



**Independent Electoral and Boundaries Commission v Attorney General (Advisory Opinions Application E004 of 2024) [2025] KESC 57 (KLR) (5 September 2025) (Advisory Opinion)**

Neutral citation: [2025] KESC 57 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**ADVISORY OPINIONS APPLICATION E004 OF 2024**

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK  
IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**SEPTEMBER 5, 2025**

**IN THE MATTER OF: ARTICLES 1,10, 38,81, 88,89, 95,96, 138,160,174 & 177 OF THE  
CONSTITUTION OF KENYA**

**IN THE MATTER: THE INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION ACT, 2011**

**IN THE MATTER OF: THE ELECTIONS ACT, 2011**

**IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT, 2011**

**IN THE MATTER OF: THE SUPREME COURT ACT, 2011**

**BETWEEN**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... APPLICANT**

**AND**

**THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY**

**ADVISORY OPINION**

Representation:

Mr. George Murugu appearing with Mr. Kipkogei, Ms. Lydia Aduke, Mr. Odhiambo Isaac, Mr. Edwin Mukele, Mr. Hassan Nura, Ms. Joy Anami and Ms. Magdalene Ngetich for the Applicant (G & A Advocates LLP)

Mr. S.O. Kaumba for the Interested Party



(The Office of the Attorney General)

## A. Introduction

1. The Independent Electoral Boundaries Commission (hereinafter “IEBC ”), by a reference dated 4<sup>th</sup> July, 2024, has sought this Court’s advisory opinion pursuant to Article 163(6) of the Constitution, Section 13 of the Supreme Court Act, Cap 9B and Sections 4(c) & 36 of the Independent Electoral Boundaries Commission Act, Cap 7C. The Reference is supported by an affidavit sworn by Marjan Hussein Marjan, the Secretary and Chief Executive Officer of IEBC.
2. At the commencement of these proceedings, IEBC was not fully constituted, having remained without a Chairperson and members for a period exceeding two years following the exit of its previous members shortly after the 2022 General Election. However, by the time of delivery of this decision, a new cohort of Commissioners had been duly appointed and sworn into office on 11<sup>th</sup> July 2025. This fact is noted for the record.
3. The Reference seeks this Court’s opinion on the following issues:
  - a. Whether IEBC can undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners.
  - b. Whether IEBC can conduct a review of the names and boundaries of constituencies and wards when the timelines envisaged under Articles 89(2) and 89(3) as read with Section 26 of the County Governments Act have lapsed.
  - c. Whether the constitutional timelines envisaged under the provisions of Article 89(2) and 89(3) as read with Section 26 of the County Governments Act can be extended, and if so, by whom and under what circumstances.
4. The Attorney General (hereinafter “AG”), who was named in the reference as an interested party, raised a preliminary objection dated 20<sup>th</sup> September, 2024, citing several grounds. First, that the Reference is invalid on account of IEBC not being properly constituted as envisaged under Articles 88 and 250(1) of the Constitution due to the vacancies in the office of the Commissioners thereof at the time the Reference was filed. Second, that the matters/questions raised in the Reference are subject of proceedings before the High Court in Kilfi HCCHR No. E007 of 2024, which was instituted first in time. Thirdly, that the matters/questions in issue are not urgent to warrant the exercise of the Court’s advisory opinion jurisdiction notwithstanding the pending suit in the High Court; that the urgency, if any, has dissipated in light of the expiry of the constitutional timelines under Article 89(2) of the Constitution and the absence of Commissioners to undertake the delimitation of boundaries of electoral units. Fourthly, that the matters/questions in issue are not novel and have in fact been settled by the Supreme Court in a number of decisions. Finally, that there is a separate legislative process, which is at an advanced stage, to remedy the legal quagmire.

## B. Background

5. In the Reference, IEBC has stated that pursuant to Article 88(4)(c) of the Constitution, it is bestowed with the responsibility of delimitation of constituencies and wards. The parameters of such delimitation are further spelt out under Article 89 of the Constitution. Of significance, by dint of Article 89(2), IEBC is mandated to review the names and boundaries of constituencies at intervals of not less than eight (8) years, and not more than twelve (12) years. However, such review is required to be completed at least twelve (12) months before a General Election of Members of Parliament. In



addition, Article 89(3) stipulates that IEBC shall review the number, names and boundaries of wards periodically. Section 26(3) of the County Governments Act goes further to prescribe time limits for delimitation of wards, which are more or less similar to those of constituencies, that review of ward boundaries should be at intervals of not less than eight (8) years, and not more than twelve (12) years, and are required to be completed at least twelve (12) months before a General Election of members of County Assemblies.

6. In the above context, on 6<sup>th</sup> March 2012, IEBC published the National Assembly Constituencies and County Assembly Wards Order, 2012 vide Legal Notice No. 14 of 2012 (the delimitation order). This meant that IEBC ought to have carried out a subsequent delimitation process between 6<sup>th</sup> March, 2020, 8 years after the delimitation order, and 6<sup>th</sup> March, 2024, 12 years after the delimitation order. However, at the time of filing the Reference, the said review had not commenced since there were no Commissioners in office. The vacancies occurred when: three Commissioners resigned from office on diverse dates in December 2022; one Commissioner was removed from office by a tribunal that recommended her removal, while the other three Commissioners retired upon expiry of their terms of service.
7. Following the vacancies, by a Gazette Notice dated 27<sup>th</sup> February, 2023, the President appointed members of the Selection Panel for the Recruitment of Nominees for appointment as the Chairperson and Members of IEBC. The composition of the selection panel became a bone of contention, bringing the recruitment process to a halt. Eventually, a suit, Adan Mohammed Abdullabi v Attorney General & 2 others (Constitutional Petition E148 of 2023) [2024] KEHC 434 (KLR) (Abdullahi Case), was filed in the High Court. The petitioner therein contended that the selection panel and the Parliamentary
8. Service Commission had deliberately slowed down the recruitment process in total disregard of the impact of the delay. It was argued that the same would have a ripple effect of delaying not only the by-elections which were pending then but also the process of delimitation of constituency and ward boundaries, all of which are time-bound. By a judgment dated 26<sup>th</sup> January 2024, Thande, J issued inter alia, a mandatory order directing the selection panel to proceed with the recruitment process. Notwithstanding the said order, the recruitment process did not immediately kickstart.
9. The foregoing set of circumstances, coupled with the fact that the time frame for delimitation of electoral boundaries had lapsed, the Secretary/Chief Executive Officer, Marjan Hussein Marjan, by a letter dated 20<sup>th</sup> March, 2024 wrote to the Attorney General (AG) seeking advice on the following issues:
  - i. Whether the Secretariat of IEBC, in the absence of Commissioners, can undertake the functional mandates of the Commission including boundaries delimitation, elections (including byelections) and referenda;
  - ii. What is the effect of the failure to undertake delimitation of electoral boundaries at all, and within constitutional timelines? ; and
  - iii. Under what circumstances, if at all, can constitutional timelines be breached?
10. The AG acceded to the request and by a letter dated 22<sup>nd</sup> April, 2024 expressed as follows: on the first issue, that the IEBC Act distinguishes the functions of the Commission and the Secretariat; Section 4 thereof enumerates the functions of the Commission, which by dint of Section 5 consists of a Chairperson and six members thereof; and that Section 11A of the IEBC Act outlines the relationship of the Commission and the Secretariat. According to the AG, the Commissioners perform the functional mandate of IEBC while the Secretariat supports the Commission by performing the day-to-day administrative functions of the Commission, as well as overseeing the implementation of



policies and strategies formulated by the Commission. Therefore, it was the AG's position that, while the Secretariat plays a vital role in supporting the functions of the Commission, it could not perform the functions of the Commission under Article 88(4)(c), specifically, delimitation of constituencies and wards, in the absence of Commissioners.

11. On the second issue, the AG opined that the failure to undertake the delimitation of boundaries within the timelines set by the Constitution may result in litigation touching on the legality of the electoral process. The AG took the position in that regard that individuals may seek legal redress, arguing that the failure to delimit boundaries has compromised their constitutional right to fair representation and participation in the electoral process.
12. As for the last issue, the AG intimated that even though the prescribed timelines for undertaking delimitation of boundaries had lapsed, IEBC could not afford to simply fold its hands and fail to undertake the important process. The AG noted that Parliament was seized of the matter having adopted the report of the National Dialogue Committee (NADCO) on 22<sup>nd</sup> February, 2024. One of the issues recommended in the report was the amendment of Article 89 of the Constitution to provide that, where for any reason the review of names and boundaries of constituencies by the IEBC is not completed within the stipulated time under Article 89(2) or where there are justifiable reasons for extension of review, Parliament may extend the period by way of resolution passed by the National Assembly. The AG, however, pointed out that he was not in a position to advise on the outcome of the parliamentary process.
13. In the alternative, considering the legal nuances involved in the delimitation of electoral boundaries and the legal uncertainty arising from the lapse of constitutional timelines, the AG advised IEBC that it may seek an advisory opinion from the Supreme Court pursuant to Article 163(6) of the Constitution. The AG considered an advisory opinion to be recognised as the best recourse for the resolution of constitutional issues that raise issues of public interest. In his view, by seeking this Court's advisory opinion, IEBC would obtain authoritative guidance on any legal issues relating to the delimitation of boundaries beyond constitutional timelines.
14. Based on the foregoing, IEBC lodged the Reference in issue on the grounds that firstly, IEBC is a statutory body. Secondly, that the Reference relates to a matter affecting County Governments more so, since delimitation of wards and constituencies affects the membership of County Assemblies, which play a crucial role in the functioning of County Governments. Thirdly, that the issues which are the subject of the opinion sought are of public interest as the failure to undertake delimitation of boundaries may have far-reaching consequences to the country's political stability, social cohesion and electoral integrity. Expounding further, IEBC contends that at the core of any electoral system which relies on singlemember constituencies, is equality of vote which always must be assured. In its view, disproportionate and/ or unbalanced voting blocs, that is, constituencies and wards, will *ipso facto* result in unjust representation in the assemblies, and compromise fair representation as well as the equality of vote.

## C. Parties' Submissions

### i. IEBC's Submissions

15. In support of its request for an advisory opinion, IEBC in its written submissions dated 6<sup>th</sup> February, 2025 avers that the Supreme Court has on several occasions effectively pronounced that constitutional timelines, as far as election petitions are concerned, are sacrosanct and ought to be strictly adhered to. To buttress that line of submission, reference has been made to *Jobo & another v Shabbal & 2 others*



(Petition 10 of 2013) [2014] KESC 34 (KLR) and *Munene v King'ara & 2 others* (Petition 7 of 2014) [2014] KESC 37 (KLR).

16. In contrast, IEBC argues that the Reference herein relates to the obligation of the State to ensure the realisation of one of the most sacrosanct principles of our electoral system, that is, equality of the vote. It is IEBC's position that the said principle is achieved by ensuring that electoral units have an equal or near equal number of voters. Accordingly, it is urged that, since Kenya is yet to achieve
17. equality of vote, the significance of delimitation of boundaries is that it allows the country to progressively realise the right to fair representation and equality of vote. Laying emphasis, IEBC submits that the 2012 boundary delimitation was conducted based on the 2011 national census, wherein the population of the country was estimated at about 38.6 million. Since then, the population, as per the 2019 census, has risen by over 10 million and stands at about 46.7 million. As such, IEBC maintains that the delimitation of boundaries after a national census and before the next General Election is crucial as it prevents what it terms as over and/ or under dilution in votes, which will in turn assist in the achievement of the right to fair representation. Towards that end, the case of In *Reynolds v Sims*, 377 US 533- Supreme Court 1964 is cited.
18. IEBC further argues that, while Article 89(2) of the *Constitution* prescribes a strict timeline that ought to be adhered to, Article 81 (d) underscores the importance of fair representation and equality of vote. Therefore, IEBC states that it is imperative for the Court to adopt a holistic approach in resolving the tension between the two constitutional provisions. In its view, the two provisions should not be read as competing interests rather as complementary to each other. In essence, IEBC is calling upon the Court to balance the principles in the said provisions by excluding the period when the office of the Commissioners remains vacant, that is, from March 2023 until new Commissioners are appointed. It is furthermore urged that such an approach would meet the interpretative test set by the Court in *Munya v Kitbinji & 2 others* (Petition 2B of 2014) [2014] KESC 38(KLR) and *In the matter of the principle of gender representation in the National Assembly and the Senate* (Advisory Opinion 2 of 2012) [2012] KESC 5 (KLR).
19. Making reference to Section 11A of the *IEBC Act*, it is submitted that in as much as the Secretariat carries out the day-to-day functions of the Commission, its duties must be authorised and sanctioned by the Commissioners. It follows therefore, IEBC argues, that only the Commissioners are constitutionally mandated to carry the ultimate weight and responsibility of the Commission.  
  
Towards that end, it is submitted that Commissioners are obligated to carry out the process of delimitation of electoral boundaries, as they are the office bearers and accountable to the Kenyan people. In the end, it is contended that the Secretariat cannot undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners.
20. Moving on to the preliminary objection, IEBC concurs that it is not properly constituted in the absence of the Commissioners but submits that the *Constitution* did not envisage the existence of a constitutional crisis wherein IEBC is not properly constituted as required under Article 88 of the *Constitution*. Further, it was never envisaged that the timelines for delimitation of boundaries would lapse without the delimitation being undertaken. Accordingly, it is posited that in the absence of Commissioners, IEBC cannot go into a comatose state and not function completely. In its view, IEBC has the right to defend suits where it has been sued and vice versa institute suits where its rights have been infringed. In support of that line of argument, among other cases, *Muruli v Oparanya & 3 others* (Petition 11 of 2014) [2016] KESC 14 (KLR) was cited, where this Court held that the constitutional purposes and objectives of the Commission will still go on even in the absence of Commissioners.



Further, IEBC cited the cases of *Okiya Omtata Okoiti v IEBC & 2 others* [2017] KEHC 5147 (KLR), *Maina & 12 others v IEBC & 2 others; Mutai & 2 Others* [2024] KEHC 208 (KLR) and *Kipyegomen v Independent Electoral Boundaries Commission & 12 others* Election Petition Appeal No. E001 of 2023 [2023] KEHC 25632 (KLR) to demonstrate that the Commission’s Secretariat has been defending suits where the Commission has been sued, running the Commission as a going concern and has been compelled to perform functions reserved for Commissioners in their absence. It is therefore submitted that the Commission’s Secretariat has the legal capacity to institute the Reference.

21. With respect to the pending petition in the High Court, Kilifi HCCHR No. E007 of 2024, IEBC’s stand is that the AG has neither furnished the Court nor
22. IEBC with proceedings of the said case. It also claims that contrary to the position taken in the Reference, the AG had advised the Secretary/CEO of IEBC to seek the Court’s advisory opinion and cannot now withdraw that advice. Moreover, it is contended that the IEBC has limited time within which to undertake the delimitation of electoral boundaries ahead of the General Election scheduled for August 2027, a factor that, in itself, underscores the urgency and necessity of the advisory opinion sought herein. With respect to the allegation that there exists a pending legislative process intended to address the subject matter of the Reference, the IEBC submits that no such process has been specifically identified or substantiated by the AG. Consequently, the IEBC maintains that the preliminary objection is devoid of merit.

## ii. The AG’s submissions

23. The AG, by written submissions filed on 20<sup>th</sup> September 2024, reiterates the preliminary objection aforesaid. On the capacity of IEBC to lodge the Reference, the AG submits that IEBC is a state organ for purposes of Article 260 of the *Constitution* and therefore prima facie has the locus standi to seek an advisory opinion from this Court. The AG, however, contends that although IEBC, pursuant to Article 253 of the *Constitution*, is a juristic person with corporate personality, it is not properly constituted as envisaged under Articles 88 and 250(1) of the *Constitution* as read together with the provisions of the *IEBC Act*. This is on account of the vacancies of the entire of the membership of the Commissioners.
24. The AG further contends that the issues or questions raised in the Reference, substantively concern the mandate of the Commissioners, distinct from the day to day operational matters of the Secretariat. Thus, in the absence of the Commissioners, the AG submits that, to the extent that filing of a suit does not constitute day to day operations of IEBC, the Secretariat or any member thereof cannot make a decision to file suit in the corporate name of IEBC devoid of a resolution to that effect by the Commissioners. By parity of reasoning, *Dale and Carrington Invt. P. Ltd. v P.K. Prabhapan and others* 2004 (SC) 1026 and *Spire Bank Limited v Land Registrar & 2 others* [2019] KECA 530 (KLR) are cited on account that a body corporate, being a juristic person, acts through its Board of Directors. The AG therefore submits that a body corporate can only sue upon resolution of its governing organ. Moreover, it is the AG’s position that the Reference as filed has the effect of clogging/denying opportunity to future Commissioners, once appointed, to exercise their mandate, including applying their minds to the issues at hand.
25. It is further urged that the matters or questions in issue in the Reference are the subject matter of proceedings before the High Court, and which proceedings were instituted earlier than the Reference. The AG submits in that context that High Court Kilifi HCCHR No. E007 of 2024 raises substantively similar issues to the legal questions raised in the instant Reference. It is thus contended that this Court *In the Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application 2 of 2011) [2011] KESC 1 (hereinafter “Re IIEC”) held that it will only exercise its



discretion to issue an advisory opinion in a matter notwithstanding the fact that the matters or issues in question raised therein are pending determination in a lower court where (a) public interest or (b) urgency are demonstrated. The AG submits that though the questions raised herein bear a measure of great public importance, the urgency has not been demonstrated, given the lapse of the constitutional timelines under Article 89(2) of the *Constitution*. Further, it is urged that the issues are not novel since they border on settled points of law including the role of a properly constituted constitutional commission to undertake its mandate and the legal effect of lapse of constitutional timelines in any governance processes. Towards that end, reference is made to *Aramat & another v Lempaka & 3 others* [2014] KESC 21 (KLR) and *Jobo & another v Shabbal & 2 others* [2014] KESC 34 (KLR).

26. Finally, the AG submits that there is a separate legislative process that is at an advanced stage and that is intended to remedy the legal quagmire raised in the Reference. It is urged in that regard that Parliament, being alive to the legal quagmire of the effect of the lapse of the constitutional timelines on the delimitation of electoral boundaries, proposed a Constitutional Amendment Bill, 2024; and which was processed by the National Assembly and is now pending before Senate, after being passed by the National Assembly. The Court is therefore urged to exercise deference by allowing that legislative process to come to its logical end. In conclusion, the AG urges the Court to decline to issue the advisory opinion sought.

#### **D. Issues for Determination**

27. From the pleadings and the submissions, the following issues have crystallized for our determination:
- i. Whether this Court has jurisdiction to render the advisory opinion and if so;
  - ii. Whether IEBC can undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners;
  - iii. Whether IEBC can conduct a review of the names and boundaries of constituencies and wards when the timelines envisaged under Articles 89(2) and 89(3) as read with Section 26 of the *County Governments Act* have lapsed.
  - iv. Whether the constitutional timelines envisaged under the provisions of Article 89(2) and 89(3) as read with Section 26 of the *County Governments Act* can be extended, and if so, by whom and under what circumstances.

#### **E. Analysis**

##### **1. Whether this Court has jurisdiction to render the advisory opinion**

28. The AG contends that though IEBC, pursuant to Article 253 of the *Constitution* is a juristic person with corporate personality, it is not properly constituted as envisaged under Articles 88 and 250(1) of the *Constitution* as read together with the provisions of the *IEBC Act*. This is on account of the vacancies of the entire membership of the Commissioners. It is also contended that a body corporate, such as the IEBC, can only initiate legal proceedings upon a formal resolution by its governing body and it follows therefore that IEBC, without its governing organ, being its Commissioners, and given that the filing of a Reference such as the present one is not part of the Commission's day-to-day operations, the Secretariat or its members lack the authority to file a suit in IEBC's name without such a resolution.
29. Conversely, IEBC submits that in the absence of Commissioners, it cannot go into a comatose state and not function completely and therefore its Secretariat has the legal capacity to institute the Reference,



as it also has the right to defend suits where it has been sued and, conversely, to institute suits where its rights have been infringed. In support of that line of argument, among other cases, IEBC cited the cases of *Okiya Omtata Okoiti v IEBC & 2 Others* [2017] KEHC 5147 (KLR), *Maina & 12 Others v IEBC & 2 Others; Mutai & 2 Others* [2024] KEHC 208 (KLR) and *Kipyegomen v Independent Electoral Boundaries Commission & 12 others* (Election Petition Appeal No. E001 of 2023) [2023] KEHC 25632 (KLR) to demonstrate that the Commission’s Secretariat has been defending suits where the Commission has been sued, running the Commission as a going concern and has been compelled to perform functions reserved for Commissioners in their absence. IEBC also cited the case \*of *Muruli v Oparanya & 3 others* (Petition 11 of 2014) [2016] KESC 14 (KLR) where this Court held that the constitutional purposes and objectives of the Commission will still go on even in the absence of Commissioners.

30. At the outset of any matter, we have to determine whether the jurisdiction of this Court to render an advisory Opinion has been properly invoked, and if so, whether the Court should exercise its discretion to render the Opinion as prayed. Towards this end, it is instructive to recall our decision in *Re Matter of Gender Representation to the National Assembly & Senate*; Advisory Opinion No. 2 of 2012, [2012] eKLR; wherein the following principles were laid down to guide the Court on the exercise of its jurisdiction under Article 163 (6) of the *Constitution*. At paragraph 83 of that judgment, this Court stated:

- i. For a reference to qualify for the Supreme Court’s Advisory Opinion discretion, it must fall within the four corners of Article 163(6): it must be “a matter concerning county government.” The question as to whether a matter is one “concerning county government” will be determined by the Court on a case-by-case basis.
- ii. The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.
- iii. The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.
- iv. Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process”.

31. At paragraph 17 of the decision, the Court re-emphasized that:

“Only a truly deserving case will justify the Court’s Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in Section 3(c) of the *Supreme Court Act*, 2011



(Act No. 7 of 2011), of developing “rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth.”

32. Flowing from the above exposition of the law, we have to answer the question as to whether the Reference herein meets the above criteria to enable the Court to exercise its advisory opinion jurisdiction. The first limb of the jurisdictional inquiry concerns whether the Reference refers to a matter concerning county government under Article 163(6). We have no hesitation in finding that the matter concerns county governments as the exercise of boundary delimitation concerns constituencies and wards pursuant to Articles 82(1)(a), 88(4)(c) and 89(3), (6), (7) and (9) of the *Constitution*, thus having a direct impact on the elections of members of county assemblies.
33. The second limb concerns who may request the Court for an advisory opinion. Put another way, we are asked to determine whether IEBC, in the absence of substantive office holders as Commissioners, can validly institute these proceedings through its Secretary and Chief Executive Officer who is the person that swore the affidavit in support of the Reference.
34. Article 260 of the *Constitution* defines a ‘State organ’ as including ‘a commission, office, agency or other body established under this Constitution’. Further, Article 248(2)(c) expressly lists the IEBC as one of the independent commissions, while Article 250(12) provides for the establishment of the office of Secretary to each commission under Article 248, who shall also serve as the Chief Executive Officer thereof. When read conjointly, these provisions affirm that the IEBC constitutes a State organ within the meaning of Article 260 of the *Constitution* and the Commission’s Secretary is a constitutional office. Accordingly, it is our considered view that the IEBC’s Secretary and Chief Executive Officer, irrespective of whether or not IEBC’s Commissioners are in office, is constitutionally clothed with the competence to seek an advisory opinion from this Court under Article 163(6) of the *Constitution*. To do so however, the Secretary must approach this Court with a clear and definite averment that he or she is seeking an advisory opinion in that capacity only or with the authority of the IEBC upon a resolution of that commission which resolution ought to be in writing and presented before the court. In the present Reference, there could not have been a resolution in the manner we have stated in the absence of Commissioners. From the pleadings before us, Mr. Marjan in the heading and body of the Reference indicated that the Reference was filed by IEBC qua IEBC and not by its Secretary in that capacity. At paragraph 1 thereof he categorically states that the applicant is the IEBC and in his affidavit in support of the Reference he deponed that he was swearing the affidavit on behalf of IEBC, the applicant. The IEBC is a corporate body while the Secretariat is not and therefore, in the absence of the Commissioners, the Secretary has no independent power to bring proceedings in the nature of the Reference before us on behalf of the Commission. The courts have been unanimous on this issue. See, for example, *Kituo Cha Sheria & Another v. IEBC & another*, (2004) eKLR and *New Vision Kenya v. IEBC & Others* (2021) eKLR.
35. Having determined that the IEBC was not properly constituted at the time of filing of the Reference and that its Secretary did not file any Reference in his name and capacity as the Secretary and Chief Executive Officer and could not have filed it on behalf of IEBC, which in turn means that the Court has not been properly moved, is there need for us to go further and address the issues raised in the Reference? While downing our tools is an attractive course of action, we think that the issues raised are far too important for us not to settle them. We say so noting that advice of the Attorney General was sought before the Reference was filed before us and the advice given to Mr. Marjan was that he ought to approach this Court for guidance, a position the AG has curiously departed from once the Reference was filed. We are also alive to the fact that our advisory opinion jurisdiction is a special one and is not subject to the usual rules applicable to civil or criminal proceedings. The public interest is an important factor to take into account in the former hence our decision to address the questions placed before us



for our opinion notwithstanding the fact that the applicant, IEBC, did not properly approach us. In other words, ordinarily and in strict application of the principles enunciated in the *Owners of Motor Vessel Lillian S v. Caltex (K) Ltd* (1989) KECA 48 (KLR) our finding on this issue would have sufficed to dispose of this Reference in its entirety and justified our downing tools. However, in light of the public interest inherent in the matter, the nature of the dispute, the broader interests of the parties, and the need to offer guidance both to the judicial process and to the courts below, this Court considers it prudent to pronounce itself on all the substantive questions raised. This approach is consistent with our jurisprudence in *Aramat & another v. Lempaka & 3 others* [2014] KESC 21 (KLR) and *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR).

36. In the above context, we note that the Attorney General in his Preliminary Objection states that the matters/questions raised in the Reference are also the subject of proceedings before the High Court in Kilifi HCCHR No. E007 of 2024 which was instituted first in time. The AG, unfortunately, failed to furnish the Court with particulars or pleadings of the said matter so as to aid it in making an informed decision.
37. However, during the hearing, Mr. Kaumba, learned counsel from the office of the AG, clarified that the matter the AG referred to was Mombasa, High Court Constitutional & Human Rights Division (HCCHR) Petition No. E028 of 2024. The learned counsel revealed that parties in the said matter were Jacqueline Kambithi Joshua, Tribeless Youth and Siasa Place as petitioners; the Attorney General and Speaker of the National Assembly as respondents and the Independent Electoral Boundaries Commission and Kenya National Commission on Human Rights as interested parties. He contended that the core issues raised in the said petition were the conduct of elections and the delimitation of boundaries in the absence of Commissioners. On the other hand, Mr. Edwin Mukele, learned counsel appearing for IEBC, submitted that they represent the Commission in a matter before the High Court at Malindi bearing the same case number, being HCCHR No. E007 of 2024, which could be the matter the AG was referring to. Learned counsel submitted further that the matter in question arose from the decision of this Court wherein this Court upheld the decision of the Court of Appeal nullifying the election of the Member of the National Assembly for Magarini Constituency. The learned counsel went on to submit that the petitioners in the matter were seeking a determination as to whether a seat could be declared vacant and a by election subsequently held in the absence of Commissioners.
38. This Court on its own motion took time to search for the matter that the Attorney General had made reference to. First, while the Judiciary has a Court station situated in Kilifi, the same does not include a High Court. The nearest High Court Stations to Kilifi are in Malindi and Mombasa. A search for Mombasa High Court HCCHR No. E007 of 2024 revealed a matter that was completely unrelated to the issues raised before this Court. It is a matter filed against the Cabinet Secretary of the Ministry of Labour and Social Services and four others challenging the minimum qualifications for a mandatory Homecare Training Course for purposes of securing employment in Saudi Arabia.
39. However, it is Malindi High Court, HCCHR No. E007 of 2024 dated 6<sup>th</sup> June, 2024 and filed on 11<sup>th</sup> June, 2024 that bore semblance or similarity to the instant Reference. The Petition was filed by Jackline Kabibi Joshua, Tribeless Youth and Siasa Place against the Attorney General, the Speaker of the National Assembly as respondents, as well as IEBC, the Kenya National Commission on Human Rights and Kenga Stanley Karisa as interested parties. The Petition was triggered by, among other issues, the Supreme Court decision delivered on 31<sup>st</sup> May, 2024, directing IEBC to declare a vacancy and conduct a by-election in Magarini Constituency in *Kombe v Karisa & 3 others* (Petition E020 of 2023) [2024] KESC 25 (KLR). The Petitioners in the said Petition decry the lack of IEBC commissioners in office as well as the lapse of the 12-year deadline in boundary delimitation. They



contend that, complying with the Supreme Court's decision would leave the Magarini seat vacant and the residents unrepresented in the National Assembly indefinitely to their detriment. The petitioners therefore sought the following reliefs:

- a. A declaration be and is issued that KNHCR's advisories and recommendations on matters within its mandate are binding under Articles 10, 59, and 249 of the Constitution.
  - b. A declaration be and is issued that a delay of one year in considering and determining a petition to Parliament is inordinate and violates Article 119.
  - c. A declaration be and is issued that without the minimum number of three commissioners in office, IEBC lacks the quorum to receive or act on the notice of vacancy under Article 104 of the Constitution, conduct the resulting by-election within ninety days, or to delimit boundaries under Articles 89 and 104 of the Constitution.
  - d. A declaration be and is issued that the failure to reconstitute IEBC for over one year violates the electorate's rights under Articles 38 and 81 of the Constitution and the right to recall their representatives under Article 104 of the Constitution.
  - e. A structural interdict is issued directing the Respondents to reconstitute the IEBC immediately and to file a report before the court within 45 days of the court's order on the steps they have taken to comply with this order
40. The said petition is strikingly similar, if not the same as Mombasa HCCHR Petition No. E028 of 2024. It was filed by the same parties being Jackline Kabibi Joshua, Tribeless Youth and Siasa Place against the same parties, save for Kenga Stanley Karisa. The matter is lodged by the same firm of Advocates as Mombasa HCCHR Petition No. E007 of 2024 that is Messrs Bond Advocates. It is predicated upon the same facts concerning the by-election in Magarini Constituency.
41. We are satisfied that it is these two matters in respect of which both parties directed their respective submissions. The parties named are those the AG referred to, while the issues are those that IEBC referred to. Having examined the aforementioned matters and the present Reference, we are of the considered view that though the two High Court petitions may bear some similarities to the instant Reference, they cannot be considered to be raising similar issues. The High Court petitions are confined to Magarini Constituency and the enforcement of the decision of this Court from the Judgment in Kombe v Karisa & 3 others (*supra*).
42. Further, as this Court stated in Re IIEC, where a Reference has been made to the Court and the subject matter of which is also pending in a lower court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. We take the view, that in light of the next 2027 General Election that is fast approaching and IEBC Commissioners having been sworn into office just before the delivery of this decision, it needs no further demonstration that this is one such matter that falls within the settled parameters elsewhere above as the issues raised concern great public importance as well as great urgency.
43. Consequently, the Attorney General's Preliminary Objection on the issue at hand must fail. We hasten to add that when a party refers this Court to a matter pending before another court, especially in References whereby a pending matter has the consequence of the Court declining to exercise its jurisdiction, that party is under an obligation to furnish the Court with full particulars in order to aid the Court in making a full and informed decision.



44. Accordingly, this Court finds that it has the requisite jurisdiction to render the advisory opinion sought in addition to the public interest issue we have alluded to above.

**11. Whether IEBC can undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners.**

45. The AG contends that, in the absence of its Commissioners, IEBC cannot undertake actions that require Commission-level decisions, such as the process of delimitation of boundaries. The AG asserts in that regard that, delimitation of electoral boundaries is a function of the Commissioners, not the Secretariat. That the Secretariat's role is limited to the day-to-day operations, and undertaking delimitation is beyond that scope. The AG emphasizes that a body corporate such as IEBC acts through its governing organ, being the Commissioners. Without a resolution by the Commissioners, IEBC cannot legally act, including undertaking delimitation.

46. IEBC concurs that it is not properly constituted in the absence of the Commissioners. Section 11A of the *IEBC Act*, it is submitted, provides that in as much as the Secretariat carries out the day-to-day functions of the Commission, its duties must be authorised and sanctioned by the Commissioners. It follows therefore, IEBC argues, that only the Commissioners are constitutionally mandated to carry the ultimate weight and responsibility of the Commission. Towards that end, Commissioners are obligated to carry out the process of delimitation of electoral boundaries, as they are the office bearers and accountable to the Kenyan people. In the end, it is admitted that the Secretariat cannot undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners.

47. We have partly addressed this issue above but must add that, Article 250(12) of the *Constitution* as read together with Section 10(7) of the *IEBC Act* provides that the Commission's Secretary plays the role of chief executive officer, accounting officer, custodian of the Commission's records and is the head of the secretariat. Section 10(7)(e) of the *IEBC Act* further provides that the Secretary of the Commission is responsible for executing decisions of the Commission, assignment of duties and supervision of all employees of the Commission, facilitating, coordinating and ensuring execution of the Commission's mandate, ensuring staff compliance with public ethics and values, and the performance or such other duties as may be assigned by the law and the Commission.

48. Section 11(1) of the *IEBC Act* further provides that the Commission shall be comprised of employees who form the secretariat, and which is headed by the Secretary. Section 11A of the *IEBC Act* demarcates clear roles for the Chairperson and Commissioners on one side and the Secretariat on the other. For avoidance of doubt, the provision is reproduced hereunder as follows:

“ 11A. Relationship between the Commissioners and secretariat

For the effective performance of the functions of the Commission—

- a. the chairperson and members of the Commission shall perform their functions in accordance with the *Constitution* and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and
- b. the secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission.”



49. This demarcation of duties was discussed by this Court in the case of *Muruli v Oparanya & 3 others* [2016] KESC 14 (KLR), where the Court expressed itself as follows:

“ 55. The *IEBC Act* also provides for a Secretary to the Commission (section 10), who is appointed pursuant to article 250(12) of the *Constitution*. The Secretary is the chief executive officer of the Commission; head of the secretariat; accounting officer of the Commission;...; facilitator, coordinator and executor of Commission’s mandate; ... Without a doubt, the Secretary is a vital component of the IEBC - indeed, a central part of the IEBC, regardless of not bearing the designation “Commissioner” ....

56. ... We take judicial notice that it would be impractical to expect the Commissioners qua “Commissioners”, to conduct all the functions entrusted to the Commission under article 88(4) of the *Constitution*.... Had it been the case that all such tasks devolved only to “Commissioners”, the consequence would be that all actions routinely taken by the IEBC staff, such as continuous registration of voters, regular revision of voters’ roll, and registration of candidates, would be a nullity in law. There is need to avoid such construction of the *Constitution* as would be contrary to the public interest.

The requisite approach in interpreting article 88(1) of the *Constitution*, is one that vindicates the constitutional purposes and objectives, and that fosters good governance, in accordance with the terms of article 259. Good governance in this instance entails ensuring that the constitutional functions of the Commission do not come to a standstill, as is destined to happen if the discharge of such functions were left entirely to the nine Commissioners.

56. In short, as we perceive it, the IEBC comprises the Commissioners, as well as its employees who have been duly authorised. ”

50. We are inclined to agree with the submissions before us that the Secretary of the Commission, though a constitutional office holder, is an employee of the Commission and cannot be equated to nor be considered a Commissioner. Further, even though the secretariat carries out the day to day functions of the Commission, their duties must be authorized by the Commissioners. Yet we must consider what is to happen where there is a lacuna as has been the case where the need for a resolution by the Commissioners could not be available, due to the absence of Commissioners. The Attorney General contends in her argument that filing a Reference before the Supreme Court is not a day to day operation as defined by law. The answer to this conundrum would be found in Section 11A of the *IEBC Act*. However, we do note the fact that during the period when IEBC was without Commissioners, the Secretariat has continued to defend suits against IEBC without any objections. The filing of suits and related matters before Courts of law, therefore may be considered as actions that may affect day to day operations and falling within the ambit of Section 11A, even in the absence of the Commissioners.

51. In *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* [2022] KESC 56 (KLR) after handling the election petitions concerning elections to the office of the president, one of the issues this Court addressed its mind to was whether IEBC had carried out the verification, tallying, and declaration of results in accordance with Article 138(3)(c) and (10) of the *Constitution*. In analysing the evidence and rendering a determination on this issue, the Court was confronted with the need to understand the roles played by the Chairperson of the Commission, the Commissioners and IEBC’s secretariat, as well as a last-minute divide that had occurred between the Chairperson of the



Commission and some of the Commissioners. The Court stated that it was clear to it that there were legal, policy and institutional reforms that were urgently required to address the glaring shortcomings within IEBC's corporate governance structure. The Court therefore made the recommendations pertaining to IEBC's corporate governance issues as follows:

- “ 1. Parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of IEBC.
  2. IEBC ought to effect formal internal guidelines that clearly delineate the policy, strategy, and oversight responsibility of the Chairperson and the Commissioners; and develop institutionalized guidelines on how to manage the separation of administrative and policy domains.
  3. The roles of the Chairperson, Commissioners, and the Chief Executive Officer, other staff and third parties should be clearly set out in both the legislative and administrative edicts as stipulated above. ”
52. In the absence of the aforementioned reforms, the IEBC may continue to experience challenges stemming from unresolved corporate governance deficiencies. We say no more.
53. However, what is certain, and we are inclined to agree with the position advanced by the Attorney General, that the Secretariat under the leadership of the Commission Secretary and CEO, is empowered to undertake routine administrative and operational tasks essential for the day-to-day functioning of the Commission. In the same vein, it is necessary to clarify that the absence of Commissioners does not, of itself, vitiate or invalidate administrative actions taken by the Secretariat within the scope of its lawful mandate, including the execution of contracts, management of personnel, procurement, and other functions necessary for institutional continuity. Such acts remain valid and binding, provided they fall within the bounds of statutory delegation and do not purport to usurp the constitutional functions of the Commission as a corporate body.
54. Having concluded as above, a clear distinction must be drawn between administrative continuity by the Secretariat and the exercise of constitutional authority vested in the Commission as a collegial entity. It is our considered view that the exercise of constitutional functions expressly reserved for the Commission, such as those enumerated under Article 88(4) of the *Constitution*, cannot be lawfully discharged in the absence of a properly constituted Commission with the requisite quorum as contemplated under Article 250(1) and (2) of the *Constitution*.
55. This Court therefore finds that the function of delimitation of electoral boundaries, as provided for under Article 88(4)(c), is a substantive constitutional responsibility that requires the deliberation and approval of the Commissioners of IEBC acting as a collective body. Accordingly, the Court further determines that in the absence of Commissioners or the requisite quorum of Commissioners, IEBC is constitutionally incapacitated from undertaking or purporting to undertake the exercise of delimitation of electoral boundaries and other constitutionally mandated electoral processes.

**111. Whether IEBC can conduct a review of the names and boundaries of constituencies and wards when the timelines envisaged under Articles 89(2) and 89(3) as read with Section 26 of the County Governments Act have lapsed; & whether the timelines can be extended, if so, by whom and under what circumstances**

56. Issues (iii) and (iv) are related, we shall therefore determine them together. It has been submitted that this Court has on several occasions effectively pronounced that constitutional timelines, as far as election petitions are concerned, are sacrosanct and ought to be strictly adhered to. To buttress that



- line of submission, reference has been made to *Jobo & another v Shabbal & 2 others* (Petition 10 of 2013) [2014] KESC 34 (KLR) and *Munene v King'ara & 2 others* (Petition 7 of 2014) [2014] KESC 37 (KLR).
57. We have also been referred to *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR) and requested to follow our own guidance on how to interpret the *Constitution* in situations where there is a constitutional conundrum, and one that is not only novel, but also cannot be resolved by applying conventional constitutional methods, and that is by keeping an open mind in resolving such issues.
58. Emphasis has also furthermore been laid on the importance of the boundary delimitation process and it has been submitted that it is through the delimitation process that the State ensures progressive realisation of one of the most sacrosanct principles of our electoral system, that is, the right to fair representation and equality of vote. And that the said principle is achieved by ensuring that electoral units have equal or near equal number of voters. Accordingly, it is urged that since Kenya is yet to achieve equality of vote, the significance of delimitation of boundaries is that it allows the country to progressively realise the right to fair representation and equality of vote. Reference has been made to the fact that the 2012 boundary delimitation was conducted based on the 2011 national census wherein the population of the country was estimated at about 38.6 million. Since then, the population, as per the 2019 census, had risen by over 10 million and stood at about 46.7 million.
59. As such, it has been maintained that the delimitation of boundaries after a national census and before the next General Election is crucial as it prevents what it terms as over and/or under dilution in votes, which will in turn assist in achievement of the right to fair representation. The Court is therefore asked to innovatively exclude the period running from March 2023 to the date when the new Commissioners take office for the reckoning of time for boundary delimitation. It is argued that this approach would meet the interpretive test set by this Court in *Munya v The Independent Electoral and Boundaries Commission & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) where the Court held that the *Constitution* should be read holistically, with each provision complementing the other ensuring that each provision sustains the other.
60. We note, in this regard, that the Attorney-General's objection acknowledged the legal challenges posed by the lapse of constitutional timelines and referred to previous judicial pronouncements, her advice was inclined towards allowing the legislative process commenced by Parliament to run its course. This being the constitutional amendment Bill, 2024, which was passed by the National Assembly and is now pending before Senate. The recommendation that the Commission seek an advisory opinion did not, in her view, derogate from her position on locus standi, rather, she cautioned that such action might predetermine and constrain the discretion of incoming Commissioners.
61. We recall that in the case of *Attorney-General & 2 others v Ndiu & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) this Court was called upon to interpret Article 257(10) of the *Constitution*, specifically, whether it requires that each proposed constitutional amendment be submitted as a separate and distinct question during a referendum. The Court in its Judgment, by a majority, was of the view that IEBC was yet to be invited to make a determination on the manner and form of the referendum question(s). Therefore, IEBC had not had an opportunity to address its mind and make a determination on the issue. Taking into consideration that IEBC's obligation under Article 257(10) of the *Constitution* had not yet arisen, the Court therefore arrived at a decision not to accede to the invitation by the respondents to consider an issue that was not ripe and was therefore not justiciable. The Court reasoned that rendering a decision at that stage would amount to engaging in an abstract exercise, effectively directing an independent



constitutional commission on how to execute its constitutional mandate, an outcome this Court is constitutionally enjoined to avoid.

62. In the present matter, it is uncontested, and indeed a matter of public record, that, at the time of filing of the present Reference, IEBC was not fully constituted, following the exit of its previous Commissioners. There was, at the time, no indication as to when new Commissioners would be appointed. As such, the Commission remained, for all practical and constitutional purposes, incapable of discharging functions that, by law, require the participation, deliberation, or approval of a properly constituted Commission in accordance with Article 250(1) and (2) of the Constitution. This state of affairs had direct implications on the Commission's ability to undertake certain statutory and constitutional responsibilities. However, as pointed out at paragraph 2 of this decision, the IEBC Chairperson and the Commissioners of IEBC were, during the pendency of this matter, sworn into office by the Chief Justice on 11<sup>th</sup> July, 2025.
63. Article 249(2)(b) of the Constitution affirms the independence of constitutional commissions and the holders of independent offices, providing that they are subject only to the Constitution and the law and not subject to direction or control by any person or authority. This Court in the cases of Re IIEC (*supra*) and National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) underscored that the independence of such institutions is a vital safeguard against undue influence from any quarter, whether other State organs or private actors. This safeguard was deliberately embedded in the Constitution as a response to Kenya's history of executive overreach and institutional compromise. The Court emphasized that these bodies were created as the people's watchdogs, and that in order to discharge this role effectively, they must operate without fear, favour, or improper influence.
64. It follows therefore, that the question of whether the IEBC can lawfully undertake a review of constituency and ward boundaries after the expiration of the timelines set out in Articles 89(2) and 89(3) of the Constitution, read together with Section 26 of the County Governments Act, is one that only a duly constituted Commission, comprising the Chairperson and other Commissioners, can bring to this court to determine.
65. In these circumstances, and as this Court held in Attorney-General & 2 others v. Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (*supra*), and by parity of reasoning, we are similarly constrained to find that, prior to the Commission first considering and applying its mind to the matter, particularly in light of the ongoing legislative intervention pending at the Senate, this Court lacks any basis upon which to assess or evaluate the propriety or validity of any decision, or failure to decide, on its part. As we have repeatedly stated, this Court does not engage in hypothetical determinations.
66. However, before we conclude we must address a matter that has troubled us. The history of Kenya's electoral process, from the findings of the Kriegler Commission after the 2007-2008 post-election crisis, to the litigation around elections culminating in the 2022 Presidential Petition, reveals a consistent theme. One of a deep-seated trust deficit between Kenyans, the IEBC, and the electoral process. This deficit did not occur by accident, rather it is the product of decades of politicization of the electoral process, relentless attacks on the Commission's independence, and a failure to implement electoral reforms in good time and in good faith. Leaders exercising delegated authority on behalf of the People under the Constitution, rather than fueling this mistrust for short-term political gain, undermining the very institutions they are duty-bound to protect, should channel their power and influence toward addressing structural weaknesses, enhancing accountability, and reinforcing public confidence in the impartiality and competence of the IEBC. Ultimately, the legitimacy of Kenya's democratic order depends not only on credible institutions, but equally on the fidelity of political actors to the spirit of the Constitution and the sovereignty of the People.



- 67. In conclusion, having found and held as we have hereinabove, though we have overruled the Preliminary Objection raised by the Attorney General, we are also inclined to dismiss the Reference.
- 68. Regarding costs, guided by our decision in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others*, (Petition 4 of 2012) [2014] KESC 31 (KLR), and further considering that the advisory opinion is hinged on public interest matters, we find it appropriate that each party shall bear their own costs.

**F. Final Orders**

- 69. In that context, and responding to the Preliminary Objection before us, our orders are as follows:
  - i. The Preliminary Objection by the Attorney General be and is hereby overruled;
  - ii. The Reference dated 4<sup>th</sup> July, 2024 be and is hereby struck out; and
  - iii. Each party shall bear its costs.Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

.....

**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**P.M MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....

**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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



**REGISTRAR  
SUPREME COURT OF KENYA**

