REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MAKHANDIA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 218 OF 2012

BETWEEN

THE MINISTER FOR INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION……..……APPELLANTS

VERSUS

CENTRE FOR RIGHTS EDUCATION & AWARENESS (CREAW)

CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS)

WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K)

DEVELOPMENT THROUGH MEDIA (DTM)

COALITION OF VIOLENCE AGAINST

WOMEN (COVAM)…….RESPONDENTS

YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI)

INTERNATIONAL CENTRE FOR POLICY & CONFLICT

PATRICK NJUGUNA

CHARLES OMWANGA

AND

THE HONOURABLE ATTORNEY GENERAL

(*An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi by the Honourable Lady Justice Mumbi Ngugi dated 29th day of June, 2012 in Nairobi Petition No. 208 of 2012 and Miscellaneous Application Judicial Review No. 207 of 2012)*

BETWEEN

PETITION NO. 208 OF 2012

CENTRE FOR RIGHTS EDUCATION & AWARENESS (CREAW)

CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS)

WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K) …..PETITIONERS

DEVELOPMENT THROUGH MEDIA (DTM)

COALITION OF VIOLENCE AGAINST WOMEN (COVAM)

YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI)…….PETITIONERS

INTERNATIONAL CENTRE FOR POLICY & CONFLICT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPL. JUDICIAL REVIEW NO. 207 OF 2012

PATRICK NJUGUNA

CHARLES OMANGA……..……..…….PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

JUDGMENT OF THE COURT

1. On 11th May 2012, Mwai Kibaki, the then President and Commander-in-Chief of the Defence Forces of the Republic of Kenya, caused to be published Gazette Notice Number 6604, appointing 47 County Commissioners pursuant to the provisions of Section 17 of the 6th Schedule of the Constitution of Kenya 2010. These appointments immediately sparked and generated a great deal of public debate and commentaries in the media by a cross-section of politicians and Civil Society Organizations. This snowballed into two court cases instituted against the Attorney General and Minister for Internal Security and Provincial Administration challenging the constitutionality and legal basis of the said appointments.

2. Almost simultaneously, on 16th and 17th May, 2012, two suits were filed by Centre for Rights Education and Awareness (CREAW) alongside other six Civil Society Organizations being High Court Petition No. 208 of 2012. Two other citizens; Patrick Njuguna and Charles Omanga, filed the suit in their personal capacities but stated that they were representing a Civil Society Organization called Youth Platform for Change (UP4C) filed Judicial Review Application No. 207 of 2012. Both suits were consolidated and heard together. The Constitutional Petition by CREAW and several Women Organizations challenged the constitutionality of the appointments by the President. They cited violations of parts of the Constitution that guarantee equal treatment and opportunities to men and women to the effect that the County Commissioners comprised of 10 women and 37 men contrary to the provisions of Article 27 (3) of the Constitution. The appointments were also done in an opaque manner as there was no advertisement; therefore there was no accountability which was a stark contravention of the national values and principles. The petitioners sought for a declaration that the appointments be declared null and

void. They also sought for an order restraining the respondents and any state officer or organ from swearing the County Commissioners into office.

3. The suit filed on behalf of Youth Platform was by way of Judicial Review, seeking for three principal orders as follows:

1. ***An ORDER OF CERTIORARI removing to this Honourable Court for purposes being quashed and to quash the decision of His Excellency the President of the Republic of Kenya, Honourable Mwai Kibaki, carried out or published in the Kenya Gazette Notice No. 6604 Vol. CXIV – No. 40 dated 11th May, 2012 appointing 47 County Commissioners.***

2. ***An ORDER OF PROHIBITION prohibiting His Excellency the President of the Republic of Kenya, and the 2nd Respondent herein: the Minister for Internal Security and Provincial Administration from implementing the decision carried out or published in the Kenya Gazette Notice No. 6604 Vol. CXVI – No. 40 dated 11th May, 2012 appointing 47 County Commissioners, or from swearing the said 47 Commissioners into office and if the said swearing in has taken place, to prohibit the said County Commissioners from taking or assuming office, drawing any salaries or allowances and other benefits of that office until such time as competitive recruitment procedures taking into account gender and regional balance, public participation and advertising, representation of marginalized communities and principles set out under Article 10 (2), 27 and 232 (d), (e), (f), (g), (h), i, ii &iii & (2) of the Constitution of the Republic of Kenya, provisions of Article 232 (1), (d), (e), (f) & (g) of the Constitution as read together with the Public Service Commission Act, shall have been complied with.***

3. ***An ORDER OF MANDAMUS directing the 1st Respondent and the Minister for Internal Security to comply with the Constitution and to advertise and subject the positions of County Commissioners to competitive recruitment taking into account gender parity, regional balance, public participation and to ensure that a legal framework exists for County Governments prior to the advertisement, recruitment and putting into place the said County Commissioners***.

4. The record also shows that perhaps because the Gazette Notice No. 6604 of 11th May, 2012 had raised a huge public hue and cry. On the 23rd May 2012, the President this time round invoked the provisions of section 3 (2) of the Sixth Schedule of the Constitution of Kenya and sections 23 and 24 of the former Constitution, and caused another Gazette Notice No. 6937 to be issued revoking Gazette Notice No. 6604. In this Gazette Notice, the officers named there in as County Commissioners in the respective 47 Counties were deployed. The respondents did not however amend the pleadings although in the judgment, and the orders made thereto referred to Gazette Notice No. 6937 of 23rd May 2012

5. Both suits were heard by Mumbi Ngugi, J. and in a fairly detailed judgment, the learned Judge concluded as follows:

> ***"There is no reason to believe that the actions of the respondents were motivated by a desire other than to start the process of coordinating national government functions at the county level prior to the coming of the county governments following the forthcoming elections. However, it is important that anything that is done in order to implement the new Constitution is done so as to faithfully accord with the provisions of the Constitution. It will do great damage to the hopes of Kenyans for a new dawn should the country continue on the well-trodden path of disregard for the provisions of the Constitution.***
>
> ***In light of the above matters, l find and hold as follows;***

1. ***The President had no power to appoint or deploy County Commissioners as he purported to do under Gazette Notice No. 6937 of 23rd May 2012***
2. ***Even if the President had had power to make such appointments or deployments, the***

appointments or deployments violated Article 10 and 27 of the Constitution

3. ***The purported deployment of County Commissioners by Gazette Notice 6937 of 23rd May 2012 was therefore unconstitutional, null and void."***

6. This is the judgment that provoked the present appeal which is filed by the Minister for Internal Security and Provincial Administration (appellants) through a firm of Kinoti & Kibe Company Advocates. The appellant raised a total of 17 grounds of appeal to wit:

1. ***The proceedings before the High Court were null and void ab initio for being in contravention of Section 14 (2) of the former Constitution of Kenya which protects the President from civil proceedings in respect of anything done or omitted to be done while he holds office.***

2. ***The learned Judge erred in failing to dismiss the Petition dated 17th May, 2012 and Notice of Motion dated 30th May, 2012 on the ground that none of them challenged the legality or validity of Gazette Notice No. 6937 of 23rd May, 2012.***

3. ***That the learned Judge erred in finding and holding that the President had no power to appoint or deploy County Commissioners as he purported to do under Gazette Notice No. 6604 of 11th May, 2012 and Gazette Notice No. 6937 of 23rd May, 2012.***

4. ***The learned Judge erred in finding and holding that even if the President had had power to make appointment or deployment of County Commissioners, the appointments or deployments violated Articles 10 and 27 of the Constitution.***

5. ***The learned Judge erred in finding and holding that the purported deployment of County Commissioners by Gazette Notice No. 6937 of 23rd May, 2012 is unconstitutional, null and void.***

6. ***The judgment and decree of the High Court dated 29th June, 2012 are fundamentally defective as the orders (findings and holdings) made by the learned Judge were not pleaded or sought by the Petitioners.***

7. ***The learned Judge erred in failing to find and hold that Gazette Notice No.6937 of 23rd May, 2012 remains in force as the Petitioners and/or Applicants neither pleaded nor challenged its validity in their respective pleadings.***

8. ***The learned Judge erred in holding that Sections 23 and 24 of the former Constitution under which the President made Gazette Notice No. 6937 of 23rd May, 2012 had not been saved in the Sixth Schedule and therefore Sections 23 and 24 are not in force.***

9. ***The learned Judge of the High Court erred in basing her judgment or Articles 129, 131 and 132 of the Constitution of Kenya, 2010 despite the fact that the said provisions have been suspended by Section 2(1) (c) of the Sixth Schedule until the first election under the new Constitution.***

10. ***The learned Judge erred in holding that the President's action was unconstitutional for refusal or failure to consult the Prime Minister despite the fact that under Section 29(2) of the Sixth Schedule to the Constitution the appointment/deployment of County Commissioners in exercise of the President's powers under Section 23 and 24 of the former Constitution did not require such consultation.***

11. ***The judgment dated and delivered on 29th June, 2012 is based on a fundamental misconception of transitional provisions of the Sixth Schedule, which upholds the executive authority and powers of the President in terms of the former Constitution.***

12. ***The finding by the learned Judge of the High Court that Parliament must first enact a law to provide for the office of the County Commissioners is based on a misconception of the requirement for the restructuring of the provincial administration within five years from the date of promulgation as the said restructuring is an ongoing process and the President does not need any additional powers to commence it pending the enactment of the law that would finally provide the administrative structure for the national government upon the establishment of the devolved government.***

13. ***The learned Judge of the High Court erred in finding that the appointment/deployment of County Commissioners vide Gazette Notices No. 6602 dated 11th May, 2012 and Gazette Notice No. 6937 of 23rd May, 2012 were unconstitutional, null and void in view of the fact that by dint of Sections 23 and 24 of the former Constitution read with Article 6(3) of the Constitution and Section 17 of the Sixth Schedule thereof the President was constitutionally, and still is, obligated to ensure that pending the first general election under the new Constitution all Kenyans shall have reasonable access to the services of the system of administration popularly known as the Provincial Administration.***

14. ***The holding by the learned Judge of the High Court in paragraph 59 of the judgment to the effect that the President erred in appointing/deploying County Commissioners because in restructuring of the Provincial Administration pursuant to Section 17 of the Sixth Schedule logic dictates the existence of some form of legislative and institutional frameworks is fundamentally wrong on the grounds that Sections 23 and 24 of the Constitution provides for institutional framework and legal powers that mandate the President to make such appointments and deployments of public officers in the Provincial Administration until the first general elections under the New Constitution are held.***

15. ***The learned Judge of the High Court erred in finding that the President had contravened Article 10 of her Constitution despite the fact that in constitutional jurisprudence, constitutional values are usually used to interpret ordinary laws as well as the effective (binding) parts of the Constitution but the same cannot be used to hold decisions, law and actions as unconstitutional without other binding law.***

16. ***The finding that the President contravened Article 27 of the Constitution is based both on misapprehension of the facts in issue and legal character of the President's actions and the fact that under the Court's jurisdiction pursuant to Article 22 and 23 of the Constitution, the Petitioners could not competently and lawfully seek that declaration.***

17. ***The learned Judge erred in holding that the phrase progressive realization in Article 21(2) of the Constitution did not apply to the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender per Article 27(8) of the Constitution.***

7. Because this appeal was filed by a private firm of Advocates, namely Kinoti & Kibe Advocates on behalf of the appellant, a Government Ministry, the respondents raised a preliminary objection.The respondents took out a notice of Preliminary Objection dated 2nd November, 2012, raising the following points of law:

1. ***The Notice of Appeal, Notice of Motion and the Appeal, infringe provisions of Article 156 of the Constitution.***

2. ***The Applicant has no authority to represent the national government in civil proceedings before any court.***

3. ***The entire Notice of Appeal, Notice of Motion and Appeal, create a legal absurdity where the Ministry of Internal Security and Provincial Administration is purporting to act against the Attorney General when both are one and the same government.***

4. ***The Notice of Appeal, Notice of Motion and the Appeal, offend the national values and principles in Article 10 of the Constitution and the principle of good governance protected by the Constitution.***

8. When this appeal came up for hearing, Mr. Ongoya, learned Counsel for the respondent, urged us to deal with the issues of law raised in the Preliminary objection first before the main appeal, as in his view, the legal issues would dispose the appeal. However, as a Court, we held the view that the mandate of this Court is to hear and determine appeals and in the interest of saving judicial time, we were minded to hear the substantive appeal that was before us. We therefore directed the respondents to argue the preliminary points of law in response to the appeal so the Court could consider the whole matter and pronounce a comprehensive judgment determining the entire appeal. Mr. Kibe Mungai appeared for the appellant, Mr. Ongoya, appeared for the respondents, and Mr. Waigi Kamau appeared for the Attorney General. Both Mr. Mungai and Mr. Ongoya made extensive submissions in support of their client's respective positions. We will summarize those submissions herein below.

9. On the part of the appellant, Mr. Mungai submitted that, the dispute arose due to a misunderstanding of the challenges to do with the interface of the former and new Constitutional order. After the promulgation of the New Constitution, certain provisions of the New Constitution came into force immediately while others were to become operational after the first general elections under the New Constitution. Until a new President was sworn into office, certain provisions of the old Constitution were extended and the Articles of new Constitution that dwelt with executive powers of the President suspended until after the 1st general elections. For example, the Executive Powers vested on the President under Section 23 and 24 of the former Constitution were saved thereby giving him authority and power of constituting and abolishing offices for the Republic of Kenya, and appointing officers or terminating such appointments. However, the learned Judge took an erroneous view that those powers were never extended after the promulgation of the New Constitution.

10. Mr. Mungai's further arguments were that the President was elected under former Constitution and was to be held accountable to those standards in performance of his duties. Therefore, the President had powers to issue Gazette Notice No. 6937 of 23rd May, 2012 that revoked the Gazette Notice No. 6604 of 11th May, 2012. The Gazette Notice that triggered the dispute and the basis upon which the suits were filed was No. 6604 of 11th May 2012 which was nonetheless revoked. Mr. Mungai contended that despite the revocation of the gazette notice and the fact that pleadings were never amended, the learned Judge proceeded to deal with the matter challenging a revoked notice and issued orders on the new notice although there were no pleadings in support of the orders. He urged that the appointments could not have been quashed because an order of certiorari can only focus at a specific act, or legal instrument and there was no prayer seeking to quash the 2nd notice.

11. The learned Judge appreciated the provisions of section 17 of the Sixth Schedule of the Constitution and it was common ground that the restructuring of the County Governments is required to be achieved progressively within 5 years. This necessitated enactment of Legislations, pending which the deployment and delivery of services was to be undertaken within the existing legal framework of the Provincial Administration. Once a new structure is in place, new appointments should be done accordingly. Counsel pointed out that several legislations have been enacted such as the National Government Co-ordination Act No. 1 of 2013 that makes provisions on how County Commissioners should be recruited and appointed into office. However the Judge erred by basing the judgment on an erroneous interpretation of Articles 129, 131 and 132 which had been suspended to give room for the 1st general elections under section 2 (c) of the Sixth Schedule. Since the appointments were made by the hand of the President, the Judge also failed to consider that the President enjoyed immunity from criminal and civil proceedings under section 14 and now Article 143 (2) of the Constitution. If the President violates the law there is a whole elaborate procedure for his removal by impeachment under Article 145.

12. Further the Judge was faulted for failure to understand the interface between the two Constitutions and the obligation placed upon the President under Article 6 of the Constitution regarding the devolution and access to services in all the four corners of the Country. There was an immediate obligation for the

Executive to ensure the services of Government were rendered in all corners of the country. Previously, the services were offered through provincial administration but under Article 6(1) of the New Constitution, the territory of Kenya is divided into 47 Counties. In terms of the provisions of government services, each of the 47 Counties became an administrative unit requiring government services and also deployment of officers at that level. There was no dispute regarding the deployment of officers in Education, Health, Agriculture and others, the dispute arose only regarding the Provincial Administration despite the fact that services are cross cutting.

13. Regarding the issue of lack of consultation between the President and the Prime Minister as provided for under the National Accord and Reconciliation Act, Mr. Mungai contended that the necessary consultations and processes were done within the Ministry as reported by the then Minister in charge of Internal security in Parliament. However, there was no obligation to consult the Prime Minister as these were deployments, and moreover they did not require Parliamentary approvals as provided for under Section 29 (2) of the Sixth Schedule. On the question of gender discrimination, the provisions of Article 27 especially the principle of appointments or elections of not more than two third of persons from the same gender are supposed to be realized progressively. The Constitution gives many commands at the same time, and actions are to be determined collectively. He cited the Advisory Opinion No. 2 of 2012 by the Supreme Court the majority decision that interpreted Article 27 as

> ***"Presupposes open-ended schemes of decision –making and programming, which can only be effected over a span of time. By accommodating such prolonged time-spans of action by Legislative and Executive Branches, the Judiciary by no means negates the principle of the separation of powers"***

The law provides for a period of 5 years for the implementation of the devolved governments, which gives a window of opportunity for a progressive realization of the gender rule.

14. Regarding the participation of the Attorney General in this appeal, Mr. Mungai admitted that the role of the AG under the former Constitution was both the Chief Legal Advisor to the Government and Public Prosecutor. In this case the President was not sued although orders were issued against him. The Attorney General was sued with the Minister for Internal Security. The Attorney General declined to appeal, but the Minister opted to file an appeal while invoking the fundamental rights enshrined under Article 50 of the Constitution. The right of appeal vests upon an aggrieved party. According to counsel for the appellant, this right overrides every other statute that makes provisions on legal representation. Moreover the Attorney General has not filed any depositions or facts giving reasons why the appellant should not have pursued the right of appeal, counsel from his office merely submitted from the bar. Mr. Mungai urged us to dismiss the preliminary objection and allow the appeal.

15. On the part of Mr. Ongoya, he opposed the appeal, which he submitted lacked merit as the Attorney General represented the appellant before the High Court. Under Article 154 (4) the Attorney General is the principal legal advisor to the government, and is mandated to represent the national government in court or in any other legal proceedings to which the national government is a party. The dispute before the High Court was against the national government and the Minister was sued in his official not personal capacity. This Article was not suspended; otherwise every imposter can appear in courts and claim to be representing the National Government. Counsel also pointed out that the firm of Kinoti & Kibe Advocates, did not follow the provisions of order 9 rule (5) of the Civil Procedure Rules, as they failed to file a notice of change of Advocates and therefore it is only the Attorney General who remains on record as counsel for the appellant. Thus Mr. Mungai violated the provisions of Article 156 of the Constitution as well as order 9 rule (5) of the Civil Procedure Rules. In addition, the national values and principles of accountability come into play to interrogate why the government resources would be used to mount an appeal by a private law firm and at the same time the Attorney General is also being paid for the same services. If the Minister was aggrieved by the decision of the High Court, he should have filed an appeal within the provisions of Article 156.

16. On the merit of the appeal, Mr. Ongoya, contended that the government has continued to disobey the court orders therefore this appeal should not be entertained. Counsel went on to argue that although

the gazette notice of 11th May 2012 was revoked, there was a specific order by the court quashing the Gazette Notice of 23rd May 2012. The pleadings did not need to be amended as the prayers attacked even future nominations or appointments that may contravene the constitution. The President was supposed to follow the Constitution and the matters that were declared unconstitutional were a nullity. Mr. Ongoya was of the view that the transitional provisions did not create two constitutions and also the saved clauses in the former constitution were part and parcel of the new constitution and they were all supposed to be read together giving effect and force to each other.

17. Mr. Ongoya conceded that the powers of the President under section 23 and 24 of the old Constitution remained in force; he however submitted that they were altered by the New Constitution that sets out values such as gender balance as well as all the other national values provided under Article 10. The learned Judge found that the President had violated the Constitution by failing to observe the values and for failing to consult on the appointments. The Constitution required things to be done differently and all new appointments required consultation with the Prime Minister. There was no particular provision of the law that exempted the provincial administration from consultation. The immunity clause does not extend to the office of the President, after all Article 3 obligates everybody to uphold and defend the Constitution including the courts of law who have a duty to declare and quash any infractions against the Constitution.

18. On the issue of gender parity, counsel defended the judgment and referred to a statement made by the then Minister that confirmed that officers serving as District Commissioners possessed the necessary qualifications and there were 26 of them. Counsel urged us to find like the learned Judge that the President acted arbitrarily and violated the constitution.

19. On the part of Mr. Waigi for the A.G., he merely stated that the Attorney General stated publicly that he was not going to appeal against the judgment of the High Court. Thus the present appeal was not filed with the AG's blessings, but he was not willing to submit on the merit of the appeal. This is how he put his case and we quote;

> ***"We have not filed the present appeal before this Court. On the issue of representation we are alive to the provisions of Article 156 (4) of the Constitution. This was not our appeal, what the appellant should have done was to request the Attorney General for authority to hire counsel. Such authority was never sought and was never granted. I will not go to the merit of the appeal, l rest my submission"***

20. In response to the above, Mr. Mungai urged us to ignore the above as a mere statement made by the AG from the Bar, in his view, the AG should have placed relevant material before the Court by way of an affidavit. The question of representation is a matter of fact and the AG should have filed a disposition to that effect. In any event the Minister was a party, he also happens to be an individual who bears responsibility to obey the law and if aggrieved by a decision, he had a fundamental right to be heard on appeal. The orders appealed against had national and personal implications on the person in charge of the Ministry. There was an Advocate / client relationship between the Minister and Attorney General and if the client wanted to appeal, and the AG as the Advocate was of a contrary view, the client had a choice and choose to pursue the appeal through another Advocate.

21. On the intersection between the provisions of Article 156 (4) of the Constitution and Section 26 of the former Constitution, counsel urged us to read all of them together and find that the National Government was not in force by May 2012. The National Government was to take effect after the 1st general elections when the new President took the Oath of Office. As regards the provisions of the Civil Procedure Rules, counsel submitted that proceedings under order 53 are *sui generis*, while litigation as in this case was by way of Judicial Review and a constitutional petition, and order 9 rule (5) is not imported as part of the Rules of Procedure for the implementation of the Bill of Rights.

22. The above is a brief overview of the submissions made for or against this appeal. On our part, we appreciate that the very nature of the dispute that gave rise to this appeal raise several matters of general public interest. It raises issues regarding the interface between the former and the new Constitution; the

operationalization of the transition clauses, the exercise of the executive powers *vis-a- vis* the devolved government; and whether the President is subject to civil litigation in the event of violations of the Constitution. This was *a locus clasicus case w*here the old order met with the new dispensation and everything became very contentious including legal representation by counsel in this appeal.

23. We shall deal with legal representation first, as it was intended to be raised as a preliminary point of objection to the appeal. Was the appellant justified to seek legal representation from a private law firm despite the provisions of the Constitution that vests that power upon the Attorney General? Mr. Ongoya's arguments are somehow valid and we would have considered them favourably; but only if the Attorney General was candid and placed material before us by way of an affidavit giving reasons why he advised the appellant (if he did it) against filing an appeal. We were told the AG made a public announcement that he was not going to appeal but no reasons were given. We were left with unanswered questions. For example, why did the Attorney General fail to file an affidavit stating his position regarding his advice to the appellant on this appeal? If he had done so, detailing the reasons why he was not appealing as a party and advising the Minister too not to appeal; if such a deposition was availed in this appeal, its fate would have been sealed.

24. Article 50 of the Constitution guarantees a fair hearing. This fundamental right to a fair hearing has no limitation or qualifications. The appellant was sued alongside the Attorney General and we are told the Minister or the Ministry were aggrieved by the judgment and intended to exercise that right to a fair hearing and ventilate it in the Court of Appeal by challenging the decision of the High Court. There was also a mention of contempt proceedings and the fact that the Minister at the end of the day as a legal person will have to bear some responsibility. We are of the view that the Court of Appeal is created by the same Constitution to provide every party a fair hearing and just as the High Court and others exist to enforce the law when there are infractions or violations thereto. Rule 74 of the Rules of this Court envisage and provide that "*any person*" affected by a decision of the High Court may appeal. It is our view that as matters stand, the appellant has a right to be heard. We however, wish to caution that in a situation where the AG has given written advice and given reasons against a particular Ministry from pursuing litigation, in that case a Minister or Officers pursuing litigation in their personal capacities, the costs thereto cannot be paid from the state coffers but be born personally.

25. Regarding the competency of this appeal, it is to be noted that the suits before the High Court were by way of a constitutional petition and Judicial Review. We agree with Mr. Mungai, that the procedure for filing an appeal the orders issued in aforesaid proceedings are not strictly provided for under the Civil Procedure Rules. The fact that he did not file a Notice of Change of Advocates, may not be fatal because the provisions of **Order 9 Rule 5** of the **Civil Procedure Rules**, is not particularly imported under the provisions of Order 53 and also the Rules of the Implementation of Fundamental Rights. Moreover, nowadays, pendulums have swung and the courts are disregarding matters that are regarded as technicalities while aiming to administer substantive justice. Further, we do not think that a party filing an appeal from the superior court will need to file a Notice of Change of Advocates from the lawyers who were previously on record for the appellant. The appeal is an entirely new proceeding.

26. The gravamen in this matter was the publication of Gazette Notice Number 6604 of 11th May, 2012 that purported to appoint 47 County Commissioners. This publication caused an outcry because this happened after the Constitution was promulgated. The Constitution sets out National Values such as transparency in public appointments and considerations of principles of gender equality, inclusiveness among other values. The parties who came to court thus questioned the constitutionality of these appointments which was purportedly done under the Constitution of Kenya 2010 yet the appointments did not evince the values therein. No wonder this was promptly replaced by Gazette Notice Number 6937 of 23rd May, 2012 in which the President invoked his powers under Section 2 of the Sixth Schedule and Sections 23 and 24 of the former Constitution.

27. The first question we have to answer is whether the President violated the Constitution in making those appointments/deployments? It is common ground that Articles 129 to 155 of Chapter Nine of the Constitution were all suspended until the 1st general elections after the Constitution. The executive powers and authority of the President were retained under Section 23 and 24 of the former Constitution.

Clearly, the learned Judge misapprehended this aspect when she stated that:

"**Gazette Notice Number 6937 states that the deployment was carried out in accordance with Sections 23 and 24 of the former Constitution. These provisions of the former Constitution provided for Executive Powers, were as follows:**

> ***23. (1) The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.***
>
> ***(2) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.***
>
> ***24. Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.***

These provisions of the former Constitution were not saved by the Transitional Provisions contained in Schedule 6 of the Constitution. Consequently, the President could not make any appointments under the former Constitution".

28. The learned Judge also proceeded on that mistaken premises while analyzing the issues for determination. The learned Judge set out Articles 129, 131 and 132 of the Constitution of Kenya as the basis upon which the President derived the powers. This is what the Judge pointed in part of the judgment:

> ***"In making a determination of the issues raised in this matter, I will start from the Constitutional provisions relating to the exercise of powers by the President of the Republic of Kenya. Article 129 sets out the principles of Executive Authority as follows:***
>
> **.....**
>
> ***Article 131 spells out the authority of the President in the following terms:***
>
> **.....**
>
> ***Article 132 sets out the functions of the President while Article 132 (2) sets out his powers with regard to appointments as follows:***
>
> **.....**

The learned Judge clearly overlooked the provisions of Section 2(c) of the Sixth Schedule which provides that:

"Article 129 to 155 of Chapter Nine except that the provisions of the Chapter relating to the election of the President shall apply to the first general elections under this Constitution."

29. Articles 129 to 155 which make provisions for the executive powers of the President were suspended until after the first general elections under the New Constitution. The suspension of the powers of the executive meant the President was exercising the executive powers under Section 23 and 24 of the former Constitution that gave him authority to establish offices in the Republic of Kenya and to appoint officers, thereto.

30. Was the President supposed to consult with the Prime Minister on these appointments/deployment? Arguments were made by the respondent that not only did the President fail to consult as per the **National Accord and Reconciliation Act**, but also disregarded the National values

stipulated under **Article 10** of the **Constitution** that include for the purposes of the issues before us inter alia, participation of the people, equality, social justice, inclusiveness, non-discrimination, transparency and accountability. In response to this issue The Acting Permanent Secretary in the Ministry of Internal Security **Mr. Mutea Iringo,** explained how the exercise of deployment of the County Commissioners was done. Some of the pertinent paragraphs of the replying affidavit states as follows:

1. ***That following the Parliamentary Inquiry, the minister appeared before the Parliamentary Oversight Committee and explained the process.***

2. ***That I am aware that His Excellency the President deployed 47 serving officers of the Provincial Administration as County Commissioners.***

3. ***That I am also aware that the deployment involved officers who are currently serving as Regional Commissioners, Senior Administrators from Central Government serving in the Scheme for Administrative Officers.***

4. That the deployment of the said officers was based on the following criteria: -

(i) Performance record

(ii) Seniority

(iii) Regional representation and

(iv) Gender

5. ***That I am aware that officers serving in these positions go through a series of training programmes specifically tailored to impart the skills and competencies that are unique to their career such as paramilitary and leadership courses which lock out officers who are not serving in the scheme of service for administrative officers.***

6. ***That in the deployment, my office made every effort to adhere to Article 27 (6) & (8) of the Constitution but due to historical reasons, we have faced challenges in complying with these provisions. Currently, only 9% (26 out of 286) of the serving District Commissioners (including Acting District Commissioners) are female.***

7. ***That in the appointment of County Commissioners, the office went out of the way to reach out to lady officers including lowering the requirement for appointment to ensure that more female officers were considered. Despite all this effort only 23% (11 out of 47) of those appointed were female.***

8. ***That the requirement for Gender balance as per Articles 27 (6) were observed in the spirit of progressive realization. The Government has taken deliberate measures of appointing more available female officers being 11 out of 26 from the total 286 compared to 36 men from the available 264 from the total 286.***

31. As regards the consultation with the Prime Minister, Mr. Iringo, responded as follows:

"**That I am advised by my counsel on record, Stella Munyi, which advice I verily believe to be true that the Orders sought in the Nairobi High Court Petition No. 208 of 2012 and in the Nairobi High Court Misc. Application Judicial Review No. 207 of 2012 cannot issue and are not available for the following reasons:**

a. ***The Petitioners and ex-parte applicants herein have totally misapprehended the facts, the law and the constitutional provisions applicable to the subject matter.***

b. ***The impugned process is a deployment of existing officers in the Provincial Administration and not appointment if County Commissioners.***

c. ***The Transitional provision under the 6th Schedule in respect of the National Accord and Reconciliation Act is not applicable in the deployment of officers in the Provincial Administration. The Restructuring of the Provincial Administration as contemplated under Section 17 of the 6th Schedule to the Constitution has to be done within five years after effective date which is 28th August, 2010.***

d. ***Public participation under Article 10 (2) of the Constitution has never contemplated to apply in deployment of officers holding existing offices as at the effective date.***

e. ***The proportion of the available number of female officers qualified and effectively deployed is higher than the corresponding proportion in respect of men in the same category. Thus female officers were given a more favourable opportunity to be deployed than their male counterparts.***

f. ***The redeployed officers are to operate within the existing Legal and Constitutional framework and structure of the Provincial Administration.***

g. ***That the legal basis for the deployment of officers within the Provincial Administration is clearly set under Section 24 as read with Section 23 of the former Constitution and Article 3 (21) of the Constitution of Kenya (2010).***

h. ***Gazette Notice No. 6604 Vol. CXIV – No. 40 dated 11th May 012 was revoked by the Special Issue of the Kenya Gazette Vol. CXIV – No. 45 dated 23rd May, 2012."***

32. On our own reading of the provisions of Section 29(2) of the 6th Schedule of the Constitution, only new appointments by the President that needed approval of the National Assembly required consultation with the Prime Minister under the National Accord and Reconciliation Act. It was argued and we were persuaded these were not new appointments, and more importantly they did not require the approval of the National Assembly, in this regard, consultation with the Prime Minister was not a statutory requirement. Consultation with the Prime Minister as had become the practice in key public offices would have given the process more credibility and perhaps it would have assuaged the public, especially because these were times of transition but the President did not deem it necessary to consult as he was not obliged by law. There were many arguments on whether these were new appointments or deployments of existing officers, but at the end of the day, it became clear that it was an exercise of redeployment of existing officers.

33. The next critical issue and the real gravamen of the matter before the learned Judge that was particularly of interest to a large number of the petitioners from the Women Civil Society Organizations, was the issue of gender discrimination. This is what the learned Judge observed in part of the judgment:

> ***"The respondents give two explanations for this violation of Constitutional requirement. The first is that there were not enough women qualified to be appointed County Commissioners. However, the respondents destroy their own argument by conceding that there are at least 26 women who are District Commissioners, and who have the necessary paramilitary and leadership training. The respondents picked 10 from this number. To meet the Constitutional requirements, they would have needed only another five (5). There is no explanation tendered before the court why and in what way the other 16 female District Commissioners did not meet the criteria enumerated by the respondents. Was it performance? Seniority? Regional representation?***
>
> ***In our view, the primary obligation imposed by Article 27(8) on the state is to do its utmost to meet the Constitutional requirement. An effort must be made, bearing in mind the ministerial disadvantages to which women have been subject, to ensure gender***

equality. From the facts before me, there does not appear to have been any effort made to meet the requirements of the Constitution …."

34. The learned Judge went on to distinguish the case ***Federation of Women Lawyers & Others –V- The Attorney General H.C.C.C. Petition No. 102 of 2011*** **(FIDA Case)**, and held the 'Progressive realization of rights recommended in the FIDA case was in respect of social economic rights. This reasoning was supported by the South African case of ***Soobramoney –V- Minister of Health (Kwa Zulu Natal)1998 (1) SA 765 (CC),*** thus the Judge concluded:

"In matters of appointment or election to office in order to achieve gender equality and equity, there is no qualification of the state's obligation as there is no outlay of resources required and which is shown to limit or inhibit the realization of this right. This is particularly so in a scenario such as the one before the court where, on the respondent's own admission, there are at least another 16 female District Commissioners with the requisite qualifications to meet the criteria that the respondents had set for appointment as County Commissioners……."

35. This reasoning by the learned Judge in our view is correct; it is also progressive and cannot be faulted within this context of appointment of officers but with a caution; that is if the appointments were done purely pursuant to the Constitution of Kenya 2010. However, the impugned appointments happened within the transitional period when the new Constitution was not the one fully being applied. For instance, there were measures to be taken to devolve the county governments that were given a period of five years. These raft of measures included enactment of relevant legislations that would guide the appointments, allocation of resources and others. During the hearing of this appeal, it was pointed out that the National Government Co-ordination Act No. 1 of 2013 was enacted and became operational in March, 2013. Section 15 makes provisions on Recruitment and Appointment of the National Government Administrative Officers as follows: -

15 (1) "In accordance with the National Government functions under the Constitution, this Act or any other written law, the Public Service Commission shall, in consultation with the Cabinet Secretary, recruit and appoint National Government Administrative Officers to co-ordinate National Government functions and to perform such other functions as may be assigned to them under this Act or any other law.

(2) Pursuant to sub-section (1), the Public Service Commission shall appoint –

a. ***a County Commissioner in respect of every County.***

b. ***a Deputy County Commissioner in every Sub-County.***

c. ***an Assistant County Commissioner in respect of every ward;***

d. ***a Chief in respect of every location.***

e. ***an Assistant Chief in respect of every Sub-Location and***

f. ***any other National Government Administrative Officer in respect of service delivery unit established under Section 14."***

36. If the appointments/ deployments were being done under the New Constitution and after the passage of the above law that governs the appointments of county officers, clearly the learned Judge's reasoning would have been correct. As stated the learned Judge was ahead of her time regarding her interpretation of the rule of gender parity in public offices. Had the learned Judge appreciated the aforesaid transitional situation, perhaps she would have arrived at a different finding as we have done that the deployment did not go against the provisions of the constitution as it was done pursuant to the executive powers vested in the President under the old constitutional clauses that were saved in the new

constitution.

37. There were also issues raised regarding the immunity of the President as provided in the Constitution in respect of civil and criminal litigation. We wish to say no more on this issue as the Constitution is clear, if the President violates the law, he or she can only be subjected to the process of impeachment, however the former Constitution did not have provisions of impeachment.

38. In conclusion, we laud all those who took steps to guard the Constitution and promote the rule of law. The participation of all the people is called upon so as to breathe life and spirit in our Constitution. We have said enough to show this appeal should succeed. The judgment and decree of the High Court dated 29th June, 2012 is hereby set aside. We were invited by the appellant to uphold **Gazette Notice No. 6937 of 23rd May, 2012** we are, however, reluctant to do so in view of the provisions of **Section 15 of the National Co-ordination Act of 2013**. It is up to relevant bodies to operationalize the Act and appoint the County Commissioners according to the law. At the moment the County Commissioners are transitional office holders much like the Permanent Secretaries as they wait for new appointments.

This being a matter of public interest, each party shall bear their own costs.

Dated and delivered in Nairobi this 14th day of June 2013.

M. K. KOOME

…….

JUDGE OF APPEAL

A. MAKHANDIA

…….

JUDGE OF APPEAL

S. GATEMBU

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR