REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 74 & 82 OF 2012

CENTER FOR RIGHTS EDUCATION AND AWARENESS …...................................... 1ST APPELLANT

CAUCUS FOR WOMEN\'S LEADERSHIP ….. 2ND APPELLANT

AND

JOHN HARUN MWAU.. 1ST RESPONDENT

MILTON MUGAMBI IMANYARA …... 2ND RESPONDENT

PROFESSOR LAWRENCE GUMBE... 3RD RESPONDENT

MARTIN MUTHOMI GITONGA ….. 4TH RESPONDENT

THE HON. ATTORNEY GENERAL …... 5TH RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION …...........6TH RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.........................7TH RESPONDENT

WITH

PROFESSOR YASH PAL GHAI ….. 1ST AMICUS

CURIAE

DR. STEPHEN KIMEMIA NJIRU ….. 2ND AMICUS CURIAE

INTERNATIONAL CENTRE FOR CONSTITUTIONAL

RESEARCH AND GOVERNANCE..3RD AMICUS CURIAE

(Appeal from a judgment and orders of the High Court of Kenya at Nairobi (Constitutional and Human Rights Division, Lenaola, Mumbi Ngugi and Majanja, JJ.) dated the 13th January, 2012

in

Constitutional Petition No. 65 of 2011
****

Consolidated with

CIVIL APPEAL NO. 82 OF 2012

John Harun Mwau …... Appellant

And

Milton Mugambi Imanyara …... 1st Respondent

Professor Lawrence Gumbe ….. 2nd Respondent

Martin Muthomi Gitonga ….. 3rd Respondent

The Honourable Attorney General ….. 4th Respondent

Commission for the Implementation of the Constitution …............... 5th Respondent

Independent Electoral & Boundaries Commission …......................... 6th Respondent

With

Professor Yash Pal Ghai …...1st Amicus Curiae

Dr. Stephen Kimemia Njiru …... 2nd Amicus Curiae

International |Centre for Constitutional Research and Governance..........Interested Party

(Appeal from the judgment of Justice Lenaola, Justice Majanja and Lady

Justice Mumbi Ngugi dated 13th day of January, 2012.)

JUDGMENT OF GITHINJI, J.A.

INTRODUCTION

[1] The two consolidated appeals arise from the judgment of the High Court Constitutional and Human Rights Division (Lenaola, Mumbi Ngugi & Majanja, JJ.) delivered on 13th January 2012 in three consolidated **Constitutional Petitions Nos. 65 of 2011, 123 of 2011 and 185 of 2011**.

[2] The first **petition No. 65 of 2012** was filed by ***Milton Mugambi Imanyara, Professor Lawrence Gumbe*** (as Chairman of Centre for Multi party Democracy) and ***Martin Muthoga Gitonga*** against the Attorney General as first Respondent, the Commission for the Implementation of the Constitution (CIC) as 2nd respondent and the Interim Independent Electoral Commission (IIEC), as the third respondent. The petitioners claimed that there was an apparent inconsistency between ***Articles 101 and 102*** of the *Constitution, 2010* (*hereinafter referred as the Constitution) and* ***paragraphs 9(1)*** and ***10*** ofto the Sixth Schedule (*hereinafter referred to as Schedule*) as to the actual date of the next general election and that the respondents were divided on their interpretation of the two Articles of the Constitution and the two sections of the Schedule. Invoking the jurisdiction of the High Court under ***Articles 165 and 259*** of the Constitution for interpretation of the Constitution, they sought two declaratory orders, firstly, that the two Articles and two sections aforesaid are inconsistent in so far as they imply that the next general elections should be held on a date other than the second Tuesday of August 2012, and secondly, that the next general elections of the President and the National Assembly, Senate, County Assemblies and County Governors shall be held at the same time on the second Tuesday of August, 2012.

[3] The Constitutional petition No. 185 of 2011 was filed by Milton Mugambi Imanyara against the Attorney General. It was triggered by the publication of the Constitutional of Kenya (Amendment) Bill, 2011 which sought to amend ***Article 136 (2)(a)*** of the Constitution relating to the date of election of the President which provides:-

> ***"An election of the President shall be held -***
>
> ***(a) on the same day as a general election of the members of Parliament being the second Tuesday in August in every fifth year; or ...."***

The petitioner averred that the Bill intended to amend the phrase *"the second Tuesday in August"* to read *"the third Monday in December"*; that the amendment was intended to circumvent the constitutional *petition No. 65 of 2011* and would thus contravene the Constitution, and that, it was intended to be effected without reference to a referendum. The petition sought two declaratory orders viz – that no amendment effecting the term of the President would be enacted without a referendum and that the proposed amendment was inconsistent and in contravention with ***Article 136(2) (a)*** amongst other provisions. The petitioner in addition sought prohibitory orders prohibiting the tabling and passing of the Bill.

[4] The third petition No. 123 of 2011 was filed by Hon. John Harun Mwau against the Attorney General as a member of Parliament for Kilome Constituency on the basis that the people of Kilome desired to know the date of the next general election. He averred in essence that since the new session of the 10th Parliament began on *15th January, 2008* for a term of 5 years and since ***section 10*** of ***Transitional and Consequential Provisions*** of the schedule stipulates that the National Assembly existing before the new Constitution was promulgated on *27th August, 2010,* should continue in force for its unexpired term, the next election should be held pursuant to ***section 9 (1)*** of the Transitional and Consequential Provisions of the schedule within sixty days after the dissolution of the National Assembly at the end of its term. He sought declaratory orders to that effect. In addition, the petition asked the High Court to determine the question whether or not the National Accord and Reconciliation Act (h*ereinafter*

referred to as the Accord) ceased upon the enactment of the Constitution or whether it became part of the existing laws carried forward under ***Article 7*** of the schedule.

[5] At the hearing, the three petitions were consolidated. The High Court in addition gave leave to Professor Yash Ghai; Dr. Stephen Kimemia Njiru and the International Centre for Constitutional Research and Governance (ICCRG) to participate in the proceedings as *"friends of the Court"*. The court in addition framed five issues, namely, (i) a determination of the question as to when the next General Elections should be lawfully held; (ii) a determination as to whether an amendment to the Constitution affecting the term of the President can be proposed, enacted or effected into law without a referendum being held under the Constitution, (iii) a determination whether the unexpired term of the existing members of Parliament includes terms and conditions of service, (iv) a determination whether the President has power or authority to dissolve Parliament under the current Constitution and, lastly, (v) the question of who should bear the costs of the petitions.

[6] The first framed issue relating to the date of the first election under the Constitution was the central and the most contentious issue. The High Court was asked to determine whether the first election should be held in the year 2013 between **15 January, 2013** and **15th March, 2013** or on second **Tuesday of August, 2012** or between **October** and **December, 2012**.

The petitioners in petition No. 65 of 2012 – that is, Milton Mugambi Imanyara; Prof. Lawrence Gumbe contended that the lawful date of the first elections was second **Tuesday of August, 2012**.

The petitioner in ***petition No. 123 of 2011*** Hon. John Harun Mwau supported by Prof. Yash Pal Ghai (*1st Amicus Curiae*) contended that the first elections should be held between **15th January, 2013 and 15th March, 2013.**

The Attorney General (1st Respondent) supported by Dr. Stephen Kimemia Njiru (2nd Amicus Curiae) supported a date between **October, 2012** and **December, 2012**.

The Independent Electoral and Boundaries Commission (IEBC) (3rd respondent) adopted a neutral position.

[7] **DECISION OF THE HIGH COURT**

The High Court summarized the rival submissions, considered them and made the following findings as embodied in the order given on 12th March, 2012.

"IT IS HEREBY ORDREED:

- ***THAT the Court has jurisdiction to determine this matter and it is founded on two grounds, first failure to hold the first elections on a day fixed in accordance with the provisions of the Constitution will be a threat to the Constitution and therefore any party is entitled to move the Court under Article 258(1) for appropriate relief and secondly, the Supreme Court in Constitutional Application No.2 of 2011 directed this Court to determine the Petitions having been satisfied that the Court has jurisdiction.***
- ***THAT the date of the first elections under the Constitution is determined by reference to Sections 9 and 10 of the Sixth Schedule as follows: -***
- ***(a)In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the President and the Prime Minister in accordance with Sections 6(b) of the National Accord and Reconciliation Act, 2008 or,***
- ***(b) Upon the expiry of the term of the 10th Parliament on the 5th of the Anniversary of the day it first sat which is designated by Legal Notice No.1 of 2008 on 15th January 2008 and the term therefore expired on 14th January, 2013 and the elections shall be held within sixty days of 15th January, 2013.***
- ***THAT following the repeal of the former Constitution and together with the Section 59 thereof and in the absence of a specific provision entitling the President to dissolve Parliament the President has no power under the Constitution to dissolve Parliament.***
- ***THAT the body entitled under the Constitution to fix the date of the first elections within sixty***

days of the expiry of the term of the National Assembly or upon dissolution of the National Assembly by written agreement between the President and the Prime Minister in accordance with Section 6(b) of the National Accord and Reconciliation Act, 2008 is the Independent Electoral and Boundaries Commission.

- ***That in accordance with Article 255 of the Constitution, an amendment to the Constitution affecting the term of the President cannot be effected into law without a referendum.***
- ***That the terms and conditions of service of Members of Parliament are governed by the National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya) and Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya) which are saved by virtue of the provisions of Section 6 and 7 of the Sixth Schedule up to the end of the term of the National Assembly or upon dissolution of the National Coalition.***
- ***THAT each party to bear its own costs.***

Given under my hand and seal of this Honorable Court this 12th day of January, 2012.

Issued at Nairobi this 13th day of April, 2012.

Sgd
DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI.”

[8] The appellants in ***Civil Appeal No.74 of 2012*** gave notice of intention to appeal against orders No. 2, 3, 4 and 5 and subsequently filed a memorandum of appeal containing 24 grounds of appeal. The appellant in ***Civil Appeal No. 82 of 2012*** gave notice of intention to appeal against the entire decision but his appeal is essentially against order No.2(a) to the effect that elections could be held in the year 2012 on the basis of the provisions of the Accord.

There is no appeal against the rest of the findings of the High Court including the finding that the High Court had jurisdiction to determine the questions raised in the petitions.

[9] Although IEBC and the Attorney General intended to raise preliminary objections to ***Civil Appeal No.74 of 2012,*** in the essence, that, the appeal is incompetent as the appellants therein have no *locus standi* to lodge the appeal and although ICCRG has filed a notice of preliminary objection to the same appeal on other grounds the respective counsel agreed at the hearing that the respective grounds of preliminary objections should be argued as grounds of opposition to the appeal and an order was made to that effect.

It is however convenient to deal with the objection to the competence of the appeal first.

[10] LOCUS STANDI

Mr. Nowrojee, learned counsel for IEBC, vehemently contended that the appellants in CA No.74 of 2012 have no locus standi to lodge the appeal on the grounds inter alia; that they were not parties to the petitions in the High Court; that appellants had opportunity to apply to join in the proceedings in the High Court but failed to apply for 1½ years; that the subject matter of the appeal – that is, the elections can only be lawfully held in *October, 2012* was not raised in the High Court nor was there a determination on it; that the Court would be exercising original jurisdiction and not appellate jurisdiction if it was to entertain the appeal, and, that, the appellants are no more directly affected by the appeal than the millions of other Kenyans. Mr. Nowrojee while asking that the C.A. No.74 be struck out asked the Court in the same vein to deal with the merits of the appeal *de bene esse* and determine the issues raised in the appeal.

[11] On her part, M/S Muthoni Kimani the learned Deputy Solicitor General submitted, among other things, that, the submissions being made by the appellants should have been made in the High Court; that no party in the High Court raised similar argument and suggested a similar date and that this Court has no discretion to entertain the appeal.

[12] Mr. Mwangi, learned counsel for appellant, in *Civil Appeal No.82 of 2012* also raised objection to the appeal, in essence, that, the Attorney General is the custodian of public interest and that the appellants have not shown that they have suffered greater prejudice than other members of the public.

[13] Mr. Mwenesi, learned Counsel for the appellants, in Civil Appeal No.74 of 2012 contended that the appellants have a right of appeal by virtue of ***Article 164(3)*** of the Constitution and ***Rule 75*** of the Court of Appeal Rules. He relied on two authorities namely, ***Kamlesh Mansukhlal Damji Pattni vs Starwood Hotels and Resorts World Wide Inc. and 7 others*** ***– Court of Appeal Civil Application No. NAI 330 of 2001*** (unreported) and ***Commercial Bank of Africa Ltd vs. Isaac Kamau Ndirangu*** ***– Court of Appeal – Civil Appeal No.157 of 1991*** (unreported).

Mr. Mwenesi further submitted that the two appellants are involved in various functions including organizing elections and that they are directly affected by the decision of the High Court and fall under the definition of a "*person*" in ***Article 260*** of the Constitution.

[14] It is clear as stipulated by ***Article 164(3)(a)*** of the Constitution that the Court of Appeal has jurisdiction to hear appeals from the High Court. It is also clear that under ***Article 258(1)*** "*Every person has a right to institute court proceedings*" claiming that the Constitution has been contravened, or is threatened with contravention. Further, as stipulated by ***Article 159 2(d)*** a court in exercising judicial authority on behalf of the people is required to do justice without undue regard to procedural technicalities.

> ***Section.64(1)*** of the former Constitution established the Court of Appeal in the following terms:
>
> ***"There shall be a Court of Appeal which shall be a superior Court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by statute."***
>
> The Constitution is differently worded.
>
> ***Article 164 provides:***
>
> *"(1). There is established the Court of Appeal which*
>
> - **…..**
> - **…..**
>
> *(2).* …..
>
> *(3). The Court of Appeal has jurisdiction to hear appeals from:-*
>
> *(a) the High Court; and*
>
> *(b) any other tribunal as prescribed by an Act of Parliament*".

[15] It is manifest that the former Constitution merely established the Court of Appeal and left it to the National Assembly to confer appropriate jurisdiction to it. The National Assembly by the Appellate Jurisdiction Act conferred jurisdiction on the Court of Appeal and subsequently the Court of Appeal Rules were made to prescribe the practice and procedure of the Court of Appeal. In contrast, Article 164 both establishes the Court of Appeal and confers jurisdiction on it raising questions whether the Appellate Jurisdiction Act which is one of the Acts saved by ***section 7 (1)*** of the schedule and the Court of Appeal Rules are operative.

However the determination of the question is not necessary for the purpose of disposing of the objections

under consideration because ***Article 164 (3)*** expressly confers jurisdiction on this Court to hear appeals from the High Court. The question has to await due consideration in appropriate proceedings.

[16] Nevertheless, the conferment of general jurisdiction does not resolve the two questions which necessarily arise – the first a procedural one – whether a person who was not a party to the proceedings in the High Court has *locus standi* to lodge an appeal and, the second – a jurisdictional issue, whether an appellate court has jurisdiction to decide upon a matter which was not canvassed in the High Court and adjudicated upon.

[17] In the High Court the ordinary civil proceedings are adversarial. Ordinarily, a party to such proceedings who is aggrieved by the determination has a right of appeal. However the two decisions relied on by the appellants seem to show that a party directly affected by the decision could appeal. In **Pattni\'s** case, a person who was not a party in the proceedings in the High Court and who had filed a notice of appeal signifying an intention to appeal against the decision of the High Court was allowed to prosecute an application for stay of execution of the decree of the High Court pending appeal on the ground that he was directly affected by the appeal. In **Commercial Bank of Africa Ltd,** the Court of Appeal observed, *obiter*, that a person who had bought property sold by a bank in exercise of its statutory power of sale in apparent breach of a court order staying the sale was entitled to appeal against an order nullifying the sale.

[18] It was apparent from the two cases that the Court was influenced by the fact that the party had either a proprietary or financial interest in the subject matter of the dispute. In contrast, the petitions in the High Court concerned public law litigation–a constitutional adjudication. The High Court categorized it as a dispute relating to the contravention of the Constitution entitling any person to institute proceedings under ***Article 258*** and held that its jurisdiction under ***Article 165 (3) (d)*** to interpret the Constitution is not exercised in a vacuum but in the context of a dispute or controversy.

[19] Thus, the two cases are irrelevant. In my view, the appellants have no *locus standi* to lodge the appeal from the decision of the High Court as the decision did not directly or substantially contravene their fundamental rights or freedoms nor directly affect their economic and social rights. The general right to "*institute court proceedings*" under ***Article 258 (1)*** refers to a right to institute proceedings in the Constitutional Court and not in an appellate court. Furthermore, the issue raised in this appeal that the first general elections under the Constitution should be held in *October 2012* was not raised in High Court nor adjudicated upon. The jurisdiction of an appellate court is, in essence, to correct errors of law or fact made by the courts below. The High Court adjudicated on the controversy disclosed by the petitions. The appellants should have approached the High Court and suggested the October date for its decision. They did not. The Court has no jurisdiction, and, indeed, it would be a judicial impropriety to criticize the decision of the High Court on basis of extraneous matters which did not form part of the decision. This is not a case of undue regard to technicalities of procedure which can be cured by ***Article 159(2)(d)***. It is essentially an issue of jurisdiction.

[20] It may be argued that, as a matter of public policy, the Court should freely allow any person to appeal against a decision from the High Court arising from public interest petition for prevention of contravention of the Constitution although he was not a party to the petition in the High Court. Firstly, a right of appeal would have to be given by law. Secondly, such an open - door policy would offend against the same public policy as it would not only prolong litigation but would, also, affect the orderly administration of justice, and overstretch judicial resources. Moreover, public policy being an "***unruly horse"*** may yield undesirable consequences that might clog the Court.

That notwithstanding, the respective advocates have asked the court to consider the appeal on the merits.

[21] I now turn to the consideration of the appeal.

Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus:-

- that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."
- 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 as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as 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. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

SUBMISSIONS

[23] The essence of the appeal _Civil Appeal No. 74 of 2012_ is stated in ground No. 21 of the Memorandum of Appeal which states:-

> ***"Articles 101 and 102 apply to the first general election (the next general election) and the term of Parliament will expire on "the date of the next general election "u*****nder Article 102 (1).*****" Accordingly the date of the first elections pursuant to Section 9 (1) of the Sixth Schedule is within 60 days of 14th August 2012, the second Tuesday of August 2012, the fifth year of the term of the Parliament within the meaning of Article 101 (1). The last date of 14th October, 2012"***.

The appellants also aver in the Memorandum of Appeal, *inter alia*, that the High Court misdirected itself on the interpretation of ***Sections 9*** and ***10*** of the schedule and, in particular, of **Section 9 (2)**; that the High Court did not consider that **Section 2** of the Schedule applies chapters Seven and Eight of the Constitution to the first elections; that the High Court failed to determine that the Constitution contemplates a general election not later than 2012 and, lastly, that the High Court did not give effect to the ***"fifth year"*** in ***Article 101*** and instead referred to the former Constitution to determine that a date of the expiry of the term of the 10th Parliament beyond 2012 and within sixty days after the ***"5th anniversary of the date when it first sat"*** as reckoned from Legal Notice No. 1 of 2008.

[24] Mr. Mwenesi submitted in support of the appeal, among other things, that the court misdirected itself in giving power to the executive to determine date of the election, that the tradition suggested by the Attorney General of holding elections in the month of December should not have been overlooked; that the court did not give sufficient consideration to the conventions and suggestions by Mr. Otiende Amollo, that **Section (3) (2)** of the Schedule intended that the whole Constitution as promulgated was to apply to the first general elections; that the term of Parliament expires on the next election date; that the High Court rewrote the Constitution, and, that the date of the next election is specified by the Constitution in **Section 9 (1)** of the Schedule as read with ***Articles 101*** and ***102*** – that is, on 2nd Tuesday of August 2012.

[25] Mr. Mwangi supports the decision of the High Court in ***Order 2(b)*** that the next election should be held in 2013 but does not support decision in Order 2(a) that the election could be held in 2012. Indeed, Civil Appeal No. 82 of 2012 is against that finding. Mr. Mwangi relies on the Judgment of the High Court and on his submissions in the High Court. Regarding appeal against Order No. 2(a) Mr. Mwangi submitted *inter alia*, that, **Section 9 (2)** of the Schedule was already spent when the High Court delivered its judgment on 13th January 2012, that the Accord does not now exist as it ceased to apply when the new Constitution was enacted and that **Section 12** of the Schedule did not save the whole Accord but only saved the structures of government, the Presidency, Premier and the Executive.

[26] M/s Muthoni Kimani supports the Judgment of the High Court and states that the Attorney General's view that the election should be held in December according to tradition was found to have no constitutional foundation; that at the time the decision was given I.E.B.C was not in place; that ***Articles 101 and 102*** apply to future elections; that the High Court correctly applied ***Section 9(2)*** of Schedule; that it is not in public interest to alter the election date now announced by I.E.B.C, that the whole Accord was saved by ***Section 3(2)***; that after the judgment of the High Court the President and Prime Minister could not agree and IEBC took the 2nd option, and that, the first option has been overtaken by the Elections Act and by the decision of I.E.B.C.

[27] Mr. Nowrojee distinguished the provisions of ***Section 9(1)*** of the Schedule and ***Article 101*** and submitted that ***Section 9(2)*** refers to first elections while ***Article 101*** refers to general elections of Members of Parliament. He supported the Judgment of the High Court that elections should be held in 2013 and submitted that the decision by I.E.B.C to fix the election date for *4th March, 2013* can only be challenged in the High Court, and, that, while the first option that the elections could be held in 2012 was based on speculative jurisprudence there was nothing wrong in giving two dates.

[28] Mr. Kibe Mungai supported the Judgment of the High Court regarding the 2013 elections date. He however did not support the finding of the High Court that the elections in 2012 could be triggered by the dissolution of the Parliament by the President and Prime Minister, submitting, among other things, that there was nothing in the Accord providing that a dissolution of the coalition would trigger general election; that by the time the High Court made the decision, ***Section 9(2)*** had ceased to apply; that after the Constitution was promulgated the President lost power to dissolve Parliament; that ***Section 9(2)*** has no clear meaning; that the option contradicts ***Section 12 and 3(2)*** which extends the term of the coalition government until after the general election; that the effect of the option was to give the President and the Prime Minister power which the law did not give them; that if the prayers sought by appellants in C.A No.74/2012 are given, the Court would have to order the Parliament to amend the laws to comply with times set by the law which power it does not have, and, that the election law has already been acted upon.

[29] The first Amicus Curiae Prof. Yash Pal Ghai was represented by Mr. Nowrojee who presented his views *inter alia*, that he does not take sides in the dispute but that the decision of the High Court of 2013 elections date is the correct interpretation; that the first option – elections in 2012 following agreement between the President and the Prime Minister is legally impossible; that the Accord is still in force by virtue of ***Section 3(2)*** of Schedule but there are no provisions for general elections if the coalition is dissolved; that the correct position is as stipulated in the Accord – that coalition is dissolved if the Parliament is dissolved and that ***Section 9(1)*** prevails over ***Article 101*** regarding first elections.

[30] Those are in brief the highlights of the respective submissions.

THE CONSTITUTION

[31] The petitions necessitated the construction by the High Court of the relevant Articles of the Constitution, sections of schedule thereto and sections of the former Constitution, particularly ***section 59*** and the provisions of Accord.

The relevant Articles are ***101(1)*** which provides"-

"A general election of members of Parliament shall be held on the second Tuesday in August in

every fifth year **(emphasis provided)** and

Article 102(1) which provides:-

"The term of each house of Parliament expires on the date of the next general election".

Article 93(1) establishes the Parliament in these terms:-

"There is established a Parliament of Kenya; which shall consist of the National Assembly and the Senate.

Article 262 provides that the transitional and consequential provisions set out in the schedule shall take effect on the effective date (that is to say, the date that the Constitution came into force on 27th August, 2010).

By ***Article 264*** the former Constitution stood repealed on the effective date subject to the schedule.

The schedule contains the Transitional and Consequential provisions.

Section 2 of the schedule suspends *inter alia*:-

"the provisions of Chapter Seven of the Constitution except that the provision of the chapter which apply to the first general elections; chapter Eight, except that the provisions of the chapter ***relating to the election of the National Assembly and the Senate***would apply to the first general elections under the Constitution **(emphasis added).**

Section 3(2) specifies the provisions of the former Constitution which would continue to apply until the first general elections. That section excludes section 59 which gave the President power to prorogue and to dissolve Parliament at any time.

Section 59(4) provided:-

"Parliament unless sooner dissolved, shall continue for five years from the date when the National Assembly first meets after the dissolution and shall then stand dissolved."

Section 3(2) of the schedule further provides that the provisions of the former Constitution concerning the executive and the Accord would continue to operate until the first general elections.

The contentious ***section 9*** provides:-

"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. *(emphasis added).*

- ***Despite subsection (1), if the coalition established under the National Accord is dissolved and general elections are held before 2012, elections for the first county assemblies and governors shall be held during 2012."***

Section 10 which preserves the National Assembly provides that the National Assembly existing immediately before the effective date would continue as the National Assembly for the purposes of the Constitution for ***its unexpired term*** (emphasis mine).

Lastly, ***section 12(1)*** provides that the President and the Prime Minister would continue to serve in accordance with the former Constitution and the Accord until the first general elections unless they vacate office under the former Constitution and the Accord.

Similarly, ***section 12(2)*** allows the Cabinet and the Assistant Ministers to continue holding office until the first General Elections unless they vacate or are removed from office in accordance with the former Constitution and the Accord.

LEGAL STATUS OF SIXTH SCHEDULE

[32] It was submitted by Mr. Mwangi in the High Court that

> ***"the transitional and consequential provisions and the schedules to the Constitution are provisions of the Constitution and no provision of the Constitution is superior to the other."***

He relied on Southern African case of ***Azania Peoples Organization (AZAPO) and 3 Others vs. The President of the Republic of South Africa and 4 Others*** CCT 17/96 of the Constitutional Court of South Africa.

That case however is not an authority for the general principle as stated by Mr. Mwangi for it is clear that there is a specific provision in the Constitution of the Republic of South Africa to the effect that the provisions of the Constitution and the provisions of the Schedule to the Constitution are of the same status and further that the provisions of the schedule were deemed to be part of the substance of the Constitution. The Constitution of Kenya does not have such a specific provision. However, ***Article 262*** provides that the Transitional and Consequential provisions take effect on the same day as the Constitution.

The submissions by Mr. Mwangi were accepted without any qualification by Prof. Yash Pal Ghai in his written submissions filed in the High Court. In statutory interpretation, a schedule to an Act is construed as a full part of the Act. The authors of ***Halsbury\'s Laws of England 4th Edn Re-issue*** state at para 1399 at page 853:-

> ***"A schedule to an Act is to be construed by virtue of the functional construction rule, as an adjunct to the main body of the Act but nevertheless fully part of it. Any conflict between the inducing section (or any other section of the Act) and the schedule is to be resolved without regard to the fact that some of the relevant words are contained in the schedule rather than in the section."***

The functional construction rule referred to requires that enactments must be construed in a manner which gives each component part of the Act containing it according to its legislative function as such a component.

In my view, the same construction applies to a schedule to a constitution.

Furthermore, the schedules including the Sixth schedule to the current Constitution were contained in the ***Proposed Constitution of Kenya*** which was approved in a national referendum.

It follows therefore,and I hold, that the sixth schedule is an integral part of the current Constitution and has the same status as the provisions of the other Articles although it is of a limited duration.

APPEAL AGAINST ORDER 2(a)

[33] The finding by the High Court that the first election could be held in the year 2012 was based on the provisions of the ***Section 9(2)*** of the Schedule and of the Accord. The Accord came into force on *20th March, 2008*. Its purpose was principally to provide for the formation of a Coalition Government and the establishment of the offices of the Prime Minister, Deputy Prime Ministers and Ministers. The offices of the Prime Minister and Deputy Prime Ministers were subsequently entrenched in the former Constitution – ***(Section 15A***). The relevant provisions of the Accord for the present purpose is ***Section 6*** which provides:

"The Coalition shall stand dissolved if –

(a) The tenth Parliament is dissolved;

(b) The Coalition parties agree in writing; or

(c) One Coalition partner withdraws from the Coalition by resolution of the highest decision-making organ of that party in writing."

Section 8 of the Act is also relevant. It provides that the Act: -

"Shall cease to apply upon dissolution of the tenth parliament, if the Coalition is dissolved or a new Constitution is enacted, whichever is the earlier."

Section 3(2) of the Schedule, among other things, preserves the provisions of the Accord until the first general elections held under the current Constitution. Further, ***Section 12(1)*** of the Schedule provides that the President and Prime Minister would continue to serve in accordance with the former Constitution and the Accord unless they vacate office in terms of the former Constitution and the Accord.

[34] The High Court appreciated that the Accord does not provide for the elections upon dissolution of the Coalition and that there is nothing in the Accord that triggers dissolution of the Parliament. However, the High Court said that ***Section 9(2)*** points to the possibility of the elections being held in ***2012*** and implies that the dissolution of the National Coalition would lead to general election.

The High Court relying on ***Section 7*** of the Schedule held that ***Section 9(2)*** of the Schedule amends and modifies the provisions of the Accord to the extent that general elections can be held if the Coalition is dissolved and general elections are held in 2012. The High Court further reasoned that since ***Section 12*** of the Schedule preserved the positions of the President and the Prime Minister, ***Section 6(b)*** of the Accord must read, in effect, that, if the President and the Prime Minister agree in writing to dissolve the National Coalition, then the general elections shall be held in 2012. The High Court further amended ***Section 10*** of the Schedule to the extent that the *expired term* in that Section must include "*upon dissolution of the National Coalition in accordance with the terms of the National Accord and Reconciliation Act, 2008*" purportedly in order to give effect to ***Section 9 (2)***.

[35] It is difficult to understand the impact of the amendments of ***Section 9 (2)*** of the **Sixth *Schedule, Section 6 (b)*** of the Act and ***Section 10*** of the Schedule by the High Court. It seems, however, that the resultant effect was to alter the provisions of ***Section 9 (2)*** to provide that election shall be held in the year 2012 if the President and the Prime Minister agree in writing to dissolve the Accord and further to provide that the term of the National Assembly expires upon dissolution of the National Coalition in accordance with the Accord.

Those amendments are inconsistent with the earlier interpretation by the High Court that the dissolution of the Accord does not lead to an election or trigger the dissolution of the Parliament.

The qualification of the term of the National Assembly saved by ***Section 10*** would contradict the earlier finding that the powers of the President under the former Constitution to determine the term of the National Assembly no longer exists and that the term of five years expires on *14th January 2013*.

The High Court made the amendments admittedly inspite of the fact that the parties had not addressed it on the meaning of ***Section 9 (2)*** of the Schedule.

The Courts should not under the guise of construing statutes to conform with the Constitution under ***section 7*** of the schedule usurp the legislative powers of the National Assembly.

[36] The appellants in both appeals and all counsel are in agreement that Order No.2(a) was made in error. They all agree, and the High Court found so that the first election is dependent on the dissolution

of the Parliament and that ***Section 59*** of the former Constitution that gave power to the President to dissolve the Parliament at any time was not saved by the Constitution.

I agree with the submissions of Mr. Kibe Mungai, that the effect of Order 2 (a) is to give the President and the Prime Minister power to dissolve the National Assembly which power is not conferred by the Constitution.

It was not within the province of the High Court to amend, as it in effect did, ***Section 9(2)*** of the schedule, ***Section 10***of the schedule and ***Section 6(b)*** of the Act. The High Court exceeded the limits of permissible judicial adventurism or activism. The decision amounted to what Mr. Nowrojee labeled as *"speculative jurisprudence"*. In addition, the decision was inconsistent with the Constitution particularly ***Section 10*** **a**nd ***Section 12*** of the Schedule which saved the life of the National Assembly and the Executive until the next General Elections. Further, ***section 9(2)*** envisaged an election before 2012 without specifying the circumstances which would trigger the election which date was prior to date of the judgment of the High Court. Thus, ***Section 9(2)*** was spent by the time of the Judgment.

The subsequent events have proved that the High Court gave a construction to ***Section 9 (2)*** which not only produced an artificial result but was also unworkable and impracticable. The order has now been rendered futile and ***Civil Appeal No. 82 of 2012*** should be allowed.

APPEAL AGAINST ORDER 2(b): DATE OF FIRST ELECTION

[37] I earlier referred to the grounds of appeal in **Civil Appeal No. 74** of **2012** particularly ground 21. It is apparent that the appeal is based on the same grounds as Petition No. 65 of 2012, that is that, the date of first elections has to be determined with reference to **Articles 110** and **102**.

The respective parties filed written submissions in the High Court relating to the elections date which have been adopted in this appeal. The *"three friends"* of Court filed respective comprehensive and illuminating submissions which have also been adopted in this appeal. The three friends of the court particularly the 1st and 2nd have in their scholarly submissions articulated the relevant applicable law.

The 2013 date is supported by Mr. Harun Mwau, ICCRG, IEBC, Prof. Yash Pal Ghai and now by the Attorney General. The August 2012 date is supported by the appellant in **Civil Appeal No. 74** of **2012** and by **C.I.C.**

[38] Although there is no appeal against the finding that the first elections could not be lawfully held between October 2012 and December 2012 as submitted by the Attorney General and the 2nd *amicus curiae*, Mr. Mwenesi submitted that the views of the Attorney General and the views of Otiende Amollo, relating to the convention should have been accepted.

The case for December date as presented in the High Court by M/s Muthoni Kimani was based on the interpretation of **Section 10** and **Section 12** of the Schedule and **Section 59** of the former Constitution. The Attorney General contended that **Section 59** of the former Constitution was preserved by **Section 10** of the Schedule, and, since by virtue of **Section 12** the term of the President was saved until the first general elections, then the President had power under **Section 59** to dissolve the Parliament and pave way for the holding of the general elections in December 2012 according to the tradition. That was also the view of the 2nd *amicus Curiae*.

[39] The opinion of Mr. Otiende Amollo, a member of the Committee of Experts which drafted the Constitution was brought to the attention of the High Court. Mr. Otiende Amollo concluded his opinion dated 20th July 2011 by saying:-

> ***"Thus ultimately the contemplation was, that going by precedent, that Parliament would be dissolved around October 2012 allowing about two months of usual preparation, for election to be held between 27th and 29th December 2012. It could also be earlier if the Parliament was dissolved earlier. Importantly, the elections were tied to the life of the Parliament.***

What is important then is that the elections cannot spill over to 2013 and nothing compels them to be held on the 2nd Tuesday of August, 2012 either.

The schedules, precedent and tradition leads one to late December, 2012."

Prof. Yash Pal Ghai commented on that opinion in his submissions filed in the High Court. The amicus curiae stated that there has been a popular expectation that the elections are held in December as happened in 1992, 1997, 2002 and 2007 but that there is nothing in law which fixes December as an election month and continued:-

> *"The only reason it was possible to hold elections in December on all those occasions was that the President of the day dissolved Parliament before its term expired.....................................*
>
> *Unfortunately, there is some indication that the Committee of Experts believed that there was some particular reason for elections to be held in 2012: In section 9(2) of the sixth schedule, it is provided that if election are held for National Assembly on 2012 those for county governments would be held in 2012. It is submitted that this betrays some misunderstanding on their part of the old Constitutional provisions but that this assumption on their part can create no legal obligation or even power to hold elections in 2012."*

[40] Although the High Court did not specifically deal with the issue of the December date, it nevertheless considered the provisions of ***section 59*** of the former Constitution and made a finding that the Constitution does not provide for dissolution of the Legislature by the President, except in ***Article 261*** (not relevant) and firmly held that the exclusion of ***section 59*** of the former Constitution automatically excludes the possibility that the term of the National Assembly could be brought to an end by an act of dissolution by the President in the manner contemplated by ***section 59***.

There is near unanimity of the opinion in this appeal that the President indeed has no power under the Constitution to dissolve the Parliament and that the first election under the Constitution can only spring from the dissolution of the Parliament.

In the absence of the constitutional power by the President to dissolve the National Assembly, it is legally impossible to hold elections between October 2012 and December, 2012 in accordance with the tradition.

[41] Like the 1st amicus curiae, the issue whether or not the Accord is still in existence is not relevant to the determination of the election date and I refrain from expressing an opinion on the issue.

[42] The fundamental question which the petitioners in petition No. 65 of 2012 sought a determination by the court and which civil appeal No. 74 of 2012 raises is whether there is inconsistency between ***Articles 101*** and ***102*** on one hand ***and sections 9(1)*** and ***10*** of the schedule as to the actual date of the next general election.

In essence the issue was whether the lawful date of the first elections is ***the second Tuesday of August or within sixty days after the dissolution of the National Assembly at the end of its term***.

To encapsulate the decision of the High Court, the High Court in searching for an answer was guided by the Schedule for two reasons – firstly, – in its view the schedule specifically and unambiguously deals with the first elections, and, secondly, ***section 2(b)*** of the Schedule in its view, specifically suspends the whole of Chapters Seven and Eight and ***Articles 129*** to ***159*** of Chapter Nine until the final announcement of all results of the first elections after the whole Constitution has come into force. The High Court rejected the contention by CIC that the reference to ***system of elections, eligibility and electoral process*** preserves particularly ***Articles 101*** and ***102*** for three reasons – namely, (i) ***section 2(b)*** is very clear on the parts of the Constitution that are suspended; (ii) those words were defined by the Constitution as the first elections will involve new entities - the Senate and County governments, and, thirdly, the words do

not apply to the date of the elections.

The High Court next embarked on an interpretation of the meaning of the phrase "***unexpired term***"of the Parliament and reasoned thus:-

- Since the present National Assembly is a creature of the former Constitution, the term has to be fixed with reference to the former Constitution.
- By section 59(4) of the former Constitution, the term is five years from the date when the National Assembly first meets after dissolution unless sooner dissolved.
- Although the term of Parliament is indeterminate under former Constitution, it has an outer limit of five years.
- Since section 59 of the former Constitution was not saved by section 3 (2) of the schedule, and since the Constitution does not provide for dissolution of the National Assembly by the President except in one instance (not relevant), the power of the President to dissolve Parliament no longer exists and the National Assembly cannot be brought to an end by an act of dissolution by the President.
- The term in section 10 refers to five years which according to Legal Notice No. 1 of 2008 started when Parliament sat on 15th January, 2008 and therefore ends on 14th January, 2013.
- Pursuant to section 9(2) the elections shall be held within sixty days of 15th January, 2013.

[43] Although the Schedule is an integral part of the Constitution, it should be understood for what it is – transitional in character. The nature and extent of transitional provisions naturally vary from case to case according to its purpose. In our situation, it was intended to be a bridge between the old Constitution and the new. The new Constitutional order ushered in a complete transformation of the system of the government.

The transformation is to be achieved through the instrumentality of first general elections. I respectively agree with the submissions of Professor Yash Pal Ghai in the High Court that a transitional provision is ***par excellence*** a provision drafted for a special situation and must prevail over an apparent contradictory provision intended to cover a normal situation.

Furthermore, the schedule embodying the constitutional provisions should be construed, among other things, in a manner that promotes the purpose, value and principles of the constitution and which contributes to good governance. Further it should be construed in accordance with the harmonization principle and all provisions should be regarded as cogs of the same wheel.

[44] When ***Article 101(1)*** is read in juxtaposition with ***S.9(1)*** of the Schedule there is *ex facie* two dates of elections. One is specific - second Tuesday in August in every fifth year and the other is dependent on the dissolution of the National Assembly at the end of its term. Similarly, when ***Article 102(1)*** is read in collocation with ***Section 10*** of the schedule, there are, on the surface, two dates for expiry of the term of the National Assembly – one on the day of the next general election and the other on expiry of its unexpired term. However, if ***Article 101(1)*** and ***Section 9(1)*** are examined carefully – it is clear that ***Article 101(1)*** does not refer to any specific election rather provides a permanent date for successive elections – in every fifth year. In contrast ***S.9(1)*** refers to the first elections under the Constitution. Further ***Articles 101(1)*** and ***102(1)*** as read together indicate that the date and the term is in reference to National Assembly and the Senate. There is no Senate in existence. It will come into being on the commencement of the results of first elections for Parliament. ***(Section 2(1) of the Schedule.)***

Moreover, ***Section 2(1)*** specifically, inter alia, suspends the provisions of Chapter Eight – under which ***Article 101(1)*** and ***102(1)*** fall until final announcement of all results of the first elections except that the provisions of Chapter Eight relating to election of National Assembly and the Senate apply to the first elections. The provisions of Chapter Eight relating to elections are contained in ***Article 199*** which deals with qualifications and disqualifications for elections Chapter Seven which is also suspended by ***Section 2(a)*** but whose provisions apply to the first elections deals, among other things, with electoral system and process.

Lastly, ***Section 3(2)*** while saving the specified provisions of the former Constitution and the provisions of the Act provides: -

> ***"but the provisions of this Constitution concerning the system of elections, eligibility for election and the electoral process shall apply to that election."***

The provisions of Chapter Seven and Eight which apply to the first elections concern the system of elections, eligibility for elections and the electoral process. It is logical, and indeed in conforming with the interpretation criteria of the Constitution specified in ***Article 259*** that, the acceptable constitutional threshold of a general election should apply to the first elections. Further, it is not illogical that the first elections under Constitution should be held on a different date from the future elections. The phrase "*shall be held on the second Tuesday in August in every fifth year*" in ***Article 101(1)*** and the phrase "*within sixty days after the dissolution of the National Assembly at the end of its term*" are not tautological. They refer to two different elections.

From the foregoing it is erroneous to construe **S.2(b)** and **S.3(2)** to mean that the first election should be held on the second Tuesday of August 2012.

[45] The intention of the makers of the Constitution can be gathered from the provisions of the schedule and from its Final Report. The Committee of Experts said in its F*inal Report*:-

> ***"The Committee of Experts decided that on balance it would be in the interest of political stability to suspend the operations of those provisions of the new Constitution that concern the executive and legislature until the current incumbents have completed their terms, and to extend the operation of the Accord until the next scheduled elections."***

Thus, it was intended as **Section 9 (1)** and **Section 10** provides,that, the National Assembly would complete its unexpired term and that the first elections would be held within sixty days after the dissolution of the National Assembly at the end of its terms.

The assertion by Mr. Otiende Amollo that it was expected that first elections would be held in December according to precedent is, with respect, not only inconsistent with the clear provisions of the Constitution but also a legal impossibility since the Constitution did not confer power on the President to dissolve parliament before the end of its term or provide other legal mechanisms for premature dissolution of Parliament to precipitate a general election.

Similarly, the ***October 2012*** elections date suggested by the appellants in Civil Appeal No. 74 of 2012 has no constitutional underpinning. Moreover, it is impracticable to hold elections in October, 2012 in view of the time lines set by the relevant law.

[45] The High Court after an extensive and objective analysis of the relevant provisions of the Constitution held, correctly in my view, that the first elections under the Constitution can only be lawfully held within sixty days upon the expiry of the term of he 10th Parliament and computed the date of expiry as 14th January 2012.

On my own analysis, I am satisfied that the High Court reached a correct decision regarding **Order No. 2 (b)**. The IEBC has pursuant to the judgment fixed the election date as 4th March 2012 which falls within the stipulated sixty days.

That date should be adhered to.

[46] Regarding the costs of the appeal, the High Court categorised the dispute as falling under ***Article 258 (1)*** of the Constitution. However the appellants in *Civil Appeal No. 74 of 2012* were not parties to the petitions. I have upheld the objection to the effect that the applicants have no *locus standi* to lodge the appeal. However, we are at early stages of the implementation of the Constitution and guiding principles

relating to constitutional adjudication have not been settled. For that reason, it cannot be said that the appellants lodged the appeal in contravention of settled principles.

Regarding the costs of the appellant in *Civil Appeal No. 82 of 2012*, his Petition was intended to prevent the threatened contravention of the Constitution. No party had yet violated the Constitution.

I would in the circumstances make no order as to costs in both appeals.

It is not desirable to lay down a general principle governing costs in constitutional adjudication. The courts should be left free to exercise discretion on case to case basis.

In the result, I would allow ***Civil Appeal No. 74 of 2012*** to the extent that I would set aside the **Order No. 2(a):** Otherwise, I would the dismiss the appeal with no orders as to costs.

I would allow ***Civil Appeal No. 82 of 2012*** to the extent that I would grant prayer 2 and similarly set aside **Order No. 2(a).** I would decline the rest of the prayers in the appeal. I would not award costs.

No orders for costs.

As ***Okwengu, Rawal and Maraga, JJ.A.*** agree, the orders of the Court shall be that ***Prayer (a)(i)*** of the Civil Appeal No. 74 of 2012 is allowed to the extent that ***Order 2(a)*** given by the High Court to the effect that the first elections should be held in the year 2012 within 60 days from the date on which the National Coalition is dissolved by written agreement between the President and the Prime Minister in accordance ***with section 6(b)*** of the Accord is set aside.

However, ***prayer a (ii)*** in Civil Appeal No. 74 of 2012 seeking the setting aside of the decision of the High Court that the elections shall be held within sixty days from 15th January, 2013 is dismissed. Civil Appeal No. 82 of 2012 is allowed to the extent that ***Order 2(a)*** above is set aside with no orders as to costs.

The result of the decision of the majority is that the ***order No. 2(b)*** of the High Court that the elections shall be held upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by legal notice No. 1 of 2008 as 15th January, 2008 and the term therefore expired on **14th January, 2013** and the election shall be held within sixty days of 1**5th January, 2013** is confirmed.

There shall be no order as to costs of the consolidated appeals.

Dated and delivered at Nairobi this 31st day of July, 2012.

E. M. GITHINJI

…........................
JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF KOOME, JA:

1. The facts giving rise to the consolidated appeals have been sufficiently outlined in the lead judgment of

Githinji JA, it is, therefore, not necessary to repeat them. The main issue that arises from the consolidated appeals which admittedly is a matter of general public interest is the determination of whether the learned Judges of the High Court erred in their judgment which resulted in the granting of orders **2 (a) and 2 (b),** the effect of which gave two scenarios of when the next general elections can be held.

2. In order to put this judgment in perspective, the following orders were made:

> *1. That the court has jurisdiction to determine this matter and it is founded on two grounds, first, failure to hold the first elections on a date to fixed in accordance with the provisions of the Constitution and therefore, any party is entitled to move the court under **Article 258 (1)** for appropriate relief and severally the Supreme Court in **Constitutional Application No. 2 of 2011** directed this Court to determine the petitions before it having been satisfied that the Court has jurisdiction.*
>
> *2. That the date of the first elections under the Constitution is determined by reference to **Sections 9 and 10 of the Sixth Schedule** as follows:*
>
> *(a) In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement the President and the Prime Minister in accordance with **Section 6 (b) of the National Accord and Reconciliation Act 2008**; or*
>
> *(b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary day it first sat, which is designated by **Legal Notice No. 1 of 2008** on 15th January, 2008 and the term, therefore, expires on 14th January, 2013 and the elections shall be held within sixty days of 15th January, 2012.*
>
> *3. That following the repeal of the former Constitution and together with it **Section 59** thereof and in the absence of a specific provision entitling the President to dissolve Parliament, the President has no power under the Constitution to dissolve Parliament.*
>
> *4. That the body entitled under the Constitution to fix the date of the first elections within sixty days of the expiry of the term of the National Assembly or upon dissolution of the National Coalition by written agreement between the President and the Prime Minister in accordance with **Section 6 (b) of the National Accord and Reconciliation Act, 2008,** is the Independent Electoral and Boundaries Commission.*
>
> *5. That in accordance with **Article 255 of the Constitution**, an amendment to the Constitution affecting the term of the President cannot be effected into law without a Referendum.*
>
> *6. That the terms and conditions of service of Members of Parliament are governed by the **National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya)** and **Parliament Pensions Act (Chapter 196 of the Laws of Kenya)** which are saved by the virtue of the provisions of **Section 6 and 7 of the Sixth Schedule** up to the end of the term of the National Assembly or upon dissolution of the National Coalition." ….*

3. There are many grounds of appeal in the two appeals, also there seems to be no issue regarding the other orders except orders **2 (a) and 2 (b)** and the order for costs. The key issue for determination remains when the next general election can lawfully be held under the Constitution of Kenya 2010. This still remains the thrust of the consolidated appeals. During the hearing of the appeal, a second issue of *locus standi* regarding whether the Appellant in Civil Appeal No. 74 of 2012, The Centre For Rights Education and Awareness **(CREAW)** who were not parties to the High Court matter that gave rise to this appeal could file an appeal was canvassed extensively. I will, therefore, deal with the issue of *locus standi* first.

4. Mr Mwenesi, learned counsel for **CREAW,** relied on the provisions of ***Article 164 (3) of the Constitution***:

"The Court of Appeal has jurisdiction to hear appeals from:

(a) the High Court and

(b) any other court or tribunal as prescribed by an Act of Parliament."

He also relied on the Appellate ***Jurisdiction Act*** *especially* ***Rules 75 (1)*** which provides:

"Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. …"

While ***77 (1)*** provides:

"An intended appellant shall before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court."

5. The above provisions have also to be considered alongside a plethora of other Constitutional underpinnings namely:

Article 22:

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied violated or infringed or is threatened";

Article 24:

"A right to fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, …"

The right to a fair hearing is protected under ***Article 50 of the Constitution***.

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court."

Article 258 which gives:

"Every person a right to institute proceedings claiming that this Constitution has been contravened or is threatened with contravention";

6. According to Mr Mwenesi learned counsel for CREAW, he argued that CREAW is a body pursuing democratic and human rights of Kenyans through education and creation of awareness, thus they have an interest in the matter of ensuring that the Constitution is upheld. CREAW is aggrieved by the decision of the High Court to the extent stated in the grounds of appeal. Apart from Mr Kibe Mungai learned counsel appearing for the 2nd and 3rd *Amicus Curiae*, who did not object the *locus standi* of CREAW, and Mr Norwjee learned counsel for 7th respondent was of the opinion that the appeal by CREAW can be considered *de bene esse***.** All the other counsel were vehemently opposed and sustained very strenuous arguments in opposition of the participation of CREAW.

7. Mr Kibe indeed supported the prayer sought by CREAW in Civil Appeal No.74; prayer a (i) which reads:

"The decision of the High Court given at Nairobi in High Court Constitutional Petition No. 65 of 2011 consolidated with Constitutional Petition Nos. 123 of 2011 and 185 of 2011 to the extent that decision declares that the date of the first election under the New Constitution be determined by reference to Section 9 and 10 of the sixth schedule as follows:

(a) In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the President and the Prime Minister in accordance with Section 6(b) of the National Accord and Reconciliation Act, 2008…… is set aside."

8. I generally agree with the arguments and also Githinji, JA's judgment regarding the participation of CREAW *de bene esse* but, however, I wish to state that, the ***Appellate Jurisdiction Act and the Court of Appeal Rules*** have not been revised to align them with the provisions of the constitution. I am particularly conscious that the Court of Appeal is a creature of statue and there is no implied procedure for original jurisdiction. The same Constitution has structured the court and donated original jurisdiction to the High Court. Thus the Court of Appeal deals with the record of appeal and issues that are raised as grounds of appeal from the decision that is appealed against.

9. The Court of Appeal has previously dwelt with some cases of: ***KAMLESH MANSUKHLAL DAMJI PATTNI V STERWOOOD HOTELS & ROSASH WORLD WIDE INC. & 7 OTHERS CA NO. NAI 330 OF 2001*** *(unreported)* and ***COMMERCIAL BANK OF AFRICA LIMITED V ISAAC KAMAU MARAGU, CA NO. 157 OF 1999*** *(unreported).*

The decisions in both cases clearly demonstrate that a party who was directly affected by an order was allowed to appeal. These were commercial matters unlike in the present case, the matter involves the implementation of the Constitution and the next date of this Nation's general elections is a matter of general public interest. In the circumstances, can CREAW who did not participate in the High Court file an appeal?

10. In ***R V THE INTERIM INDEPENDENT BOUNDARIES REVIEW COMMISSION & 13 OTHERS, Civil Appeal No. 64 of 2012,*** a Bench of this Court composed differently allowed parties who had not participated in the High Court but the parties were allowed to restrict themselves to the matters that arose before the High Court. The parties were not allowed to introduce new issues that may lead to a departure from the role of Appellate Court which is basically the re-evaluation of the evidence in the High Court.

Secondly, in my humble view a party who was not a party before the High Court has to demonstrate how they are affected by the decision being appealed against, and in the above appeal parties sought leave by way of a Notice of Motion and they were able to demonstrate how the matter was going to affect them as well as members of general public in the eight constituencies. I am of the view that CREAW should have sought leave first of all before the High Court so as to demonstrate the general public interest they are pursuing and give reasons why they did not appear before the High Court to agitate their case.

11. Since the ***Appellate Jurisdiction Act*** and the Rules thereto have not been revised; and being cognisant that this is a matter of general public interest, I will allow limited participation by CREAW which is to be limited to the two issues that were germane in the High Court. This is obviously to guard against any introduction of *"new issues"*. Looking at the grounds in the two appeals, the arguments by CREAW should be considered within the context of the two orders made by the High Court that:

"the date of the first elections under the Constitution is by reference to ***Section 9 and 10 of the Sixth Schedule*** *as follows:*

(a) In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the president and the prime minister in accordance with ***Section 6(b) of the National Accord and Reconciliation Act****; or*
(b) Upon the expiry of the term of the 10th parliament on the 5th Anniversary day it first sat which is designated by Legal Notice No. 1 of 2008 as 15th January, 2008 and the term therefore expires

on 14th January, 2013 and the lections shall be held within sixty days of 15th January, 2012."

This is because the interpretation of ***Sections 9 and 10*** is germane and is also a ground of appeal on Civil Appeal No. 82 especially ground No. 6:

> *"The learned Judges erred in law and in fact in failing to apply or in misapplying the rules of constitutional interpretation by failing to give the words of Section 9 of the Sixth Schedule to the Constitution their ordinary and material contextual meaning."*

12. It was agreed by all the parties that the first alternative order given by the court was erroneous for reasons that the Coalition Government as constituted under the National Accord was not dissolved before 2012. By the time the Court issued the orders above, the first scenario was no longer obtaining. Therefore, by the time the judgment was delivered, ***Section 9 (2) of the Sixth Schedule*** had ceased to have any application. Moreover the dissolution of the Coalition Government could not trigger the dissolution of the National Assembly; and that the provisions of ***Section 59*** of the retired Constitution that gave the President power to dissolve Parliament was not saved by the new Constitution. For the above reasons that l wholly agree with, I would set aside the ***Order 2 (a).***

13. As regards ***Order 2 (b),*** I agree with the lead judgment by Githinji, JA and also the reasoning by the learned Judges on the guiding principles of interpreting the Constitution as they summarised them thus:

> *(i) that as provided by Article 259, the Constitution should be interpreted in a manner that promotes its purpose, values, principles, advances rule of law, human rights and freedoms and permits development of the law and contributes to good governance;*
> *(ii) that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion;*
> *(iii) that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism"; and*
> *(iv) 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 so as to effectuate the great purpose of the instrument (the harmonisation principle).*

14. I also agree with Githinji, JA that the Court should avoid adopting irrational and illogical interpretation of the Constitution or Statute that gives rise to an impracticable result. I have also taken into account the provisions of ***Chapter 17 of the Constitution*** that embody the principles of interpretation that should *inter alia*:

> *(a) promote its purpose, values and principles;*
> *(b) advance the rule of law and human rights and fundamental freedoms in the Bill of Rights;*
> *(c) permit the development of the law and the human rights and fundamental freedom in the Bill of Rights;*
> *(d) permit the development of the law; and*
> *(e) contribute to good governance."*

15. Also in the case of ***SOUTH DAKOTA V NORTH CAROLINA*** ***192 US 268 (1940) L ED***, the US Supreme Court said at page 465:

> *"Elementary rule of constitutional construction is that no one provisions 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."*

16. However, bringing the above principles to bear in this case, I most respectfully disagree with the order that the next general elections should be held sixty days after the expiration of the unexpired term.
I am bothered by ***Order 2 (b)*** that the next elections can be held sixty days from the expiry of the term of the National Assembly on 15th January, 2013. This anxiety is brought about by my reading and

understanding of ***Sections 9 and 10 of the Sixth Schedule*** read conjunctively, the unexpired period of the National Assembly should come to an end on the 15th January, 2013. The learned Judges of the High Court went to great lengths to define the term *"unexpired term"* and they correctly arrived at the date of 15th January, 2013. Having also considered that the life of Parliament is five years as per the provisions of ***Section 59 (5) of the retired Constitution***, which is saved by **section 10 of the sixth schedule**, then the provisions of ***Section 9*** (**1)** should not have been read as a standalone leaving out the provisions of ***Section 10 of the Sixth Schedule and 59 (5) of the old Constitution***. If ***Sections 9 and 10 of the Sixth Schedule and Section 59 (5***) were read conjunctively and given their purposeful meaning within the prevailing context that traditionally general elections are held within five years, then the High Court would have arrived at a different date for the dissolution of Parliament. Using this formula, therefore, the National Assembly should dissolve sixty [60] days **before** the expiration of term. In my view the dissolution of Parliament sixty days **after** the expiry of its term contradicts the provisions of ***Section 10 of the Sixth Schedule*** as it extends the period of the National Assembly beyond the term of five years.

17. ***Sections 101 and 102*** deal with the date of the subsequent general elections and it is common ground that under the Constitution, the President has no power to dissolve the National Assembly. The lack of powers in matters of dissolution of parliament is further confirmed by the fact that the provisions of ***Section 59 of the retired Constitution*** were not saved. The first General Elections are clearly to be held according to the provisions of ***Sections 9 and 10 of the Sixth Schedule***. The drafters of the Constitution could have helped matters if they named the actual date when Parliament should have dissolved. Under ***Article 88***, the Independent Electoral and Boundaries Commission is the body mandated to conduct and supervise elections. Thus, this body can decide the date of the general election but that date must be in accordance with the Constitution.

18. My problem with ***Order 2 (b)*** is that the interpretation given did not give due regard to the provisions of ***Section 10*** that saved the unexpired period of five years which expires on 15th January, 2013. The cardinal principle in interpretation takes due regard to harmonization of clauses. The various provisions of the law torching on a single issue are read together with each provision sustaining the other and none destroying the other. Am afraid this principle was not followed because the literal meaning given to ***section 9 (1)*** destroyed ***section 10*** by taking the term of the National Assembly beyond its term of five years.

19. Taking into account the above principles, the provisions of the Constitution and also the customs and previous traditions the previous General Elections have been held after five years the formula for arriving at the date of the next general elections should have been sixty days **BEFORE** the end of its term and not **AFTER**. The National Assembly should have been dissolved sixty days before the expiration of its term that should have been on or about 14th November, 2012. This way, the current National Assembly cannot go beyond its life span of five years and the Members of Parliament will have served their entire term of five years. The date for the next general elections should have been on or about the 15th January, 2013. That way the term of the current Parliament is not at all extended beyond the five years and there is harmony between the different clauses also taken in the context of past customs and traditions.

20. Subsequent to the judgment of the High Court, the Independent Electoral & Boundaries Commission **[IEBC],** fixed the date of the next general elections to 4th March, 2013. In my humble view, much as the unexpired term of the current Parliament should be respected and allowed to run its full term, by the same reasoning, the term should not be extended beyond five years.

21. Mr Norwjee addressed us on the many challenges, logistics, structures and other organisations that are supposed to be completed by **IEBC** before conducting the general elections as well as the timelines that are set out under the ***Elections Act***. I am afraid all those challenges and timelines should be worked within the provisions of the Constitution which should be obeyed and followed with utmost obedience. For the aforesaid reasons, I would allow the appeal and substitute the orders of the High Court with a definitive date for the dissolution of Parliament by **14th November, 2012**, and the date for the next general elections as **15th January, 2013**.

22. On the issue of costs this being a public interest matter, I order each party should bear their own costs of this litigation.

Dated and delivered at Nairobi this 31st day of July, 2012.

M. K. KOOME

JUDGE OF APPEAL

JUDGMENT OF OKWENGU, JA.

1. I have had the opportunity to read in draft the leading judgment of **Githinji, JA,** and I do agree with it in its entirety. The circumstances leading to these appeals and the rival arguments, need no recapitulation as they have been clearly captured in the judgment of Githinji, JA, and also stated in the judgments of my other brother and sister judges. The issues have been exhaustively dealt with in the judgment of Githinji JA. However, for the sake of emphasis, I find it necessary to make brief comments on two issues.

2. First is the issue of the *locus standi* of the appellants in Civil Appeal No. 74 of 2012. It is common ground that the two appellants i.e. Centre for Rights, Education & Awareness, and Caucus for Women Leadership, were not parties in the original suit in the High Court. That being the position, the question is whether the two have the locus to lodge an appeal against the judgment of the High Court in a matter in which they were not parties.

3. This Court's jurisdiction as stated under Article 164(2) of the Constitution of Kenya is essentially an appellate jurisdiction. The Appellate Jurisdiction Act, Cap 9 and the Court of Appeal Rules, provides clear guidance on how the jurisdiction of this Court is to be exercised. The overriding objective of the Appellate Jurisdiction Act, and the Court of Appeal Rules as stated under Section 3A of the Appellate Jurisdiction Act, is to facilitate the just, expeditious, proportionate and affordable resolution of appeals. Under Section 3B of the same Act, the Court is under a duty to handle all matters before it for attaining the following aims:

> ***"(a) the just determination of the proceedings;***
>
> ***(b) the efficient use of the available judicial and administrative resources;***
>
> ***(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
>
> ***(d) ….."***

4. The Court must also not lose sight of **Article 159(2)** of the Constitution of Kenya which obligates it to be guided by the following principles in the exercise of its judicial authority.

> ***"(a) justice shall be done to all, irrespective of status;***
>
> ***(b) justice shall not be delayed;***
>
> ***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***
>
> ***(d) justice shall be administered without undue regard to procedural technicalities; and***

(e) the purpose and principles of this Constitution shall be protected and promoted."

5. With the above in mind, although it is evident that in the first instance appeals to this Court will invariably be brought by persons who were parties in the suit from which the appeal emanates from, I would be reluctant to lay down a hard and fast rule that no person who was not party to the suit, subject of the judgment under appeal, can come to this Court on appeal. I would also be wary of restricting the required interest in a suit to proprietary or financial interest. In my view, each case must be considered on its own merit. A person who was not a party in the original suit has the obligation to establish that it is affected by the judgment or order, subject of the appeal; secondly, that there are good reasons for not having pursued its interest in the High Court; and thirdly, that where a matter is of public interest and relates to the protection and promotion of the Constitution, it may be in the interest of justice to admit such a party.

6. must point out however, that such a party, if admitted, cannot bring in new matters which were neither canvased nor ruled upon in the High Court. In this case, as Githinji, JA. has pointed out, the appellants in Civil Appeal No. 74 of 2012 have not given any good reasons for their failure to pursue the matter in the High Court, nor have they shown that they have any interest in this matter, which is above that of the parties already in the suit. It would not be appropriate to allow them in this appeal at this stage. It is enough that for the purposes of the protection and promotion of the Constitution, their arguments have been considered *debene esse*.

7. On the pertinent issue regarding the appropriate date for the first election, my considered view is that the answer is to be found in section 9 and 10 of the Sixth Schedule to the Constitution of Kenya. At the risk of repetition, I reproduce these provisions hereunder:

> ***"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 <u>after the dissolution of the National Assembly at the end of its term</u>.*** *(Emphasis added)*
>
> ***10. The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution <u>for its unexpired term</u>."****(Emphasis added)*

8. In my view section 9(1) is clear that the first election shall be held within 60 days <u>after</u> the dissolution of the National Assembly, at the end of the term of the National Assembly, whilst Section 10 provides a saving for the National Assembly to continue its unexpired term under the retired Constitution, after the coming into effect of the new Constitution. The wording of Sections 9 and 10 of the Sixth Schedule is clear and unambiguous, and therefore needs no interpretation other than the literal meaning. To interpret Section 9 as applying the 60 days <u>before</u> the dissolution of the National Assembly, would be contrary to the clear wording of the Schedule.

9. The argument that an election date, 60 days after the expiry of the term of the National Assembly, would lead to the term of the National Assembly being irregularly extended, can only hold if the term of the National Assembly is to expire on the date of the next general election. Nonetheless, I hold the view that **Article 102(1)** of the Constitution of Kenya which provides that the term of each House of Parliament expires on the date of the next general election, is not applicable to the first general election, which is the subject of this appeal. This is because **Article 102(1**) is one of the provisions which has been suspended by **Section 2(1)(b)** of the Sixth Schedule. Thus, Section 10 of the Sixth Schedule is the one applicable in the case of the first general election, which means that the current parliament shall continue for its unexpired term which ends on 14th January, 2013.

10. I am fortified in this view, by Section 12 of the Schedule, which provides without any ambiguity for the extension of the term of the person occupying the offices of President, Prime Minister, Vice President, Deputy Prime Minister, Minister or Assistant Minister, to continue to serve until the first general election is held. These members of the executive are legally allowed by this section to remain in office until the first general election is held. There is no equivalent provision in regard to the members of the National

Assembly who are not members of the executive, and therefore, upon the expiry of the term of the National Assembly on 14th January, 2013, their mandate is automatically terminated. The retention of members of the executive is understandable because there cannot be a vacuum in the government. It must function until it hands over to a new government. There is also logic in announcement of election date within 60 days after dissolution of parliament, as it gives opportunity to the members of parliament to go out, campaign and seek a fresh mandate from their electorate, without being shackled with their responsibilities in the National Assembly.

With these brief remarks, I concur with the orders proposed by Githinji, JA.

Dated and delivered at Nairobi this 31st day of July, 2012.

H. M. OKWENGU

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JUDGE OF APPEAL

<u>JUDGMENT OF RAWAL J.A.</u>

I have had the advantage of reading judgments of other members of this Bench andI do concur with the final determinations made by majority members of the Court, but I would like to put my thoughts on few points raised before the Court.

I shall begin with the objection raised on the competence of the appellants in ***Civil Appeal No. 74 of 2012*** (referred to as 'CREAW') to be adjoined as such appellants at the late stage of hearing of the appeal. It is not in dispute that those appellants were not parties before the High Court.

Though the facts, grounds of Appeal and submissions thereon have been concisely put forth in Judgments of other Hon. Members of the Court, I may state them in brief.

Mr. Mwenesi, the learned counsel for CREAW contended that they have the right to come before this Court even at the stage of appeal so that the issue of first election date be properly construed as per the Constitution. He began with citing the words ***'ANY PERSON'*** appearing in ***Rule 75*** of the ***Court of Appeal Rules, 2010*** followed by ***'who desires to appeal'***. He stressed that the issue before the Court is very much of public interest and importance and it is the organization of individuals with interest in political and social side of Kenya which includes the date of the election; that a person includes an individual or the aggregate of persons; that it is directly and substantially affected by the outcome of this matter and thus be allowed the full participation in the process of this appeal. He took further support on the provisions of ***Proviso of Rule 77*** of this Court's Rules. I do not cite the same at it is referred to in other Judgments of this Bench.

Two decisions of this court were relied upon, which are:

- ***Commercial Bank of Africa Limited Vs. Issac Kamau Ndirangu (Civil Appeal No. 157 of 1991),*** and

- ***Kamlesh Mansukhlal Damji Pattani Vs Starwood Hotels and Resorts World Wide Inc. & 7 Others (Civil Application No. Nai. 330 of 2001)***

Lastly Mr. Mwenesi quoted ***Article164 (3) (a)*** of the ***Constitution*** to submit that the Court of Appeal has been given general power to hear appeals from the High Court.

Mr. Kibe Mungai, the learned counsel for the third interested party submitted that CREAW be allowed to join in the appeal as the appellants.

Mr. Mwangi, the learned counsel for the appellants in ***Civil Appeal No. 82 of 2012*** in opposition submitted that first of all there is no evidence that the appellants are persons in law; that only the persons who were parties before the High Court has the right of appeal; that appearance from the Attorney General can amply take care of the issue of public interest. Same grounds were raised by the learned ***Sr. Deputy Solicitor General Ms. Muthoni*** who added that no explanation is proffered by the appellants as to why they failed to appear before the High Court when many parties were allowed to join in this matter which attracted wide publicity and public interest.

Mr. Nowrojee, the learned counsel for the 7th Respondent raised interesting grounds to oppose the inclusion of the appellants in the appeal. He contended that the objection raised is not technical in nature but has serious implications in law and procedure, namely:-

> ***"The appeal is raising new grounds for the consideration from this Court like the suggestion of the election date in October, 2012 which was never an issue before the High Court. If so, this Court is not asked to exercise its appellate jurisdiction by re-evaluating them and examining afresh the issues raised before the High Court. This Court is in reality is tried to be converted into the trial court and this Court lacks totally that original jurisdiction. The course taken by the appellants is a distortion of the procedure donated to this Court both by the Constitution and by the Statute."***

Lastly it was submitted that the parties in the cases cited were not allowed to be joined in appeal as a matter of right but by indulgence as they were directly affected by the decisions of the High Court. CREAW in this appeal is not in any manner more affected than the whole population of Kenya.

It is true that this issue has been considered by other Judges in this bench, and except a slight deviation in Judgment of Hon. Koome, J.A. the Court by majority has concluded that CREAW is not the person directly affected in this matter. I shall also concede that as per the circumstances of this appeal the appellants do not have *locus standi* to appeal against the decision of the High Court delivered on 13th January, 2012 in Misc. Application No. 65 of 2011.

My reasons are that CREAW considering all aspects of the matter is not the person directly and substantially affected by the decision of the High Court. The issue in the petition before the High Court cut across the whole kaleidoscopic spectrum of the nation. A party intending to be a part of that pattern should have exercised due diligence and vigilance to come before the High Court.

Moreover, it has to be noted that bringing fresh points of law at the stage of appeal could alter the ambit of jurisdiction of this Court donated by the Statute and the Constitution.

However, I shall hesitate to restrict this Court's discretion and/or jurisdiction to allow an affected party to come before this Court in appeal limited only to vindicate proprietary or financial interest in the subject matter of the dispute as observed by Hon. Githinji J.A. It is my opinion that our Constitution is vibrant and wide in its spirit, values and purport. I shall not cite the specific provisions of the Constituion, as some of them are quoted in Judgments of other Hon. Members of the court. I would hence like to preserve the discretion of the Court to protect and to develop the Rule of Law as well as the spirit and principles of Constitution in appropriate cases. I shall hasten to add that the said discretion has to be zealously preserved for exceptional cases looking at the relevant facts, laws of the land and Constitution holistically. I may further observe that the language of proviso to Rule 77 of the Court's Rules, in my humble view, does not suggest inclusion of any or the restrictions mentioned hereinbefore.

Suffice it shall be to state at present that I entirely agree that the appellants in Civil Appeal No. 74 of 2012 have failed to satisfy me that they have legal as well as justiciable *locus standi* to be a part of this appeal.

It must, however, be appreciated that there cannot be a universal or a definite test which will clearly indicate the circumstances when any person could be adjudged as directly or substantially affected party. ***The law in my humble view, like a clock should be serviced and tuned so that it continues to show and keep up to the correct time.***

The second issue arose when Mr. Nowrojee contended, I think in passing, that despite CREAW represented by Mr. Mwenesi lacks *locus standi*, the submissions made by him can be taken into account as *De bene esse.*

Our Courts have generally used the process of *De bene esse* to allow a witness to give his/her evidence before the actual process of trial has begun. The reasons for such leave are usually old age, non-availability of that witness, perishable nature of any evidence etc.

In my view, suggestions by Mr. Nowrojee are timely when the Nation and of course the three arms of the Government are grappling with the arduous task of implementation of the Constitution. It is heartening to state that in this matter the Court has adopted the submissions made by Mr. Mwenesi in that spirit and thus in all practical purposes CREAW has been afforded limited participation as suggested by Hon. Koome, J.A.

I may quote a general definition and purport of the term *De bene esse* as under

> ***"De bene esse is a Latin term that means "of well being". In a legal context, it refers to things done conditionally; allowed to stand for the time being; done in anticipation of future need. For example, an appearance de bene esse is a special appearance allowing a person to fulfill their obligation to appear without submitting to the court's jurisdiction unless there is a final determination that the right to object to jurisdiction has been waived."*** *(emphasis mine)*

However, I should not be misconstrued to mean by my aforesaid observations that all and sundries can come before this Court and present their *De bene esse* opinion to be considered by this Court in any matter. In my view, without being exhaustive, the Court, to deserve to be called a court of justice, cannot and should not shirk from receiving relevant submissions in exceptional and great public importance matters to preserve the rule of law as well as to promote and develop the constitutional values and aspirations of the people of Kenya.

In respect of the issue of declaration of an appropriate election date, I shall agree w ith the conclusions of Hon. Githinji, J.A. and Hon. Okwengu, J.A. I shall, however, add that adopting the conclusions made by Hon. Koome, J.A. on the election date after interpreting ***Sec. 9 and 10*** of the ***Sixth Schedule*** to the Constitution shall have adverse effects on many provisions of the ***Election Act (No. 24 of 2011)*** necessating the imminent amendments to many sections of the Act to cite a few they are Sections 13, 14, 16, 17, 19, 26 and 27. In my view, the first election is a special event and the Constitution has treated the same as such.

With those observations made, I concur with the orders proposed in the Judgment of Hon. Githinji, J.A which shall be the orders of this Court in this appeal.

Dated and delivered at Nairobi this 31st day of July, 2012.

K. H. RAWAL

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JUDGE OF APPEAL

JUDGMENT OF MARAGA, JA

1. I have had the benefit of reading in draft the judgment of the Ag. President of this Court, the Honourable Justice Githinji JA. I concur with the conclusions he has reached but I wish to express myself on a few points particularly on the *locus standi* of the Appellants in Appeal No. 74 of 2012 (the Appeal).

2. The facts of the case giving rise to this appeal have conciselybeen stated by the Hon. Justice Githinji JA. I will therefore recapitulate the bit necessary to make my points clear.

3. This appeal arises from the decision of the High Court delivered in Nairobi on 13th January 2012 in Petition No. 65 of 2011 consolidated with Petition Nos. 123 and 185 of 2011. All those petitions sought the interpretation of various provisions of the new Constitution and declarations on the date of the first general election under the new Constitution (the Constitution). Petition No. 65 of 2011 sought a declaration that the first general election under the new Constitution (the general election) should be held, pursuant to **Article 136(2)(a)**of the Constitution, on **the second Tuesday of August 2012.** Petition No. 123 of 2011sought declarations to the effect that the present parliamentary term should be allowed to run its entire course and the first general election should be held within 60 days of 14th January 2013 when its term expires. Petition No. 185 of 2011 on the other hand sought to prohibit the enactment of the Constitution (Amendment) Bill 2011 which had sought the amendment of **Article 136(2)(a)** of the Constitution with a view to changing the election date. That Article, it should be recalled, is the one which provides that general elections in Kenya shall henceforth be held on the second Tuesday of August in the fifth year of each Parliamentary term. In a nutshell therefore, all the three petitions sought the court's guidance as to when the first general election, under the current Constitution, should be held.

4. In its judgment, the High Court gave two options. The first option was that the first general election under the current Constitution should be held within 60 days of the dissolution by the two Principals of the current Coalition Government while the second option was that they be held on a date within 60 days of 14th January 2013 when the term of the present Parliament expires.

5. Aggrieved by that decision, Centre for Rights Education and Awareness and the Caucus for Women's Leadership, both of which were not parties to any of the three petitions in the High Court, filed Appeal No. 74 of 2012 while John Harun Mwau, the petitioner in Petition No. 123 of 2011, filed Appeal No. 82 of 2012. At the hearing, the two Appeals were, at the request and by consent of all the parties, consolidated. Following the submissions made by learned counsel for the parties, the first issue that arises for our determination is the competence of Appeal No. 74 of 2012, that is, whether or not the Appellants in that Appeal (the Appellants) have *locus standi* to institute an appeal in the matter, having not been parties to any of the petitions in the High court.

6. Arguing that issue, in his usual eloquence, Mr. Mwenesi, learned counsel for the Appellants submitted that the Appellants, like all other Kenyans, have an interest on how the affairs of their country are or should be run. Like all the other Kenyans, they are keen to see that the Constitution is complied with, inter alia,as regards the date of the first general elections under the new Constitution. He argued that they are "persons" within the meaning of **Article 259** of the Constitution entitled to institute legal proceedings. And pursuant to **Rule 77(1)**of the **Court of Appeal Rules** (the Rules), they are also persons "directly" affected by the High Court decision in petition No. 65 of 2011. In the circumstances, they did not need to wait until any of the parties who participated in the High Court filed an appeal and they are served with the record of appeal for them to seek to be allowed to participate in any such appeal. Being "directly affected" by the High Court decision, counsel further argued, like any other Kenyan, they were themselves therefore entitled to lodge a Notice of Appeal under **Rule 75(1)** of the Rules and appeal against it and that is what they did. Besides these provisions, Mr. Mwenesi cited this Court's decisions in the cases of **Kamlesh Pattni Vs Starwood Hotels and Resorts World Wide Inc. & 7 Others** and **Commercial Bank of Africa Limited Vs Isaac Kamau Ndirangu** as authorities in support of that proposition.

7. Mr. Kibe Mungai, learned counsel for the 2nd and third amicus curiae supported Mr. Mwenesi on the competence of Appeal No. 74 of 2012 only to the extent that it relates to the issue of the two Principals having authority to dissolve the National Coalition and thus trigger general elections. That issue having not been canvassed in the High Court, Mr. Mungai argued that any Kenyan had a right to appeal against

the High Court decision on it and have the issue adjudicated upon. In support of his submissions, he cited **Articles 22, 23** and **24**of the Constitution. He also argued that because the High Court gave two options, there is confusion and accordingly under **Article 50** of the Constitution, that confusion has to be resolved by a court of competent jurisdiction, which, in this case is this court hearing the appeal from the High Court decision. He concluded that the appeal is, however, incompetent with respect to the other grounds.

8. Mrs. Mwenesi (no relation with Mr. Mwenesi, counsel for the Appellants) supported the appeal by adopting Mr. Mwenesi's submissions.

9. Counsel for the other parties contended that Appeal No. 74 of 2012 is incompetent. Teaming up with Mr. Ombwayo for the Attorney General, Ms Muthoni Kimani submitted that that appeal is incompetent as the Appellants, having not been parties to the High Court petitions giving rise to this appeal,had no *locus standi* to institute the appeal. She said **Rule 76 (now Rule 77)** of the Court of Appeal Rules is a procedural provision and **Article 164** of the Constitution does not confer the Court of Appeal with jurisdiction to hear appeals from strangers. The two provisions therefore do not avail the Appellants. The jurisdiction of this court is to hear appeals and not new matters or opinions which should have been taken to the High Court. This case was widely publicized and the Appellants have not given any reason why they did not participate in the High Court. In the circumstances, she urged us to struck out the appeal.

10. On the issue of the competence of the appeal, Mr. Nowrojee, assisted by Mr. Nyamodi, for the 7th Respondent submitted that, except under **Rule 5(2)(b)** of the Court of Appeal Rules, this Court has no original jurisdiction. Its jurisdiction is limited to hearing appeals only. In this matter, to entertain theappeal which urges that the first general elections be held in October 2012, a proposal that was not placed before the High Court, would be usurping original jurisdiction which this Court does not have. He also submitted that **Article 164** of the Constitution deals with the Court of Appeal's jurisdiction to hear appeals and not the parties' standing in the appeals. He said jurisdiction cannot be granted by implication as the appellants would wish and it is not the kind of technicality envisaged by **Article 159(2)(d)** of the Constitution.

11. Mr. Nowrojee further submitted that the phrase "directly affected" in **Rule 77** of the Court of Appeal Rules refers to the persons more affected by the decision than the rest of the Kenyan population. The Appellants are not more affected by the High Court decision in this matter than the rest of the 39 million Kenyans. He also urged us to strike out this appeal.

12. On his part Mr. Mwangi, learned counsel for the 1st Respondent urged us to strike out Appeal No. 74 of 2012 for two reasons. One, the Appellants, not being limited liability companies or statutory corporations,are not persons in law who can sue or be sued. Secondly, they have no standing in this matter, having not been parties to any of the petitions giving rise to this appeal. Although the High Court decision in this matter affects the whole country, he said the entire population of 39 million Kenyans cannot come to court. Some have to be content with the protection that the Attorney General, as the custodian of public interest, provides.

13. I have considered the matter. The Court of Appeal is a creature of statute and as such it can only do what the creating statute authorizes it to do.I agree with Mr. Nowrojee that Article 164(3) of the Constitution deals with the jurisdiction of the Court of Appeal and not the parties' standing to institute appeals. After establishing the Court of Appeal, **Articles 164(3)**of the Constitution clearly and expressly defines its jurisdiction. It states that the Court of Appeal**"has jurisdiction to hear <u>appeals</u> from-**

> **(a) the High Court; and**
>
> **(b) any other court or tribunal as prescribed by an Act of Parliament." [emphasis supplied]**

14. My understanding of this provision is that, unlike the High Court which has unlimited original jurisdiction in both criminal and civil matters, except for applications under **Rule 5(2)(b)** of the **Court of Appeal Rules** and when, in exceptional circumstsnces,it takes fresh and additional evidence, in both of which situations it amalgamates both original and appellate jurisdictions, the Court of Appeal has no

original jurisdiction in any matter. Its jurisdiction is limited to hearing appeals. It only has an appellate jurisdiction to hear appeals oncauses which have been tried by inferior courts. That jurisdiction differs from original jurisdiction, which donates to courts power to entertain suits instituted in the first in stance. I must point out that jurisdiction cannot, by any stretch of imagination be regarded as a procedural technicality that **Article 159(2)(d)** of the Constitution requires courts to ignore.

15. **Article 260** of the Constitution, which has interpretive provisions, does not define the term "appeal".The seventh edition of **Black's Law Dictionary**, however, defines the term as:

> **"A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority; esp. the submission of court's or agency's decision to a higher court for review and possible reversal."**

I endorse that definition. An appeal is a proceeding brought in a higher court to challenge the decision of a lower court. It is "the right of entering a superior court, and invoking its aid and interposition to redress the error of the court below."In exercising that jurisdiction, the appellate court has to determine whether or not the decision appealed against was rightly decided upon the facts and the law existing at the time of the decision.That far, I do not think there is any dispute. The issue at hand is who can bring an appeal.

16. To me, as to who can institute an appeal is quite clear. It is the person who is affected by the decision in question who is entitled to seek its reversal. To that extent there is, I think, also no dispute. The issue then is, who is the affected person for the purposes of an appeal?

17. To answer that question, we have to consider how court decisions are made. Court decisions are not made in a vacuum. They are not made in hypothetical academic issues. They are made in disputes that have been taken to courts. They are determinations made pursuant to rival pleas of persons who allege that their legal rights have, in one way or another, been violated and those who contend otherwise. Court decisions are also made pursuant to pleas for enforcement or those seeking to redress infringed rights. They either uphold or dismiss such pleas. A person aggrieved by such decision is the one who can complain by appealing. Which means then that there must be a decision on an issue or issues against which there is a complaint. An issue or plea that has not been the subject of a determination by a court or tribunal or agency, as the case may be, cannot, in my humble view, be the subject of an appeal. This is because "[A]n appellate court, in hearing an appeal, is called upon to redress error on the part of the court below. In deciding whether [or not] there was an error, the appellate court looks at the materials which were before the court below."New issues should be determined by courts with original jurisdiction.

18. Subject to special cases, which I will address shortly, the person entitled to appeal against a decision is the one who has taken his plea to or challenged one in the court that decides the matter and is aggrieved by the decision of that court. Any other person will, in my respective view, be a busybody who has no *locus standi* in the matter. In saying this I am not oblivious to the provisions of **Articles 22(2)(c)**and **258(1)**which authorise "[E]very person…to institute court proceedings" not only to enforce fundamental rights but to also challenge any contravention or "threatened…contravention" of the Constitution. What I am saying is that such person should institute proceedings in the court with original jurisdiction. It is, I think, in view of this that the Supreme Court refused to give an advisory opinion in **Re The Matter of the Interim Independent Electoral Commission**which wasan application that sought interpretation of certain provisions of the Constitution and remitted the same to the High which has original jurisdiction in such matters.

19. This brings me to the authorities and other legal provisions cited by counsel.

20. Counsel for the Appellants cited **Rule 77(1)** of the Court of Appeal Rules as authorizing the Appellants who were not parties to the High Court petitions to appeal because they are affected by the decision. That Rule states:

> **"An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on <u>all persons directly affected</u> by the appeal:**

> **Provided that the Court may on application, which may be made ex-parte, within seven days of lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court."**[Emphasis supplied]

As I have already stated, the Appellants' argument is that they are affected by the High Court decision and they therefore did not need to wait to be served hence their decision to lodge Appeal No. 74 of 2012. They also cited two decisions of this court as supporting their said position.

21. I have perused those authorities. With profound respect to counsel they are distinguishable and therefore not applicable in this matter. The persons who joined the proceedings at the Court of Appeal stage in both of those cases were those whose property and financial rights had been affected. In the case of **KamleshPattni**(supra)which related to a foreign judgment that had been registered by the Kenyan High Court under the **Foreign Judgments (Reciprocal Enforcement) Act** Cap 43 of the Laws of Kenya, the parties thereto were not strangers to each other. They had four other cases among themselves in the High Court of Kenya. Because the foreign judgment affected the property rights of the Applicant in that case, he was in the circumstances allowed to challenge the foreign judgment in the Court of Appeal. In the case of **Commercial Bank of Africa**(supra), the appellant had, in the purported exercise of its statutory right of sale under a charge, sold the charged property despite a clear court order staying the sale. On the respondent's application, the High Court nullified the sale. On appeal, the Court of Appeal allowed (suomoto) the purchaser thereof, who had not participated in the High Court proceedings that set aside the sale, to be heard.

22. It is clear that in those two cases property rights of the persons allowed to join the proceedings at the Court of Appeal stage were affected. Even in such situation, a party who knows or ought to have known of court proceedings involving his property but does not seek to be enjoined at the trial of the case cannot be granted any relief. In the **Commercial Bank of Africa Case**, the Court of Appeal refused to grant any relief to Mr. Maina who had purchased the suit property and had known of court proceedings relating to it but watched at a distance.

23. In this case no proprietary rights of the Appellants have been affected. The Appellants are like any of the other 39 million Kenyans who are keen to see that the provisions of their Constitution are properly implemented. Nothing prevented them from taking their pleas to the High Court or seeking to be enjoined in the High Court petitions which were widely publicized. Their contention in this Court that the first general election under the current Constitution be held somewhere in October this year was not raised before the High Court. As the universally accepted rule is that an appellate court will only consider those issues properly raised by the appealing parties, our decision on that issue therefore will have nothing to do with the High Court decision appealed against. Our decision will not be a reversal or affirmation of the High Court decision.

24. Review by way of appeal is available only to parties to an underlying action and the word "party" has a technical meaning referring to those by or against whom a legal suit is brought.In my humble view the person "directly affected" within the meaning of **Rule 77(1)** of the Court of Appeal Rules must be one whose property interest is affected. With regard to political, social or cultural rights, he must be one who is affected more than the rest of the other Kenyans. He must be one whose affected interest surpasses "the common interest of all citizens in procuring obedience to law." And such interest must be substantial, direct and immediate.Any others will, with respect, be intermeddlers.

25. The issues usually raised in public interest litigations affect many and sometimes all Kenyans. Let as many as possible of the people affected litigate such issues in courts with original jurisdiction. If anyone feels, as we are being told in this case, that there is an aspect of the matter that was not properly addressed, and which can properly be the subject of appeal, let him team up with the parties in the appeal to urge it. To allow any affected people or those purporting to be affected to join in such litigations at the appeal stage, the appellate courts will, in my humble view, not only be usurping original jurisdiction as such people will always come up with new issues, but they will also facilitate the clogging of the system by allowing themselves to be burdened with repetitious material and thus delaying finalization of cases.

26. For these reasons, I would strike out Appeal No. 74 of 2011 with no order as to costs this being a public interest litigation. I now want to consider the appeal **de benese** just in case I am overruled on the question of its competence.

27. On the merits of Appeal No. 74 of 2012, Mr. Mwenesi submitted that the Constitution having taken away the President's power to dissolve Parliament, the High Court erred to return it to him. According to counsel, as provided by **Article 101** of the Constitution, the current Parliament's term ends on the second Tuesday of August 2012. So instead of giving two options, the High Court, as directed by the Supreme Court, should have complied with that Article and fixed a definite date for the first general election within sixty days from the second Tuesday of August 2012 (14th August 2012). He concluded that if we overrule him on a date in October 2012, then we should fix it in December 2012.

28. I concur with the High Court decision that the transitional provisions in the Sixth Schedule to the Constitution are to be read and understood as part and parcel of the Constitution. The statement in **Volume 37 of Halsbury's Laws of England** that though it is an adjunct to the main Act, a schedule should be construed as being part of the main Act, reinforces that view. I also concur with the High Court that it is a fundamental principle of constitutional interpretation that various provisions of the Constitution, especially those bearing upon a particular subject, have to be harmonized. In the Ugandan case of **Tinyefuza v The Attorney General**the court 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."**

A similar principle was enunciated in **Smith Dakota v. North Carolina** in which the United States Supreme Court stated:-

> **"it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument".**

29. As far as I am concerned, the Constitution is quite clear on the date of the first general election under it and there is no conflict between **Articles 101** and **102** of the Constitution on the one hand and **Sections 9** and **10** of the **Sixth Schedule** to the Constitution (the Schedule) on the other. Except in relation to "the system of elections, eligibility for elections and the electoral process"of the National Assembly and the Senate", the operation of the two Articles is suspended until after the first general election under the current Constitution. Sections 9(1) and 10 of the Sixth Schedule state when the first general election under the Constitution should be held. **Section 9** provides 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, <u>within sixty days after the dissolution of the National Assembly at the end of its term.</u>** [Emphasis supplied]
>
> **(2) Despite subsection (1), if the coalition established under the National Accord is dissolved and general elections are held before 2012, elections for the first county assemblies and governors shall be held during 2012.**
>
> **Section 10**of the Scheduleon its part provides that:-
>
> **10. The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its <u>unexpired term.</u>**[Emphasis supplied]

As the coalition was not dissolved before 2012, the first general election under the current Constitution

are to be held at the end of the term of the current Constitution.

30. It is not in dispute the current Parliamentary term commenced on 15th January 2008 and was for a term of five years.That term having been saved by **Section 10** of the Schedule it follows that it will end on 14th January, 2013 and according to **Section 9(1)** of the Schedule, the first general election shall be held **within sixty days** of that date. I therefore concur with the High Court's second option that the first general election under the current Constitution shall be held on a date within sixty days after 14th January 2013.It follows therefore that the date of "the second Tuesday in August in every fifth year" of each Parliament contained in **Article 101(1)**of the Constitution relates general elections subsequent to the first general election under the current Constitution.

31. Being of that view, I therefore find that the contention of the Appellants in Appeal No. 74 of 2012 that the first general election should be held sometime in October 2012, that is, within sixty days of the second Tuesday of August 2012, has no legal basis. Even if that appeal were competent, I would have dismissed it.

32. I agree with counsel for the parties that the Sixth Schedule is neither harmonized with the **National Accord and Reconciliation Act**nor happily worded. While **Section 8** of that Act provides that the Act shall cease to apply upon, inter alia, the enactment of the new Constitution,**Section 3(2)** of the Schedule states that it shall continue to apply until the first general election under the current Constitution is held. **Section 12(1)** and **(2)** of the Schedule also retains in power the President, the Prime Minister and their entire cabinet appointed under the former Constitution and the National Accord and Reconciliation Act until the first general election is held under the current Constitution.

33. That anomaly notwithstanding, however, the election in 2012 referred to in **Section 9(2)** of the Schedule was the election of the first County Assemblies and Governors if the coalition was dissolved and general elections were held before 2012. Given the friction that we witnessed at the initial stages of the coalition government like failing to agree on mundane matters such as the perking order, the Committee of Experts that drew the current Constitution was right to provide for the eventuality of dissolution of the coalition, and without expressly saying so, the passing of a vote of no confidence in the government of one of the parties to the coalition with the consequence of a general election. If that happened before 2012, because we would not have been ready or provided for County Assemblies, the Committee provided that elections for those Assemblies be held in 2012. That to me is quite clear. In the circumstances, I find no warranty for the High Court's holding that **Section 9(2)**"amends or modifies the provisions of the National Accord and Reconciliation Act, 2008 to the extent that general elections can be held" in 2012. Having delivered its judgment on 13th January 2012, the dissolution of the coalition and holding of general elections before 2012 was therefore untenable. The High Court's first option of the President and the Prime Minister agreeing to dissolve the coalition in accordance with **Section 6(b)** of the National Accord and Reconciliation Act was, in the circumstances, clearly wrong and at any rate obiter.

34. For these reasons, I would allow both appeals (if Appeal No. 74 of 2012 is found to be competent) to the extent that they challenge the High Court's first option.

35.I would dismiss the proposal by the Appellants in Appeal No. 74 of 2012 that the first general election be held in October or in December, 2012 as legally untenable. I know that a large fraction of the Kenyan population would have wanted the first general elections to be held in December as they have traditionally been held in the past but the Constitution simply does not allow that. The present Parliament ensured it secured its full term and there is nothing the courts can do about it.

36. Given that the Principals did not dissolve the coalition and no general elections were held before 2012, and the President having been robbed of the power to dissolve Parliament, I find that the only body left to fix the date for the first general election under the current Constitution is the Independent Electoral and Boundaries Commission (IEBC) and the date of 4th March 2013 that it has fixed being within sixty days of 14th January 2013, is lawful and cannot therefore be faulted. To that extent, I accordingly allow Appeal No. 82 of 2012. As I said earlier this being a public interest litigation, I order that each party bears

its own costs.

DATED and delivered at Nairobi this 31st day of July, 2012.

D.K. MARAGA
…........................
JUDGE OF APPEAL