members of the First Respondent (IEBC) and its staff make preparations for and conduct elections in circumstances where their suitability and integrity have been impugned and a unanimous resolution made in parliament for their removal and/or with the support of the President of the Republic of Kenya and major party coalitions inside and outside parliament.

21) The First Respondent has disregarded the Elections Laws (Amendment) Act 2016 and failed to consult the stakeholders including political parties on a matter which has a direct impact on their existence and operations.

22) The First Respondent has not allowed public participation nor carried out civic education to educate members of the public on the establishment of an integrated electronic electoral system and its impact on the activities of the First Respondent before or after 4th October 2016.

23) The First Respondent's conduct is capricious, arbitrary, oppressive and unfair and cannot be justified in an open democratic society.

24) The decision of the First Applicant violates the legitimate expectations of the Applicant and members of the public.

25) The Applicant's legitimate expectation that the conduct of the general elections in 2017 or any other election will be free and fair and in accordance with the law has been and is being frustrated and denigrated.

26) The Applicant's legitimate expectation that the retired Commissioners whose conduct has been impugned will not be involved or participate in the preparation and conduct of the elections and in the management of the affairs of the First Respondent has been violated.

27) The Applicant's legitimate expectation that the new enactment of the Election Laws (Amendment) Act will generate public confidence in the preparation and conduct of the general elections to be held in 2017 has been violated.

168. Although the Respondents contended that the *ex parte* applicant did no expressly raise the issue of the composition of the Commission in its Statement it is clear that one of the grounds was that:

> ***The decisions in respect of Tender Number IEBC/01/2016 – 2017 is and continues to be in the hands of retired Commissioners who do not qualify to make such decisions as the legality and constitutionality of their being in office and operations are questionable and their conduct elicited public outcry and opprobrium resulting in their removal from office.***

169. A holistic consideration of the grounds in the statement clearly show that in these proceedings the

dispute concern what the Review Board termed "***matters of election and…the provisions of the Elections Act and the Election Laws (Amendment) Act 2016"*** which matters the Board found rightly in my view ***"only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with jurisdiction to consider."*** The IEBC itself has adopted the same position and has stated that issues in respect of the voting system or the technology to be employed or applied by it in fulfilment of its constitutional mandate is an issue that is outside the jurisdiction of the Review Board. In fact the IEBC was even more emphatic that the jurisdiction of the Review Board does not extend to applying and enforcing non- procurement laws such as the Election laws when in fact under the ***Elections Act*** the Election Court is the High Court and appeals therefrom lie to the Court of Appeal. Such an argument, it asserted, would be an invitation for the Review Board to usurp the powers of the High Court and thereby act in excess of its jurisdiction. Further the Review Board would be acting outside its jurisdiction and in contravention of sections 90 and 91 of the ***Public Procurement and Asset Disposal Act, 2015*** if it held itself out as directing an independent Commission such as the IEBC on what and when to procure or the method of procurement to be used.

170. The applicant has made it clear that it is not questioning the decision of the Review Board in these proceedings and that in fact it agreed with the finding of the Board with regard to the said issue. The applicant was however faulted, and rightly too, in my view for seeking prayer (4) in the Motion and joining the Review Board to these proceedings. That irregularity, it is my view only amounts to misjoinder and is not fatal to these proceedings. For avoidance of doubt however and in light of the applicant's concession the orders sought against the Review Board cannot be granted.

171. In contending that this Court has no jurisdiction, the Respondents relied on section 175 of the ***Public Procurement and Asset Disposal Act*** which provides that:

> ***A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.***

172. Since the Board did not make a decision with respect to the issues raised before me in these proceedings and could not do so, it is my view that the ex parte applicant cannot be termed as a "person aggrieved" in order to warrant it invoking the provisions of section 175 aforesaid. It follows that the fourteen days period stipulated under the said section could not apply to it.

173. With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the ***Public Procurement and Asset Disposal Act, 2015*** administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein have no locus to commence proceedings before the Review Board.

174. This does not however mean that a person aggrieved by the action of the Procuring Entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 174 of the ***Public Procurement and Asset Disposal Act*** which provides as follows:

> ***The right to request a review under this Part is in addition to any other legal remedy a person may have.***

175. In my view a person who would otherwise be locked out from invoking the provisions of the ***Public Procurement and Asset Disposal Act*** is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by this Court in **Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR** where the Court expressed itself as hereunder:

"…any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights."

176. It is not in doubt that one of the available remedies for challenging a decisions made by the IEBC is to apply for judicial review which is what the ex parte applicant sought in these proceedings.

177. It is therefore my view and I hold that these proceedings cannot be terminated on the basis of the availability of alternative remedies or want of jurisdiction on the part of this Court.

178. It was contended that the tender the subject of these proceedings was awarded at a time when the IEBC was not properly constituted. It was averred, and this was not disputed that the President of the Republic of Kenya declared the vacancies of the offices of the Chairperson and members of the Commission on 5th October 2016 and published a Gazette Notice to that effect on 6th October 2016 through Gazette Notice No 8113 contained in Special Issue of the Kenya Gazette Vol. CXVIII – No. 121. The President then appointed a Selection Panel consisting of nine members for purposes of selecting nominees for appointment of Chairperson and members of the Independent Electoral and Boundaries Commission which appointments were made on 10th October 2016 and published in a Special Issue of the Kenya Gazette, Vol CXVIII – No 124 through Gazette Notice No. 8312.

179. However, earlier on 17th August 2016 the IEBC had invited tenders through Tender Ref No: IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election results declaration forms and poll registers which tender was finally awarded to **Al Ghurair Printing and Publishing Company Limited**, the 1st Interested Party herein. **Paarl Media (Pty) Limited** the 2nd Interested Party made a request for review in Application No 93 of 7th November 2016 to the Public Procurement Administrative Review Board against the IEBC as the procuring entity and on 28th November, 2016, the Board made its decision. The IEBC has however maintained that it signed the contract with the 1st Interested Party on 30th November 2016.

180. It is therefore clear that at the time the contract was signed the position of the Chairperson and the members of the Commission had already been declared vacant and the process of recruitment of new Chairperson and the Commissioners was underway. It has however been contended by IEBC that there was no legal vacuum in the Commission as the Commissioners were validly in office until and unless they were validly replaced. To the Respondents there was no legal determination of the unsuitability or lack of integrity on the part of any Commissioners or members of staff of the Commission.

181. In **Hon. Gerald Kafureeka Karuhanga vs. Attorney General – Petition No. 0039 of 2013** the Constitutional Court of Uganda (**Justice Professor L. Ekirikubinza)** stated:

"I am inclined to the arguments of the Petitioner. Article 142 explicitly refers to posts of Justices of the Supreme Court, the Court of Appeal and Judges of the High Court as posts which can be held in Acting Capacity after an individual has vacated office as a result of the mandatory age limit. The provision is silent on the office of the Chief Justice and this, I believe, is a strong message that the office of Chief Justice is not one which can be held by an individual who has vacated office as result of the mandatory age limit. Had the framers of the Constitution contemplated that a retired Chief Justice could be re-appointed in an acting capacity, the provision would have, as it did with the other posts, explicitly said so. Since it is Article 142 which deals with appointment of judicial officers, it is unlikely that the framers of the Constitution would find it useful to make specific mention of the possibility of extending the tenure of other judicial officers on the one hand, and on the other, relegate the office of the Head of the Judiciary to a general provision. My interpretation is strengthened by the existence of Article 133 (4) which provides thus,

"Where the office of the Chief Justice is vacant or where the Chief Justice is for any reason unable to perform the functions of his or her office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has

resumed the performance of those functions, those functions shall be performed by the Deputy Chief Justice".

In regard to a vacancy in the office of the Chief Justice, the enactors of the Constitution specifically provided that the Deputy Chief Justice would take up the mantle until a person has been appointed to and has assumed the functions of that office. There is thus no need to resort to a general provision. The omission of the office of the Chief Justice in Article 142 and the existence of Article 133 (4) is clear evidence that the enactors of the Constitution addressed their minds to vacancies in Judicial Offices and restricted the possibility of extension of tenure to judicial functions but not to administrative functions. The two provisions read together culminate in a strong message that the office of the Chief Justice is not one which was to be held by an individual who has vacated office of the Chief Justice as a result of the mandatory age limit".

182. In my view once an office is declared vacant, unless there is a transition clause that deems the holder thereof to be still in office, it would with respect amount to an aberration to contend that the person whose position is declared vacant is still in the office. In my view the declaration of vacancy has the effect of compelling the holder of the office to vacate the office unless otherwise ordered by a Court of competent jurisdiction. Once an office becomes vacant, it is in effect empty and it cannot be contended that an empty office can make decisions. It is in this respect that certain legislation make provision for appointment of persons to take charge in acting capacity. One would imagine a situation in which the Commissioners whose positions had been declared vacant would act in a manner warranting their removal if they were still in office. Would a legal process be instituted to remove them from "office" which had been declared vacant? That kind of reasoning would clearly be irrational in my view.

183. That view would resonate with the opinion of **De Smith, Woolf and Jowell: *Administrative Law* 7th Edition** at paragraph 11-036 on page 602, that:

"Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic…Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision."

184. **Sedley, J's** decision **R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, at page 11 states that:

"What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic."

185. I therefore agree with the applicant that there are no enabling provisions in the Constitution of Kenya that would allow members of the Commission who have resigned from office to retrieve and extend tenure in any shape of form. Since the President had declared the offices vacant, the power and authority delegated to the members of the Commission cannot be exercised in an acting capacity in circumstances where the Constitution has not donated or granted the mandate or competence.

186. To make the argument of the IEBC even more absurd, the ***Election Laws (Amendment) Act*** at section 31 changed the composition of the Commission by amending section 5 of the ***Independent Electoral and Boundaries Commission Act, 2011*** by providing that:

5(1) The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.

187. The date of assent and the date of commencement of the ***Amendment Act*** respectively are 13th September 2016 and 4th October 2016 and the Act was published in the Kenya Gazette as required under Article 116(1) of the Constitution of Kenya on 20th September 2016. Therefore the numerical strength of the members of the Commission was reduced from the previous nine members including the chairperson to seven members including the chairperson. If therefore the contract was signed on 30th November 2016, which seven of the nine Commissioners properly authorized the entry into the said contract?

188. I therefore have no hesitation in finding that the positions of the Chairperson and the Commissioners having been lawfully declared vacant, they could not lawfully continue with their duties as such Chairperson and Commissioners respectively.

189. It was however contended that since there was an accounting officer, the entry into the contract the subject of these proceedings was lawful. In **Eng. Michael Kamau and Others vs. Ethics and Anti-Corruption Commission and Others Nairobi (Milimani) High Court Petition No 230 of 2015** the Court expressed itself *inter alia* as follows:

"…it is clear to us that under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has resolved upon. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission's staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission".

190. Section 134(1) of the ***Public Procurement and Asset Disposal Act*** provides as follows:

The accounting officer shall be responsible for preparation of contracts in line with the award decision.

191. Similarly, section 135(2) of the same Act provides that:

An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

192. It was averred that the successful tenderer was duly notified of Award of Tender and simultaneously the unsuccessful tenderers were also notified that they had not been successful and details of the successful tenderer disclosed on 18th October 2016. The 1st interested party on its part averred that it received a Notification of Award Letter dated 18th October, 2016 from the IEBC informing it that its bid had been accepted and requiring it to thereafter accept the award within fourteen (14) days. However, the presidential declaration of vacancy was made 5th October 2016, 13 days before the letter to the 1st interested party was drafted. In my view, section 134(1) of the ***Public Procurement and Asset Disposal Act*** only empowers the accounting officer to prepare and execute the contract. It does not empower him to award the tender. It is therefore my view that the aforesaid provision cannot be the basis of an award of a tender by the accounting officer where the Commission technically does not function. This was the position of the Court in **Michael Kamau and Others vs. Ethics and Anti – Corruption Commission and Other**s (supra) where it expressed itself as hereunder:

"Whereas a Commission may be disabled in its ability to perform its functions, such disability does not automatically render the Commission extinct. Such an event in our view only places

the Commission in a state of dormancy until such a time as it is able to carry out its functions…In our view therefore the fact that the Commission was disabled by pressure exerted upon them by third parties, whether deliberate or otherwise, did not obliterate the Commission, and though its ability to effectively carry out its functions was impaired by its incapacitation, the Commission was legally alive but inactive."

193. This may be an undesirable situation and as the Court held in **Michael Kamau and Others vs. Ethics and Anti – Corruption Commission and Other**s (supra):

"It is our view that three arms of the Government are under a Constitutional obligation to protect the sovereignty of the people, and to achieve this, they must protect those organs through which sovereignty is expressed such as the Commissions, Independent Offices and the principle of devolution. To fail to do either by action or inaction is an abdication of their Constitutional mandate. Under Article 255 of the Constitution, an amendment relating to the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies can only be done in a referendum. That clearly shows the importance the people of Kenya attached to these Commissions. In fact this importance is emphasized by the fact that the people of Kenya were of the view that these commissions were important for the protection of their sovereignty. In our view any act or omission whose effect is geared towards crippling the actions of any Constitutional Commission or independent office cannot be justified on the ground of public interest as we have held herein below public interest is reflected in the Constitution and legislation".

194. It was contended that since the ***Amendment Act*** was enacted because of the dissatisfaction with the electoral law and process, it is unreasonable and irrational and unlawful for a procurement to be validated based on a legal framework that has been repealed, amended or reformed. It was therefore the applicant's case that the procurement of the polls register, ballot papers and election result forms as specified in Tender IEBC/01/2016 – 2017 are unlawful and irrational in view of the changes and reforms in the law regarding elections.

195. There is no gainsaying that the ***Amendment Act*** was enacted following a spirited agitation by a section of the society. Whether rightly or wrongly, the said amendments were meant to put into place mechanisms through which the coming elections would be administered in an efficient, accurate, accountable verifiable, secure, credible and transparent manner. In my view laws which are enacted with a view to facilitate an event such as the forthcoming elections, if they to achieve their intended purpose ought to be interpreted as if their operationalisation was to have retrospective effect in so far as the preparations for the forthcoming elections are concerned. This interpretation must be so due to the appreciation of the fact general elections are a process as opposed to a one off event. All the processes leading to the elections are subject of scrutiny and may well be grounds for nullification of elections. Therefore to avoid such an eventuality, the preparations leading to the elections must meet the minimum standards articulated in Article 81 of the Constitution that election system must be free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. In addition Article 86 of the Constitution enjoins the IEBC to ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

196. It is therefore my view that the award of the tender for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers ought to have taken into account the current legislative framework that has been put into place to ensure the constitutional threshold is attained. This is even so taking into account the fact that by the time the formal contract was being entered into the ***Amendment Act*** had already commenced on 4th October, 2016. It was therefore unreasonable on the part of the IEBC to have proceeded with the contract in light of the new legal developments.

197. It was contended that because a contract has been entered into this Court should not disturb the same. The Court is well aware of section 167(4)(c) which provides where a contract is signed in accordance with section 135 of the Act, it shall not be subject to review of procurement proceedings. As I have stated hereinabove the proceedings before me are not review of procurement proceedings and could not properly be subject of such proceedings. It is also my view that Article 227 of the Constitution provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, the starting point must necessarily be the Constitution. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any other stipulation whether in an enactment or in the tender document can only be secondary to the said Constitutional dictates.

198. Whereas the IEBC was of the view that to permit a person to directly challenge the decision of the procuring entity by way of judicial review would make nonsense of sections 167 and 175 of the ***Public Procurement and Asset Disposal Act, 2015*** and by extension Article 227(2) of the Constitution of Kenya, 2010, the IEBC, with due respect failed to appreciate the provisions of Article 3(1) of the Constitution which provides that:

> ***Every person has an obligation to respect, uphold and defend this Constitution***

199. On the note Article 258(1) of the Constitution provides that:

> ***Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

200. In my view a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article 227 of the Constitution, and who has no other recourse known to law, as the IEBC concedes the applicant does not have, must in my view find recourse in the High Court which is the Court entrusted under Article 165(2)(d) with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. In my view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this Court of one of its core mandate under Article 165(2)(d) of the Constitution.

201. It is my view that Parliament cannot enact legislation whose effect would be render provisions of the Constitution a dead letter of the law and this is what would be the effect if the IEBC's position is carried to its logical conclusion.

202. A related issue was with respect to public interest. The IEBC asserted that in this case there is a need to hold the next General Elections by 8th August 2017 and the failure to do so is likely to expose the country to serious injury and loss akin to that of the 2008 Post Election Violence. It is now trite that 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. This was the position in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where the Court held 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."**

203. In my view, whereas public interest is a factor to be considered by the Court in arriving at its decision, where the alleged public interest is not founded on any legal provision or principle and runs contrary to the Constitution and the law, such perceived public interest will not be upheld by the Court. Under Article 10 of the Constitution, all State organs, State officers and all persons tasked with *inter alia* the making and implementation of public policy decisions are bound by the national values and principles of governance one of which is the rule of law. Consequently, any alleged public policy or interest that is contrary to the rule of law cannot be upheld.

204. As was held in **Resley vs. The City Council of Nairobi [2006] 2 EA 311,** to the effect that:

> **"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."**

205. However, 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.

206. 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 hence it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

207. 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.**

208. However in circumstances where there are two competing public interests and none can be said to outweigh the other, it would be disastrous to uphold a patent violation of the law under the guise of upholding public interest. Where for example the preparations for elections are at such an advanced stage that to direct that the act complained of be corrected is likely to make it impossible for the elections to be conducted the Court may well be justified in declining to grant the orders sought as long as such violations are unlikely to materially affect the conduct of the intended elections.

209. In this case there are two competing public interests. The first is the necessity to comply with the timelines while the second is the constitutional requirement that the election system must be free and fair; and administered in an impartial, neutral, efficient, accurate, verifiable, secure, accountable and transparent manner. It has not been contended that if this Court was to grant the orders sought herein it would be impossible to conduct the elections on 8th August, 2017. To the contrary the ***Public Procurement and Asset Disposal Act***, itself provide for circumstances under which restricted and direct tendering processes may be resorted to where applicable as long as the law if complied with.

210. Although the IEBC alluded to the post -election violence of 2008, it was not the failure to conduct the elections that led to the same but the manner in which the same were conduct which rightly or wrongly aggrieved some of the contestants therein. Whereas the Court agrees with the IEBC that it owes Kenyans a duty to ensure that unnecessary obstacles are not permitted to prevent the IEBC from preparing and carrying out the general elections of 8th August 2017, this Court's mandate is to ensure that the elections are conducted in accordance with the Constitution and the law, and will not allow itself to be a rubberstamp for a process that is clearly flawed and whose result is unlikely to meet the constitutional and legal threshold. In opposing the application the 1st interested party referred this Court to clause 7.15.2 (ii) of the Special Conditions of Contract for the provision that the agreement entered into between itself and the IEBC *"cannot under any circumstances be terminated for convenience"* and proceeded to issue veiled threats that it would pursue redress for any improper termination to safeguard its interests asserting that the consequences of such termination will also interfere with the legally set elections timelines and occasion hefty losses to the Kenyan taxpayer. I, with due respect wish to clarify to the 1st interested party that termination of a procurement contract by this Court for failure to adhere to the Constitution and the law cannot under any circumstances be termed as a convenience and where this Court finds that the procurement process does not meet the constitutional and legal threshold, this Court will not hesitate to terminate the same notwithstanding the terms of the contract that was crafted between the IEBC and the 1st interested party. This Court will not partake in a ritual in which the democratic rights of Kenyans are sacrificed on the altar of financial interests especially where the interested party itself avers that materials will be supplied only when the IEBC puts in an order to the 1st Interested Party and as long as the said delivery is as per the order and the same in undertaken within specific timelines.

211. While this Court cannot delve into the so called imminent hefty losses to the tax-payer, it is noteworthy that the 1st interested party avers that the subject contract between the IEBC and itself is a framework contract by virtue of Clause B thereof whereby the various materials are to be supplied on "as and when required basis" for a period of two (2) years and that as such, the IEBC retains substantial discretion as to which materials are to be supplied at what point meaning that the IEBC is at liberty to only place orders for the materials which are strictly required in electoral processes.

212. Accordingly no amount of threats and blackmail will deter this Court from undertaking its mandate under the Constitution. I can do no better than to cite the decision in **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146** where it was held that:

> **"For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the**

principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law."

213. In my view the sentiments expressed by the 1st interested party in these proceedings were rather unfortunate considering the magnitude of the issue at hand. I will say no more on the issue.

214. In my view the 1st interested party's assertion that because the IEBC is an independent constitutional commission which must be allowed to execute its constitutional mandate without undue and extraneous interferences is a manifestation of the failure by the 1st interested party to appreciate the nature of the country's constitutional dispensation. This submission calls for an insight as to the jurisdiction of this Court. Article 165(6) of the Constitution provides that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

215. In my view, the 1st interested party's argument if taken to its extreme conclusion may easily fall foul of Article 2 of the Constitution which provides that:

(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorised under this Constitution.

216. In my view, when any of the state organs steps outside its mandate, this Court will not hesitate to intervene and this was appreciated by the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** in the following words:

"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

217. As this Court held in **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".

218. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J** in **R vs. Kenya Roads Board ex parte 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."

219. 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."

220. 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."

221. **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."**

222. **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."

223. 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."

224. 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."

225. 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."

226. 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 Constitutional Commissions 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.

227. 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.

228. 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."

229. 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 a commission's independence given to it by 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;"**

230. In this respect I associate myself with the decision in **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** that the "independence clause" does not "accord" constitutional commissions *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. I prescribe 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"*.

231. I must however hasten to add that this is not a jurisdiction that the Courts would lightly invoke. In this respect I would paraphrase the position adopted by the Supreme Court of India in **Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083** at pg 1105 and hold that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to matters pertaining to the actual conduct of the elections in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of the electoral process. It would be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the electoral system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice.

232. Further in **R vs. Council of Legal Education [2007] eKLR** at pg. 9, it was held that

> **"The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature".**

233. I also agree with the position adopted in **Puhlofer & Anor. vs. Hillingdon London Borough Council [1986] 1 AC 484** that:

> **"It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely."**

234. Having so warned itself, I however am of the view that where the Constitution is shown to have been or is under a threat of being defiled or the law violated, the Court must undertake its Constitutional mandate and correct the wrong. This Court being a state organ is constitutionally bound by national values and principles of governance in Article 10 of the Constitution and in applying or interpreting the Constitution, or any law and one such value or principle is democracy. Our Constitution in its preamble appreciates that we recognise the aspirations of all Kenyans for a government based *inter alia* on democracy.

235. So where it is brought to the attention of the Court that certain electoral processes are being undertaken which are not in accordance with the Constitution and the law, the Court must give appropriate directions and ought not to wait until the country goes into flames before undertaking its mandate. Unless Kenyans are assured that their will in the ballot box will be upheld, they are likely to be disillusioned with the electoral process.

236. In these proceedings although the parties and in particular the applicant attempted to introduce the issues relating the system of voting, these proceedings and the prayers sought were substantially with respect to the Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers. I have therefore avoided making any determinations with respect to the issues which were not properly the subject of these proceedings. In my view the prayer for "*such other or further relief as it may deem fit and necessary in the circumstances***"** only permits the Court to issue consequential and not substantial reliefs which are not specifically and expressly sought in either both statement and the substantive Motion. See **Municipal Board of Mombasa vs. Ogilvie [1956] 23 EACA. 157** and **Sultan Sir Saleh Bin Ghaleb and Others vs. Saif Bin Sultan Hussain Al Quaiti and Others Civil Appeal No. 17 of 1956 [1957] EA 55.**

237. As a parting shot, it is important that the IEBC ensures that the Regulations contemplated by section 17(5)(b) of the ***Election Laws (Amendment) Act*** are in place as soon as practicable in order to avoid further litigation.

238. It is also my view that the provisions of section 38 of the ***Political Parties Act*** ought to be put into motion and implemented and the ***Political Parties Liaison Committee*** activated and booted up as it were in order to avoid unnecessary tensions and suspicions between the ***Independent Electoral Commission and Boundaries Commission***, the ***Registrar of Political Parties*** and the political parties themselves. The said provision provides as follows:

> ***(1) There is established a Political Parties Liaison Committee.***
>
> ***(2) The Political Parties Liaison Committee shall be established at the national and county levels.***
>
> ***(3) The principal function of the Political Parties Liaison Committee is to provide a platform for dialogue between the Registrar, Commission and political parties.***
>
> ***(4) The Political Parties Liaison Committee shall perform such other functions as may be prescribed by the Registrar.***

239. It must be appreciated that the process of general elections is as much a political process as it is legal. Perception therefore plays a not too minor role in the said process. It is therefore as much important for the process to be fair as it is to be seen as fair. It is therefore crucial that a continuous dialogue between the Commission, the Registrar of political parties and the political parties themselves be nurtured in order to avoid any suspicions that the process is not being undertaken in a free, fair and transparent and that the system being administered is not impartial, neutral, efficient, accurate and accountable. An electoral process must not only meet the constitutional and legal threshold but ought to carry with it the confidence of the electorates. This in my view can only be achieved in a process where all the players are afforded a forum at which to air their grievances collectively and individually and in my view this is where the **Political Parties Liaison Committee** comes in.

240. Having considered the issues which were raised in this application I find merit in this application.

Order

241. Consequently I grant the following orders:

(1) An order of certiorari removing into this Court for the purposes of being quashed the decision of the 1st Respondent to award Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited of Dubai which decision is hereby quashed.

(2) The 1st Respondent is at liberty to restart the tender process for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers and the same be done in compliance with the Constitution, provisions of the Public Procurement and Asset Disposal Act and the relevant election laws.

(3) Having granted an order of certiorari, it is not necessary to grant the order of prohibition in the manner sought'

(4) I however decline to issue the order sought against the 2nd Respondent.

(5) Being public interest litigation, each party will bear own costs of these proceedings.

242. Orders accordingly.

Dated at Nairobi this 13th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Magaya with Mr Muchemi and holds brief for Hon. Orengo. SC for the ex parte applicant

Mr Wabuge for Mr Lubullelah for the 1st Respondent

Miss Odhiambo for Mr Bittta for the 2nd Respondent

Mr Kamau with Mr Kabathi for the 1st interested party

CA Mwangi