



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & OUKO, J.J.A)**

**CIVIL APPEAL NO. 147 OF 2017**

**BETWEEN**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> APPELLANT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....2<sup>ND</sup> APPELLANT**

**AND**

**ANDREW KIPLIMO SANG MUGE.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY FORUM.....2<sup>ND</sup> RESPONDENT**

**RICHARD OUMA OGINDA.....3<sup>RD</sup> RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Nairobi (Murithii J), dated 27<sup>th</sup> April, 2017)*

*in*

*H.C. Constitutional Petition No. 576 of 2017 as consolidated with Petition No.118*

*of 2016 and Petition No. 148 of 2016)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The real gravamen against the decision of the High Court (Muriithi, J) in the judgment appealed against here is whether there is a conflict between **Articles 177(1)(a) and 177(4)**, the answer to which, that has aggrieved the appellants is encapsulated in the following eight paragraphs of that judgment;

**“[38].....For the County Assembly elected on 4.3.2013 therefore their term of office in accordance with Article 177(4) of the Constitution ends on 3.3.2018. The second Tuesday of August of the fifth year from 2013 would remain in all instances the 8th August 2017 well before the expiry of the five year period from whatever date in 2013. The reason for this is that the fifth year prescribed by the Constitution will always begin at the end of the fourth year from the date of the previous election, and the month of August is the two months after**

the mid fifth year not at the end of it to allow it to coincide with the end of the five year term

.....

[40] The right to hold office is a right to property in the widest sense of the property including the salary and emoluments earned by virtue of holding such office and an aggrieved party would be entitled to claim damages for loss of property, or in proper case an injunction to stop the deprivation of property. See A-G for The Gambia v. Jobe (1985) LRC (Const) 556 where it was held that the term ‘property’ in the Constitution was to be construed widely.

[41] In this case, however, the loss may be ascertained and remedied in an award of damages for loss of income for the uncompleted period of the tenure of office.

[42] For the reasons set out above, I find that while the petitioners are not entitled to any order affecting the constitutionally ordained election date of the second Tuesday of August every fifth year, falling in the present case on the 8<sup>th</sup> August 2017, the Petitioners are entitled to an order for the payment as damages for loss of income for the uncompleted term of office cut short by reason of the elections being held before the expiry of their constitutional term of five years under Article 177 (4) of the Constitution.

.....

[45] How do we remedy the loss suffered by the MCAs? It must be by payment of money of their opportunity cost resulting from the holding of the general election in accordance with the constitution before the expiry of constitutional term of office of the MCAs.

.....

[47] To reduce the burden on the tax payer in public interest as in this case where the payments may not have been budgeted for in advance, the Court must direct that the damages for loss of income being the monthly salary and applicable emoluments for the remainder eight month period be paid not as lump-sum damages but as monthly dues in arrears in the same manner as it would have been paid in the course of the MCAs’ tenure had their term not been reduced by the general election.

.....

[49] The duty to pay for the loss of income suffered by the MCAs must be borne by the taxpayer. The public may understandably feel aggrieved that it is required to meet salaries and emoluments for MCAs for period for which they did not provide service as office holders. There is great public interest, however, in the observation of the Article 10 principle of the rule of law, which must mean that rights accrued under the Constitution and statute must be upheld. The MCAs suffer a reduced opportunity to remain in office for the full term of their constitutional tenure consistently with their right to hold office under Article 38 (2) of the Constitution and, for that reason, they are entitled to compensation for the lost income for the period”(Our emphasis).

Since the contention is on Articles 177(1)(a) and 177 (4) it is, at this stage apposite to set them out here below.

“177. (1) A county assembly consists of—

(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

.....

**(4) A county assembly is elected for a term of five years”.**

At the heart of the three consolidated petitions (Nos. 118 of 2016, 148 of 2016 and 576 of 2017) which also form the subject of this appeal, was the construction of the above Articles to determine the term of office of the Members of County Assembly (MCAs). This question became pertinent when, pursuant to Article 177(1), the 2<sup>nd</sup> respondent, declared 8<sup>th</sup> August 2017 as the date of the general election.

In their understanding, the respondents believed that, in terms of **Article 77(4)** the term of the county assembly is five years from 4<sup>th</sup> March, 2013, the date of the last general election and therefore the elections of 8<sup>th</sup> August, 2017 would prematurely terminate that term by eight months. Apprehensive of the outcome, the respondents petitioned the High Court to determine;

- i. The term of office of MCAs under the Constitution.
- ii. The correct date for the next general election after the one of 4<sup>th</sup> March, 2013.
- iii. Whether MCAs would suffer loss of reduction of tenure by reason of the general election being held on 8<sup>th</sup> August 2017; and
- iv. Whether the respondents would be entitled to the reliefs sought in the petition.

In the learned Judge’s view there is an apparent conflict between **Articles 177(1) (a)** and **177 (4)**, which would require an amendment to the Constitution to harmonize the terms of all elective offices; that although **section 177(4)** defines the term of MCAs as five years, that alone does not make it discriminatory of the holders of other elective offices whose terms are defined by reference to second Tuesday of August, in the fifth year; that the five year term of MCAs is set out in unambiguous text of **Articles 177 (4)** and **194 (f)** of the Constitution so that “**a county assembly is elected for a term of five years**” expiring “**at the end of the term of the Assembly**”.

Applying the mischief rule of interpretation, the learned Judge noted that the provisions of the Constitution for ascertainment of the election date are intended to ensure certainty of the election date; and that all the relevant provisions for elections under the Constitution of Kenya 2010 appoint the second Tuesday of August of the fifth year as the election date for all elective positions in the general election.

The general election cycle for Member of Parliament, President and Deputy President, County Governors and their deputies and for the County Assemblies as set out, respectively in **Articles 101, 136(2)(a), 180(1)** and **177 (1) (a)** are to be held on the same day, being the second Tuesday in August, in every fifth year. This fact is emphasized by **section 9** of the Sixth Schedule, that;

**“9. (1)The first elections for the President, the National Assembly, the Senate, county assemblies and county governors under this Constitution shall be held at the same time, within sixty days after the dissolution of the National Assembly at the end of its term”.**

The learned Judge expressed the view that it would be absurd to adopt an interpretation of these provisions whose effect would lead to the holding of the Presidential, members of Parliament and the County Governors elections together and those of MCA separately eight months afterwards; and that harmony and consistency in interpretation of relevant constitutional provisions must lead to the conclusion that the election date for all political positions be held as stipulated, on the same day.

Guided by **SDV Transami Kenya Limited and 19 Others V The Attorney General & 2 Others and Anor** H.C Petition No. 76 OF 2012, the learned Judge reiterated that the Constitution must be construed in generous and purposive manner and in accordance with the principles set out in **Article 259**; that the Constitution be interpreted in a manner that promotes its purposes, values and principles; advances the

rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; contributes to good governance; that every provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking; and that it must be interpreted as an integral whole with no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument.

**South Dakota V. North Carolina** 192 U.S 268 (1904) and **Olum v. AG** [2002] 2 EA 508 were cited by the Judge to buttress these principles.

Applying these principles to the facts before him and citing the High Court decision in **John Harun Mwau & 3 others V Attorney General & 2 others**, Constitutional Petition No. 65 of 2011 Consolidated with Petition Nos. 123 of 2011 and 185 of 2011, and this Court's judgment in **Centre for Human Rights Education and Awareness & 2 Others. V John Harun Mwau**, Civil Appeal No. 74 of 2012, the learned Judge said of the two provisions under review as follows;

**“[33] I consider it an aspect of purposive construction of the constitution, the rule of harmonious interpretation of constitutional provisions which must mean that where two or more provisions of the constitution conflict, the court must adopt a construction that achieves a harmonizing balance to reconcile the conflicting provisions into a constitutional meaning that gives effect to the one without destroying the other. In the end the greater purpose of the constitution is achieved, which is the orderly governance of the state governed by the particular constitution in accordance with the cardinal principles of rule of law and constitutionalism.**

.....

**[35] It is not sought to have one constitutional provision declared unconstitutional as against another. The object of harmonization is to give effect to both or more constitutional provisions in a manner that makes constitutional sense in terms of the purposes of the Constitution. If the two provisions the subject of this inquiry are put side by side, it will be clear that they cannot both be given effect at the same time. Yet they relate to the same constitutional transaction of the General Election: Article 177 (1) (a) provides that the elections for the County Assembly be held at the same time with the elections for Members of Parliament on the second Tuesday of August of every fifth year. Article 177 (4) requires a period of five years between the term of one County Assembly and another.**

.....

**[37] For example, whenever the elections are held, the period of five years would always end after the Second Tuesday of August of the fifth year, that is on the day before the commencement of the same date five years later according to the provisions of reckoning time under Article 259 (5) of the Constitution”.** (Our emphasis).

From this the learned Judge was clearly of the view that there was a conflict between **Articles 177(1)(a) and 177(4)**; and that second Tuesday of August of the fifth year from 2013 would remain in all instances the 8<sup>th</sup> August 2017, well before the expiry of the five year period from 2013. This is because, through interpretation, the fifth year prescribed by the Constitution will always begin at the end of the fourth year from the date of the previous election.

On whether the affected MCAs suffered any loss of reduction of tenure, the learned Judge was convinced, on the authority of **A-G for The Gambia V. Jobe** (1985) LRC (Const) 556, that the right to hold office is a right to property in the widest sense of the word property and included the salary and emoluments earned by virtue of holding such office and that an aggrieved party would be entitled to claim damages for loss of property.

As a result he ultimately concluded that;

**“[42] .....while the petitioners are not entitled to any order affecting the constitutionally ordained election date of the second Tuesday of August every fifth year, falling in the present case on the 28th August 2017 (sic), the Petitioners are entitled to an order for the payment as damages for loss of income for the uncompleted term of office cut short by reason of the elections being held before the expiry of their constitutional term of five years under Article 177 (4) of the Constitution”.**

He proceeded to award all concerned MCAs damages for loss of income as explained at the beginning of this judgment. In addition he recommended the amendment of the Constitution to harmonize the tenure of the MCAs with those of the Members of Parliament and other elective state officers of the national and county governments.

The specific findings of the learned Judge that aggrieved the appellant and which has precipitated this appeal, though based on 13 grounds, in our view may be compressed into only one broad question, the main thrust being that the learned Judge failed to harmoniously interpret **Articles 177(1)(a)** and **177(4)** and the rest of the Constitution as a whole.

The case for the appellants in this appeal as urged by Ms. Gatiri and Mr Mukele, respectively learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> appellants is to the effect that, since by **Article 2(3)** of the Constitution, the validity or legality of the Constitution cannot be challenged, the learned Judge had no authority to abrogate a valid constitutional provision; that the court’s jurisdiction to interpret the Constitution did not extend to purporting to amend it or declaring any of its provisions as being inconsistent with any of its Articles; that all sections of the Constitution are equal and none is superior to the other and therefore there cannot be any inconsistencies between the provisions of the Constitution. Counsel further submitted that the object of the Constitution is to promote the rule of law and create certainty in the electoral process and the running of the affairs of the State; that to achieve certainty and harmony in the electoral process, **sections 9** and **10** of the Sixth Schedule to the Constitution provide that the first election for the President, the National Assembly, the Senate, County Assemblies, and County Governors are to be held at the same time, within sixty days after the dissolution of the National Assembly at the end of its term; that the case of **Center for Rights Education and Awareness V John Harun Mwau**, Civil Appeal No.74 of 2012, settled this question by holding that the next elections after the first one would be conducted in accordance with **Articles 101(1), 102(1), 136(2)(a), 177(1)(a)** and **180(1)** which cumulatively restates that date to be the second Tuesday of August, of the fifth year, which, Counsel submitted, in effect meant that the term for the next President, Member of Parliament, Governor and Members of County Assemblies may be shorter than five years as a consequence of the transitional provisions; and that all consecutive elections would be held in line with those Articles. In counsel’s view **Articles 177(1)(a)** and **177(4)** of the Constitution do not, in any way contradict each other but instead they complement each other if harmoniously interpreted; and that the learned Judge misapplied the Articles and in error held that the term of office for MCAs would end on 3<sup>rd</sup> of March 2018.

It was submitted that even after citing the case of **Justice Kalpana H. Rawal V Judicial Service Commission & 3 Others**, Civil Appeal No.1 of 2016 on the distinction between the words “term” and “tenure” and on the question of right to property, the learned judge misinterpreted the Constitution by holding that the President, MPs and Governors do not have a five-year term under the Constitution and that there is right to property in holding an elective office.

She contended also that the High Court misdirected itself by entertaining an employment and labour relations dispute contrary to **Article 162(2)(a)**; that it was equally erroneous for the High Court to hold that the right to hold office is a right to property. In conclusion counsel estimated that to implement the impugned decision of the High Court the National Treasury would have to set aside Kshs. 8 billion.

She cited the **Centre for Rights Education and Awareness** case (supra) where the Court pronounced itself on the principles applicable in the construction of statutes which principles also apply to construction of the Constitution, stating that a court must avoid a construction that is likely to produce an absurd, unworkable or impractical result; an anomaly or irrational or illogical result and lastly that the law should serve public interest; meaning that such construction must not in any way be adverse to public

interest, economic, social and political or otherwise. That the court should always be guided by public interest considerations when arriving at decisions which have grave ramifications on the budgetary process and appropriation of public funds. She submitted that as a result of the impugned judgment, the MCAs remuneration would cost the Kenyan taxpayer approximately Kshs.8 billion, a sum that has not been budgeted for by Parliament. This, in turn, it was argued, would create a macro-economic imbalance in addition to ballooning the wage bill and causing unnecessary burden on the taxpayer. She cited the case of **Teachers Service Commission (TSC) V Kenya Union of Teachers (KNUT) & 3 Others** Civil Appeal No.196 of 2015 to support the latter argument.

In conclusion it was submitted that the High Court's interpretation perpetuates discrimination by treating MCAs preferentially from other elected State Officers without justifiable cause contrary to **Article 27** of the Constitution; and that the learned judge had no constitutional mandate to interfere with a constitutionally mandated budget framework. In view of the above cumulative arguments Ms. Gatiri urged us to allow this appeal.

Mr. Mukele, learned counsel for the 2<sup>nd</sup> appellant, for his part, while in agreement with the foregoing, submitted that the provisions of Article 177(4) of the Constitution must be read together with **Articles 177(1)(a), 101(1), 102(1), 136(2)(a) and 180(1)**. He argued that **Article 177(4)** of the Constitution is qualified by the latter provisions. The effect of such qualification, according to him, is that the five-year term envisaged under **Article 177(4)** of the Constitution is cut short by the provisions that require general election to be held on the second Tuesday of August every fifth year. The life of a county assembly was therefore extinguished upon the holding of a general election of August, 2017 and MCAs in office at the time did not have an unexpired term.

Further he relied on **Articles 2(3) and 259(1)** of the Constitution which stresses the supremacy of the Constitution and that it must be interpreted in a manner that promotes its purposes, values and principles. He cited, among other cases, **Speaker of the Senate & Another V The Attorney General & Others**, Advisory Opinion Reference No. 2 of 2013, where the Supreme Court stated that it must remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions, and that it is the political and social demand of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship.

Counsel also urged us to follow **Justice Kalpana H. Rawal V. Judicial Service Commission** (Supra) to the effect that the right to pension for the period in which service has been rendered is a property right and accrued pension is a vested property right and conversely, that there is no right to pension in respect of an anticipated period when no service has actually been rendered.

In response to the main appeal Mr. Muge, the 1<sup>st</sup> respondent, acting in person was of the view that the learned Judge had jurisdiction based on Article 2(3) to determine whether there was a conflict between two Articles of the Constitution; that the issues raised in the petition related to conflict or inconsistency between two provisions of the Constitution; that all constitutional provisions carry the same weight and are all valid; and that the Learned Judge correctly held that there was inconsistency between **Article 177(1)(a) and 177(4)** and to recommend amendment of **Article 177(4)**. Mr. Muge contended also that the Constitution provides for two types of terms; a time-specific under **Article 177(4)** for the County Assemblies being explicitly five years; and event-specific term for President which terminates when the next President is sworn in; and for MPs, Governors and County Representatives, at the next general election. For these reasons he agreed with the learned Judge that there does not exist an explicit five year term for other elective offices.

Turning to his cross appeal, Mr. Muge maintained that it would be impossible to hold the next general election on 8<sup>th</sup> August 2017 without limiting the term of MCAs; that fixing the election date based on the literal reading of the text "**second Tuesday, in every fifth year**" would result in absurdity including a four year presidential and parliamentary term for all subsequent elections.

He submitted that County Assemblies are a critical part of the devolved structure and that the term of MCAs determines the functionality and existence of the County Assemblies; that that structure can only

be altered by a referendum hence the learned Judge erred in limiting the constitutionally protected term of the County Assembly by instead awarding damages to MCAs.

On the text “**second Tuesday in August, in every fifth year**” Mr. Muge sought to know when the 3<sup>rd</sup> general election under the 2010 Constitution would be held after the one scheduled for **8<sup>th</sup> August 2017**. Answering his own question he contended that a five-year term starting from **8<sup>th</sup> August 2017** would end on **7<sup>th</sup> August 2022 at 11.59pm**. But if “**every fifth year**” was to be applied to the **second Tuesday in August 2022**, the election would fall on **9<sup>th</sup> August 2022**; outside the 5 year constitutional requirement, that is **7<sup>th</sup> August 2022, at 11.59pm**. In the end he submitted that the correct date within the stipulated fifth year would be **10<sup>th</sup> August 2021**. The result of this, he contended, would reduce the terms of the office of the President, MPs, Governors and MCAs to 4 years. He wondered; because Article 177(1)(a) stipulates that elections for MCAs shall be held on the same day as a general election for MPs, would the term of the County Assembly again be limited by a whole year to allow for 10<sup>th</sup> August 2021 elections as is the case now and by a whole year for all subsequent elections? It was his opinion that this situation will arise in all subsequent elections and will have to be harmonized to cure bad precedent being set in subsequent elections where MCAs will have to be paid for a 1 year unexpired term. He insisted that the correct date to hold the next elections after those of 4<sup>th</sup> March, 2013 ought to be on 3<sup>rd</sup> March, 2018 as it would be determinable in advance while preserving the five year term for all other elective offices.

Learned counsel, Messrs. Amoko and Njenga, on behalf of the 2<sup>nd</sup> respondent agreed with the conclusion of the learned Judge on the effect of holding the general election on 8<sup>th</sup> August, 2017 and the award of damages for the prematurely ended term of office of MCAs. They agreed that the term of office of MCAs is not prescribed in the same way as that of the President, Governor and MPs which could be less than five years; that the five-year term of MCAs under the Constitution was deliberate and is not based on the election date; that the court cannot qualify a provision or give preferential treatment of a provision over the other; that there was no discrimination by not defining the term of MCAs as the Constitution itself specifically provides for this distinction; that the learned Judge properly harmonized the concerned provisions by looking at the interpretation which was likely to do the least damage to the Constitution and found that the appropriate relief was to compensate the concerned MCAs.

Counsel urged us to accept the argument that elected leaders have a right to hold office until the expiration of their term and that if that term is interrupted, they would be entitled to be compensated for loss of office because holding office for the term stipulated in the Constitution constitutes a proprietary right in terms of **Article 22** of the Constitution. Distinguishing the decision in the **Justice Kalpana H. Rawal Case** (Supra) and this appeal, counsel submitted that the issue in the **Justice Kalpana H. Rawal Case** was that of “tenure” which was changed by the Constitution itself as opposed to a “term” in the current appeal, the alteration of which amounts to a violation of a right.

Picking up from Mr. Amoko, Mr Njenga asked us to appreciate the peculiar facts in the **Center for Rights Education and Awareness & Another V John Harun Mwau & 6 others** (supra), where the issues raised were distinct from those in this appeal; that the application of **Articles 177(1)(a)** and **177(4)** was not considered in that case, where the interpretation concerned sections 9 and 10 of the Sixth Schedule; that the right to hold office under **Article 177(4)** cannot be qualified; and that an award for compensation for constitutional rights violations is not subject to availability of funds or budgetary provision. In any case, counsel approximated the number of MCAs in the country to be 2274 and reckoned that it would cost around Kshs. 4 and not Kshs. 8 billion to compensate them for the unexpired term.

Counsel observed that should we uphold the decision of the High Court, there would be no need to amend the Constitution as future elections have already been prescribed to be in August of the fifth year; and that there will be no future litigation on the subject since the present litigation concerned only MCAs whose terms were reduced.

Miss Sagwa, learned counsel for the 3<sup>rd</sup> respondent did not file written submissions but fully associated

herself with the 2<sup>nd</sup> respondent's submissions. She urged the Court to find that there is no merit in the appeal and to, accordingly dismiss it.

We have considered these submissions. It is desirable, in our opinion to, first set out some of the reliefs sought in the consolidated petitions in order to answer the broad question in this appeal; whether the learned Judge misdirected himself when he made the impugned declarations and awarded damages, The respondents prayed for;

**i. a declaration that the term of office of the existing members of the county Assemblies in the Republic of Kenya, ends on the 5th March 2018, being five (5) years from the date of the general election held on the 4th March, 2013, in accordance with the provisions of Article 177(4) of the Constitution.**

**ii. a declaration that holding the elections for the position and office of MCA on 8th August, 2017, would be unconstitutional in consideration of the express provisions of Article 177(4) of the Constitution of Kenya.**

**iii. a declaration that holding the elections for the position and office of MCAs on the 8th August 2017, would constitute deprivation of their property without compensation, being the accrued terms of service of the existing members of the County Assemblies of Article 40 of the Constitution of Kenya.**

**iv. a declaration that there exists a conflict between Article 177(4) and Article 177(1) of the Constitution.**

**v. an order directing the independent Electoral and Boundaries Commission to set a date for the next elections for MCAs after the expiry of the five year term of the current county assemblies.**

**vi. In the alternative to the declarations prayed for in the preceding paragraphs, the court to consider an award of damages for loss and injury arising from the premature end of term of office of existing MCAs, should the next general election for the position and office of MCAs be held on the 8th August, 2017, as declared by the 1<sup>st</sup> respondent.**

**vii. An order prohibiting the IEBC from stating that the next county assembly and parliamentary elections are on 8<sup>th</sup> August, 2017.” (Our emphasis).**

Only prayers i, iii and iv were granted by the trial court leading to three questions; whether by constitutional edict the term of office of MCAs in office before the general election of 8<sup>th</sup> August, 2017 should end on the 5<sup>th</sup> March, 2018, being five (5) years from the date of the first general election held on the 4<sup>th</sup> March, 2013 under the 2010 Constitution; whether holding the elections for MCAs on the 8<sup>th</sup> August 2017 would constitute arbitrary deprivation of their property; and whether by reason of that deprivation the affected MCAs were entitled to be compensated.

We have already reproduced **Articles 177(1)(a)** and **177(4)** of the Constitution in the preceding paragraphs. They respectively stipulate that MCAs are elected on the same day as Members of Parliament, being the second Tuesday in August, in every fifth year, and that a county assembly is elected for a term of five years.

Although the learned Judge properly directed himself on Article 259 and applied the correct interpretation of the Constitution, appreciating the import of Article 2 on the supremacy of the Constitution, he however went off on a tangent by his ultimate conclusion that indeed **Articles 177(1)(a)** and **177(4)** are inconsistent with each other. The effect of that finding was that, in accordance with **Article 177(4)** the term of MCAs would end on the 5<sup>th</sup> March 2018 and therefore to hold an election for them on 8<sup>th</sup> August, 2017, as required by **Article 177(1)(a)** would be “unconstitutional” as it would amount to a violation of

property rights of MCAs contrary to Article 40 of the Constitution.

The two Articles in question must truly mean *Ex facie*, that MCAs are to be elected **on the same day as Members of Parliament at a general election; that such election must be held on the second Tuesday in August, in every fifth year; and further, that the term of office of MCAs is five years.** Does this mean that by the time the last general election was held on 8<sup>th</sup> August, 2017, MCAs in office were entitled to complete five years in office, and that as a result of holding those elections their term was interrupted by 8 months as alleged? If that is true, then does it amount to a violation of constitutional rights of the concerned MCAs? Who is to blame for that violation, if at all?

According to the consolidated petitions, the Attorney General was sued in his capacity as the principal legal adviser to the Government and for failing to advise the 2<sup>nd</sup> appellant, the IEBC, as the body mandated with the conduct of elections, to ensure the protection of the respondents' right to administrative action. On the other hand IEBC was sued for planning to hold elections on 8<sup>th</sup> August, 2017 in contravention of Article 177(4).

Is any one of the appellants to blame for transgressions that were allegedly committed against MCAs?

In making the Constitution, the people expressed themselves saying, *inter alia*;

**“We, the people of Kenya—**

.....

**EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:**

**ADOPT, ENACT and give this Constitution to ourselves and to our future generations”.**

It must follow, as ordained by **Article 2(1) and (4)** that the Constitution being the supreme law, no court can question the validity or legality of any of its provisions and any law that is inconsistent with it is void to the extent of the inconsistency. In line with this, it has consistently been emphasized that the Constitution cannot subvert itself. See the opinion of the Supreme Court in **The Matter of The Principle of Gender Representation In The National Assembly And The Senate**, Advisory Opinion No. 2 of 2012 and **Speaker of the Senate & another V Attorney-General & 4 others**, Advisory Opinion Reference No. 2 of 2013.

In considering the two provisions in contention we must be guided by the various rules of construction of the Constitution. In terms of **Article 259**, the Constitution must be interpreted in a manner that—

**“(1) (a) promotes its purposes, values and principles;**

**(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**

**(c) permits the development of the law; and**

**(d) contributes to good governance.**

**(2).....**

**(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking .....**”

To realize these principles, courts have developed complementary parameters. For example in the famous

case of South Dakota V North Carolina 192 US 268 (1940) L ED, at page 465 the Supreme Court of the United States of America said;

**“Elementary rule of constitutional construction is that no one provision of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument.”**

This decision has been followed in many jurisdictions, including Kenya. See Dennis Mogambi Mong'are V Attorney General & 3 others, Civil Appeal No. 123 of 2012.

In the case of Tinyefuza V The Attorney General, Constitutional Appeal No. 1 of (1997) UGCC 3, the Uganda's Court of Appeal stated that:-

**“The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.”**

From the foregoing, no constitutional provision is superior or inferior to another. They are complementary and must be read as an integrated and cohesive whole. The Constitutional Court of Uganda in Rwanyarare and Haj Badru Wegulo V Attorney General, Constitutional Petition No. 5 of 1999 aptly said this in a matter challenging a provision in their Constitution;

**“This court has no power to declare one article of the Constitution inconsistent with another, but could deal with the question as to whether or not correct procedure was followed when the (amendment) Act was passed.”**

Further the Constitution or a statute ought to be construed in accordance with the intention of Parliament or the people. This Court, relying on *Halsbury's Laws Of England*, 4<sup>th</sup> Edition (Reissue), Butterworths, 1995, VOL. 44 (1), paragraph 1372 in the County Government Of Nyeri & Another V. Cecilia Wangechi Ndungu, Civil Appeal No. 2 of 2015, reiterated this principle stating that: -

**“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context ...**

**It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the act is by implication modified by another provision elsewhere in the Act ...” (Our emphasis).**

**Githinji, JA** in Center for Rights Education and Awareness & Another V John Harun Mwau & 6 others (supra) further explained that some rules of interpretation which apply to the Constitution equally apply to statutory interpretation. He identified those principles to include;

**“.....the presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social**

**and political or otherwise.”**

Applying the above principles to the current circumstances, reading **Articles 177(1)(a)** and **177(4)** and the Constitution holistically and bearing in mind the history of constitution- making in this country, we hold the firm view that there is no contradiction in terms or application. Any other construction would produce an absurd result or have the tendency of one provision destroying the other, instead of sustaining each other.

While **Article 177(1)(a)**, just like **Articles 101(1)** and **180(1)** contemplates that elections for all elective posts be held on the same day, **Article 177(4)** stipulates a 5 year-term for MCAs. But both provisions must be read and interpreted in harmony and as an integral whole ensuring that no one particular provision overrides or supplants the other.

The construction of the two Articles employed by the learned Judge did not meet the principles we have set out here, with the consequence that it, instead produced an absurd result, that one Article of the Constitution is inconsistent with another; that **Article 177(4)** vested in MCAs a constitutional right with a legitimate expectation to hold office; and that that right was violated, entitling MCAs to an award in damages. That construction was adverse to public interest and ignored our constitution- making history. It did not consider that the two provisions were dealing with different occasions; one with the transition from one constitutional order to another and the other concerned with the future elections after the transition.

It must be remembered, first and foremost that prior to the promulgation of the 2010 Constitution, in terms of section 40 of the repealed Local Government Act, Cap 265, the terms of Councillors, who were the predecessors of MCAs, depended on whether they were nominated, appointed or elected. Those nominated by the Minister would serve for five years or such shorter period as may be specified by the Minister at the time of nomination. It was also in the Minister’s discretion to terminate the nomination of such a councilor by notice in writing. On the other hand the term of office of an appointed councilor was also five years or such shorter period as would be specified by the Council which appointed him. Thirdly the term of office of the elected councilors would be five years. It is therefore correct to say that only the last category of elected councillors had a fixed term of five years, which term expired on the eve of the general election as historically scheduled every five years. The terms of the other two categories would be terminated earlier by the Minister or Council, in accordance with the law.

The last general election before the promulgation of the 2010 Constitution was preceded by the dissolution of Parliament on 22<sup>nd</sup> October 2007. Those elections were held on 27<sup>th</sup> December 2007. But following the Post- Election Violence that ensued, the parliamentary and civic terms commenced on 15<sup>th</sup> January 2008 and ended on 14<sup>th</sup> January 2013 (L.N No.1 of 2008), by which time Kenya had promulgated the new Constitution. The next elections ought to have been held, as the previous ones, in the month of December (of 2012) but for **sections 9** and **10** of the Sixth Schedule- The Transitional and Consequential Provisions, they were to conducted in accordance with those sections which directed that;

**“9. (1)The first elections for the President, the National Assembly, the Senate, county assemblies and county governors under this Constitution shall be held at the same time, within sixty days after the dissolution of the National Assembly at the end of its term.**

**10. The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term”.**

By the foregoing, the date for the first general election under the Constitution was fixed to be held within 60 days from the end of the term of the National Assembly which was on 15<sup>th</sup> January 2013.

The question of the next general election after the dissolution of the Tenth Parliament was determined by the High Court in **John Harun Mwau** (supra) and confirmed in this Court’s decision in **Center For Rights Education And Awareness**. In the former, the High Court held that, whether the first elections as envisaged under the Sixth Schedule or the general election provided for under **Articles 101, 102, 138, 177**

and **180**, the two elections necessarily involve a general election as all elections must be held on the same date. However, it went on to assert that the first elections under the Constitution are distinct with regard to the date. The date is based on the formula “**60 days from the end of the term of the National Assembly**”.

We are satisfied from its language that section 10 of the Sixth Schedule contemplated that the life of the National Assembly existing immediately before the effective date, being a creature of the former Constitution, would continue as the National Assembly despite the new Constitution until the end of its life. Upon that event the elections were to be held “**within sixty days after the dissolution.**”

The term of the Tenth Parliament ended, as we have earlier said, on 15<sup>th</sup> January 2013. Sixty days from 15<sup>th</sup> January 2013 placed the first general election under the new Constitution on 15<sup>th</sup> March, 2013. That first stage having been settled by the two courts in **John Harun Mwau** (supra) and **Center For Rights Education And Awareness** (supra) attention switched to the date of the next and subsequent general election after that of 15<sup>th</sup> March, 2013.

Going by historical trend it should have followed that the second general election would have been scheduled for 4<sup>th</sup> March, 2018, but for the provisions of **Articles 101(1), 102(1), 136(2), 177(1) and 180(1)**, which cumulatively provide that the general election of the President, Members of Parliament, Governors and MCAs after the first elections **would all be held on the same day, being the second Tuesday in August, in every fifth year.**

We refer to **Article 259(5)**, on the computation of time under the Constitution providing that;

**“(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—**

.....

**(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.”**,

With the formula and applying **Article 259 (5) (c)** aforesaid the question of subsequent elections becomes an easy one to determine. Applying it, the second Tuesday in August, in the fifth year from 4<sup>th</sup> March, 2013 fell on 8<sup>th</sup> August, 2017.

“The fifth year” would mean that each election year begins in August every second Tuesday and ends on the eve of the second Tuesday in August of the subsequent year to make 1 year. Therefore, counting 365 days for 1 year and taking into consideration the exact month from one year to the subsequent year, the 1<sup>st</sup> year would be counted from 8<sup>th</sup> August 2017 to 8<sup>th</sup> August 2018; 2<sup>nd</sup> year from 8<sup>th</sup> August 2018 to 8<sup>th</sup> August 2019; 3<sup>rd</sup> year from 8<sup>th</sup> August 2019 to 8<sup>th</sup> August 2020; 4<sup>th</sup> year would be from 8<sup>th</sup> August 2020 to 8<sup>th</sup> August 2021; 5<sup>th</sup> year would be from 8<sup>th</sup> August 2021 to 8<sup>th</sup> August 2022. “The second Tuesday in August in every fifth year”, after the elections of 8<sup>th</sup> August, 2017 would take the next general election date to 11<sup>th</sup> August 2022.

It was argued that, from 4<sup>th</sup> March, 2013 the second general election ought to be held on 4<sup>th</sup> March, 2018 or that, going by the date of 8<sup>th</sup> August, 2017, the third general election would be on 10<sup>th</sup> August 2021, four years from 8<sup>th</sup> August, 2017. The learned Judge for his part, erroneously held the view that, “**it would be impossible to give effect to Article 177(4) and maintain the election ‘on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year’**

That view clearly ignores the factors that caused the delay in the holding of the first elections under the 2010 Constitution to which we have alluded and for which no one could be blamed. The learned Judge made reference to Article 259(5) but failed to accurately apply it to the facts in the matter.

There is sufficient historical justification for the adoption of the formula “**the second Tuesday in August, in every fifth year**” in **Articles 101,136(2) (a), 177(1)(a) and 180(1)** of the Constitution. **Section 59** of the former Constitution vested in the President the sole power to dissolve and prorogue Parliament. Elections could not be called unless the President had dissolved Parliament. During this period the election date was regarded as the Executive’s “secret weapon”, unleashed only at a time appropriate to the Executive. It is evident from the archives of Parliament that, because of this, the clamour for a fixed election date was already growing as far back as 1995. This clamour was sustained throughout the early periods of the constitution making process. See Kenya National Assembly Official Record (Hansard) of 21<sup>st</sup> March 1995, 14<sup>th</sup> October 1997,11<sup>th</sup> October 2000, 13<sup>th</sup> December 2001, 25<sup>th</sup> July 2002 and 5<sup>th</sup> November 2008.

The Constitution of Kenya Review Commission (CKRC) reports also confirm that the public made submissions before for the introduction of a fixed, predictable and determinable election date as part of electoral reforms. ***The Report Of the Constitution Of Kenya Review Commission (KRC), Volume One; The Main Report***, (2003) observed that timing of the general election was a critical component of electoral process and that the President should not have the power to determine the election dates. The people of Kenya, according to the report, demanded that future elections be held regularly, in a predictable, transparent and efficient manner. The Commission ultimately recommended that;

**“.....the General Election should be held on the first Tuesday of the second full week of August after every five years”** and that,

**“.....the President shall serve for a maximum of a two five-year terms.”**

(See page 184 of the Report).

The approach to define precisely the date of election as proposed in these reports and adopted in the Constitution is not unique to Kenya. For example the United States, Canada and Sweden, among other nations have a fixed term and fixed election dates for political elective positions. On **23<sup>rd</sup> January, 1845**, in the case of the United States of American, Congress passed a law establishing that the day for choosing presidential electors would be every four years on **“the first Tuesday after the first Monday in November.”** See Acts of the Twenty-Eighth Congress of the United States, Statute II Chapter 1.

Following the amendment and having **received Royal Assent on May 3<sup>rd</sup>, 2007**, the Canadian Elections Act requires that, starting 19<sup>th</sup> October, 2009, each general election would take place on the **“third Monday in October in the fourth calendar year after the previous poll,”** See section 56.1(2) of Bill C-16.

In Sweden, likewise, the Constitution requires general election to be held on **“the second Sunday of September”** See section 3 of the Sweden Elections Act of 2005.

Back to Kenya, apart from the CKRC Report, we are unable to find any discussion in any subsequent reports of the Committee of Experts or in the parliamentary Hansard as to what informed the choice of “the second Tuesday, in August every fifth year” as our election date. It is however clear to us, in the context of past practice, where elections have traditionally been held after every five years in the month of December i.e. 1992, 1997, 2002 and 2007, though nothing in law fixed December as the election month, that the people wanted to maintain the five year election cycle, but imposing a definite and predictable election date.

We reiterate that a series of events occasioned the reduction of the term of MCAs by approximately 8 months. Those events included the Post - Election Violence that ensued immediately after the 2007 elections, which was resolved by the formation of the Grand Coalition Government on 28<sup>th</sup> February, 2008. See the Schedule to the National Accord and Reconciliation Act, No. 4 of 2008.

Secondly there was some delay in dissolving Parliament in 2012 to pave way for the first general election.

The Sixth Schedule of the Constitution anticipated that, within sixty days of the dissolution of Parliament, the first general election under the new Constitution would be held at the same time for all political elective positions. By complying with the formula “the second Tuesday, in August of every fifth year” and holding the second elections on 8<sup>th</sup> August, 2017, the five-year election cycle for all political elective positions has once more been restored.

These peculiar circumstances notwithstanding **Articles 177(1)(a)** and **177(4)** cannot, as the learned Judge erroneously held, be construed to be in conflict or to contradict each other.

It follows that the award of damages for the unexpired term of MCAs was based on misapplication of the law. According to the learned Judge the affected MCAs were entitled to compensation for the loss of legitimate expectation of remuneration or income. Citing **Articles 38 (3) (c)** and **39** of the Constitution, he posed:

**“Do the Members of the County Assembly suffer loss of reduction of tenure?”.**

In answer he explained that;

**[40] The right to hold office is a right to property in the widest sense of the property including the salary and emoluments earned by virtue of holding such office and an aggrieved party would be entitled to claim damages for loss of property, or in proper case an injunction to stop the deprivation of property. See A-G for The Gambia v. Jobe (1985) LRC (Const) 556 where it was held that the term ‘property’ in the Constitution was to be construed widely”**

No doubt the office of an MCA is a public office, which under section 9 of the County Governments Act is vested with enormous public service roles.

There are many questions that arise from the learned Judge’s determination that MCAs who were in office before the elections of 8<sup>th</sup> August, 2017 were entitled to be compensated for loss of office for the unserved period. For example, how were the MCAs expected to serve for the period of 8 months if elections were held, as required by the Constitution, on the 8<sup>th</sup> August 2017? Would the monthly remuneration of both the MCA who was voted out and the incumbent for the same job not result in a nugatory public financial expenditure? It was estimated by the appellants that the Exchequer would require approximately Kshs. 8 billion to finance the award. The respondents’ own estimate was Kshs. 4 billion. Both figures are by any assessment astronomical.

It is for these reasons and construction of **Articles 177(1)(a)** impracticable result, that it did. concerns that we said that the learned Judge’s and **177(4)** was bound to produce an absurd and

In awarding damages for the unserved term, the learned Judge was persuaded that the affected MCAs would suffer loss of income for the unexpired term of office; that the right to hold office including the right to a salary and other related emoluments in the office is a right to property; that the interruption of that term amounted to deprivation of property rights contrary to **Articles 38 (2)** and **40** of the Constitution, which would entitle those affected to a claim in damages for loss of property.

There is rich jurisprudence on the question at hand from other jurisdictions from which we can develop ours. However in relying on such foreign decisions, as Dr. Mutunga, CJ cautioned in the **Judges & Magistrates Vetting Board & 2 Others V. Centre for Human Rights & Democracy & 11 Others**, SC Petitions Nos. 13A, 14 & 15 of 2013 (consolidated), we must always appreciate Kenya’s unique Constitutional – making historical context, not to mention that our laws may not necessarily be the same as those of the foreign jurisdictions on which we wish to rely.

To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See **South African Veterinary Council V Szymanski** 2003 ZASCA 11. See also **Justice Kalpana H. Rawal V. Judicial Service Commission & 3 others** (supra).

In Eckerson V City of Des Moines, 137 Iowa 452, the Iowa Supreme Court emphasized that:

**“Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected..... ...In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing thereof, the right of the incumbent to further act ceases *eo instante*, notwithstanding the term for which he was elected has not expired.”**

Specifically the “employment” of an elected leader differs qualitatively from other forms of employment. The Supreme Court of Pennsylvania in Sweeney v Tuckers 473 Pa 493, 375 A2d 698 (1977) held that:

**"It is questionable whether [an elected official's] interest in his office is a property interest. An elected office is a public trust, not the private domain of the officeholder. A member of the Legislature. . . holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office ....[T]he public interest in the office far outweighs any private interest of the office-holder."**

In our case, under Article 194 of the Constitution, an MCA may vacate office, *inter alia*, at the end of the term of the county assembly; or if he dies; or removed from office; or if he resigns; or becomes disqualified for election on grounds specified in **Article 193(2)**. If they can leave office before the expiration of the term of the office, it cannot be said to be entitled to be compensated should his term be interfered with in accordance with the law.

As this Court did, with approval in Justice Philip K. Tunoi & Another V Judicial Service Commission & Another, Civil Appeal No. 6 of 2016, we cite the following passage from the decision of the Philippines Supreme Court in The Provincial Government of Camarines Norte V Beatriz O. Gonzales, G.R. No. 185740 to stress the point that a public office holder or an elected political official has no property right in his office.

**“Security of tenure in public office simply means that a public officer shall not be suspended or removed or dismissed except for cause as provided by law and after due process. It cannot be expanded to grant a right to public office. Security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by law.”**

In Butler V Pennsylvania, 10 How. 402: 13 L. ed. 472, the US Supreme Court rejected the argument that an official is entitled to pay for a period he expected to work, but had not in fact worked. The court said:

**“... promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and equity, but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures.”**

In our own Justice Kalpana H. Rawal V Judicial Service Commission & 3 Others, Civil Appeal No. 1 of 2016, the Court reiterated these principles saying:

**“...Accordingly we are satisfied that the right to pension for the period in which service has been rendered is a proprietary right and accrued pension is vested property right. There is no evidence on record that such right of the appellant has been violated or is even threatened. We are however not persuaded that there is a right to pension in respect of an anticipated period in which no service has been actually rendered. In such period there are no**

**contingents or accrued rights. Our conclusion in this respect therefore also settles the appellant's contention that her right to property was violated by retrospective application to her of Article 167(1) of the constitution."**

**Article 38. (2)** relied on in the judgment provides that;

**(2) 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 for—**

**(a) any elective public body or office established under this Constitution; or**

**(b) any office of any political party of which the citizen is a member".**

We do not see how, by fixing the date of the general election to "the second Tuesday in August of every fifth year" would be in contravention of the right **to free, fair and regular elections**. The only right the concerned MCAs would have been entitled to is the salary and related emoluments for the period in which they rendered service to the public.

In conclusion, it must be stressed that the electoral reforms introduced by the Constitution of Kenya, 2010 were aimed at ensuring a regular, free and fair exercise of the right to vote. The definite and predictable election date ("the second Tuesday in August of every fifth year") was intended to champion Article 38 which provides for political rights of the citizens. **Article 101 (1)** as read with **Article 136 (2), 177(1) & 177(4)**, and **180(1)** ensure such regularity by making certain that the election date remains the same for all the six elective seats.

The people considered the importance, convenience and the cost-effectiveness of holding general elections together for all positions once every fifth year from the last general election.

We observe, ultimately that the making and implementation of a new Constitution must result in many transitional challenges and sacrifices. The 2010 Constitution was no exception. **Section 24** of the Sixth Schedule provides the transitional tenure of the Chief Justice in office immediately before the effective date. He was required to vacate office within six months after the effective date, but could elect either to retire from the Judiciary; or subject to vetting, could choose to continue to serve on the Court of Appeal. The Chief Justice who was in office on the effective date opted to retire on 27<sup>th</sup> February 2011.

Despite **Articles 160, 167** and **168**, Parliament was to enact legislation within one year after the effective date to establish mechanisms and procedures for vetting the suitability of all judges and magistrates in office on the effective date to continue to serve. Eleven (11) out of fifty five (55) judges and fourteen (14) out of two hundred and ninety eight (298) magistrates were found unsuitable and removed from the service of the Judiciary.

The cases of **Justice Philip K. Tunoi & Another V Judicial Service Commission & Another** (supra) and **Justice Kalpana H. Rawal V Judicial Service Commission & 3 Others**, (supra) on the reduced retirement age from 74 to 70 years is yet another example.

The Attorney-General and the Auditor-General, on the other hand were to continue in office for a period of no more than twelve months after the effective date. For the other existing state offices the transitional provisions stipulated that a person who immediately before the effective date was in an office established by the former Constitution would on the effective date continue to hold or act in that office for the unexpired period, if any, of the term of the person.

We have given these examples to illustrate how, with the advent of the new Constitution terms of service and tenures were altered without provision for compensation.

To the extent, therefore, that the learned Judge declared that there is a conflict between two constitutional provisions (**Articles 177(4)** and **177(1)**), and raising one provision on a high pedestal than the other, such

a declaration cannot stand. Remember the Constitution is the supreme law and its validity or legality cannot be challenged by or before any court. Only statutes and other laws can be challenged for being inconsistent with the Constitution and not any of its Articles. It was an interpretation that destroyed **Articles 101,136, 177(1) (a) and 180(1)** at the altar of **Article 177(4)**.

Similarly, the declarations that conducting the county assembly elections on the 8th August 2017 would constitute a deprivation of property without compensation; and that serving MCAs would suffer loss and injury from the premature end of their term of office for which they were entitled to damages, were made in error.

Accordingly there is considerable merit in this appeal. We accordingly allow it and set aside the judgment of the High Court of 27<sup>th</sup> April, 2017 and substitute it with an order dismissing High Court Petition No. 576 of 2015 as consolidated with Petition No. 118 of 2016 and No. 148 of 2016. The cross-appeal, which for the reasons we have given earlier lacks merit, is on the other hand dismissed.

Because of the public interest nature of this appeal, we make no orders as to costs.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of November, 2017.**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**