



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(CORAM: KIMONDO, MABEYA & ONG’UDI JJ)**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 328 OF 2017**

**IN THE MATTER OF SECTIONS 44A AND 109 OF THE ELECTIONS ACT (NO.24 OF 2011)**

**AND**

**IN THE MATTER OF ARTICLES 2(1), (4), (5), (6), 10, 19, 20, 21, 22, 23, 36, 38, 81, 82(2), 86, 88, 162(2) (B), 232, 258 &259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**BETWEEN**

**NATIONAL SUPER ALLIANCE (NASA) KENYA .....**  
**.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....**  
**.....RESPONDENT**

**AND**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> INTERESTED PARTY**

**JUBILEE PARTY OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**A. Introduction.**

1. This petition revolves around the *use of technology* in the forthcoming general elections. Section 44 A of the *Elections Act 2011* (as amended from time to time and hereafter *the Act*) requires the Independent Electoral and Boundaries Commission (hereafter the *IEBC* or *the respondent*) to put in place a *complementary mechanism* for *identification* of voters; and, for *transmission* of election results. The mechanism is supposed to be simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

2. The petitioner contends that the IEBC was mandated to make regulations, with the approval of Parliament, at least *60 days* before the general election. The petitioner’s case is that IEBC has failed to

consult with “relevant stakeholders” or to make the matter public. It further contends that since there are “less than 40 days to the elections”, a declaration should issue that the identification of voters and transmission of results for the election to be held on 8<sup>th</sup> August 2017 be *exclusively electronic*.

### **B. The reliefs sought.**

3. The petitioner therefore prays for three key reliefs. Firstly, for a *declaration* that the respondent should have developed the *complementary mechanism* within 60 days before the 2017 general elections. Secondly, for a *declaration* that the respondent has *failed* to do so within the prescribed period as envisaged by section 44A of the Act. Thirdly, the petitioner craves for a *declaration* that the identification of voters and transmission of results for the election to be held on 8<sup>th</sup> August 2017 be *exclusively electronic*. There is also a prayer for costs.

4. The petition is contested *in toto* by the respondent and the two interested parties. The retort by the respondent is that the mechanism was put in place a long time ago by dint of Regulations 69 and 83 of the ***Elections (General) Regulations 2012*** (as amended by Legal Notice No. 72 of 2017, hereinafter ***the Regulations***). The respondent submitted that technology is not a magical ward; and, is susceptible to failure or hacking. One of the key security and reliability standards in the electoral process is thus an “optional specification for a voter-verified paper audit trail”.

5. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contend that exclusive use of electronic voter identification or transmission of results could violate political rights enshrined in Article 38 of the Constitution. The interested parties also submitted that *public participation* could take various forms informing the public of the steps being undertaken by an administrative body. The respondent’s position is that the *complementary mechanism* is a support mechanism which enhances the integrated electronic electoral system. It was also intended to give effect to electoral tenets and obligations under international instruments to which Kenya is a signatory. We were implored to dismiss the petition with costs.

### **C. The nature of the petition, pleadings, depositions and the description of the parties.**

6. The petition is dated 29<sup>th</sup> June 2017. The substratum of the petition is that the conduct of the IEBC is inimical to the constitutional rights of citizens to a free and fair election guaranteed by Articles 10, 38 (2), 81, 82 and 86 of the Constitution. It is also pleaded that the conduct of the respondent has infringed upon the rights of citizens to access information enshrined in Articles 33 and 35 of the Constitution. In a synopsis, the petitioner avers that IEBC has not been accountable or transparent; and, that public confidence in the electoral process has accordingly been eroded.

7. The petition is supported by the deposition of ***Norman Magaya***, the Chief Executive Officer of the petitioner, sworn on 29<sup>th</sup> June 2017; and two supplementary affidavits by the same deponent sworn on 12<sup>th</sup> July 2017 and 17<sup>th</sup> July 2017. The petitioner is described as a coalition of “*several political parties with a substantial voter support base*” in the Republic.

8. The respondent is an independent commission established under article 88 of the Constitution and tasked with the responsibility of conducting and supervising elections and referenda in Kenya. Its *grounds of opposition* are dated 11<sup>th</sup> July 2017. They are two-pronged: first, that the respondent has complied with the law. Accordingly, the petition is misconceived. Secondly, that the petitioner is asking the Court to legislate and to permeate its boundaries.

9. The 1<sup>st</sup> interested party is the Attorney General. The office is established by Article 156 of the Constitution. The Attorney General is sued in his capacity as the principal legal adviser to the national government. The Attorney General has also filed *grounds of opposition* dated 14<sup>th</sup> July 2017. There are four grounds. They can be condensed into *two*. Firstly, that the ***Regulations*** made pursuant to section 109 of the Act provide for a complementary mechanism. Secondly, that the prayer in the petition that the elections to be held on 8<sup>th</sup> August 2017 be *exclusively electronic* offends Articles 38, 82, 83 and 86 of the Constitution.

10. The 2<sup>nd</sup> interested party is a duly registered political party under the **Political Parties Act**. There is a replying affidavit filed on 17<sup>th</sup> July 2017 by **Mary-Karen Sorobit**, the Deputy Director and Legal Affairs Director of the party. We shall shortly examine all the affidavits in detail.

**D. The affidavits by the petitioner and by the 2<sup>nd</sup> interested party.**

11. The relevant parts of the supporting affidavit of Norman Magaya are paragraphs 5 to 10. He deposes as follows-

*“5. That section 44A as read together with Section 109 of the Elections Act imply that in order to guarantee the accountability, transparency and effectiveness of the mechanism, the same ought to be designed and set out in regulations established for that purpose at least sixty (60) days before the general elections and with the approval of Parliament to be given at least four (4) months before the said Elections.*

*6. THAT it is now less than forty (40) days to the 8<sup>th</sup> August, 2017 General Elections and there is no evidence and/or indication that the Respondent has complied with the aforesaid provisions of the Elections Act.*

*7. THAT in the premises, all indications are that the Respondent has failed and/or neglected to comply with Section 44A of the Elections Act.*

*8. THAT without derogating from the foregoing, with less than forty (40) days to the 8<sup>th</sup> August general Elections, the Respondent has neither consulted with relevant stakeholders including the Petitioner herein nor made public the complementary mechanism.*

*9. THAT owing to the fast approaching Election date, I do not believe that the Respondent can establish an effective mechanism that meets the requirements of Section 44A of the Elections Act to wit: simple, accurate, verifiable, secure, accountable and transparent considering that the same has to be subject to the public participation by relevant stakeholders in the Electoral process. The delay in establishing the mechanism shall negatively impact the effectiveness of the said system to facilitate free fair and democratic elections.*

*10. THAT in the event, any complementary mechanism of voter identification and transmission of electoral results established by the Respondent after the deadline prescribed by legislation shall be invalid and/or illegal for all intents and purposes of the law.”*

12. The same deponent has sworn two supplementary affidavits. The first is dated 12<sup>th</sup> July 2017. It seeks to widen the boundaries of the petition by annexing an audit of the register of voters by the audit firm **KPMG**. The deponent avers that he is apprehensive that *dead voters* will take part in the forthcoming general election. This may explain why learned counsel for the respondent, **Professor Lumumba Otieno**, claimed the petition as originally pleaded was now mutating.

13. At paragraphs 5 to 7, the deponent avers-

*“5. THAT the Petitioner is apprehensive that as per the Audit of the Voters’ Register conducted by the KPMG, the Respondent having admitted to the existence of dead voters in the voter’s register, there is a high likelihood of such dead voters and other persons not validly so registered taking part in the forthcoming General Elections as has been the events in the past Elections. Annexed herewith and marked NM-1 is a copy of the Media Briefing issued by the IEBC on the KPMG Audit Report.*

*6. THAT the Petitioner is apprehensive that dead voters and individuals not qualified to vote shall take part in the forthcoming General Elections in the absence of a well-defined and lawfully established complementary system as contemplated under the law. Such scenarios occurred in the*

previous elections whereby ghost voters took part in the elections and unknown registers were used. Annexed herewith and marked NM-2 is a copy of the extract of the Kriegler Report regarding the same.

7. THAT the Petitioner is apprehensive that as evidenced from the Parliamentary debates during the discussion of the aforesaid amendments that introduced Section 44A even the Legislature did not understand the Complimentary [sic] system anticipated and as such, until a clear legislation and or further Regulation is put in place, the Respondent herein ought not to secretly and without following the national values of transparency and public participation among others, introduce a purported 'complementary system' on the day of the election without having involved the Kenyan citizens and the stakeholders and in order to ensure that political parties and independent candidates train and educate their agents on how such a complementary system works. Annexed herewith and marked NM-3 is a copy of the excerpts of the Hansard containing the aforesaid Parliamentary debates both at the Senate and the National Assembly."

14. Finally, there is the further affidavit of **Norman Magaya** sworn on 17<sup>th</sup> July 2017. The deponent broadens the petition even further. He avers that the electronic KIEMS equipment to be used in the elections was not subjected to pre-export verification. He states as follows at paragraphs 6 to 9-

"6. THAT the KIEMS to be used in the elections were never subjected to pre-export verification of conformity which facts has [sic] been admitted by the Respondent and the Kenya Bureau of Standards. Annexed herewith are communications to that effect.

7. THAT the purported complementary system established by the Respondent does not meet the threshold and/or does not fall under the Complementary Mechanism that was contemplated under Section 44a [sic].

8. THAT the alleged Complementary System was secretly established without the involvement of stakeholders; political parties; independent candidates and through a transparent process which involves the participation of the people. The establishment was thus shrouded by [sic] secrecy and hence it is an attempt by the Respondent to re-introduce the manual system of voter identification and results transmission."

15. The respondent and the 1<sup>st</sup> interested party did not file any replying affidavit. They were content with their grounds of opposition referred to earlier. The 2<sup>nd</sup> interested party, Jubilee Party, filed a replying affidavit. Like we said, it is sworn by **Mary-Karen Sorobit**. In a synopsis she raises concerns of *reliability and integrity* of electronic systems. She also draws experiences from other jurisdictions including Ghana, India, The Netherlands, Finland and some State and County elections in the USA. She also deposed that the petitioner is attempting to repeal the impugned provision through the back door.

16. At paragraphs 8, 9, 10, 11, 12, 15 and 16 she deposes as follows-

"8. The orders sought by the Petitioner in this suit are a collateral attempt to repeal Section 44A which was enacted on 16<sup>th</sup> January 2017 through the Election Laws (Amendment) Act 2017.

9. The Coalition for Reform and Democracy (CORD), whose members have now morphed into the Petitioner, strenuously objected to the said enactment and indeed filed a suit, Judicial Review Miscellaneous Application no 657 of 2016 to stop parliament from debating the said enactment. I now produce copies of the said application which are in a bundle marked "MK1". Mr Norman Magaya, who made the affidavit in the aforesaid suit and is also the deponent in the affidavit supporting this petition, has deliberately suppressed this fact from the court.

10. In essence, the orders sought are an attempt by the Petitioner to procure through the back door what the Petitioner (in the form of its predecessor CORD) failed to do in parliament. The Petitioner is trying to legislate its electoral agenda through the court and should not be allowed to

do so in view of the doctrine of separation of powers.

11. It is also a well-accepted fact internationally that the use of technology in elections and indeed in many other spheres of life poses numerous challenges including:

- i) lack of transparency;
- ii) Negative impact on confidence in the process;
- iii) Confusion for the illiterate, uneducated and elderly voters on process;
- iv) Need to conduct widespread voter education, how to use it and its impact on the process;
- v) Difficulties in auditing results;
- vi) Issues regarding secrecy of the ballot;
- vii) Security of the voting and counting process;
- viii) cost of introducing and maintaining the technology over the lifecycle of the equipment;
- ix) Potentially losing control over the process to outside technology vendors;
- x) Recruitment of staff with specialized IT skills;
- xi) Added complexity in the electoral process
- xi) Consequences in the event of equipment or system malfunction.
- xii) In addition to these challenges, it is also vitally important that electronic voting and counting systems are implemented in such a way as to not violate core electoral standards.

12. If any component of the electronic system fails the entire election may very well be rendered a nullity. It is not clear to me why the Petitioner, which is no doubt aware of this fact, would then move this court to declare that electronic systems should be exclusively used to identify voters and transmit results.

15. I am aware that during the Kenyan general elections in 2013, the Electronic Voter Identification Systems (EVID) failed leading to significant delays in many polling stations. Indeed, the CORD Presidential candidate Mr Raila Odinga could not be identified by the EVID machine at his polling station and was eventually identified by paper records.

16. The fact that there may be failure in electronically transmitting results or other electronic systems, as demonstrated above, should not invalidate elections since manual transmission of results still meets the constitutionally required threshold of an accurate, verifiable, secure, accountable and transparent process.”

#### **E. Petitioner’s submissions.**

17. The petitioner filed submissions and a list of authorities dated 12<sup>th</sup> July 2017. Lead counsel for the petitioner **Mr. Orengo** submitted that prior to enactment of Section 44 of the **Elections Act** the electronic electoral system was unclear. He said the system was largely manual. Reference was made to the annexed **Kriegler Report** to demonstrate the inherent mischief. Counsel cited the Supreme Court decision in **Raila v IEBC & Others** Petition 5 of 2013 [2013] eKLR where the Court agonized over the multiple voter registers. Counsel submitted that this was the backdrop to the *Integrated Electronic Electoral System*

under Section 44 of the Act. The section envisages biometric voter registration; electronic identification of voters; and, electronic transmission of results.

18. Learned counsel submitted that section 44A of the Act requires IEBC to put in place a *complementary mechanism* for *identification* of voters and *transmission* of election results. He submitted that the IEBC has not put in place regulations covering the full spectrum of the right. He blamed the respondent for delay noting that the President of the Republic assented to the amendments to the Act way back on 9<sup>th</sup> January 2017.

**19. Professor Sihanya**, who also appeared for the petitioner, cited the case of **Public Citizen Health Research Group v Commissioner Food & Drug Administration** 740 F.2d 21, 34 (D.C. Cir. 1984) where the US Court of Appeals, District of Columbia Circuit, held that reasonableness of delay “must be judged in the context of the statute which authorizes the agency’s action”.

20. Referring to the ***Hansard***, counsel submitted that there was no *unanimity* in Parliament during the passage of section 44A. To the extent that the Act was passed by the requisite majority in the House, we found this submission baffling. Counsel submitted that the intention of the legislature was to link the complementary mechanism in Section 44A to the electronic system in section 44. He buttressed his argument by referring to section 2 of the Act which defines the terms “register” and “biometric” for example.

21. Counsel relied on the decision in **IEBC v Maina Kiai & Others**, Court of Appeal, Nairobi, Civil Appeal 105 of 2017 [2017] eKLR. The learned judges hailed the electronic system as a guarantee for accuracy and integrity of the election results. Reference was also made to guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people enshrined in Article 10 (2) of the Constitution.

22. In the petitioner’s view, section 44A was not meant to deal with isolated incidents of missing biometrics of a voter at a polling station. There are solutions for such situations. **Mr. Orengo** gave the example of the *Manual on Identification of Voters in Ghana*, 3<sup>rd</sup> Edition (Page 260 of the bundle of authorities). That submission was in conflict with the petitioner’s written submissions at paragraph 20. There the petitioner states that “borrowing from countries like Ghana, the complementary system is in the form” stated in the above manual.

23. He submitted that section 44A was meant to deal with a major *collapse* of the electronic system. He said that IEBC seems to be addressing the minor failures of technology. He posed the question: What if the devices fail? He said the answer from IEBC is that they would fall back on a *manual system*. He submitted that that would not meet the test in the Constitution or section 39(1C) of the Act particularly with regard to the presidential election.

24. The petitioner submitted at length on political rights enshrined in Article 38 of the Constitution. Counsel submitted that IEBC has a constitutional duty to conduct a free and fair election. Reference was made to Articles 81, 82 and 86 of the Constitution.

25. Learned counsel also referred to Article 86 which mandates IEBC to ensure that at every election; (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the 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.

**26. Professor Sihanya** cited Articles 23 and 47 of the Constitution and section 7 of the ***Fair Administrative Act*** for the proposition that the Court has *coercive power* to compel IEBC to set up the complementary mechanism. To buttress his argument, he relied on the decision in **Fose v Minister of Safety and Security** 1997 (3) Sa 786 (Cc).

27. **Mr. Paul Mwangi**, who teamed up with **Mr. Orengo** and **Professor Sihanya**, made the closing arguments. He said that Regulations 69 and 83 created confusion. He re-emphasized that the purpose of the complementary mechanism was to *complement* the electronic system. He submitted that a *mechanism* is one that kicks in when the primary one fails. In his view, Regulations 69 and 83 are not the type contemplated by section 44A of the Act.

28. Counsel wondered what would happen if there is *widespread* failure of the electronic system under section 44 of the Act. He said that Regulation 83 on transmission of results is not based on any widespread failure of the electronic system. Referring to section 112 of the **Evidence Act**, he submitted that the complementary mechanism was a fact especially within the knowledge of the IEBC. The IEBC did not file a replying affidavit. He submitted that it thus failed to prove that there was public participation in making the Regulations.

29. Learned counsel also submitted that IEBC was obligated under Article 35 of the Constitution to publish information on the complementary mechanism, if any. He concluded that in the absence of a credible complementary mechanism, the general elections should be postponed as provided for in section 55B of the Act.

#### ***F. The respondent's submissions.***

30. We now turn to the submissions by the respondent. The original submissions are dated 14<sup>th</sup> July 2017. There are supplementary submissions filed on 17<sup>th</sup> July 2017. Learned counsel **Mr. Nyamodi** submitted that the petition does not question the efficacy or constitutionality of the complementary mechanism; or, whether the system is manual or electronic. He opined that Regulation 69 (e), 75 and 83 (1) (h) and (i) of the Regulations clearly provide for a complementary mechanism. On the other hand, section 39 (1C) of the Act has an electronic system of transmitting poll results. Reliance was placed on the decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** Court of Appeal at Nairobi, Civil Appeal No. 290 of 2012 [2013] eKLR.

31. Learned counsel submitted that the petitioner failed to prove that its constitutional rights have been violated. He dealt at length with the legislative process leading to the **Election Laws (Amendment) Act 2016** that introduced section 44A of the **Elections Act**. In the written submissions, the respondent asked us to interpret the meaning of the word *notwithstanding* prefacing section 44A. He relied on the decision of the Indian Supreme Court in **Chandavakar Rao v Ashalata Guram** [1986] 4SCC 447.

32. Counsel emphasized the independence of the IEBC by dint of Article 249 of the Constitution. Reliance was placed on the case of **Diana Kilonzo & another v IEBC & 10 others** Nairobi High Court Petition 359 of 2013 [2013] eKLR. He implored us not to grant prayer 3 of the petition because the petitioner has *not* asked us to pronounce ourselves on the *constitutionality* or otherwise of section 44A of the **Elections Act**. In support of that proposition, counsel relied on **Law Society of Kenya v Kenya Revenue Authority** Nairobi High Court Petition 39 of 2017 [2017] eKLR, **Richard Ogendo & others v Attorney General & others** and **Ogden v Saunders** 44 USSC 1827.

33. **Professor Lumumba**, also appearing for the respondent, referred us to the caveat by **Ronald Dworkin** in **Law's Empire** that "*Judges ought to remember that their office is jus dicere and not jus dare; to interpret law and not to make new law, or give law*".

34. Lastly, **Mr. Mukele**, who also appeared for the respondent, sought to demonstrate that the respondent had engaged the public before making the Regulations. However, the respondent failed to file documentary evidence within the timelines that we set. In a considered ruling; and, to ensure proportionate justice; and, in view of the urgency of the matter, we declined to extend time to file new materials. Counsel then submitted that the onus to prove that there was no public participation fell squarely upon the petitioner. In his view, the petitioner failed to discharge its onus of proof.

#### ***G. The submissions by the 1<sup>st</sup> interested party.***

35. **Mr. Mutinda** appeared on behalf the Attorney General. He associated himself fully with the submissions by the respondent. He relied on the submissions filed on 14<sup>th</sup> July 2017 and a bundle of authorities filed on even date. He added that the complementary mechanism in Regulations 69 and 83 (1) (h) and 81(1) is closely linked with political rights enshrined in Article 38, 81, 82(1) 83 and 86 of the Constitution. The elections of 8<sup>th</sup> August 2017 are deemed to be the “first election” under sections 44 and 44A of the **Elections Act**. He submitted that the word complementary means “harmonious or compatible”. As we shall discuss shortly, our view is slightly different.

36. Learned counsel submitted that Regulations 69 and 83 were brought into force by *Legal Notice No. 72 of 2017* pursuant to Section 109 of the **Elections Act**. As the constitutionality of the regulations has not been raised, he implored us to dismiss the petition. He also relied on **Ndyanabo -vs- Attorney General** [2001] E.A 495 on the rebuttable presumption of constitutional validity of legislation. He submitted that the petitioner had failed to rebut the presumption.

#### **H. The submissions of the 2<sup>nd</sup> interested party.**

37. The 2<sup>nd</sup> interested party filed submissions on 17<sup>th</sup> July 2017 together with a list of authorities. Learned counsel **Mr. Ahmednasir** took up cudgels on the legal persona of the petitioner. He also submitted that the petition had not been pleaded with particularity; and, that **Norman Magaya** perjured himself by falsely claiming that there was no complementary mechanism.

38. Regarding public participation, counsel submitted that the petitioner had participated in the legislative processes that led to the impugned section and Regulations. He was of the view that there was no factual basis for the petition; and, that it was lodged in bad faith. He submitted further that section 44A does not oblige the IEBC to put up an advert or a gazette notice of the Regulations. He said the Commission had already shared with the public the aspects of the complementary mechanism. He referred us to pages 1 to 86 of the bundle of authorities which, in his view, contain the complementary mechanism. He also implored us to take judicial notice of the subsidiary legislation.

39. Learned counsel **Mr. Macharia**, who teamed up with **Mr. Ahmednasir**, submitted that section 85 of the **Evidence Act** presumes a gazetted law to be valid. He also referred us to **R v Speaker of the National Assembly & 4 others**, Nairobi Judicial review 657 of 2016 that had been filed by parties allied to the petitioner seeking similar reliefs. To him this was evidence of bad faith.

40. Counsel submitted further that Articles 81, 83 and 86 of the Constitution do not expressly call for an electronic system of elections. He cited at length the materials annexed to the replying affidavit of **Mary-Karen Sorobit** for the proposition that technology is susceptible to malfunction or attack; and, it is not 100% reliable. That is why the system should have a component of a “voter-verified paper ballot”. He said the interpretation of the law by the petitioner would disenfranchise the citizens and defeat Articles 38, 81, 82, 83 and 86 of the Constitution. He relied on the decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) **Judgment of the Second Senate** of 3<sup>rd</sup> March 2009 [BVerfG] 2 BvC 3/07; 2 BvC 4/07 for that proposition. He also cited the Supreme Court decision in **Raila v IEBC & Others** Petition 5 of 2013 [2013] eKLR on the use of technology in elections.

41. Learned counsel submitted that the IEBC has in any case published Regulations for a complementary mechanism vide Legal Notice No. 72 of 2017 on 21<sup>st</sup> April 2017; and, which was well within 60 days of the forthcoming general elections. He submitted further that section 44A of the Act does not oblige the IEBC to subject the process to public participation. He relied on the decisions in **The Matter of the Principle of Gender Representation in the National Assembly**, Supreme Court Advisory Opinion No. 2 of 2012 [2012] eKLR, **Amos Kiumo & 19 Others v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 8 Others** High Court, Meru, Petition 16 of 2013 [2014] eKLR and **Kenneth Otieno v Attorney General & another** Nairobi, High Court Petition 127 of 2017 [2017] eKLR.

42. Lastly, learned counsel implored us to respect the constitutional boundaries between the Court and

other independent organs set up by the Constitution. For that proposition, he referred us to the decisions in **Doctors for Life Case Doctor's for life International v The Speaker National Assembly and Others** (CCT12/05)[2006] ZACC II and in **The Matter of the Principle of Gender Representation in the National Assembly**, Supreme Court Advisory Opinion No. 2 of 2012 [2012] eKLR.

### **I. Analysis and determination.**

43. We are greatly indebted to all the learned counsel for their elaborate submissions; diligence; and, courtesy to the Court. If we do not make direct reference to all the cited cases and materials, it is not for their lack of relevance.

44. We have anxiously considered the petition, depositions, grounds of opposition, rival submissions and the precedents. From the pleadings and submissions, the issues that arise for our determination are as follows:

- a) *Whether the petitioner has the locus to bring these proceedings; and, whether the petition is a constitutional petition properly so called.*
- b) *What electoral system obtains in Kenya?*
- c) *Whether a complementary mechanism has been put in place in terms of section 44A of the Elections Act.*
- d) *Whether the respondent set up regulations to operationalize section 44A of the Act; and if so, whether there was any public participation in the making of the Regulations.*
- e) *Who will bear the costs of the petition?*

45. Before delving deeper into the issues it is important to lay the constitutional framework governing elections in Kenya. Kenya is a *democratic* Republic. In the design of our Constitution, all *sovereign power* belongs to the people. Article 1 of the Constitution is emphatic on that matter-

***“1(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***

***(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.”***

46. The guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people are enshrined in Article 10 (2) of the Constitution. Article 38 of the Constitution on the other hand guarantees the citizens *political rights*. Article 38 (2) and (3) are particularly relevant to the dispute before us. Article 38 (2) provides that every citizen *has the right to free fair and regular elections based on universal suffrage and the free expression of the will of the electors*. Article 38 (3) on the other hand provides as follows-

***“Every adult citizen has the right, without unreasonable restrictions-***

- a) ***To be registered as a voter;***
- b) ***To vote by secret ballot in any election or referendum; and...”***

47. The respondent is an *independent commission* established under Article 88 of the Constitution. It is tasked with the responsibility of conducting and supervising elections and referenda in Kenya. Articles 81, 82, 83 and 86 of the Constitution contain fundamental principles underpinning a free and fair election. For example, Article 81 (e) provides as follows-

***“The electoral system shall comply with the following principles—***

***(e) free and fair elections, which are—***

***(i) by secret ballot;***

***(ii) free from violence, intimidation, improper influence or corruption;***

***(iii) conducted by an independent body;***

***(iv) transparent; and***

***(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”***

48. This petition revolves around the *use of technology* in the forthcoming general elections. Due to historical electoral malpractices which culminated in the 2007/2008 *post-election violence*, there was need for reforms. The *Kriegler Commission* of 2008 recommended as follows-

***“IREC recommends that without delay ECK start having developed an integrated and secure tallying and data transmission system, which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.”***

49. Those experiences informed constitutional and statutory reforms to the Kenyan electoral system. We have already set out the key constitutional provisions of the 2010 Constitution. The *Elections Act* was amended to introduce sections 39, 44 and 44A dealing with the use of technology in elections; and, a complementary mechanism.

50. Section 39 sets out an elaborate process for determination and declaration of election results. It provides as follows:-

***“(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.***

***(1A)The Commission shall appoint constituency returning officers to be responsible for—***

***(i)tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;***

***(ii)collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and***

***(iii)submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.***

***(1B))The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.***

***(1C)For purposes of a presidential election the Commission shall —***

**(a)electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;**

**(b)tally and verify the results received at the national tallying centre; and**

**(c)publish the polling result forms on an online public portal maintained by the Commission.**

**(1D)The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.”**

51. Section 44 of the Act on the other hand deals with the *integrated electronic electoral system*. It provides-

**“(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.**

**(2)The Commission shall, for purposes of subsection(1), develop a policy on the progressive use of technology in the electoral process.**

**(3)The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.**

**(4)The Commission shall, in an open and transparent manner —**

**(a)procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and**

**(b)test, verify and deploy such technology at least sixty days before a general election.**

**(5)The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for —**

**(a)the transparent acquisition and disposal of information and communication technology assets and systems;**

**(b)testing and certification of the system;**

**(c)mechanisms for the conduct of a system audit;**

**(d)data storage and information security;**

**(e)data retention and disposal;**

**(f)access to electoral system software source codes;**

**(g)capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;**

**(h)telecommunication network for voter validation and result transmission;**

**(i)development, publication and implementation of a disaster recovery and operations continuity plan; and**

*(j) the operations of the technical committee established under subsection (7).*

*(6) Notwithstanding the provisions of [section 109\(3\)](#) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under [subsection \(4\)](#) within a period of thirty days from the date of commencement of this section.*

*(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —*

*(a) be restricted to the process of voter registration, identification of voters and results transmission; and*

*(b) be procured at least one hundred and twenty days before the general election.*

*(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology”.*

52. Section 19 of the *Election Laws (Amendment) Act* introduced section 44A into the *Elections Act* as follows:

*“44A. Notwithstanding the provisions of [Section 39](#) and [Section 44](#), the Commission shall put in place a Complementary Mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.”*

53. The issue of use of technology in elections has occupied courts in Kenya and other jurisdictions. In the case of **RAILA ODINGA & 5 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS** [2013] eKLR, the Supreme Court at paragraph 233 of its judgment stated thus-

*“We take judicial notice that, as with technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and linewomen to notice....*

*“But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done...*

*“From case law, and from Kenyan’s electoral history, it is apparent that electronic technology has not provided perfect solution. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner’s contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner’s case, insofar as it attributes nullity to the Presidential election on grounds of failed technology devices, is not sustainable...”*

54. It is clear from this judgment that when the electronic system fails there should be a fall-back system

to avoid the entire election falling into shambles. The complementary mechanism in Ghana closely mirrors our Regulations 69 and 83. This Ghanaian position is contained in the ***Manual on Election Adjudication in Ghana 3<sup>rd</sup> Edition*** (DPI Print Ltd, Accra, 2016). Chapter 10(c) and (d) of that manual deals with *failure* of the biometric system in presidential and parliamentary elections.

55. The German Federal Constitutional Court (*Bundesverfassungsgericht*) has had occasion to pronounce itself on *electronic voting*. In ***Judgment of the Second Senate*** of 3<sup>rd</sup> March 2009 [BVerfG] 2 BvC 3/07; 2 BvC 4/07, the Court found that even where electronic voting systems are deployed, the citizen should still be able to check and ascertain the results reliably without expert knowledge; and, that it was not possible for a voter to independently verify the integrity of the elections using the electronic system only. The Court in the relevant part stated:

***“bb) in a republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge.***

***cc) The Public nature of the elections is also anchored in the principle of the rule of law. The public nature of the state’s exercise of power, which is based on the rule of laws, serves its transparency and controllability. It is contingent on the citizen being able to perceive acts of the state bodies. This also applies as to the activities of the election bodies.***

***b) The principle of the public nature of elections requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception. Particular significance attaches here to the monitoring of the election act and to the ascertainment of the election result. An election procedure in which the voter cannot reliably comprehend whether his or her vote is unfalsifiably recorded and included in the ascertainment of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence does not comply with the constitutional requirements.***

***C) Despite the considerable value attaching to the constitutional principle of the public nature of elections, it does not ensue from this principle that all acts in connection with the ascertainment of the election result must take place with the involvement of the public so that a well-founded trust in the correctness of the elections can be created.....***

***It is certainly ensured in these cases that the voters are in charge of their ballot and that the result of the election can be reliably checked by the election authorities or by interested citizens without any special prior technical knowledge. Whether there are still other technical possibilities which create trust on the part of the electorate in the correctness of the proceedings in ascertaining the election result based on verifiability, and which hence comply with the principle of the public nature of elections, need not be decided here.***

***b) Restrictions on possibilities for citizens to monitor the election events cannot be compensated for by sample devices in the context of the type approval procedure or tin the selection of the voting machines specifically used in the elections prior to their deployment being subjected to verification by an official institution as to their technical performance. The monitoring of the essential steps in the election promotes well-founded trust in the correctness of the election certainly in the necessary manner that the citizen himself or herself can reliably verify the election event.***

***For this reason, a comprehensive bundle of other technical and organizational security measures (e.g. monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and local organization of the elections) is also not suited by itself to compensate for a lack of controllability of the essential steps in the election procedure by the citizen.***

***Accordingly, neither participation by the interested public in procedures of the examination or approval of voting machines, nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verification of the election events. Technical examinations and official approval procedures, which in any case can only be expertly evaluated by interested specialists, relate to a stage in the proceedings which is far in advance of the ballot. The participation of the public in order to achieve the required reliable monitoring of the election events is hence likely to require other additional precautions.”***

56. A Report titled *Implementing and Overseeing Electronic Voting and Counting Technologies* on electronic voting in the Netherlands commissioned by the *National Democratic Institute* and the *International Foundation for Electoral Systems* concluded that electronic voting was unreliable. As a result, MOIKR, the body mandated to deal with elections in the Netherlands, decided that paper ballots were the preferred mode. See page 273 of the report. Electronic voting was not sufficiently transparent and verifiable, as there was no way of determining whether votes had been accurately recorded or stored.

57. The constitutional right of citizens to vote and elect their leaders is guaranteed in Article 38(2) and (3) of our Constitution. The Court of Swaziland in the case of **ZWANE & 562 OTHERS V ELECTIONS & BOUNDARIES COMMISSION & ANOR** (1513/3013)[2013] SZHC 240 (17 October 2013) had this to say of the right to vote:-

***“[50] Section 85(1) of the Constitution of the Kingdom of Swaziland Act No.01 of 2005 postulate “Subject to the Provisions of this Constitution, every Swazi or person in Swaziland has a right to vote at any election of members of the House or Members of Bucophho.***

***[51] From the above Constitutional right, emanates the Principles of election which are well defined in de Villiers v. Louw, 1931 AD 241 at 266 & cited with approval in Beckmann v. Minister of the Interior & Others 1962 (20 SA 233 at 241 as follows:-***

***“It is after all in the public interest that every person whose name is on the voters’ list shall record his vote, and the policy of the Act is to give every voter the opportunity of voting, whether he can be present at the poll or not. The Act and the Regulations are mainly concerned with two cardinal principles in connection with an election, one being that it shall be by secret ballot, and the other being that a person who records a vote is a person of that name and no other, appearing on the voters’ list”.***

58. The IEBC has a constitutional duty under Article 86 of the Constitution to ensure that at every election; (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the 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.

59. The process of accounting and verification in an election is closely intertwined with the concept of transparency and accountability. This promotes free and fair elections. Any electoral regulations should therefore ensure that only registered voters who present themselves at a polling station participate in the poll; and, that each vote is accounted for.

60. We shall now turn to the issues we framed earlier. We shall deal first with the question of *locus* of the petitioner. Learned Counsel for the 2<sup>nd</sup> interested party, **Mr. Ahmednasir**, appearing with **Mr. Macharia**, submitted that although the petitioner is a legal person, it lacks capacity to present a *constitutional* petition. He submitted that a constitutional petition for enforcement of the Bill of Rights can only be lodged by a human person. The petitioner on the other hand is a conglomeration of political parties.

61. Counsel further submitted that the petitioner only cited Articles 36 and 38 of the Constitution; and, that there was no averment that the rights under those Articles had been breached. On his part, **Mr. Mwangi**, Learned Counsel for the petitioner, submitted that under Article 22 of the Constitution, any party is at liberty to present a petition on behalf of another. He submitted further that Article 260 defines a *person* to include a company or association.

62. Article 22 of the Constitution provides as follows-

***“(1)Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened”***

63. Article 260 on its part provides, *inter alia*,:

***“‘person’ includes a company, association or other body of persons whether incorporated or unincorporated”***

64. The petitioner described itself in the petition as a *“coalition of several political parties in Kenya with a substantial voter support base”*. To our minds, a conglomeration of political parties answers to the description of an incorporated body of persons under Article 260. **Mr. Ahmednasir** admitted that the petitioner had elsewhere been held to be a legal person. That being the case, we hold that the petitioner has legal standing to bring these proceedings.

65. The 2<sup>nd</sup> interested party objected to the petition on the basis that the petition does *not* satisfy the requirements of a constitutional petition properly so called. It was submitted that the petition did not precisely set out the rights under the Bill of Rights that had been breached. The petitioner did not address this issue.

66. The principles governing the precision with which a constitutional petition should be pleaded were well stated in **Anarita Karimi Njeru v Republic** High Court, Nairobi Misc. Crim. Appl. 4 of 1979 [1979] eKLR. The petitioner should specifically set out the provisions of the Constitution that are alleged to have been violated; provide the particulars of the alleged violation; and, how the respondent has violated those rights. This position has been reiterated in **Martin Nyaga Wambora & Others v Speaker of the Senate & 6 Others** High Court, Kerugoya Petition 3 of 2014 [2014] eKLR and **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others** Court of Appeal, Nairobi, Civil appeal 290 of 2012 [2013] eKLR. In **Mumo Matemu’s** case the Court of Appeal observed as follows:-

***“(43) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole action of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.....***

***“In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with the rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act Cap 21..... “Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in the Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle....”***

67. In the present case, the heading of the petition cites Articles 10, 19, 20, 21, 22, 23, 162(2)(b), 258 and 259 of the Constitution. In addition, it stated that it was a matter for *enforcement of the fundamental rights* enshrined under Articles 2(1), 2(4), 2(5), 2(6), 10, 36, 38, 81, 82(2), 86, 88 and 232 of the Constitution. However, in the body of the petition, the petitioner did not plead with *exactitude* the particular rights or freedoms that had been breached or were likely to be violated by the respondent. What the petitioner pleaded loosely was that Article 38(2) of the Constitution guarantees the right to free fair and regular elections; that Articles 81 and 86 directs the respondent to ensure that whatever method or system used for election is simple, accurate, verifiable, secure, transparent and accountable; that such electoral mechanism was to be established by way of Regulations within 60 days before the general election and only with the approval of Parliament. The petitioner then concluded that the respondent had not established a mechanism to meet the constitutional and statutory threshold of simplicity, accuracy, verifiability, security, accountability and transparency. This was then followed by prayers for the three declarations.

68. With greatest respect to the drafters of the petition, it falls far short of the test set in the **Anarita Karimi Njeru case** (supra) as to precise pleading of the rights violated. To our minds, the petitioner did not plead that any of the fundamental rights had been breached or was about to be violated. It was left to this Court to gather from the supporting affidavit and two supplementary affidavits of **Norman Magaya** of 12<sup>th</sup> July 2017 and 17<sup>th</sup> July 2017 to establish what the petitioner's complaint was. Accordingly, it is our determination that the petition dated 29<sup>th</sup> June 2017 did not satisfy the criteria of a *constitutional petition for enforcement* of fundamental rights and freedoms.

69. It is because of the imprecise manner in which the petitioner's claim was pleaded in the petition that counsel for the respondent and the interested parties objected to certain submissions by **Prof. Sihanya**. They argued that the petition was mutating. We nevertheless allowed **Prof. Sihanya** to address us on the objected matters but directed that we shall rule on them in this judgment.

70. After carefully analyzing the supporting and supplementary affidavits, we have established that the petitioner's complaint is the following: that although Articles 81 and 86 of the Constitution require the respondent to establish an electoral system that is simple, accurate, verifiable and transparent; and, that although section 44A of the **Elections Act** provides for a complementary mechanism for identification of voters and transmission of election results, the respondent had *failed* to establish the same less than 30 days to the next general election. Since counsel for all the parties ably addressed us on the matter, we see no prejudice suffered and we shall proceed to make our determination on the matter.

71. The next issue relates to the electoral system obtaining in Kenya. The electoral system and processes are underpinned by Chapter Seven of the Constitution. As already stated, the net effect of Articles 81, 82 and 86 of the Constitution is that the electoral system to be put in place should be simple, accurate, verifiable, secure, transparent and accountable. This is captured in sections 39 and 44 of the **Elections Act**. We have already set out above those provisions of the Constitution and the Act.

72. Under sections 39 and 44 of the Act, the use of technology in our electoral system is *entrenched*. Registration of voters, their identification at the point of voting and the transmission of election results is purely *electronic*. However, the actual voting, tallying and collating of votes is wholly *manual*. Unlike in the 2013 general elections, when the use of technology was left to the discretion of the respondent, section 44 of the Act, which was introduced by the amendments made in 2016 and 2017 respectively, establishes an *integrated electronic electoral system* that enables biometric voter registration, electronic voter identification and electronic transmission of results.

73. Section 44(2) of the Act requires the respondent to procure and put in place the technology necessary for the conduct of a general election at least *one hundred and twenty days* before the elections and to test, verify and deploy such technology at least *sixty days* before the general election. This is to be undertaken in a consultative manner and through Regulations that have to be approved by Parliament within *thirty days* of that section coming into force. The respondent has complied with the requirement by dint of the **Elections (General) Regulations 2012**, as subsequently amended, and culminating with the latest amendments contained in Legal Notice No. 72 of 21<sup>st</sup> April 2017.

74. Accordingly, the legal regime obtaining in this country at the moment in the *electoral system* requires an *integrated electronic system* that enables biometric voter registration; electronic voter identification; and, electronic transmission of results.

75. This leads us to the question whether the respondent has developed a *complementary mechanism* under section 44A of the Act. The petitioner contended that; pursuant to the ***Election Laws (Amendment) Act*** No. 1 of 2017 section 44 of the Act was amended by inserting section 44A. The latter requires the respondent to put in place a complementary mechanism for identification of voters and transmission of election results that complies with the provisions of Article 38 of the Constitution. It was further contended that under section 109 of the Act, the said mechanism ought to have been put in place by regulations with the approval of Parliament at least 60 days before the general elections; that the respondent has not complied with the aforesaid provisions of the Act and that it is therefore time barred from developing such a complementary mechanism. The petitioner therefore contended that a declaration should issue that the voter identification and transmission of results of the elections of 8<sup>th</sup> August, 2017 should exclusively be electronic.

76. **Mr. Orengo**, Learned counsel for the petitioner submitted that section 44A of the Act was a product of a process that ended up in the enactment of the ***Election Laws (Amendment) Acts*** of 2016 and 2017; that prior to the enactment of that section, the electoral system in Kenya was manual. He submitted that since section 44A was for a complementary mechanism, the mechanism must be electronic. Counsel referred to the ***Hansard*** of Parliament during the debate and submitted that there was no evidence that the system envisaged under section 44A of the Act was manual.

77. It was further submitted for the petitioner that section 44A was meant to deal with circumstances where the entire system set up by section 44 of the Act collapses. In the petitioner's view, the mechanism was not meant to deal isolated incidents in polling stations in terms of what the respondent had put in place. **Prof. Sihanya** on his part urged the Court to direct its mind to three questions: *What the components of the complementary system anticipated in S44A are; whether the respondent had complied with the section within 60 days and whether the mechanism was constitutional; and, finally, what remedies are available to the petitioner in the circumstances.*

78. In opposition to the petition, the respondent *only* filed *grounds of opposition*. The respondent contended that it had put in place the complementary mechanism under section 44A of the Act. It was submitted on behalf of the respondent that the complementary mechanism envisaged in section 44A was actualized in Regulations 69 and 83 introduced by *Legal Notice No. 72 of 2017*.

79. On the part of the two interested parties, it was contended that Regulations had been promulgated to give effect to Articles 38, 81, 82, 83 and 86 of the Constitution; that the complementary mechanism under section 44A of the Act had been introduced pursuant to Regulations made under section 109 of the Act; that what the petitioner was seeking was meant to restrict the citizens' political rights under Article 38; that the petition was an attempt to repeal section 44A which the constituent parties of the petitioner had failed to block in Parliament or through the case of ***R v Speaker of the National Assembly & 4 others***, Nairobi Judicial review 657 of 2016. We have carefully considered those matters.

80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is *complementary* to the one set out in section 44 of the Act. The system under section 44 is an *integrated electronic electoral system* that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.

81. In the ***The Concise Oxford English Dictionary***, Oxford University Press, 12<sup>th</sup> Edition 2011, the word *complementary* "means forming a complement or addition, ... combining in such a way as to form a complete whole or enhance each other" while *complement* means "a thing that contributes extra features to something else so as to enhance or improve it...". That being the plain and literal meaning of the word *complementary*, our view is that section 44A of the Act presupposes a mechanism that will complement, add, enhance or improve the mechanism already set out in section 44 of the Act.

82. It follows therefore that the complementary mechanism in section 44A need not be similar, same, akin or *parallel* to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution. This complementary mechanism only sets in when the *integrated electronic system* fails.

83. It was the petitioner's contention that the mechanism envisaged under section 44A is akin to the one in section 44 of the Act; that the debate in Parliament did not indicate that the complementary mechanism was to be manual. With greatest respect, we do not think that there is any *ambiguity* in the language used in section 44A to resort to the *Hansard of Parliament* in order to decipher the true intention of the legislature in this case. The language and meaning in that section is plain and clear. To our mind, what was required of the respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.

84. One other thing that buttresses our position that the mechanism contemplated in section 44A of the Act is independent of the one set out in section 44 of the Act, is the use of the words '*Notwithstanding the provisions of section 39 and section 44, ...*'. The use of the term '*notwithstanding*' makes the mechanism in section 44A *independent* of what is contained in sections 39 and 44. The authors of **Stroud's Judicial Dictionary of Words and Phrases** 6<sup>th</sup> Edition, London, Sweet and Maxwell 2000 at page 1732 have defined *notwithstanding* as follows:

***“NOTWITHSTANDING: “Anything in this Act to the contrary notwithstanding” is equivalent to saying that the Act shall not be an impediment to the measure, ...”***

85. On the other hand, the **Blacks Law Dictionary**, 9<sup>th</sup> edition, Bryan and Garner, 2009, defines the word *notwithstanding* to mean “*despite, inspite of*”. In this regard, the use of the term *notwithstanding* in section 44A means that *inspite* of what the provisions of section 39 and 44 stipulate as to the mechanism in our electoral system, the respondent is to put in place a mechanism to *complement* sections 39 and 44 of the Act. All that is required is that the said mechanism be simple, accurate, verifiable, secure, accountable and transparent; and, one which will not disenfranchise the citizens.

86. We are fortified in our finding by the decision of the Supreme Court of India in **Chandavakar Rao v Ashalata Guram** [1986] 4SCC 447. It was held-

***“A clause beginning with the expression ‘notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract’ is more often than not appended to a section at the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment”***

87. Accordingly, our determination on what constitutes the components of the complementary mechanism to be established under section 44A of the Act is: that the mechanism should be separate but which is meant to improve or augment the mechanism already set out in section 44. That mechanism has to be simple, accurate, verifiable, secure, accountable and transparent. It must also comply with Article 38 of the Constitution, that is, it must ensure that every citizen's right to register as a voter, vote at an election or vie for political office is safeguarded.

88. The next issue for determination is whether the respondent has established the complementary mechanism. The respondent contended that it has done so through Regulations 69 and 83 vide *Legal*

Notice No. 72 of 21<sup>st</sup> April 2017. In the said Legal Notice, Regulations 69 and 83 were amended. Regulation 69 (e), at the relevant part, now provides as follows-

***“(e) in case the electronic voter identification device fails to identify a voter the presiding officer shall-***

- (i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;***
- (ii) complete verification Form 32A in the presence of agents and candidates;***
- (iii) identify the voter using the printed Register of voters; and***
- (iv) once identified proceed to issue the voter with the ballot paper to vote.”***

89. Regulation 83 on the other hand provides-

***“Tallying and announcement of election results***

***(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—***

- (a) tally the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;***
- (b) disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;***
- (c) disregard the results of the count of a polling station where the total votes exceeds the total number of voters who turned out to vote in that polling station;***
- (d) collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly;***
- (e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the—***
  - (i) name of the respective electoral area;***
  - (ii) total number of registered voters;***
  - (iii) votes cast for each candidate or referendum side in each polling station;***
  - (iv) number of rejected votes in each polling station;***
  - (v) aggregate number of votes cast in the respective electoral area; and***
  - (vi) aggregate number of rejected votes;***
- (f) sign and date the relevant forms and publicly declare the results for the position of—***
  - (i) member of County Assembly;***
  - (ii) member of National Assembly; and***

**(g) issue certificates to persons elected in the county assembly and National Assembly elections in Forms 36C and 35C respectively set out in the Schedule;**

**(h) deliver to the county returning officer the collated results for the election of the county Governor, Senator and county women representative to the National Assembly; and**

**(i) deliver to the Chairperson of the Commission the collated results for the election of the president to the national tallying centre.**

**(4) The Chairperson of the Commission shall tally and verify the results received at the national tallying centre.”**

90. The net effect of the two Regulations is to introduce a *manual mechanism* of identifying a voter; and, transmitting the election results. We are at this juncture alive to the Court of Appeal decision in **IEBC v Maina Kiai & Others**, Court of Appeal, Nairobi, Civil Appeal 105 of 2017 [2017] eKLR. The Court of Appeal was emphatic that the results for the presidential election declared at the constituency tallying center are *final* and only subject to an election petition. In this regard, the delivery of the forms by the returning officer to the chairman of IEBC under Regulation 83(1) (i) will be but to physically deliver what would have already been declared with *finality* at the constituency level. Therefore, the mischievous act by the respondent of repealing Regulation 83 (3) is *meaningless* and *futile*.

91. In the circumstances, we hold that the respondent has put in place a complementary mechanism for identification of voters and transmission of election results as required by section 44A of the Act. It should be remembered that the Constitution has not specified the type of mechanism, whether, electronic or manual that should be put in place. That duty was well within the province of the legislature which has spoken through sections 39, 44 and 44A of the Act and the Regulations thereunder.

92. There was the contention by the petitioner that the Regulations should have been made within *60 days* of the section coming into force. Firstly, section 44A is an independent provision. It is not part of section 44 of the Act. If it was the intention of Parliament for section 44A to be part of section 44 of the Act, nothing would have been easier than to have done so. It could have enacted that section as section 44(9). Secondly, nowhere in section 44A is there any reference to *timelines* as to when the Regulations, if any, under that section were to be enacted.

93. This leaves the question whether the IEBC has set up Regulations in compliance with Section 44A as read with Section 109 of the Elections Act. Section 109 of the Act empowers the respondent to make Regulations for the better carrying out of the purposes and provisions of the Act. Pursuant to the aforesaid provisions the respondent enacted the **Elections (General) Regulations 2012**. These Regulations have been amended a number of times the latest being by Legal Notice No. 72 of 21<sup>st</sup> April 2017. It is the petitioner's case that the respondent has not enacted any Regulations in respect of a complementary mechanism as provided for under section 44A of the Act. However the petitioner did not cite before this Court any provisions of the law that compel the respondent to enact any Regulations to operationalize Section 44A.

94. Section 109 (1) of the Act is *permissive* as far as the making of Regulations is concerned; and, cannot be used to advance the petitioner's case. This is unlike section 44 which specifically provides in *mandatory* terms for the enactment of Regulations within set *time frames*. We therefore find that the Regulations made to operationalize Section 44 and in particular Regulations 69(e), 82 and 83 provide an alternative mechanism for the operationalization of section 44A.

95. The other issue raised by the petitioner was alleged lack of public participation in the making of the Regulations. Public participation is a means by which citizens take part in the conduct of public affairs, directly or through their chosen or elected representatives. It is one of the national values enunciated in Article 10(2) of the Constitution. In **KING & OTHERS V ATTORNEY FIDELITY FUND BOARD OF CONTROL & ANOTHER** (561)/2004)[2006] the Court of Appeal of South Africa held that:-

***“The Public may become involved in the business of the National Assembly as much as by understanding and being informed of what it is doing as by participating directly in these processes”.***

96. In ***R v Speaker of the National Assembly & 4 others***, Nairobi Judicial Review 657 of 2016, the Coalition for Reform and Democracy (CORD) sought leave to apply for orders in judicial review to prohibit the Speakers and Members of Parliament from transacting, discussing and carrying out any business in respect of among other bills, the bill affecting the amendments to the ***Elections Act 2011***. This is but a confirmation that there were discussions and debates in Parliament in respect of the amendments to the Act.

97. Section 44(6) and Section 109(3) of the Act make it mandatory for Regulations made under Section 44(5) to be submitted to Parliament for approval. The Regulations are supposed to be gazetted under Section 109(4) of the Act. All these procedures were adhered to. The Regulations resulting therefrom have not been challenged. There is therefore a general presumption that the Regulations as enacted are constitutional and have met the requirement for public participation.

98. There is a rebuttable presumption of constitutionality of statutes. This position was affirmed by the Court of Appeal of Tanzania in ***Ndyanabo v Attorney General*** [2001] E. A 495. The decision was a restatement of the law in the English case of ***Pearlberg v Varty*** [1972] 1 WLR 534. In the former, the Court held that:

***“Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative.”***

99. See also ***Katiba Institute & another v Attorney General***, Nairobi, High Court petition 209 of 2016 [2017] eKLR.

100. This position is also in tandem with sections 60 and 85 of the ***Evidence Act***. Section 85 provides as follows-

***“The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.”***

101. In view of the foregoing, we find that Regulations 69 and 83 of the ***Elections (General) Regulations 2012*** have the full force of law as they were approved by the Parliament which represents Kenyans.

102. The petitioner contended that in the absence of a credible complementary mechanism, the general elections should be postponed as provided in section 55B of the ***Elections Act***. We disagree. We take judicial notice that Parliament has been *dissolved*. Secondly section 55B applies where an election date has been appointed but there is (a) likelihood of a serious breach of peace; (b) a natural disaster; or, (c) occurrence of an electoral malpractice of such *nature* and *gravity* as to make it *impossible* to proceed with the election. Thirdly and most importantly, the *date* for the general elections provided by Articles 101 and 136 of the Constitution is *cast in stone*.

103. The petitioner had also prayed for a *declaration* that the identification of voters and transmission of results for the election to be held on 8<sup>th</sup> August 2017 be *exclusively electronic*. We wish to emphasize again that every citizen has a right under articles 38(3), 81, 83(3) to be registered as a voter, to vote and to have every vote counted. The electronic system failed during the 2013 general election. We have already dealt with the question of reliability of technology from other jurisdictions. Technology can be susceptible to hackers, software bugs, badly trained frost workers or power outages which could intentionally or accidentally erase or alter voting data captured by the machines leading to failure.

104. Finally this Court has to consider the impact or consequences if the exclusive electronic system fails. It would throw the entire election into jeopardy and imperil our democracy. We therefore find that it would not be feasible to declare that the elections to be held on 8<sup>th</sup> August 2017 be *exclusively electronic*.

105. The upshot is that the entire petition is devoid of merit. It is hereby dismissed with costs to the respondent and the interested parties.

**DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>st</sup> day of July 2017.**

**KANYI KIMONDO**

**JUDGE**

**A. MABEYA**

**JUDGE**

**H. ONG'UDI**

**JUDGE**

**Judgment read in open court in the presence of-**

Mr.....for the Petitioner instructed by Murumba & Awele Advocates.

Mr.....for respondent instructed by V. A. Nyamondi & Company Advocates.

Mr.....for the 1<sup>st</sup> interested party instructed by the Honourable Attorney General.

Mr.....for the 2<sup>nd</sup> interested party instructed by Mbugua, Atudo & Macharia Advocates.

Mr. .... Mr. .... & Mr. ....Court Clerks.