



**Independent Electoral and Boundaries Commission v Chege (Petition 23 (E026) of 2022) [2023] KESC 74 (KLR) (12 September 2023) (Judgment)**

Neutral citation: [2023] KESC 74 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**PETITION 23 (E026) OF 2022**

**PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**SEPTEMBER 12, 2023**

**BETWEEN**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... APPELLANT**

**AND**

**SABINA WANJIRU CHEGE ..... RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the Court of Appeal at Nairobi (Karanja, J. Mohammed & Laibuta, JJ.A.) delivered in Civil Appeal No. E255 of 2022 on 15th July 2022.)*

**Jurisdiction of Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee to entertain disputes arising from nomination**

*The appeal majorly revolved around the jurisdiction of Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee to entertain disputes arising from nominations. The court found that under article 88(4)(e) of the Constitution, the Independent Electoral and Boundaries Commission (IEBC) was tasked exclusively with the responsibility to entertain disputes arising from nominations and conclusively determine them. Further, the Elections Act in its Second Schedule in section 15(4) empowered the Committee to issue summons requiring attendance before it. Further, the Rules of Procedure on Settlement Disputes conferred similar powers to the IEBC, including the imposition of sanctions.*

Reported by Kakai Toili

***Jurisdiction*** – jurisdiction of the Independent Electoral and Boundaries Commission (IEBC) - jurisdiction to entertain disputes arising from nominations and conclusively determining them - whether the Independent Electoral and Boundaries Commission had the jurisdiction to entertain disputes arising from nominations and to conclusively determine them - what were attendant powers which the Independent Electoral and Boundaries Commission could exercise in settling electoral disputes – Constitution of Kenya, 2010, article 84, 88 and 252(1); Elections Act, (cap 7), Second Schedule, section 15(4).



**Electoral Law** - Electoral Code of Conduct – parties bound by the Electoral Code of Conduct - whether a member of a political party participating in an election but was not a candidate was bound by the Electoral Code of Conduct.

**Civil Practice and Procedure** – cross-appeals vis-à-vis cross-petitions - what was the distinction between a cross-appeal and a cross-petition.

**Civil Practice and Procedure** – cross-appeals – filing of cross-appeals at the Supreme Court - what was the effect of failure to file a cross-appeal without eight copies of the memorandum and record of appeal as required by rule 47 of the Supreme Court Rules - Supreme Court Rules, 2020, rule 47.

**Words and Phrases** – cross-appeal – definition of a cross-appeal - a proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal - Bryan A Garners, *Black’s Law Dictionary*, (11<sup>th</sup> ed).

**Words and Phrases** – cross-petition – a claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action. Also known as a cross-complaint - Bryan A Garners, *Black’s Law Dictionary*, (11<sup>th</sup> ed).

### **Brief facts**

The appellant, the Independent Electoral and Boundaries Commission (IEBC), through its Electoral Code of Conduct Enforcement Committee (the Committee) instituted proceedings against the respondent following comments that she had allegedly made at a public rally in contravention of clause 6(a) and (i) of the Electoral Code of Conduct (the Code). According to the IEBC, the respondent’s comments cast aspersions on the integrity of the 2017 general elections 2017, and raised credibility questions on the IEBC’s capacity to deliver a free and fair elections administered in an impartial, accurate and accountable manner. Subsequently, the respondent was summoned to appear before the Committee for hearing of the complaint against her.

The respondent appeared before the Committee but raised a preliminary objection challenging *inter alia*, the jurisdiction of the Committee to hear the matter. The Committee dismissed that preliminary objection. Dissatisfied, the respondent moved the High Court challenging the proceedings, together with an application for conservatory orders staying further proceedings. IEBC argued that it was empowered to: conduct its own investigations, issue summons to persons suspected to have breached the Code, examine them and arrest those suspected of having committed election offences. The High Court allowed the respondent’s petition, effectively quashing the summons and statement of breach levelled against her, as well as the proceedings conducted before the Committee. Aggrieved, the IEBC filed an appeal at the Court of Appeal which dismissed the appeal. Further aggrieved, the IEBC filed the instant appeal.

### **Issues**

- i. Whether the Independent Electoral and Boundaries Commission had the jurisdiction to entertain disputes arising from nominations and to conclusively determine them.
- ii. What were attendant powers which the Independent Electoral and Boundaries Commission could exercise when settling electoral disputes?
- iii. Whether a member of a political party participating in an election but was not a candidate was bound by the Electoral Code of Conduct?
- iv. What was the distinction between a cross-appeal and a cross-petition?
- v. What was the effect of failure to file a cross-appeal without eight copies of the memorandum and record of appeal as required by rule 47 of the Supreme Court Rules?

### **Held**

1. The IEBC was a constitutional commission established under article 88(1) of the Constitution and further provided for under article 248(2)(c) of the Constitution. Article 252 of the Constitution provided for the general functions and powers of commissions. The IEBC was clothed with the powers to conduct investigations, either on its own initiative, or pursuant to a complaint made by a member of the public.



2. The Committee was established under section 15 of the Code. Pursuant to section 15(4) to (7), the Committee was empowered to issue summons requiring attendance before it. Additionally, sections 7, 8, and 10 of the Code and rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes conferred similar powers to the IEBC, including the imposition of sanctions. Article 252(3) of the Constitution listed the commissions and independent offices empowered to summon witnesses to include the: Kenya National Human Rights and Equality Commission; Judicial Service Commission; National Land Commission; and the Auditor-General. The object of the Code envisaged under article 88(4)(j) of the Constitution was set out in section 3 of the Second Schedule to the Elections Act.
3. Article 88(4)(e) of the Constitution was clear and without ambiguity that the IEBC was tasked exclusively with the responsibility to entertain disputes arising from nominations and conclusively determine them. The Elections Act in its Second Schedule in section 15(4) empowered the Committee to issue summons requiring attendance before it. Further, the Rules of Procedure on Settlement Disputes conferred similar powers to the IEBC, including the imposition of sanctions. The Elections Act and the Regulations thereunder were normative derivatives of the principles embodied in articles 81 and 86 of the Constitution, and in interpreting them, a court of law could not disengage from the Constitution.
4. The Elections Act and the Code therein were deliberately designed to enable the IEBC to perform its constitutional roles notably in articles 84, 88(4)(e), 88(5), and 252(1) of the Constitution. The IEBC could conclusively determine pre-electoral disputes. Settling electoral disputes furnished the IEBC with all requisite attendant powers to wit; conducting investigations, summoning witnesses, hearing complaints and making determinations thereof. That overlapping mandate was exceptional because it was authorized by statute and therefore was not unconstitutional. As such, the overlap did not foul the principle of natural justice, *nemo iudex in causa sua* (no man should be a judge in his own cause).
5. The Code was designed to enable the IEBC to perform its constitutional and statutory mandate. The IEBC was empowered to enforce the Code through the issuance of summons and conducting trial proceedings. To find otherwise would be to hamper IEBC's constitutional mandate. The Code was constitutional.
6. The IEBC had jurisdiction to summon witnesses and to conduct hearings in relation to a complaint of breach of the Code pursuant to article 88(4) e of the Constitution in complement with article 252(3) of the Constitution. Thus, a constitution must be interpreted purposively and holistically and as an integrated whole, each clause supporting the other and not destroying it. Article 84 of the Constitution mandated all candidates and political parties to comply with the Code prescribed by IEBC. It was clear from the Constitution and the provisions of the Elections Act, that it was mandatory for political parties, candidates, and members of the referendum committees who participated in an election or referendum under the Constitution to comply and subscribe to the Code.
7. The respondent was not a candidate during the electoral period. However, at the respective time, the IEBC averred in its pleadings that she was a member of the Jubilee Party and that Jubilee Party was participating in the 2022 general elections. If that was indeed the case, it would mean that she was bound by the Code. However, the IEBC did not adduce any evidence to confirm that indeed the Jubilee Party subscribed to the Code for the election period which time was running from the January 20, 2022 to the declaration of the results of the general election that were held on August 9, 2022. Jubilee Party was also not a party in the cause. Neither could it be gleaned from the record that the IEBC adduced proof that the respondent was either a member or official of the Jubilee Party. Due to the inconclusive nature of the evidence, the respondent could not be found liable in the instant case.
8. A cross-appeal was distinct from a cross-petition. While a cross-appeal was filed to institute a counter appeal in an appellate process, a cross-petition was filed to institute a counter claim before a court exercising its original jurisdiction. Besides, Part V of the Supreme Court Rules, 2020, which regulated



the mode of filing appeals before the court expressly referred to a cross-appeal, as opposed to a cross-petition. The respondent ought to have filed a cross-appeal. Rule 47(1) of the of the Supreme Court Rules, 2020, provided the procedure for filing a cross -appeal.

9. From a scrutiny of the record, the cross-petition was filed without eight copies of the memorandum and record of appeal. There was no reason to depart from the Supreme Court Rules, 2020, and set procedure, as well as settled legal standards on the purpose, tenets and substance of cross-appeals. The pleadings by the respondent, ought to have been filed in adherence to rule 47 of the Supreme Court Rules. The failure to so comply rendered the cross-petition, incurably defective.

*Appeal party allowed.*

#### **Orders**

- i. *The appeal partially succeeded to the extent that the IEBC had jurisdiction to summon, hear complaints and make findings thereon, where there was breach of the Electoral Code pursuant to article 88(4)(e) of the Constitution.*
- ii. *The appeal partially succeeded to the extent that the Code was constitutionally sound.*
- iii. *The appeal, to the extent that the respondent was to be found liable, was dismissed.*
- iv. *The cross-petition was struck out.*
- v. *Each party to bear its costs before the instant court, the Court of Appeal and the High Court.*
- vi. *The court directed that, the sum of Kshs 6,000 deposited as security for costs upon lodging the appeal, be refunded to the IEBC.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Abwao, Daniel Ongong'a v Mohamed Ali Mohamed & 2 others* Election Appeal 5 of 2018; [2018] KECA 408 (KLR) - (Explained)
2. *Anami, Silverse Lisamula v Independent Electoral & Boundaries Commission & 2 others* Petition 30 of 2018; [2019] KESC 55 (KLR) - (Explained)
3. *Chege v Independent Electoral & Boundaries Commission* Constitutional Petition E073 of 2022; [2022] KEHC 239 (KLR) - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) - (Followed)
5. *Munya, Gatirau Peter v Dickson Mwenda Kithinji, Independent Electoral And Boundaries Commission & Fredrick Njeru Kamundi County Returning Officer, Meru County* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Applied)
6. *Mahamud v Mobamad & 3 others; Muktar (Interested Party)* Petition 7 of 2018; [2019] KESC 70 (KLR) - (Explained)
7. *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] KESC 83 (KLR) - (Applied)
8. *Munya v Independent Electoral and Boundaries Commission & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Applied)
9. *Popat, Alnashir & 7 others v Capital Markets Authority* Petition 29 of 2019; [2020] KESC 3 (KLR) - (Explained)
10. *Republic v Independent Electoral & Boundaries Commission & another Ex-Parte George Mbogo Ochilo Ayacko* Judicial Review 439 of 2017; [2017] KEHC 3884 (KLR) - (Explained)
11. *Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission (IEBC) & Attorney General* Petition 104 of 2013; [2013] KEHC 7004 (KLR) - (Explained)



12. *Senate & 3 others v Speaker of the National Assembly & 10 others* Petition 19 (E027) of 2021; [2023] KESC 7 (KLR) - (Followed)
13. *Waity, Sammy Ndung'u v Independent Electoral & Boundaries Commission & 3 others* Election Petition 33 of 2018; [2019] KESC 54 (KLR) - (Explained)

#### **Texts**

Garner, BA., Black, HC., (Ed) (2019), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 11th Edn

#### **Statutes**

##### ***Kenya***

1. Capital Markets Act (cap 485A) section 11(3) - (Interpreted)
2. Constitution of Kenya articles 1(1); 2(1), (4); 3(1); 20(1); 22; 23, 24 (1); 27; 33; 35(1), (3); 47(1),(2); 50; 81(e); 82; 84; 86; 88 (4), (5); 105; 163(4) (a); 249; 252; Chapter 15 - (Interpreted)
3. Elections Act (cap 7) sections 18; 74; 107; 109 (cc), (ff); 110 (1), (6); Schedule 2, clause 7(a); 8; 15(6)- (Interpreted)
4. National Police Service Act (cap 84) section 11- (Interpreted)
5. Public Service Commission Act (cap 185) section 5(a) - (Interpreted)
6. Rules of Procedure on Settlement of Disputes (cap 7 Sub Leg) rules 15(4); 17(1)(2) - (Interpreted)
7. Salaries and Remuneration Commission Act (cap 412D) section 13(1)(c) - (Interpreted)
8. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)
9. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 38; 39; 47(1), (2)(b); part V- (Interpreted)
10. Teachers Service Commission Act (cap 212) section 12(2)(c) - (Interpreted)

#### **Advocates**

*Mr Moses Kipkogei* and *Mr. Ochola* for the appellant.

*Mr Martin Oloo* for the respondent.

## **JUDGMENT**

### **A. Introduction**

1. Before this court is the appeal dated August 8, 2022 and filed on even date. It is brought pursuant to article 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act, 2011* and rules 38 and 39 of the *Supreme Court Rules, 2020*. It challenges the decision of the Court of Appeal (Karanja, J Mohammed & Laibuta, JJA) in Civil Appeal No E255 of 2022. The impugned decision upheld the decision of the High Court (Mrima, J) in Constitutional Petition No E073 of 2022.

### **B. Background**

#### **i. At the High Court**

2. The appellant before this court, through its Electoral Code of Conduct Enforcement Committee (hereinafter the 'Committee') instituted proceedings against the respondent by its summons issued on February 11, 2022 following comments that she had allegedly made at a public rally at Isibuye area within Vihiga County on February 10, 2022 in contravention of Clause 6(a) and (i) of the Electoral Code of Conduct (hereinafter 'the Code'). She was also served with a statement of breach detailing the alleged offensive utterances. According to the appellant, the Respondent's comments cast aspersions on the integrity of the General Elections 2017, and raised credibility questions on the appellant's capacity to deliver a free and fair election administered in an impartial, accurate and accountable



manner as envisaged under article 81(e) of the Constitution. Those remarks reproduced verbatim were as follows:

*“Mnajua kule Central nimeskia wengine wakisema hapa tuliwaibia... Kuna ka ukweli kidogo ... Lakini ... kama tulijua kuiba ... si bata hii tutafanya nini ... Wanafikiria wao ndo wajanja...”*

3. Subsequently, the respondent was summoned to appear before the Committee on February 15, 2022, for hearing of the complaint against her. She appeared before the Committee in obedience to the summons but raised a preliminary objection challenging *inter alia*, the jurisdiction of the Committee to hear the matter. By its ruling delivered on the same date, the Committee dismissed the respondent’s preliminary objection.
4. Dissatisfied with the Committee’s ruling, the respondent filed High Court Constitutional Petition No E073 of 2022, *Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission* (the High Court Petition) challenging the proceedings, together with an application for conservatory orders staying further proceedings. She urged that the Committee violated her fundamental rights protected under articles 1(1), 2(1) & (4), 3(1), 20(1), 22, 23, 24(1)(a) - (e), 27, 33, 35 (1) & (3), 47(1) & (2) and 50 of the Constitution and sought orders summarized as follows:
  - a. *Certiorari* quashing the statement of breach, summons and proceedings by the Committee against the respondent;
  - b. *Certiorari* quashing the ruling by the Committee made on February 15, 2022 dismissing the respondent’s objection;
  - c. A declaration that the summons and statement of breach both dated February 11, 2022, and served by the Committee, were unlawful and unconstitutional;
  - d. A declaration that the failure by the Commission to publish the regulations contemplated under section 109 (cc) and (ff) to prescribe regulations of the enforcement of the Second Schedule to the Elections Act is unlawful and unconstitutional;
  - e. A declaration that clause 15(6) of the Second Schedule to the Elections Act, 2011, is unlawful as it was based on section 110(6) of the Elections Act, which section had been deleted vide section 25(c) of Act No 36 of 2016;
  - f. A declaration that the decision by the Commission to invoke article 252 of the Constitution to commence a hearing into alleged breaches by the respondent on violations of Clause 6(a) and 6(i) was unlawful and unconstitutional;
  - g. A declaration that, by claiming that it was seized of a report and materials in respect of the complaint against the respondent, the decision by the Commission to commence investigations suo motu as stated in its ruling of February 15, 2022 was unlawful and illegal;
  - h. an order of prohibition restraining the Committee from enforcing the Second Schedule of the Elections Act without first prescribing the regulations contemplated under section 109(cc) and (ff) of the Act, in accordance with the Constitution;
  - i. A conservatory order restraining the appellant from acting unlawfully and unconstitutionally, before drafting the regulations, conducting public participation, and submitting the regulations to Parliament as per the law and the Constitution;



- J A conservatory order restraining the appellant from violating the respondent's aforementioned fundamental rights and freedoms.
5. The respondent specifically faulted the appellant's dismissal of her preliminary objection, wherein she had raised concerns, regarding its refusal to furnish her with a copy of its investigation report, and other relevant documents.
  6. In opposing the Petition, the appellant asserted that it had acted lawfully. It contended that the respondent was bound by its Code of Conduct specifically by virtue of the provisions of paragraphs (1) and (2) thereof, being an elected Woman Representative of Murang'a County and a member of the Jubilee Party Parliamentary Group. Furthermore, the appellant urged that pursuant to article 252(1)(a) and (d) of the Constitution, as read with section 107 of the Elections Act, it was empowered to: conduct its own investigations, issue summons to persons suspected to have breached the Code, examine them and arrest those suspected of having committed election offences. It was also the appellant's argument that its chairperson, had rightfully designated himself as the chairperson of the Committee, as he was the only member who by law, possessed qualifications required to chair it; that the Committee considered the preliminary issues raised by the respondent before dismissing them; and that the Rules of Procedure on Settlement of Disputes had already been enacted vide Legal Notice No 139 of 2012 pursuant to provisions of the Elections Act.
  7. In its consideration of the petition, and application for conservatory orders which were determined together, the trial court framed six questions for determination, iem: whether the Committee had jurisdiction to entertain violations of the Code; whether the Code was in force and if so, whether it was binding upon the respondent; whether the appellant's chairperson erred in chairing the sittings of the Committee; whether the appellant had formulated regulations to guide the proceedings before the Committee; whether the proceedings against the respondent before the Committee were in violation of her afore-stated fundamental rights; and whether the respondent was entitled to any reliefs.
  8. In a judgment delivered on April 4, 2022, the trial court (Mrima, J) allowed the respondent's petition, effectively quashing the summons and statement of breach levelled against her, as well as the proceedings conducted before the Committee. The trial court determined that the Committee was unconstitutional, null and void *ab initio* for being in contravention of articles 2(4), 3(1), 249 and 252 of the Constitution. It also issued orders quashing parts of sections 7, 8, 10 and 15 of the Code under the Second Schedule of the Elections Act; and portions of rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement of Disputes establishing and granting powers to the Committee to summon witnesses, and conduct hearings of complaints based on allegations of breach of the Code.
  9. On the issue as to whether the Committee had jurisdiction to entertain violations of the Code, it was the court's determination that article 252 of the Constitution, prescribes that the commissions and independent offices are vested with the powers to conduct investigations and issue summons to witnesses to assist in such investigations, namely: the Kenya National Human Rights and Equality Commission, the Judicial Service Commission, the National Land Commission and the Auditor General. The trial court found that the appellant could conduct investigations but had no jurisdiction by itself or through the Committee to summon witnesses or conduct any hearings in relation to a complaint of the breach of the Code or at all. Moreover, the court held that the Committee was an unconstitutional outfit, lacking any legality.
  10. Regarding the issue as to whether the code was in force and if so, whether it was binding upon the respondent, the trial court underscored the fact that paragraph 18 of the Code had operational timelines for its application, which in this case was from the date of publication of a notice of Election, until the swearing in of newly elected candidates. In addition, the court determined that the appellant



- did not adduce evidence to confirm that the respondent or the Jubilee Party to which she belonged, had subscribed to the Code for the election period that ran from January 20, 2022 to the declaration of results on August 9, 2022, hence there was no basis to hold that the Code was binding upon her.
11. Regarding the issue as to whether the appellant’s chairperson erred in chairing the sittings of the Committee, the trial court held that since the Committee was a nullity *ab initio*, it did not matter whether the appellant’s chairperson rightly chaired the Committee or otherwise, as he was riding on a ‘constitutionally dead horse.’ For this reason, the court declined to make a pronouncement on the issue stating that it had been overtaken by events, hence a determination on it would serve no purpose.
  12. On whether the appellant had formulated regulations to guide the proceedings before the Committee, the trial court determined that the respondent’s claim that the appellant had failed to publish regulations envisaged under the Code for its enforcement was misconceived; for the reason that it was clearly demonstrated that the Rules of Procedure had been promulgated as subsidiary legislation as Legal Notice No 139 of 2012.
  13. As regards the issues whether the proceedings against the respondent before the Committee were in violation of her fundamental rights and if she was entitled to any of the reliefs sought, the trial court determined that article 2(4) of the Constitution was violated to the extent that the Committee was contrary to article 252 of the Constitution; article 3(1) was contravened by the appellant’s failure to uphold the Constitution; article 27(1) was infringed for not according the respondent equal protection and benefit of the law; article 35 was contravened as the respondent was not provided with all the necessary evidence against her to be able to properly prepare for her defence having been served with the alleged footage from the Communications Commission of Kenya by a letter dated February 15, 2022, the date that the proceedings began. In the circumstances, articles 47 and 50 of the Constitution were also contravened. Consequently, the petition succeeded, and the trial court issued orders summed up as follows:
    - a. A declaration that the appellant’s Code and Committee contravened articles 2(4), 3(1), 249 and 252 of the Constitution and were null and void *ab initio*;
    - b. A declaration and orders of *certiorari* quashing the Committee’s summons, statement of breach, and proceedings against the respondent;
    - c. Orders of *certiorari* quashing parts of sections 7, 8, 10 and 15 of the Code under the Second Schedule of the Elections Act as well as parts of rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes establishing and granting powers to the Committee to summon witnesses and conduct hearings of complaints based on allegations of breach of the Code.

## ii. At the Court of Appeal

14. Aggrieved by this judgment, the appellant moved the Court of Appeal vide Civil Appeal No E255 of 2022. The appellate court framed the following five issues for determination:
  - i. Whether the respondent was bound by the Code;
  - ii. Whether the Committee had jurisdiction to summon the respondent, hear the alleged complaint against her, make findings thereon and possibly impose sanctions against her;
  - iii. Whether the impugned parts of the Code were unconstitutional;
  - iv. Whether the appellant was entitled to the reliefs sought in the appeal; and



- v. What remedies were appropriate under the circumstances, including orders as to costs.
15. In a Judgment delivered on July 15, 2022, the Court of Appeal (Karanja, J Mohammed & Laibuta, JJA) dismissed the appeal for being unmeritorious, in effect affirming the High Court’s decision. On the question, whether the respondent was bound by the Code, the Court of Appeal observed that the legal force of the Code is dependent on actual subscription by political parties thereto, and professed candidates for elective positions at the national and county levels as provided in section 110(1) of the Elections Act and paragraphs (1) and (2) of the Code. The appellate court noted that section 18 of the Elections Act states that the Code applies in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates. Consequently, it reasoned that the Code was not binding on the respondent on account of: her not being a candidate in the August 9, 2022 General Elections at the time of the Committee’s proceedings and at all material times thereafter, the non-joinder of her political party in the proceedings before the Committee through which evidence of subscription would have been led and the non-disclosure of her being an official of that party, if that was the case. The court posited that the fact that the respondent was not bound by the Code divested the Committee of the jurisdiction and power to enforce the same against her.
16. As regards the issue whether the Committee had jurisdiction to summon the respondent, hear the alleged complaint, make findings and impose sanctions against her, the court upheld the High Court’s finding that the appellant was not one of the specific commissions and entities under article 252(3) of the Constitution vested with the power to issue summons and examine witnesses.
17. On the issue whether the impugned parts of the Electoral Code were unconstitutional, the appellate court agreed with and affirmed the High Court in entirety in its decision that the Committee was unconstitutional. The appellate court stated that to the extent that the Elections Act purported to confer on the Committee substantive prosecutorial and judicial or quasi-judicial powers not availed to the appellant under the Constitution, the impugned provisions were inconsistent with the Constitution by virtue of article 2(4). Further, it was an infringement on both substantive and electoral due process and at variance with the Latin maxim *nemo iudex in causa sua*, ‘no one should be a judge in their own cause’. In the same vein, the court surmised that the wielding by the Commission of policing, prosecutorial and quasi-judicial powers offended the immutable principles of due process and violated the rule against bias.
18. Arising from the foregoing, the appellate court held that the appellant was not entitled to the reliefs sought and dismissed the appeal with costs to the respondent.

### iii. Proceedings at the Supreme Court

19. Aggrieved by the Judgment in its entirety, the appellant has filed the instant appeal premised on five grounds reproduced below. That the Court of Appeal misapplied and misapprehended the Constitution by:
- i. Finding that paragraph 15 of the Second Schedule to the Elections Act is unconstitutional because it empowered the appellant to summon witnesses; and that the appellant “cannot summon any witness neither can it conduct any hearing of such a complaint” ostensibly because it is not one of the Commissions and Independent Offices empowered by article 252(3) of the Constitution to issue summons to witnesses yet the provisions of article 88(4) (e) of the Constitution empowers the appellant to “settle all electoral disputes” and that the disputes relating to breaches of the Electoral Code of Conduct are envisaged by the said article;



- ii. Finding that ‘the Electoral Code of Conduct Enforcement Committee is an unconstitutional outfit and lacks any legality’ whereas article 88(4)(e) of the Constitution empowers the appellant to settle electoral disputes;
- iii. Interpreting the provisions of article 252(3) of the Constitution to mean that only the Commissions and the Independent Office listed therein have the power to summon witnesses yet the Constitution, in the case of the appellant, under articles 82, 84 and 88(5) empowers Parliament to enact legislation for better performance of the predicate constitutional responsibilities. In effect, the Court of Appeal has also by parity of reasoning, paved the way for annulment of the power to issue summons upon witnesses conferred on other Chapter 15 institutions which are not listed in article 252(3). This includes the National Police Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission, the Ethics and Anti- Corruption Commission amongst others;
- iv. Failing to consider that article 88(4)(j) and (5) of the Constitution mandates the appellant to prescribe a code of conduct for all parties and candidates participating in an election and further that the Second Schedule to the *Elections Act* is a derivative of articles 82(2), 84, 86(d) and 88(5) of the Constitution. By establishing the Electoral Code of Conduct Enforcement Committee and conferring powers upon it to issue summons to persons who are alleged to have breached the Code, Parliament was merely fulfilling the aspirations of Chapter Seven of the Constitution; and
- v. Applying the wrong principles when construing or interpreting the Constitution by not construing the Constitution as one integrated document, each clause supporting each other and not destroying it and consequently rendering the Electoral Code of Conduct ineffectual and otiose. In effect, the Court of Appeal has allowed elections to be held in a manner which is not in consonance with the principles of the electoral system envisaged in article 81(e)(ii) which requires that an election be conducted in a free and fair manner which is

“free from violence, intimidation, improper influence or corruption”

as well as the responsibility placed on the appellant by article 86(d) which requires it to put in place

“appropriate structures and mechanisms to eliminate electoral malpractice”.

20. The appellant seeks the following reliefs, that:
- a. The instant petition (appeal) be allowed.
  - b. That the Judgment of the Court of Appeal dated July 15, 2022 in Civil Appeal No E255 of 2022 and the Judgment of the High Court dated April 4, 2022 in Constitutional Petition No E073 of 2022 be set aside.
  - c. Such consequential and appropriate reliefs, further or other order(s) as this court may deem just and expedient in the interest of justice.
  - d. That the costs of this petition be provided for.
21. The respondent has filed a cross-petition and response dated September 9, 2022 and filed on November 18, 2022 in opposition to the appeal and associating herself with the decisions of the superior courts below. She seeks the following declarations:



- a. That an attempt to turn IEBC into a quasi-judicial body is unconstitutional. As an independent elections management body, IEBC must remain impartial, neutral, efficient and accountable for its actions and processes as envisaged in article 81(e) of the Constitution;
  - b. That clause 15(1-10) which turns IEBC into a quasi-judicial body is unconstitutional;
  - c. That in the matter of electoral disputes as envisaged in the Constitution, IEBC should only be called into acting out of a trigger or complaint by a citizen or political party citing violations of the Electoral Code;
  - d. That where the IEBC acts *suo motu* and investigates a breach, the only mechanism available for it is to invoke the provisions of clause 9, 10, 11 and 12 of the Electoral Code of Conduct;
  - e. That clauses 7(a)(i) and (ii) and 8 of the Second Schedule to the Elections Act is unconstitutional in so far as it purports to confer to the appellant powers to issue a formal warning, a fine as it determines, and the requirement for registration of the fine with the High Court. Such powers are not envisaged in the Constitution;
  - f. That the envisaged committee on enforcement of the Electoral Code is illegal and in excess of the powers conferred to the IEBC in the Constitution;
  - g. That the provisions of the Second Schedule purporting to establish a committee to enforce the Electoral Code, its composition and duties thereof are invalid and unconstitutional.
22. The cross-petition and response raises the following grounds:
- i. In the application of section 74 of the Elections Act disputes relating to nominations ought to be lodged with the appellant and determined within ten days.
  - ii. The appellant acted as the complainant, purportedly investigated, arrived at the decision to charge, lodged the complaint with itself and purported to sit in trial of the respondent with a view to penalizing her contrary to the Constitution, the law and the principles of separation of powers and natural justice;
  - iii. The respondent never subscribed to the Electoral Code as espoused in section 110 of the Elections Act for purposes of the general election in August 2022;
  - iv. Clause 7(a)(i) and (ii) and 8 of the Second Schedule to the Elections Act is unconstitutional in so far as it purports to confer to the appellant powers to issue a formal warning, a fine as it determines, and the requirement for registration of the fine with the High Court. the Constitution mandates the appellant to develop the Electoral Code and not to enforce it;
  - v. The provisions of Clause 15(1) – (10) of the Electoral Code in purporting to set up the Enforcement Committee and its purported composition and duties are unconstitutional, illegal and a violation of the principles of separation of powers;
  - vi. The IEBC is not clothed with constitutional powers to summon any witness neither can it conduct any hearing of such a complaint on account of article 253(3) of the Constitution;
  - vii. The provisions of article 88(4)(e) of the Constitution only empowers the appellant in a limited way, to settle electoral disputes arising from or relating to party primary or party nominations. It excludes election petitions and disputes after declaration of election results;



- viii. Article 88(4)(j) confines the role of the appellant to the development of a code of conduct for candidates and parties contesting in an election. It makes no reference nor does it vest in the IEBC, the power to enforce and punish any breaches or violation of the Code of Conduct;
  - ix. Article 88(4)(k) confines the appellant to ‘monitoring of compliance with the legislation required under article 82(1)(b) relating to nomination of candidates by political parties’;
  - x. On the general functions of the Commission and holders of independent offices, article 252(1) restricts these commissions to conduct investigations on their own motion or on a complaint made by a member of the public and nothing more;
  - xi. The second schedule to the *Elections Act* is not a derivative of articles 88(2), 84, 86(d) and 88(5) of the *Constitution*;
  - xii. The Court of Appeal acted appropriately in declaring certain provisions of the Elections Act unconstitutional to the extent that they seek to make IEBC a complainant, an adjudicator over its own cause, an investigator and prosecutor in its own cause, besides sitting in trial over the very allegations it makes and investigates.
23. The appellant, in its rejoinder to response to appeal and reply to cross- petition dated and filed on September 28, 2022, posits that the cross-petition is fatally defective as neither the *Supreme Court Act* nor the *Supreme Court Rules* contemplate the filing of a cross-petition to a petition of appeal and that having been lodged without a record of appeal as contemplated under rule 47(2)(b) of the *Supreme Court Rules*, the cross-petition is incompetent. It implores the court to strike out the cross-petition and its supporting affidavit with costs. Nonetheless, the appellant reiterates its averments in the petition of appeal in its substantive response thereto.

## The Parties’ Respective Submissions

### i. The appellant’s case

24. The appellant’s written submissions are dated October 11, 2022 and filed on November 4, 2022. The appellant raises a preliminary objection challenging the competency of the cross-petition. The appellant faults the respondent for filing the Cross-Petition without a record of appeal, in contravention of rule 47(2)(b) of the *Supreme Court Rules* therefore warranting its striking out.
25. With respect to its substantive arguments, the appellant submits that the petition of appeal meets the requisite jurisdictional threshold contemplated under article 163(4)(a) of the *Constitution*, as it involves the interpretation or application of the *Constitution*. It submits that the appeal invites this court to issue the correct interpretation of articles 82(2), 84, 86(d), 88(4)(e) and 88(5) as read together with article 252(1) as to whether the appellant has authority to summon witnesses; that there is a nexus between the content of the appeal and issues adjudicated in the superior courts below, and that the appeal alleges misapplication of article 259(1) of the *Constitution* in arriving at the impugned decision.
26. As regards jurisdiction to summon witnesses or conduct any hearing in relation to a complaint on breach of the Code, the appellant submits that pursuant to article 25(1)(a) of the *Constitution*, each independent commission is empowered to conduct investigations on its own initiative or on a complaint made by a member of the public. The appellant posits that article 88(4)(e) empowers it to settle electoral disputes relating to nominations while paragraph 15(4) of the Code empowers it to issue summons. It relies on the decisions of Musyoka, J in *Republic v Independent Electoral and Boundaries Commission & another ex parte George Mbogo Ochilo Ayako* [2017] eKLR; and the Court of Appeal in *Ong’ong’a Abwao v Mohamed Ali Mohamed & 2 others* [2018] eKLR and *Samson Owimba Ojiayo*



- v Independent Electoral and Boundaries Commission and another* [2013] eKLR which appreciated the imperative effect of the Second Schedule to the *Elections Act* in facilitating the appellant with the discretion to assess situations and intervene when necessary.
27. In response to the respondent's argument that the power to settle electoral disputes is limited to nomination disputes and disputes relating to registration of candidates, the appellantsubmits that electoral disputes transcend the entire electoral process from voter education to registration of observers. Any dispute emanating therefrom is an electoral issue that the appellant can consider pursuant to article 88(4)(e), which is the basis upon which the appellant was empowered to enforce the Code.
  28. The appellant furthermore asserts that by parity of reasoning, the position adopted by the trial and the appellate court would render other constitutional commissions established under article 248 ineffectual, stripping them of power to summon witnesses anchored in enabling statutory provisions such as: section 11 of the *National Police Service Act, 2011*; section 48 of the *Parliamentary Service Act*, section 5(a) of the *Public Service Commission Act*; section 13(1)(c) of the *Salaries and Remuneration Commission Act* and section 12(2)(c) of the *Teachers Service Commission Act*. It deemed the High Court and Court of Appeal's holding an affront to its independence from external interference while discharging its mandate, citing the case of *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*, SC Petition No 14 of 2014 [2014] eKLR to buttress its point, that independence is a necessary shield against influence of interference from external forces.
  29. It is the appellant's case that the Code was binding upon the respondent in accordance with section 110 of the *Elections Act* as read with paragraph 1(2) of the Code, because at all material times, she was a member of Jubilee Party and a Member of Parliament by virtue of having participated in an election. According to the appellant, the Code applied to the respondent during the material time. It did not matter, that she had not registered as a candidate to participate in the 2022 elections, submits the appellant. The appellant further stresses that the Code was in force when the respondent made the offensive remarks, from the date of publication of the Notice of Elections on February 12, 2022 hence it was binding upon her.
  30. Moreover, the appellant submits that the superior courts' faulty interpretation of the *Constitution* rendered the Code ineffectual and otiose. While citing jurisprudence on the purposive, liberal interpretation of the *Constitution*, the appellant asserts that there is a good reason for its application of the Code under article 84 of the *Constitution*. It posits that government officials and members of political parties in similar standing as the respondent, wield immense influence in the manner in which elections are conducted. If left uncontrolled, argues the appellant, such officials can completely derail the electoral process by inciting members of the public to violence.
  31. In conclusion, the appellantsubmits that the kind of remedies it imposes on parties who transgress the Code, cannot be issued through a judicial process. For instance, denial of an opportunity to advertise using the national broadcaster, or barring a candidate from using specified venues for campaigns, are measures which can only be issued and enforced by the appellantas the manager of electoral processes. Further, it urges, the proceedings before the Commission are sui generis in nature, hence not amenable to conventional adversarial processes.

## ii. The respondent's case

32. The respondent's submissions in opposition to the appeal and in support of its cross-petition are dated November 9, 2022 and filed on November 18, 2022.



On the issue as to whether the appellant lacks jurisdiction to either summon witnesses or conduct hearings in relation to a breach of the Code, the respondent submits that the appellant has powers to initiate investigations on its own motion, as long as it does not proceed to frame charges, and purport to usurp judicial powers to conduct a trial. It is further submitted that the appellant, contrary to its assertion, is not clothed with the authority it purports to have under article 252(1) of the Constitution. Moreover, it is the respondent's submission that article 88(4)(e) of the Constitution, only vests upon the appellant the power to settle electoral disputes arising from party nominations. The said provision does not confer upon the appellant any power to conduct trials in relation to breaches of the Code. The respondent urges that the appellant's functions and powers under article 88(4) of the Constitution are in respect of conducting or supervising referenda and elections which powers at any rate, ought to be exercised in accordance with the Constitution as per article 88(5) thereof. To this end, she associates herself with the pronouncements of the superior courts to the effect that, the provisions of paragraph 15(4) of the Code offend the letter and spirit of the Constitution and are therefore null and void.

33. On the issue as to whether the Electoral Code of conduct is binding upon the respondent, it is urged that the appellant did not lead any evidence demonstrating that she had subscribed to the Code by the time she was charged. Furthermore, it is contended that the gazette of the electoral period referred to by the appellant concerned the 2022 elections. The respondent emphasizes the fact that she did not offer herself for elective office and could not have subscribed to the Code in 2022 as she was not a candidate.
34. The respondent then urges her cross-petition which raises issues on the constitutionality and legality of the appellant's assertions before the court, as well as provisions of the Elections Act that donate powers to the appellant which are not envisioned or directly provided for by the Constitution. She reiterates that sections 74 and 110 of the Elections Act were inapplicable to her as she had not subscribed to the Code and that section 7(a)(i) and (ii) of the Second Schedule to the Elections Act offends article 50 of the Constitution in so far as it confers upon the appellant powers to issue a formal warning, or a fine without due process.

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

35. Having carefully considered the substance of the appeal, and the respective cases of the parties, as illuminated by their written and oral submissions, it is our opinion that there are four issues, the determination of which, shall dispose of the appeal. These are:
  - i. Whether the appellant had jurisdiction to summon the respondent, hear the alleged complaint against her and make findings thereon;
  - ii. Whether the impugned parts of the Code are unconstitutional;
  - iii. Whether the Electoral Code of Conduct was binding upon the Respondent;
  - iv. Whether the respondent's Cross-Petition herein is incompetent.

#### **E. Analysis**

##### **i. Whether the appellant had jurisdiction to summon the Respondent, hear the alleged complaint against her and make findings thereon.**

36. It was the appellant's argument that it is empowered under article 252(1)(a) of the Constitution, to conduct investigations on its own initiative or upon a complaint made by a member of the public.



Moreover, the appellant argued that according to article 88(4)(e) of the Constitution, it is empowered to settle electoral disputes relating to or deriving from nominations but excluding electoral Petitions.

In the same mould, the appellantsubmitted that paragraph 15(4) of the Code, being a normative derivative of the Constitution, empowers it to summon a suspected or implicated offender of the Code. The appellant took issue with the superior courts' declaration to the effect that it lacked jurisdiction. It contended that such a decision "stripping it of jurisdiction" would severely hamper the enforcement mandate of constitutional commissions, not listed in article 252(3) of the Constitution.

37. On the other hand, the respondenturged that the appellantslacks the powers or jurisdiction to issue summons as it is not one of the Commissions listed under article 252(3) of the Constitution. Consequently, the respondent submitted that the provisions of paragraph 15(4) of the Code are an aberration as they offend the letter and spirit of the Constitution, specifically, articles 252(3) and 88(5) which circumscribe the powers to issue summons.
38. It is not in doubt that the appellantis a constitutional Commission established under article 88(1) and further provided for under article 248(2)(c) of the Constitution. Under article 252, the general functions and powers of Commissions are set out as follows:

252. General functions and powers

1. Each commission, and each holder of an independent office—
  - a. may conduct investigations on its own initiative or on a complaint made by a member of the public;
  - b. has the powers necessary for conciliation, mediation and negotiation;
  - c. shall recruit its own staff; and
  - d. may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

39. Guided by the above provisions, it is clear that the appellantis clothed with the powers to conduct investigations, either on its own initiative, or pursuant to a complaint made by a member of the public. The question that then arises is whether such powers entail the issuance of summons requiring appearance before the appellantor committees established under it as well as conducting hearings in the enforcement of the Code.

40. It is instructive to take note of section 15 of the Electoral Code under which the appellant's Enforcement Committee is established. Pursuant to section 15(4) to (7) thereof, the Committee is empowered to issue summons requiring attendance before it in the following terms;

15 ...

4. The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.
5. In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.



6. The committee shall not be bound by the provisions of the Criminal Procedure Code or the Evidence Act in its proceedings.
  7. Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.
41. Additionally, sections 7, 8, and 10 of the Code and rules 15(4) and 17 (1) and (2) of the Rules of Procedure on Settlement Disputes confer similar powers to the appellant, including the imposition of sanctions.
  42. Article 252(3) of the Constitution lists the Commissions and independent offices empowered to summon witnesses to include the; Kenya National Human Rights and Equality Commission; Judicial Service Commission; National Land Commission; and the Auditor-General.
  43. Both the Court of Appeal and High Court were of the view that article 252(3) of the Constitution, limits the power of constitutional Commissions and independent offices to issue summons to the above listed four. The two superior courts concluded that since the appellant is not one of the four listed therein, any law or statutory instrument that bestows upon it the power to summon witnesses, runs contrary to the Constitution, and is therefore null and void to the extent of its inconsistency.
  44. It was the appellant’s further contention that pursuant to article 88(4)(e) of the Constitution, it is empowered to settle electoral disputes relating to or deriving from nominations, but excluding electoral petitions. It further urged that this provision clothes it with jurisdiction to enforce the Code.
  45. The respondent submitted that the appellant had powers, to initiate investigations on its own motion, as long as it would not proceed to frame charges and transform itself into a trial tribunal. Moreover, she urged that article 88(4)(e) of the Constitution, only vests upon the appellant, the power to settle electoral disputes arising from party nominations, but not the power to conduct trials arising from breaches of the Code.
  46. The respondent further urged that the appellant’s functions and powers, must be exercised in accordance with the Constitution as per the edict in article 88(5) thereof. It was her case that article 86(d) of the Constitution, requires the appellant to only ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place.
  47. In view of the foregoing submissions, we now turn to the task of determining whether, the appellant acted in excess of its constitutional mandate, by summoning, hearing the complaint against the respondent, and making a finding thereon. The following constitutional provisions of articles 84 and 88 are instructive in this regard:

“ 84. Candidates for election and political parties to comply with code of conduct.

In every election, all candidates and all political parties shall comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.

...

88 ...

- (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament, and in particular, for –



...

- e. the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election Petitions and disputes subsequent to the declaration of election results; ...
- (j) the development of a code of conduct for candidates and parties contesting elections”

48. The object of the Code envisaged under article 88(4)(j) above, is set out in section 3 of the Second Schedule to the *Elections Act* as follows:

The object of this Code is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.

49. This Court has on numerous occasions interpreted article 88(4)(e) of the *Constitution* to mean that IEBC is empowered by the *Constitution* to resolve pre- election disputes including nominations. Our pronouncements have largely been in the context of whether, an election court has jurisdiction to determine pre-election disputes, notwithstanding the provisions of article 88(4)(e) of the *Constitution*. However, they are quite instructive in the instant case as they shed light on the powers of the IEBC in summoning witnesses as well as conducting hearings in relation to complaints on breach of the Electoral Code.

50. In *Silverse Lisamula Anami v. Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 30 of 2018 [2019] eKLR where one of the issues for determination was “whether the election Court has jurisdiction to adjudicate over issues relating to the pre- election period, such as nomination and qualification of candidates, in view of article 88(4)(e) of the *Constitution*,” this court at paragraph 54 rendered itself thus:

“54. How do we resolve the apparent conflicting positions taken by the Court of Appeal and election courts? Our view is that articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the *Constitution* and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the *Constitution*. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the *Constitution*.”

51. In *Sammy Ndung’u Waity v Independent Electoral & Boundaries Commission & 3 Others*, SC Petition No 33 of 2018, [2019] eKLR, one of the issues for determination was, “whether an Election Court has jurisdiction to determine pre-election disputes, including those relating to the nomination of candidates.” We emphasized the fact that the *Constitution* has to be interpreted holistically and purposively with regards to article 88(4)(e) of the *Constitution*. We noted that article 88(4)(e) of the *Constitution* constitutes part of the normative architecture for the resolution of pre-election disputes. We stated that this framework for dispute resolution came into existence after the promulgation of the



2010 Constitution. Prior to this, the jurisdiction to determine pre-election disputes, lay with the High Court sitting as an Election Court. At paragraphs 59 and 60 the court held:

“(59) It is clear to us that the Constitution of 2010 and the resultant electoral law, deliberately set out, to delimit the institutional competencies for the settlement of all electoral disputes. In this regard, it donated jurisdictional authority to different judicial and quasi-judicial organs.....

60. Coming to pre-election disputes, including disputes relating to, or arising from nominations, the Constitution is clear. These are to be resolved by the IEBC (through its Committee on Dispute Resolution as provided for by section 12 of the enabling Act) or where applicable, by the Political Parties Disputes Tribunal. Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.”

52. To ensure that article 88(4)(e) of the Constitution was not rendered inoperable, while at the same time preserving the efficacy and functionality of an election court under article 105 of the Constitution, the court developed the following principles at paragraph 68:

- “(i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
- ii. where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a Petition to the election court;
- iii. where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the constitutional timelines;
- iv. where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a Petition to the election Court;
- v. the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution, even after the determination of an election Petition;
- vi. in determining the validity of an election under article 105 of the Constitution, or section 75(1) of the Elections Act, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the



election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.”

53. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* Petition No 7 of 2018 [2019] eKLR, the court restated the relevance of article 88(4)(e) of the *Constitution* in the clearly established constitutional mechanisms for resolving pre-election disputes. The court observed at paragraph 72:

“72 What are we to make of a situation where a contestant ignores the *Constitution*, drags an entire County through a gruelling election, only to turn around and intone that his rival was not qualified to vie in the first place? Is an election court to assume jurisdiction over such a dispute in such circumstances? We think not. If we were to allow contestants, or any other person, to consciously incubate a dispute, bypassing the *Constitution*, and originating it at an election court, that would surely render article 88(4)(e) of the *Constitution* inoperable. For if one can originate any dispute at an election court, why bother with the IEBC? The IEBC, in relation to election disputes, would surely become otiose! It is in this regard that we developed principle number (iv) hereinabove, which states that:

“Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPD, such dispute shall not be a ground in a Petition to the election court.”

54. It is therefore evident that article 88(4)(e) of the *Constitution* is clear and without ambiguity that the IEBC is tasked exclusively with the responsibility to entertain disputes arising from nominations and conclusively determine them.

55. We are also alive to our decision in *Alnashir Popat & 7 others v Capital Markets Authority*, Pet No 29 of 2019 [2020] eKLR, where we were grappling with the propriety of the dual statutory mandate granted to the Respondent therein as the investigator and enforcer of capital markets infractions in Kenya. We appreciated the social and historical background leading to the enactment of the *Capital Markets Act (CMA Act)*. We noted that to meet its objectives, the *CMA Act* section 11(3) of the *CMA Act* grants the Capital Markets Authority (CMA) wide powers to enable it instill discipline upon any errant player, with a view to regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya, in line with the preamble to the Act. We observed in paragraphs 50 & 51 that:

“[50] As the Canadian Supreme Court later stated in the case of *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301, “Administrative tribunals are created for a variety of reasons and to respond to a variety of needs.” In the case of securities commissions, that courts added, “By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act.”

(51) Such bodies will therefore have repeated dealings, in both administrative or adjudicative capacities, with the same parties. It is for this reason and to achieve the efficiency required in the operations of the securities markets, that the legislatures more often than not, allow for an overlap of functions which in normal judicial proceedings would be kept separate.” (emphasis ours)



We agreed with the respondent in that matter, at paragraphs 54 & 55 that:

“for purposes of efficiency and in the carrying out of the objective of the CMA Act, especially in the expeditious disposal of disputes that arise in the operations of the capital markets, the functions set out in section 11(3)(cc)(h) cannot be performed by separate bodies. To fragment the discharge of those functions will in our view, lead to disputes dragging for years on end and thus defeating one of the crucial objectives of the CMA Act: efficiency. As such, these functions have, as of necessity, to be discharged by one body hence the overlap in the mandate granted to CMA.

55. In the circumstances, we find and hold that section 11(3)(cc) & (h) of the CMA Act is not unconstitutional. The overlapping mandate does not per se render the Section unconstitutional.”
56. We note that the Elections Act in its Second Schedule in section 15(4) as reproduced in earlier parts of this Judgment empowers the appellant’s Enforcement Committee to issue summons requiring attendance before it. Further, the Rules of Procedure on Settlement Disputes confer similar powers to the appellant, including the imposition of sanctions. This court has been categorical that the Elections Act and the Regulations thereunder are normative derivatives of the principles embodied in articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution. (Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others, Application No 5 of 2014 [2014] eKLR at para 77; Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others, Petition No 2B of 2014 [2014] eKLR at paras 234, 243 and 244).
57. Thus, we are of the view that the Elections Act and the Electoral Code of Conduct therein are deliberately designed to enable the IEBC to perform its constitutional roles notably in articles 84, 88(4) (e), 88(5), and 252(1) of the Constitution.
58. It, therefore, goes without saying that this court consistently emphasizes the importance of adhering to the mechanisms and procedures of dispute resolutions provided by the law. As earlier illustrated, we have been quite consistent that the IEBC can conclusively determine pre-electoral disputes. Settling electoral disputes furnishes the IEBC with all requisite attendant powers to wit; conducting investigations, summoning witnesses, hearing complaints and making determinations thereof. This overlapping mandate is exceptional because it is authorized by statute and therefore is not unconstitutional. As such, the overlap does not foul the principle of natural justice, *nemo iudex in causa sua* (no man should be a judge in his own cause).
59. Noting that the Electoral Code of Conduct is designed to enable the IEBC to perform its constitutional and statutory mandate, the appellant is empowered to enforce the Code of Conduct through the issuance of summons and conducting trial proceedings. To find otherwise would be to hamper IEBC’s constitutional mandate. This finding also answers the second issue for determination, that indeed, the Electoral Code of Conduct is constitutional.
60. We, therefore, cannot agree with the superior courts below that IEBC acted in excess of jurisdiction, by issuing summons to and conducting hearings, pursuant to which it meted sanctions against the respondent. How else could IEBC conclusively resolve this matter? We are persuaded by the appellant that it has jurisdiction to summon witnesses and to conduct hearings in relation to a complaint of breach of the Electoral Code pursuant to article 88(4)(e) of the Constitution in



complement with article 252(3) of the Constitution. Thus, we remain faithful to the edict that a Constitution must be interpreted purposively and holistically and as an integrated whole, each clause supporting the other and not destroying it.

### iii. Whether the Electoral Code of Conduct was binding upon the Respondent.

61. The appellant contends that the Code was binding upon the respondent in accordance with section 110 of the Elections Act as read with paragraph 1(2) of the Code. This is denied by the respondent who urges that she did not offer herself for elective office and could not have subscribed to the Code in 2022 as she was not a candidate.

62. The Elections Act is instructive on this issue. Section 110 provides:

“ 110. Electoral code of conduct

1. Every political party and every person who participates in an election or referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that Schedule, determine.
2. A political party that is eligible to nominate candidates under the Constitution, this Act or any other written law shall not be eligible to contest in any election unless the political party and the candidate have subscribed to the Electoral Code of Conduct referred to in subsection (1).

63. The second Schedule of the Elections Act in sections 1 & 2 provide:

1. This Code shall be subscribed to by—
  - a. every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly;
  - b. every candidate; and
  - c. every leader, chief agent, agent or official of a referendum committee.
2. This Code shall, in so far as it is applicable, bind the Government and every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.

64. Article 84 of the Constitution mandates all candidates and political parties to comply with the Code of Conduct prescribed by IEBC. It is clear from the Constitution and the above provisions of the Elections Act, that it is mandatory for political parties, candidates, and members of the referendum committees who participate in an election or referendum under the Constitution to comply and subscribe to the Electoral Code.

65. Now was this Code binding on the respondent? She made the alleged utterances on February 10, 2022. We note that she was not a candidate during that electoral period. However, at the respective time, the appellant avers in its pleadings that she was a member of the Jubilee Party and that Jubilee Party was participating in the 2022 general elections. If this was indeed the case, it would mean that she was bound by the Electoral Code. However, we note that the Appellant other than stating this ground in its pleadings, they did not adduce any evidence to confirm that indeed the Jubilee Party subscribed to



the Electoral Code for the election period which time was running from the January 20, 2022 to the declaration of the results of the general election that were held on August 9, 2022. We note that Jubilee party was also not a party in this cause. Neither can we glean from the record that the appellant adduced proof that respondent was either a member or official of the Jubilee Party. Due to the inconclusive nature of the evidence on this, we find that the respondent cannot be found liable in the instant case.

### iii. Whether the respondent's Cross-Petition is Incompetent

66. The respondent filed a 'cross-petition' dated September 9, 2022, premised on eleven (11) grounds and seeking seven (7) reliefs. In objection, the appellant challenged the competency of the Cross-Petition on the grounds that the same was fatally defective to the extent that neither the Supreme Court Act nor the *Supreme Court Rules* contemplate the filing of a cross-petition to an appeal. It was further contended that the cross-petition lodged without a record of appeal as required under rule 47(2)(b) of the *Supreme Court Rules 2020*, was incompetent. Notably, the respondent did not controvert the appellant's position.

67. The *Black's Law Dictionary*, (11<sup>th</sup> Ed) Bryan A Garners defines a cross- appeal as:

'A proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal.'

68. We adopted this definition in *Albert Chaurembo Mumba & 7 others (suing on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*, SC Petition No 3 of 2016; [2019] eKLR (Albert Chaurembo) as follows:

"(163) By its definition, a cross appeal is an appeal by an appellee, usually heard at the same time as the Appellant's appeal (see *Black's Law Dictionary* 9<sup>th</sup> edition p 113). A cross-appeal is also defined as a request filed by an appellee (respondent) requesting that a higher court review a decision made by a lower court...." [emphasis added].

69. In contrast, the *Black's Law Dictionary* [*supra*] defines a cross-petition as,

'a claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action. Also known as a cross- complaint.'

Moreover, this court has expressly distinguished between a cross-petition and a cross-appeal. In *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others*, SC Petition No 14 of 2014; [2014] eKLR, we stated:

"[31] From the above definitions, there is a difference between a cross-appeal and a cross-petition. A cross- appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the court. A cross-petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies."

70. Guided by the foregoing, we restate our finding that a cross- appeal is distinct from a cross-petition. While a cross-appeal is filed to institute a counter appeal in an appellate process, a cross-petition is filed to institute a counter claim before a court exercising its original jurisdiction. Besides, Part V of the



*Supreme Court Rules 2020*, which regulates the mode of filing appeals before this court expressly refers to a cross-appeal, as opposed to a cross-petition. In the appeal before us, the respondent ought to have filed a cross-appeal. Rule 47(1) thereof provides the procedure for filing a cross -appeal as follows:

“A respondent who intends to cross-appeal shall specify the grounds of contention and the nature of the relief which the respondent seeks from the court” [emphasis supplied].

71. The second limb of the appellant’s objection was that the cross-petition was not accompanied by a record of appeal. We note that rule 47(2)(a) and (b) provides:

“47 (1) ....

2. The respondent shall-

- a. provide contact details including the names, postal address, telephone number and email address of any persons intended to be served with the notice; and
- b. lodge eight copies of the memorandum of appeal and record of appeal in the registry within thirty days of service upon the Respondent, or not less than thirty days before the hearing of the appeal, whichever is the later. [emphasis added]

72. Similarly, while extending time to file a cross-appeal, this court restated with approval this mandatory requirement in *Senate & 3 others v Speaker of the National Assembly & 10 others*, (Petition 19 (E027) of 2021); [2023] KESC 7 (KLR) and cautioned the applicant thus:

“In the circumstances, we are minded to consider granting the application, while reminding the 1<sup>st</sup> and 2<sup>nd</sup> respondent that, by rule 47(2)(b) aforesaid, they are required to lodge eight copies of the memorandum of appeal and record of appeal and not to rely on other parties’ pleadings as they have prayed” [Emphasised].

73. As submitted by the appellant, a scrutiny of the record reveals that the cross- petition was filed without eight copies of the memorandum and record of appeal as stipulated above. Flowing from the above, we see no reason to depart from this court’s rules and set procedure, as well as settled legal standards on the purpose, tenets and substance of cross-appeals. We therefore find that the pleadings by the respondent, ought to have been filed in adherence to rule 47 of the *Supreme Court Rules*. The failure to so comply renders the cross-petition, incurably defective.

## **F. Orders**

- i. The appeal partially succeeds to the extent that the IEBC had jurisdiction to summon, hear complaints and make findings thereon, where there is breach of the Electoral Code pursuant to article 88(4)(e) of the *Constitution*.
- ii. The appeal also partially succeeds to the extent that the Electoral Code of Conduct is constitutionally sound.
- iii. The appeal, to the extent that the respondent is to be found liable, is hereby dismissed.
- iv. The cross-petition is hereby struck out.
- v. Each party to bear its costs before this court, the Court of Appeal and the High Court.



vi. We hereby direct that, the sum of Kshs 6,000 deposited as security for costs upon lodging this appeal, be refunded to the appellant.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

.....

**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA**

.....

**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**

