In the matter of Commission for the Implementation of the Constitution (Advisory Opinions Application 1 of 2011) [2011] KESC 4 (KLR) (2 November 2011) (Ruling)

In Re the matter of Commissioner for the Implementation of the Constitution [2011] eKLR

Neutral citation: [2011] KESC 4 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

ADVISORY OPINIONS APPLICATION 1 OF 2011

MK IBRAHIM & SC WANJALA, SCJJ

NOVEMBER 2, 2011

IN THE MATTER OF ADVISORY OPINIONS OF THE COURT UNDER ARTICLE 163 (6) OF THE CONSTITUTION

Whether the Supreme Court can adopt and/or take over the record and proceedings from the Court of Appeal sitting as the Supreme Court.

Reported by Diana Mutunga

Civil Practice and Procedure*-advisory opinion-motion on advisory opinion taken out by the Commission for the Implementation of the Constitution (CIC) under article 163 (6) of the Constitution-jurisdiction- whether the Supreme Court had jurisdiction to direct the Court of Appeal to deliver its ruling on the matter-where the Court of Appeal sitting as the Supreme Court had been seized of its jurisdiction to hear and determine the motion-whether the Supreme Court should adopt the record and proceedings from the Court of Appeal sitting as the Supreme Court-validity of the application-Sixth Schedule (Constitution) section 24 (2), 29(2).*

Brief facts

The Commission for the Implementation of the Constitution (CIC) had filed a notice of motion before the Court of Appeal sitting as the Supreme Court seeking advisory opinions of the Court on several matters including; whether the appointing authority in making an appointment under sections 24(2) and 29(2) of the Sixth Schedule to the Constitution must have regard to the other provisions of the Constitution regarding the appointment of Constitutional Officers and if so, the extent to which the nominating or appointing authority whose powers are conferred by the Sixth Schedule to the Constitution is bound by the other provisions of the Constitution; and what the nature and extent of the consultation required under the National Accord and Reconciliation Act in making nominations and appointments to Constitutional Offices was. The Court of Appeal gave directions that the motion be heard by way of written submissions which would be orally highlighted at the hearing.

Various parties applied to be enjoined in the Application as "interested parties" and by leave of the Court they filed written submissions, some which raised issues of jurisdiction of the Court in respect of the Application. Most of the interested parties raised preliminary objections on points of law, relating to the jurisdiction of the

Court to hear and determine the Application whether as the Court of Appeal sitting as the Supreme Court or the Supreme Court generally. However, a few of the interested parties supported the right of CIC to be heard on the merits ie, they thought that that Court in whatever capacity had the jurisdiction to hear the matter.

After the hearing of the Application, the Court reserved its ruling for a later date. However, before the delivery of the ruling, the Judges of the Supreme Court were appointed and gazetted on the 16/06/2011. The Court of Appeal sitting as the Supreme Court then made the following order; "In view of the fact that there now exists the Supreme Court of Kenya and Judges thereto have been appointed and gazetted, it is doubtful whether the Court of Appeal sitting as the Supreme Court is still seized of the Jurisdiction to hear and determine this Application. In the circumstances, this Application is stood over *sine die*."

At the time of the establishment of the Supreme Court and the appointment and swearing of the Supreme Court Judges, the above motion was still pending. The Supreme Court placed the matter for mention to find out the position and views of counsel as to the way forward and to give directions accordingly. Counsel for the Applicant confirmed that the matter was still urgent and submitted that nothing stopped the Supreme Court from directing the 5 Judge Bench of the Court of Appeal, which had heard the matter to proceed to deliver their ruling.

In the alternative, counsel suggested that the now established Supreme Court could adopt the record and proceedings and prepare its ruling on the matter. Conversely, counsel for the Respondents submitted that since the Supreme Court Rules had now been promulgated, it was necessary for the Court and the parties to comply with the said Rules. Counsel further submitted that new issues could have arisen and there could be confusion if the matter proceeded from where the previous Bench had stopped. Counsel thus proposed that the matter ought to start afresh and the Applicants be directed to file fresh pleadings.

Issues

i. Whether the Supreme Court had jurisdiction to direct the Court of Appeal to deliver its ruling on a matter where the Court of Appeal sitting as the Supreme Court had been seized of its jurisdiction to hear and determine the motion

ii. Whether the Supreme Court should adopt the record and proceedings from the Court of Appeal sitting as the Supreme Court

Held

1. Regarding the jurisdiction of the Court of Appeal sitting as the Supreme Court to adjudicate over the Motion before it, the issue was already overtaken by events due to the establishment of the Supreme Court and the appointment of its judges.
2. Since the Court of Appeal sitting as the Supreme Court adjourned the matter *sine die*, it was for the 2 Judge-bench of the Supreme Court to filter and make a finding whether the said Court had the jurisdiction to constitute itself or sit as the Supreme Court, then leave it to the 5 Judge Bench to consider the matter.
3. It would be totally improper, irregular and unfair for the Supreme Court to set aside all proceedings and order the Applicant to file a fresh application so that they could comply with the new Supreme Court Rules. That would be prejudicial, costly and oppressive to the Applicant and the interested parties who had invested heavily in terms of expenses and precious time in reaching the stage of proceedings that had been recorded.
4. The Supreme Court Rules came into effect when the ruling of the Court was still pending and it would be prejudicial, onerous and oppressive to enforce the Application of the rules without taking into account what had already taken place. The law does not apply retroactively and it would be a violation of the rights of the parties who represent Kenyans to direct that the rules come first and the proceedings must wholly conform to the rules.
5. Although parties had filed their written submissions and the same adopted by the Court, the parties to the proceedings were given the option to file supplementary written submissions for purposes of

updating their already filed written submissions on grounds that many issues could have crystallized in the minds of counsel, discovery of new authorities or there may have been change of the situation on the ground in some aspect.

6. (***Obiter***) "The Court of Appeal acted judiciously prudently and wisely in declining to proceed to make a ruling after the establishment of the Supreme Court considering that any decision regarding Advisory Opinion including the questions of criteria and jurisdiction are matters that would bind the Supreme Court and the Country for a long time to come. For posterity and proper administration of justice, we think that since the Supreme Court was established it was best to leave the decision to the permanent Court and Judges who were mandated to discharge their functions under the Constitution and the Supreme Court Act. This was good for continuity, consistency and posterity. Had they delivered their ruling before the said establishment then that would have been a totally different situation and the country would have accepted their verdict and wisdom and it would still have been, the decision of the Supreme Court."

Advisory Opinion Application No 1 of 2011 including all its pleadings adopted by the Supreme Court; each party was to file supplementary written submissions if necessary; and oral submissions by way of highlighting to start afresh (de novo).

Orders

i. *The court adopted and took over Advisory Opinion Application No.1 of 2011 including all its pleadings.*
ii. *The court adopted and took over all the written submissions on record.*
iii. *The court set aside and expunged from the record all oral submissions and/or high-lighting of the written submissions on record.*
iv. *The hearing of the application/Motion was re-opened and the matter was deemed to be partly heard before the court.*
v. *Each party including Amicus Curiae was granted 14 days from the date of judgment to file and serve their respective Supplementary Written Submissions.*
vi. *Each party to file and serve a list of authorities, at least seven (7) working days before hearing (see Rule 15(1).)*
vii. *The list of authorities to contain a summarized analysis of each of the listed authorities specifying the ratio decidendi, relevance and applicability to the matter before the court (See Rule 15(2).*
viii. *Matter to be mentioned on November 17, 2011 to confirm compliance and to fix hearing dates of the Application by at least a 5-Bench Court, if not the Full Bench, as may be directed by the President of the Supreme Court of Kenya.*

Citations

None referred to

Statutes

East Africa

1. Constitution of Kenya (Repealed) sections 21(2); 24(2); 29(2)
2. Constitution of Kenya, 2010 articles 10, 21; 27(6)(8); 54(2);73; 156(2); 157(2); 163(6); 232
3. National Accord and Reconciliation Act, 2008 (Act No 4 of 2008)
4. Supreme Court Rules, 2011 rules 4(4)(c); 15(2); 23;

Texts

1. Black, HC., (Ed) *Black's Law Dictionary* St Paul Minnesota: West Publishing

RULING

1. On the 3rd March, 2011, the Commission for the Implementation of the Constitution (hereinafter referred to as "The C. I.C.") filed Notice of Motion dated 22nd March 2011 in the Court of Appeal Acting/sitting as the Supreme Court under the provisions of Section 21(2) of the Sixth Schedule of the Constitution. It was also filed under Rule 24 of the Temporary Practice Directions which the Court of Appeal had made.

2. The applicant, C.I.C. sought Advisory Opinions of the Court on the following matters:-

   (1) Section 29(2) of the Sixth Schedule to the Constitution provides as follows;

   > Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly."

   (a) Whether the appointing authority in making an appointment under Sections 24(2) and 29(2) of the Sixth Schedule (Transitional and Consequential Provisions) must have regard to the other provisions of the Constitutional regarding the appointment of Constitutional Officers and if so, the extent to which the nominating or appointing authority whose powers are conferred by the Sixth Schedule of Constitution is bound by the other provisions of the Constitution.

   (b) What is the nature and extent of the consultation required under the National Accord and Reconciliation Act in making nominations and appointments to Constitutional Offices and in particular what is the meaning and application of the provision, "until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly" contained in both Sections 24(2) and 29(2) of the Sixth Schedule?

   (2) Article 156(2) of the Constitution provides that "The Attorney General shall be nominated by the President, with the approval of the National Assembly, appointed by the President."

   Article 157(2) of the Constitution provides that "The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President."

   (a) Should the processes of nomination and appointment have due regard to and comply with the provisions of Articles 10, 73 and 232 of the constitution?

   (b) If the answer to question (a) above is in the affirmative, does such disregard and/or non-compliance render the resultant nomination and/or appointment unconstitutional?

   (3) Article 10 of the Constitution set out National Values and Principles of Governance. These guiding principles and values include:

(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) Good governance, integrity, transparency and accountability and

(d) Sustainable development.

Article 73 of the Constitution sets out the guiding principles of leadership and integrity which include;

(a) Selection on the basis of personal integrity, competence and suitability, or election free and fair elections;

(b) Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices;

(c) Selfness service based solely on the public interest, demonstrated by-

(i) Honesty in the declaration of public duties; and

(ii) The declaration of any personal interest that may conflict with public service.

(d) Accountability to the public for decisions and actions; and

(e) Discipline and commitment to public service.

Article 232 also sets out the values and principles of the Public Service.

(i) Should the processes of nomination and appointment of Constitutional officers, officers of state and Public Offers provided for in the Constitution have due regard to and comply with the provisions of Articles 10,73 and 232 of the Constitution?

(ii) If the answer to question (a) above is in the affirmative, does such disregard and/or non-compliance under the resultant nomination and/or appointment unconstitutional?

(4) Apart from outlawing discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age disability, religion, conscience, belief, culture, dress, language e or birth Article 27(3) provides that, "Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." Article 27(6) obliges the State to give effect to the realization of the rights guaranteed under article 27 by taking legislative and other measures including affirmative action programmers and polices designed to redress any disadvantages suffered by individuals or groups because of past discrimination. In addition Article 27(8) requires the State to take legislative and other measure to implement the principle that not more two-thirds of the members of elective or appointive bides shall be of the same gender.

How should the appointing and/or nominating authority exercising the powers of appointment and nomination under the Constitution and the Sixth Schedule of the Constitution apply the provisions of Article 27 of the Constitution?

(5) Article 54(2) obliges the state to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

3. How should the appointing and/or nominating authority exercising the powers of appointment and nomination under the Constitution apply the provisions of article 27 and article 54(2) of the Constitution?"

4. The Applicant also sought directions for the efficient just and expeditious consideration of the matter.

5. The Court of Appeal sitting as the Supreme Court on 5th April l, 2011 gave its DIRECTIONS in the following terms:-

> " DIRECTIONS
>
> This motion on advisory opinion was taken out by the Commission for the Implementation of the Constitution (CIC) under article 163(6) of the Constitution as read with section 21(2) of the Sixth Schedule of the Constitution.
>
> Upon hearing learned counsel for CIC, Mr. Regeru who is assisted by Mr. Majanja, T. Bryant and Ms. Thongori;
>
> And upon hearing the Attorney General who is represented by Ms Wanjiku Mbiyu.
>
> And upon hearing learned counsel Mr. Mwenesi who is instructed by the Kenya Magistrates and Judges Association (KMJA);
>
> And upon hearing learned counsel Mr. Harun Ndubi who is instructed by the Kenyans for Peace, Truth and Justice (KPTJ); we hereby issue the following directions in the matter.
>
> 1. The motion shall be heard for a period of three consecutive days commencing on 11th April, 2010.
>
> (6) The request by KMJA and KPTJ for a right of audience at the hearing of the motion is hereby granted.
>
> (7) Due to the urgency of the matter the motion shall be heard by way of written submissions which will be orally high-lighted at the hearing.
>
> (8) Any interested person shall be at liberty to peruse the motion at the Court of Appeal Registry in Nairobi, and at their own costs obtain a copy thereof.
>
> (9) Any person or group of persons who may wish to seek a right of audience before the court shall file a notice of intention to do so on or before Friday, the 8th April 2011.
>
> (10) Any person or group of persons who may wish to raise any issue of jurisdiction in respect of the motion shall file a notice to that effect on or before 11th April, 2011.
>
> (11) The Applicant shall forthwith publish the filing of the motion and these directions in three daily newspapers circulating within Kenya."

6. As a result of the said Directions the Motion was fixed for hearing for three consecutive days, namely 11th, 12th and 13th April, 2011. Various parties applied to be enjoined in the Application and be made "Interested parties". Parties were given leave to file written submissions which would be orally highlighted at the hearing. Subsequently some proposed Interested Parties gave notice directly or through their written submissions to raise issues of jurisdiction of the Court in respect of the Application.

7. On the 11th April 2011, the court did not commence the hearing as the written submissions were still being filed by various interested parties. The Application was adjourned to 12th April, 2011.

8. By the 12th April, 2011 several of the Interested Parties had filed their written submissions while quite a number had not. The Applicant filed an affidavit of compliance to confirm that they had complied with the Directions of the Court.

9. The court then granted audience to the Advocates of the parties present who were:-

    1. Mr. Regeru, Mrs. J. Thongori, Mr. David Majanja (as he then was) and Mr. T. Bryant for the Applicants.

    2. Ms. Wanjiku Mbiyu for the Attorney General.

    3. Mr. Haron Ndubi for Kenyans for Peace with Truth and Justice (K.P.T.J).

    4. Mr. A.R. Rebelo for the Institute for Democracy and Leadership in Africa – IDEA.

    5. Mr.Yash P. Ghai as Amicus Curiae.

    6. Mr. S.M. Mwenesi with Mr. S. Wamwayi for Kenya Magistrates & Judges Association and CREAW

    7. Dr. Stephen Njiru for Party of National Unity (PNU).

    8. Mr. Otiende Amolo in person.

    9. Dr. J. Khamiwna for the Law Society of Kenya.

    10. Mr. C.N. Kanjama for Mr. A. Omtatah and Kenyans for Justice and Development – ("KEJUDE").

    11. Mr. John Chigiti for the Kenya paraphelegic Organization.

    12. Mr. E. Ondieki Advocate – for himself.

    13. Koech Cosmas with 2 others for themselves

    14. Mr. Bigambo Abucheri for Kituo Cha Sheria.

10. The record shows that most of the Interested Parties through Counsel or directly raised preliminary Objections on Points of law, namely, that of the jurisdiction of the court to hear and determine the Application whether as the Court of Appeal sitting as the Supreme Court or the Supreme Court generally. However, a few of the Interested Parties supported the right of C.I.C to be heard on the merits i.e. they thought that that court in whatever capacity had the jurisdiction to hear the matter. The Amicus Curae questioned the jurisdiction of the court. As indicated earlier the Applicant and a number of the Interested Parties filed written submissions. Most of them made oral submissions to highlight these submissions or support one or the other side.

11. After the Applicant's Counsel rested his submissions, several parties expressed a wish to reply to the said submissions. However due to the constraints of time, the court directed that they could do so in the form of written submissions within 14 days. The matter was then fixed for mention on 5th May, 2011 for further orders. On the 5th May 2011, the court confirmed that the further written submissions had been filed and reserved the Court's Ruling for 3rd June, 2011. However, due to the absence of some of the Judges on official duties outside Nairobi, the Ruling was not delivered and the matter was adjourned to the 8th July, 2011.

12. Before the delivery of the Ruling, the Judges to the Supreme Court of Kenya were appointed and gazetted on 16th June 2011. The court on the 8th July, 2011 made the following order:-

> " ORDER OF THE COURT
>
> In view of the fact that there now exists the Supreme Court of Kenya and Judges thereto have been appointed and gazetted, it is doubtful whether the Court of Appeal sitting as the Supreme Court is still seized of the Jurisdiction to hear and determine this Application.
>
> In the circumstances, this application is stood over sine die."

13. As a result of the foregoing, when the Supreme Court became established and the Judges thereof duly appointed under the Provisions of Article 21 of the New Constitution we found the said Motion still pending.

14. The court placed the matter for mention to find out the position and views of counsel as to the way forward and to give directions accordingly.

15. Mr. Regeru for the C.I.C. together with Mr. J. Thongori and Mr. Bryant confirmed that they had instructions to prosecute the Notice of Motion and the urgency of the matter still existed. They set out the history of the events that took place since the Motion was filed. They decried the delays that took place as they had hoped that the matter would have been determined much earlier. Mr. Regeru submitted that infact, there is nothing which stopped the Court from directing that the 5 Judge bench which had heard the matter to proceed to deliver their Ruling. In the alternative, he suggested that the present Supreme Court now duly established could adopt the record and proceedings and prepare its Ruling on the matter, in such a situation counsel could highlight their written submissions. Finally, they were not averse to a de novo hearing based on the written submissions on record.

16. Ms Muthoni Kimani together with Mr. Ambwayo were of a different view. She submitted that now that the Supreme Court Rules, 2011 have been made and published, there was necessity that the court and parties comply with the said Rules. She proposed that the matter ought to start a fresh. She even suggested that the Applicant be directed to file fresh pleadings. She said that new issues could have arisen and there could be confusion if the matter proceeded from where the previous Bench had stopped.

17. Mr. Rebelo agreed with Ms Muthoni. He submitted that there was no provision for the Court of Appeal to have sat as the Supreme Court in the first place and therefore this court cannot now in law adopt or take-over proceedings which were a nullity.

18. Dr. Njiru, supported the said arguments and pointed out that it was now essential to follow the Rules of the Court and to file fresh submissions.

18. Mr. Kanjama also agreed with Mr. Njiru. He said that the question of the court's jurisdiction in respect of Advisory Opinions ought to be dealt with at the outset and that it was prudent to start the hearing de novo. He stated that he had not seen the proceedings of the previous Bench and there is no guarantee that if typed they would be a complete record or comply with the Supreme Court Rules. He proposed that the parties ought to be given a chance to file further submissions and authorities, at the very least.

19. Mr. Evans Ondieki commended the Court of Appeal sitting as the Supreme Court for doing a good job. He said that the 5 Judges' work ought not be brushed aside and this court ought to adopt the proceedings. He added that there ought to be continuity and save costs and judicial time. He urged the court to allow counsel to proceed and argue the emerging issues.

20. Mr. Chigiti on his part submitted that for the hearing to start de novo, it would be prejudicial to his clients and counsel. He said elaborate submissions had been done and it will cause delay and increase costs for the matter to start afresh. He said that this court could peruse the proceedings on record and give Counsel a chance to highlight their submissions. He submitted further that the Rules were published subsequently and court could conference with the parties to achieve some compliance with the Rules without setting aside what had been achieved.

21. Mr. S.M. Mwenesi narrated the events that had taken place previously leading to the decision of the Court of Appeal sitting as Supreme Court to decline jurisdiction. He submitted that the Motion was still pending and alive. He referred to Part 8 of the Rules in respect of Advisory Opinions and in particular Rule 40, 4(c) which provides as follows:-

> " 40 .....
>
> (4) A two Judge Bench may after giving the parties an opportunity to be heard reject a reference in whole or in part if –
>
> (a) .....
>
> (b) .....
>
> (c) The matter in respect of which the reference is made can be in the opinion of the court be resolved by the Attorney General and such advise has not been sought;
>
> (d) ....."

22. Mr. Mwenesi was of the view that C.I.C. ought to have consulted the Attorney General before filing the Motion. He said that the Attorney General cannot be made a Respondent in an Application for Advisory Opinion. He said that there were no transitional provisions enabling this court to take over the proceedings on record however that in the interest of substantial justice, the court could exercise its discretion and adopt the proceedings.

23. Mr. Mulekyo for Kituo Cha Sheria urged the court to adopt the proceedings as there was an urgent need for determination of the questions presented to the court. He said that the Rule ought not be a hindrance to the matter going forward.

24. Mr. Yash Pal Ghai was on record as "Amicus Curiae" to the court. He submitted that:-

- There was need for the interpretation of Article 163(6) of the Constitution.

- That Kenyans looked to the Supreme Court and they had high expectations.

- It was critical the way the Supreme Court developed the understanding of the New Constitution.

- The Supreme Court has the power and discretion to decide on whether to take jurisdiction in the matter or not.

- The Advisory Opinion and procedures were extremely unique and care must be taken when deciding on the extent of this jurisdiction in this matter.

- That most Commonwealth countries do not advocate the grant of Advisory Opinions.

- There is a risk that Advisory Opinions can weaken the political process and democratic space.

- Scope of Advisory Opinions must be stated.

- Mr. Ghai urged the court to look at the completion of the record. The court ought to direct the filing of the supplementary submissions and to start de novo on the oral submissions.

- In view of the important questions, the matter ought not be rushed for expediency.

- The court could give strict timeliness and stamp its authority in the proceedings.

25. Mr. Regeru as Counsel for the Applicant had an opportunity to reply. He submitted inter alia, that:-

- The new Supreme Court Rules cannot apply retrospectively yet they were published only on 10th October 2011 long after the proceedings had commenced.

- Rule 40 (4) (c) would complicate the situation.

- It was not intended to apply Rules that were not in place at the time.

- Parties complied with the Rules.

- There should be fidelity to the Constitution and there ought to be no down-grading or discrimination of certain provisions.

- The proceedings ought to have been typed so that there is a basis to follow.

- We do not support consolidation of this matter with Advisory Application No.2. There are different situations.

- The Attorney General has participated in the proceedings and even supported the application.

- The full Bench of 5 Judges had been constituted and sat properly under the Constitution.

- The Court of Appeal sitting as the Supreme Court promulgated Rules as Interim Supreme Court Rules.

- The Constitution clothed the Court of Appeal with jurisdiction to sit as the Supreme Court for a limited period.

- The Court of Appeal acted in deference to the Court but they can still render their judgment.

- The issues framed are still alive and require determination.

26. Mr. Bryant also submitted on the question whether any of the issues have been resolved and overtaken by events. He submitted that there were about 50 positions of state officers and Constitutional office holders to be filled.

27. That due to delays in the determination of the matter some offices had been filed but this does not resolve the questions, if the appointments were unconstitutional. He spoke of the expectations of Kenyans and their aspirations.

28. - There are questions as to whether there was ethnic, regional, gender etc balance including those with disabilities.

29. Mr. Kanjama raised concern as to the jurisdiction of a 2 Judge Bench to deal with the arguments presented at the mention. He indicated that his client expected a full Bench to deal with most of the matters raised and gave notice that they may make an application in this regard.

30. Mr. Chigiti submitted that the question No.5 touching on his clients the physically challenged were still alive and required judicial answers.

31. WE, have considered all the submissions by counsel, the unrepresented Interested Parties, and Amicus Curiae. We have also considered the pleadings, the written submissions and oral submissions on record.

32. First and foremost, we wish to clarify and place on record our function and mandate as a 2 Judge – Bench in the Mention/Directions procedure. We are, of course, not the Bench as envisaged in Article 163(2) of the New Constitution which reads.

> " 2. The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges."

33. Once a matter has been admitted for hearing in the Supreme Court then it is only a court comprising of at least 5 Judges which can hear any matter on its merits.

34. Our function and mandate under Rule 40 for the purposes of the specific motion is to filter, process and facilitate the hearing of the Application.

35. It is our view that the Court of Appeal proceeded to sit as the Supreme Court under the Provisions of Article 21(2) of the Sixth Schedule of the Transitional and Consequential Provisions which provides that:-

> " 21
>
> (1) .....
>
> (2) Until the Supreme Court is established, the Court of Appeal shall have jurisdiction over matters assigned to the Supreme Court."

36. Some parties have questioned this exercise of the said jurisdiction. After the establishment of the Supreme Court and gazettement of the appointment of the Judges to the Supreme Court, the 5 Bench Court in its discretion and wisdom adjourned the matter "sine die"

In "Black's Law Dictionary'

" Sine die" is said to be a Latin Phrase meaning "without day" –

Definition is given as "With no day being assigned (as for resumption of a meeting or hearing)

To adjourn "sine die"

- Is to end a deliberative court's session without setting a time to reconvene

- i.e. "Adjourned without day."

- (Where did we in Kenya get the phrase "Stood Over Generally" or "S.O.G."?)

37. We have seen the exact terms of the said adjournment. We do not think that it is for this 2-Judge Bench to make any finding as to whether the said Court had the jurisdiction to constitute itself as the Supreme Court or to sit as the Supreme Court. If this issue survives the filtering process then we leave it to the 5 Judge-Bench to consider the said issue.

38. Tentatively and sincerely without prejudice, we think that this is water under the bridge and the question has been overtaken by events. The said court decided not to deliver its decision doubting whether it had jurisdiction anymore considering the establishment of the Supreme Court proper and appointment of its judges.

39. The question that remains is whether the Supreme Court can now adopt and/or take over the proceedings and proceed to determine the issues in question and if so in what manner?

40. The Applicant due to the urgency of the motion and the issues which it has raised in its wisdom believed that time was of the essence and the questions which are certainly of national importance and interest could not await the establishment of the Supreme Court which we have referred to. The Court of Appeal in line with the said provisions accepted the filing of the said Application and admitted it into its Registry. The Court of Appeal which certainly constituted the then Hon. Chief Justice in exercise of this suggested jurisdiction acted accordingly and promulgated Interim Rules for the said court.

41. Directions were given and the hearing commenced and concluded on jurisdictional questions.

42. We have no doubt the Court of Appeal sitting as the Supreme Court were able and could have delivered their considered decisions/ruling. However, before they could do that, this court was established.

43. We see no fault whatsoever in the exercise of the said discretion considering all circumstances and the sensitive, weighty and serious issues of great national importance and interest that the Application for Advisory Opinion entailed.

44. It is our view that it would be totally improper, irregular and unfair for this court to set aside all proceedings and record and to order the Applicant to file a fresh Application so that they could comply with the new Supreme Court Rules. This would certainly be prejudicial, costly and oppressive to the Applicant and even the Interested parties etc who have invested heavily in terms of expenses and precious time in reaching the stage of proceedings that have been recorded.

45. We direct that the application/pleadings filed by the Applicant be and are hereby adopted and admitted into the Supreme Court proper and it is deemed as duly filed and on record.

46. We also think that the Court of Appeal acted judiciously prudently and wisely in declining to proceed to make a Ruling after the establishment of the Supreme Court considering that any decision regarding Advisory Opinion including the questions of criteria and jurisdiction are matters that would bind the Supreme Court and the Country for a long time to come. For posterity and proper administration of justice, we think that since the Supreme Court was now established it was best to leave the decision to the permanent court and Judges who were now mandated to discharge their functions under the Constitution and the Supreme Court Act. This was good for continuity, consistency and posterity. Had they delivered their Ruling before the said establishment then that would have been a totally different situation and the country would have accepted their verdict and wisdom and it would still have been, we think, the decision of the Supreme Court.

47. For us, we wish to take advantage of the situation so that as the Supreme Court we have the opportunity to be involved at first hand or hear the challenges of the famous Advisory Opinion Procedure. We wish to be involved in the resolution of the issues raised in this case. We do appreciate that any decision made herein in that regard would be a precedent –setting, historical jurisprudential event. As a result we wish

to be part of it so that we can internalize the ideas, arguments' and contentious issues. So that we can feel it in our minds, souls and bodies of the sensitives, weight and importance of the issues. We wish to be informed and educated by counsel so that we are part of this important process so that when criteria and jurisdictional parameters are set, then they are for the long haul and posterity.

48. We have considered the directions of the court regarding the written submissions, authorities, and highlighting by oral submissions. We have carefully perused the record.

49. Equally regarding the Written Submissions, we think that it would be prejudicial and wasteful to set aside the written submissions filed and on record. The parties have taken time and painstakingly prepared the elaborate and well argued submissions. Their research and industry, incisive and informative arguments and presentations are discernible from the face of the record. It would amount to an injustice to ask counsel and parties to go back to the drawing board to prepare fresh submissions. This court is inclined to build upon the good rather than dismantle for its own convenience.

50. We, therefore, hereby adopt the written submissions on record by all. They shall remain as part of the record of the court. However, we think that the oral highlighting having been done before we took over the proceedings, and having not appreciated and internalized the oral arguments it could be proper, fair and prudent that the oral submissions by way of highlighting ought to start a fresh or de novo.

51. We therefore, do hereby set aside all the oral submissions on record or oral highlighting. Each party through counsel shall be at liberty to once again and as a fresh start to make brief oral submissions by way of highlighting their respective written submissions.

52. We take cognisance of the fact that this is a very important matter as submitted by counsel and that subsequent to the closing of the hearing and/or filing of written submissions, many issues could have crystallized in the minds of Counsel, discovery of new authorities, or there may have been change of the situation on the ground in some aspect or other.

53. As a result, we think that it would be fair to give the parties an opportunity to up-date their written submissions, if necessary by way of supplementary Written Submissions.

54. We, therefore intend to give each party through counsel the right or leave to file supplementary written submissions, if necessary. This will , therefore be optional.

55. However should the Supreme Court Rules in enforce come into play, if at all in these scheme of things?

56. With regard to the Rules, we are of the view that they were made and gazetted long after these proceedings were filed and the application heard. The Rules came into force on 10th October 2011 when the Ruling was still pending. In view of the situation and our proposed direction herein, we find that it would be truly prejudicial, onerous and oppressive to enforce the application of the Rules without taking into account what has already taken place.

57. In any case, the law is clear that generally, the law does not apply retroactively. It would be a violation of the rights of the parties herein who represent Kenyans to direct that the Rules come first and the record/proceedings must wholly conform to the Rules.

58. Having said so, we think that now that we have re-opened the proceedings and have declared the matter as partly=-heard and are to order further submissions, then we could have a compromise. Some sort of – half house.

59. We propose that for the remainder of the proceedings and in particular with regard to any supplementary affidavits filed and reliance on authorities, we ought to be guided by the Rules as much as possible or practicable.

60. With regard to the parties who have been granted audience, we wish to state that the Rules as envisaged by Rule 23 will not be strictly applied here to the extent of those who were directly on record.

61. For similar reasons as given above, we are of the view that there are some aspects of the case which cannot be reversed by the application of the Rules. If the Rules were strictly applied we are not sure whether many of the parties could remain on record. However, these rules have objectives and it will apply to any new applicant though we would not encourage such late intervention in the circumstances.

62. We wish to place all future litigation litigants on notice that the Supreme Court Rules including Rule 23 will be applied to the hilt in any new proceedings in this Court, in future.

63. In conclusion, we hereby make the following Directions and Orders:-

    1. This court hereby adopts and takes over Advisory Opinion Application No.1 of 2011 including all its pleadings under the Title shown hereinabove.

    2. This court hereby adopts and takes over all the written submissions on record.

    3. This court hereby sets aside and expunges from the record all oral submissions and/or high-lighting of the written submissions on record.

    4. The hearing of the application/Motion is hereby re-opened and the matter is deemed to be partly heard before this court.

    5. Each party including Amicus Curiae is granted 14 days from the date hereof to file and serve their respective Supplementary Written Submissions.

    6. Each party shall file and serve a list of authorities, at least seven (7) working days before hearing (see Rule 15(1).)

    7. The list of authorities shall contain a summarized analysis of each of the listed authorities specifying the ratio decidendi, relevance and applicability to the matter before the court (See Rule 15(2).

    8. This matter shall be mentioned on 17th November 2011 to confirm compliance and to fix hearing dates of the Application by at least a 5-Bench Court, if not the Full Bench as may be directed by the President of the Supreme Court of Kenya.

DATED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2011.

M.K. IBRAHIM

JUDGE OF SUPREME COURT

SMOKIN WANJALA

JUDGE OF SUPREME COURT