



**Abdullahi v Attorney General & 2 others (Constitutional Petition E148 of 2023)
[2024] KEHC 434 (KLR) (Constitutional and Human Rights) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E148 OF 2023**

M THANDE, J

JANUARY 26, 2024

BETWEEN

ADAN MOHAMMED ABDULLAHI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

**SELECTION PANEL FOR THE RECRUITMENT OF NOMINEES
FOR APPOINTMENT AS CHAIRPERSON AND MEMBERS
OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

PARLIAMENTARY SERVICE COMMISSION 3RD RESPONDENT

The selection panel for the recruitment for nominees for appointment as commissioners of the IEBC ordered to expedite recruitment to ensure IEBC commissioners are appointed and in office

The petition concerned the delay in conducting a by-election for Banissa Constituency. The delay was due to the absence of Independent Electoral and Boundaries Commission (IEBC) commissioners caused by slow recruitment by the selection panel. The court highlighted the procedure for filling a vacancy in the office of a member of Parliament and the procedure for appointment of the chairperson and members of the IEBC. The court held that the delay in finalizing the selection and eventual appointment of commissioners of the IEBC was unreasonable. Further, the political rights of the constituents of Banissa Constituency to be represented had been violated by that state of affairs. The delay had also undermined the constitutional role of the IEBC to review boundaries. The selection panel was ordered to expedite the recruitment to ensure IEBC commissioners were appointed and in office.

Reported by Kakai Toili

Constitutional Law – commissions and independent offices - Independent Electoral and Boundaries Commission (IEBC) - appointment of the chairperson and members of the IEBC - what was the procedure to be followed in the appointment of the chairperson and members of the IEBC – claim that there was a delay in the



recruitment and appointment of the chairperson and members of the IEBC - whether the delay in recruitment and appointment of the chairperson and members of the IEBC was unreasonable and in violation of article 101(4) of the Constitution on the procedure for filling vacancies for members of Parliament - whether the delay in reconstituting the IEBC violated the political rights of the constituents of constituencies which had vacancies in the office of member of Parliament and threatened the discharge of IEBC's mandate to review boundaries - Constitution of Kenya, articles 38(3)(c), 89(2) and 101; Independent Electoral and Boundaries Commission Act (cap 7C), First Schedule, paragraph 4.

Constitutional Law – Parliament - office of a member of Parliament - vacancy in the office of a member of Parliament - what was the procedure to be followed in filling a vacancy in the office of a member of Parliament - Constitution of Kenya, article 101.

Evidence Law – admissibility of evidence – admissibility of evidence obtained unlawfully - whether a letter obtained unlawfully without the authority of the writer or addressee was admissible as evidence in a suit – Constitution of Kenya, article 50(4).

Constitutional Law – constitutional doctrines - political question doctrine - whether the political question doctrine could override constitutional provisions where the prevailing circumstances infringed on rights guaranteed by the Constitution.

Words and Phrases – political question doctrine – definition of the political question doctrine - the judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government - Black's Law Dictionary, Tenth Edition.

Brief facts

The petition arose from the delay in conducting a by-election for Banissa Constituency following the death of the area Member of the National Assembly in a road accident on March 29, 2023. The Speaker of the National Assembly declared the seat vacant, but no by-election was conducted within the 90-day constitutional timeline. The petitioner attributed the delay to the lack of a functional Independent Electoral and Boundaries Commission (IEBC), occasioned by the expiry of terms, resignations, and dismissal of previous commissioners. The delay in reconstituting the IEBC was traced to the slow recruitment process by the 2nd respondent, the selection panel for the recruitment for nominees for appointment as the chairperson and members of the IEBC (the selection panel) which had been appointed following amendments to the Independent Electoral and Boundaries Commission Act. The petitioner cited communications between the selection panel and the Parliamentary Service Commission (3rd respondent) suggesting a deliberate slowdown of the recruitment process. The absence of commissioners at the IEBC had affected not only the by-elections, but also the reviewing of constituency and ward boundaries, which was constitutionally due by early 2024. The petitioner sought for among other orders; a declaration that the IEBC had a constitutional obligation to hold a by-election in Banissa Constituency by June 29, 2023 being 90 days from the date of the vacancy.

The selection panel, raised preliminary objections, arguing that no specific timelines were prescribed for the recruitment process and that the matter was a political question. The 3rd respondent denied having interfered with the selection panel's work and challenged the admissibility of a letter relied upon by the petitioner, claiming it was obtained unlawfully and it violated their rights to privacy. The IEBC, appearing as an interested party, supported the petition and stated that the absence of commissioners had hampered its ability to discharge constitutional duties including the conduct of by-elections and the review of electoral boundaries.

Issues

- i. Whether the delay in recruitment and appointment of the chairperson and members of the IEBC was unreasonable and in violation of article 101(4) of the Constitution on the procedure for filling vacancies for members of Parliament.
- ii. Whether the delay in reconstituting the IEBC violated the political rights of the constituents of constituencies which had vacancies in the office of member of Parliament and threatened the discharge of IEBC's mandate to review boundaries.



- iii. What was the procedure to be followed in filling a vacancy in the office of a member of Parliament?
- iv. What was the procedure to be followed in the appointment of the chairperson and members of the IEBC?
- v. Whether a letter obtained unlawfully without the authority of the writer or addressee was admissible as evidence in a suit.
- vi. Whether the political question doctrine could override constitutional provisions where the prevailing circumstances infringed on rights guaranteed by the Constitution.

Relevant provisions of the Law

Constitution of Kenya

Article 50 – Fair hearing

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

Article 101 - Election of members of Parliament

(4) Whenever a vacancy occurs in the office of a member of the National Assembly elected under Article 97(1)(a) or (b), or of the Senate elected under Article 98(1)(a)—

(a) the respective Speaker shall, within twenty-one days after the occurrence of the vacancy, give notice in writing of the vacancy to the Independent Electoral and Boundaries Commission; and

(b) a by-election shall be held within ninety days of the occurrence of the vacancy, subject to clause (5).

Held

1. The right to privacy of communication was protected under article 31(4) of the Constitution which provided that every person had the right to privacy, which included the right not to have the privacy of their communications infringed. Both the writer and the addressee of the letter in question were persons within the definition of “person” under article 260 of the Constitution. As such, their right not to have the privacy of the letter in question infringed was protected under the Constitution. The manner in which the letter was obtained violated that right.
2. The letter in question was neither addressed to the petitioner nor copied to him. It was not clear how he obtained that letter and the court had not been told how the same was obtained. The only conclusion that could be drawn was that the letter was obtained unlawfully and in a manner that violated the respondents’ right to privacy. The letter which was obtained unlawfully, without the authority of the writer or addressee, could not be allowed to remain on the record. Using the letter as evidence would be detrimental to the administration of justice and militate against the principle underlying article 50(4) of the Constitution. Accordingly, the letter dated April 27, 2023 was expunged from the record.
3. The instant petition was principally concerned about the delay by the selection panel in concluding the process of recruitment of the chairperson and commissioners of IEBC so that they could get on with the business of the by-election for the member of the National Assembly for Banissa Constituency. Whereas the selection panel was appointed pursuant to the law under challenge in Petition No 104 of 2023, the outcome of the instant petition would not have any bearing on the other petition. In any event, were the Independent Electoral and Boundaries Commission Act ultimately found to be unconstitutional, the court seized with the matter would make appropriate orders. There was no basis for staying the instant matter.
4. Article 101 of the Constitution provided for the election of members of Parliament. Article 101(4) stipulated the procedure for filling a vacancy in the office of a member of Parliament. Once such a vacancy occurred, the provisions of article 101(4) were brought into effect. The sequence of events was that the Speaker of the National Assembly shall within 21 days after the occurrence of the vacancy notify the IEBC in writing, of the vacancy. The IEBC shall then conduct a by-election within 90 days



- of the occurrence of the vacancy. The only rider was that such vacancy may not be filled if the same occurs within three months immediately before a general election.
5. The by-election to fill the vacancy therein ought to have been conducted by June 29, 2023 as per the timelines set out in article 101(4) of the Constitution, given that the vacancy occurred on March 29, 2023. The elections were to be conducted by the IEBC pursuant to its mandate under article 88(4). However, there were no commissioners of the IEBC, a situation that was subsisting even prior to the demise of the deceased. The selection panel was appointed by the President vide gazette notice dated February 27, 2023.
 6. The law required the selection panel to within 7 days of its appointment, invite applications from qualified persons interested in the position of commissioners of IEBC. Upon receipt of applications, IEBC was required to publish the names of all applicants and their qualifications in the Gazette, 2 newspapers of national circulation and on the website of the 3rd respondent. All interviews of the shortlisted applicants were to be conducted in public. Thereafter the selection panel shall forward to the President, the names of two persons qualified to be appointed as chairperson for the nomination of one person.
 7. The names of nine persons qualified to be appointed as commissioners were to be forwarded to the President for nomination of six persons. Within seven days of receipt of the names, the President was to forward the list of nominees to the National Assembly for approval. Paragraph 4 of the First Schedule to the Independent Electoral and Boundaries Commission Act directed the President to within seven days of receipt of the names approved by the National Assembly, by notice in the Gazette, appoint the Chairperson and the members of the Commission.
 8. No time frame had been fixed for the process of receiving and considering applications, shortlisting, interviewing applicants and selecting the names to be forwarded to the President. Where no timelines had been given to do a specific thing, section 58 of the Interpretation and General Provisions Act provided that it shall be done without unreasonable delay. Similar provisions were contained in the Constitution for the performance of any act in respect of which no time frame was prescribed by the Constitution.
 9. The by-election for Banissa Constituency was to be held by June 29, 2023, as required by the Constitution, given that the vacancy arose on March 29, 2023. By that date, the chairperson and commissioners of the IEBC ought to have been in office in order to give direction to the secretariat on the conduct of the by-election and to supervise the same.
 10. The period of 90 days within which a by-election must be held was ring-fenced by the Constitution in article 101(4)(b) of the Constitution. The rationale for the strict constitutional time frame in filling vacancies must be to ensure that no electoral unit and the people thereof, shall remain unrepresented for more than 90 days.
 11. Given the prompt mechanism provided by the Constitution to fill vacancies that arose in electoral units, the delay in finalizing the selection and eventual appointment of commissioners of the IEBC was unreasonable and had resulted in a constitutional crisis. Further, the political rights under article 38 of the Constitution of the constituents of Banissa Constituency to be represented had been violated by that state of affairs.
 12. Besides conducting and supervising elections, the delimitation of electoral units also fell within the mandate of the IEBC under article 89 of the Constitution. IEBC was required to review the names and boundaries of constituencies at intervals of not less than eight years, and not more than 12 years. Any review must however be completed at least 12 months before a general election of members of Parliament. The IEBC was also required to review the number, names and boundaries of wards periodically. The functions of the IEBC were further stipulated in section 4 of the Independent Electoral and Boundaries Commission Act. Under article 88(5) of the Constitution, IEBC must



- exercise its powers and perform its functions in accordance with the Constitution and national legislation.
13. The last review of boundaries was done in March 2012. By dint of article 89(2) of the Constitution the next review ought to be conducted and concluded by February 2024. Without the appointment of the commissioners, there was no commission to discharge the critical mandate conducting and supervising by-elections as well as the review of boundaries. The delay in the recruitment of the chairperson and members of IEBC, had thus undermined the constitutional role of the IEBC.
 14. Neither the people of Kenya nor Parliament envisaged a situation where there would a vacancy in the office of the chairperson and all commissioners of the IEBC at the same time and a for an extended period of time. Indeed, paragraph 1(1) of the First Schedule of the Independent Electoral and Boundaries Commission Act made adequate provision for the timely filling of vacancies.
 15. The current state of affairs in IEBC was that notwithstanding its very important constitutional mandate, there was not a single hand on deck by way of commissioners. For IEBC, a critical constitutional commission, to remain without commissioners since January 2023, was untenable. That went counter to the provisions of article 249 of the Constitution which required IEBC and other commissions and independent offices of which IEBC was one, to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism.
 16. The court was aware and took judicial notice of the bi-partisan talks, named the National Dialogue Committee which had been co-chaired by the leader of the Majority in the National Assembly and a key leader in minority coalition. Matters which were best resolved through legislative and the executive interventions should be allowed to benefit from such resolution before or without intervention by the courts. The political question thus went to the justiciability of a matter before court.
 17. The reconstitution of the IEBC was a political question that was best resolved in a political process. However, while a political settlement on the reconstitution of the IEBC would be ideal, the prolonged period in which the recruitment process had been pending, had resulted in the continued violation of the rights of the people of Banissa Constituency to be represented in the National Assembly. The court rejected the notion that the political question doctrine should override the very explicit constitutional provisions and that the prevailing circumstances should be allowed to continue to threaten and infringe on rights guaranteed by the Constitution.
 18. The holding of by-elections in Banissa constituency was a constitutional process with strict timelines. Similarly, the review of the names and boundaries of electoral units had strict timelines. Given that the deadline for the review was looming, the threat of violation of the provisions of article 89 of the Constitution was real. Additionally, the establishment and functions, composition, appointment and terms of office of commissioners of the IEBC was stipulated in the Constitution. As such, compliance with the Constitution should not be suspended for the sake of political expediency. The intervention of the court was therefore justified, more so, because the bi-partisan talks were not anchored in either the Constitution or the law.
 19. Article 2 of the Constitution stipulated the supremacy of the Constitution and bound all persons and all State organs at both levels of Government. Article 23 of the Constitution conferred upon the court the authority to uphold and enforce the Bill of Rights in the Constitution. The court exercised unlimited jurisdiction under article 165 of the Constitution pursuant to judicial authority that was derived from the people of Kenya and vested in it under article 159 of the Constitution. The court was further enjoined under article 258 of the Constitution to uphold and enforce the Constitution and under article 259 of the Constitution, to interpret it in a manner that promoted its purposes, values and principles; advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance.



20. If the court were to fail to intervene in the instant circumstances by declining jurisdiction, it would cede not only its authority, but fail to protect the Constitution. The court did not subscribe to the notion that under no circumstances could it intervene where there was violation or threatened of the Constitution.

Petition allowed.

Orders

- i. *A declaration was issued that pursuant to the provisions of article 101(4) as read with article 103(1)(a) of the Constitution, a vacancy arose in the seat of Member of the National Assembly for Banissa Constituency on March 29, 2023 when the then sitting member died and the IEBC had a constitutional obligation to hold a by-election in that constituency by June 29, 2023 being 90 days from the date of the vacancy.*
- ii. *A declaration was issued that failure by the selection panel for the recruitment for nominees for appointment as the chairperson and members of the IEBC in view of the vacancy in the office of the Member of the National Assembly for Banissa Constituency had violated the express provisions of article 101(4) of the Constitution of Kenya.*
- iii. *A mandatory order was issued to the selection panel for the recruitment for nominees for appointment as the chairperson and members of the IEBC to take immediate measures and/or steps to undertake the nomination exercise and to submit for appointment successful applicants for the positions of members and chairperson of the IEBC as to make it possible for the commissioners to be in office.*
- iv. *No order as to costs.*

Citations

Cases

Kenya

1. *Independent Electoral and Boundaries Commission & 4 others v Ndi & 312 others; Ojwang & 4 others (Amicus Curiae) Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021; [2021] KECA 363 (KLR) (Consolidated) - (Explained)*
2. *Kiriwa Wa Ngugi & 19 others v Attorney General & 2 others Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Explained)*
3. *Mbae v Speaker, County Assembly of Nakuru & another; others (Interested Party) Constitutional Petition E004 of 2022; [2022] KEHC 3313 (KLR) - (Explained)*
4. *Okoiti, Okiya Omtatah & 2 others v Attorney General & 4 others Civil Appeal 13 of 2015; [2020] KECA 589 (KLR) - (Explained)*
5. *Ramogi, William Odhiambo & 2 others v Attorney General & 6 others Constitutional Petition 159 of 2018; [2018] KEHC 9718 (KLR) - (Explained)*

Texts

Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Constitution of Kenya article 2, 23, 31; 50(4); 88(4); 89; 101(4); 103(1)(a); 159; 165; 249; 251; 259(8); 260- (Interpreted)
2. Elections Act (cap 7) section 36 - (Interpreted)
3. Evidence Act (cap 80) section 35 - (Interpreted)
4. Independent Electoral and Boundaries Commission Act (cap 7C) section 4; paragraph 1(1) First Schedule - (Interpreted)
5. Public Appointments (Parliamentary Approval) Act (cap 7F) In general - (Cited)
6. Interpretation and General Provisions Act (cap 2) section 58 - (Interpreted)
7. Parliamentary Service Act (cap 186) section 49 - (Interpreted)



Advocates

None mentioned

JUDGMENT

1. The facts of the matter herein as set out in the petition dated May 4th, 2023 are that a vacancy occurred in the office of the member of the National Assembly for Banissa Constituency, in Mandera County. This happened following the demise of Hon Kullow Maalim Hassan (the deceased, the then sitting member, in a road traffic accident on March 29th, 2023. As required by law, the Speaker of the National Assembly declared the seat vacant.
2. Prior to the demise of the deceased, the President vide a gazette notice dated February 14th, 2023, declared the positions of the chairperson and 5 commissioners of the Independent and Electoral and Boundaries Commission (IEBC), the Interested Party. The vacancy arose due to the expiration of the term of the then Chairperson Wafula Chebukati and Commissioners Boya Molu and Abdi Guliye in February 2023, while Commissioners Juliana Cherera, Justus Nyangaya and Francis Wanderi resigned in late 2022. Commissioner Irene Masit's appointment was terminated by the President on March 1st 2023 under article 251 of the [Constitution](#), vide gazette Notice No 2642. This state of affairs led the President to appoint vide a gazette notice dated February 27th, 2023 members of the 2nd respondent (the Selection Panel). The composition was in line with the amendments to the [Independent and Electoral and Boundaries Commission Act \(IEBC Act\)](#) in January 2023. On April 2nd, 23, the President proposed that the issue of composition of the selection panel be a subject of a bi-partisan parliamentary political settlement.
3. The petitioner claims that correspondence between the 2nd and 3rd respondents reveals an agreement to slow down the process of recruitment of the chairman and commissioners of the IEBC. The process of conducting a by-election in Banissa Constituency under section 16 of the [Elections Act](#) within the prescribed time has not commenced owing to vacancy in the positions of the chairperson and commissioners of IEBC. This state of affairs has affected Kisa East Ward in Kakamega County where the member of the county assembly died. The petitioner further claims that there is also the issue of review of constituency and ward boundaries which must be done and completed by early next year and require all commissioners of the IEBC.
4. The petitioner has thus filed the petition seeking the following reliefs:
 - A. A declaration be and in hereby issued that pursuant to the provisions of article 101(4) as read with article 103(1)(a) of the [Constitution](#), a vacancy arose in the seat of Member of the National Assembly for Banissa Constituency on 29/3/2023 when the then sitting Member died and the IEBC has a constitutional obligation to hold a by-election in the said constituency by the June 29th, 2023 being 90 days from the date of the said vacancy.
 - B. A declaration that the failure by the selection panel for the recruitment for nominees for appointment as the chairperson and members of the Independent Electoral and Boundaries Commission in View of the vacancy in the office of the Member of the National Assembly for Banissa Constituency threatens to violate the express provisions of article 101(4) of the [Constitution](#) of Kenya, 2010.
 - C. A declaration that the decision of the selection panel together with the Parliamentary Service Commission (the 2nd and 3rd respondents herein) to slow down the long-listing and short-listing of persons for consideration for nomination to the office of the chairperson and



commissioners of the Independent Electoral and Boundaries Commission in total disregard of its imminent impact on the delay in holding a by-election in Banissa Constituency, Kisa East Ward, as well as the process of delimitation of constituency and ward boundaries is a threat to the relevant parts of the Constitution setting out timelines for filling vacant seats in the National Assembly, and the County Assemblies and the review and delimitation of constituency and ward boundaries

- D. A mandatory order be and is hereby issued to the Selection panel for the recruitment for nominees for appointment as the chairperson and members of the Independent Electoral and Boundaries Commission undertake the nomination exercise and to submit for appointment successful applicants for the positions of members and chairperson of the Independent Electoral and Boundaries Commission in such at such pace as to make it possible for the Commissioners to be in office.
- E. The costs of this petition.
5. The 1st respondent filed grounds of opposition dated May 10th, 2023 opposing the petition. These were however withdrawn on May 15th 2023 with counsel stating he would address issues of law in submissions, which were however not filed.
6. On its part, the 2nd respondent, the Selection Panel filed a preliminary objection dated May 12th 2023. The objections are that first, no specific timelines for undertaking the recruitment process in question has been prescribed. In such case, the recruitment ought to be done without unreasonable delay as per section 58 of the Interpretation and General Provisions Act. The Selection Panel which has been in office for barely 2 months, has been undertaking the process and is therefore not guilty of unreasonable delay. Second, under the political question doctrine, this court lacks jurisdiction determine this matter which is a quasi-political process that is reposed first in the Selection Panel, the National Assembly and the President. Third, that the letter dated April 27th 2023 from the CEO of the 3rd respondent to the Chairperson of the Selection Panel exhibited by the petitioner is inadmissible as it was illegally and irregularly obtained, in violation of the said respondents' right to privacy under article 31(d) of the Constitution and offends the provisions of article 50(4), section 49(1) and (2) of the Parliamentary Service Act and section 35 of the Evidence Act.
7. The 3rd respondent opposed the petition vide a replying affidavit sworn by Jeremiah Nyegenye, the Clerk of the Senate and Secretary to the Parliamentary Service Commission. He averred that under the 3rd respondent does not have the power or authority to direct the Selection Panel on how to carry out its mandate. Under the First Schedule of the IEBC Act, the role of the 3rd respondent in the recruitment of the Chairperson and members of the IEBC is limited to nominating two names to be members of the Selection Panel, receiving the names of nominees of persons to serve as members of the Selection Panel from the respective nominating bodies and transmitting the same to the President for appointment and providing the secretariat services and facilities required by the Selection Panel in the performance of its functions. The 3rd respondent denied having directed the 2nd respondent on how it should undertake its mandate and has not entered into any agreement with the 2nd respondent to slow down its work. it was further deposed that the letter dated April 24th 2023 is confidential and privileged communication from the 3rd respondent to the 2nd respondent and was obtained illegally and irregularly in violation of the said respondents right to privacy under article 31(d) of the Constitution and is therefore inadmissible as evidence.
8. The 3rd respondent further filed an application dated May 12th 2023, seeking that the said letter dated April 27th 2023 be expunged from the record, having been obtained by illegal and unlawful means.



9. The petition is supported by the interested party, IEBC vide a replying affidavit sworn on May 15th 2023 by Crispine Owiye its Director in Charge of Legal Services. It was deponed that as at January 19th, 2023, there were no Commissioners in office, a position which subsists to date. Given that the Constitution and the IEBC Act require a quorate Commission to undertake its Constitutional responsibilities, some key functions of the IEBC which must be undertaken in strict compliance with constitutional timelines, have been hampered. These functions include the conduct of by-elections, under article 101(4), delimitation and review of constituency and ward names and boundaries in accordance with the provisions of article 89 as read with Section 36 of the Elections Act after consultation with all interested parties. This process is yet to start due to the absence of Commissioners to make critical policy decisions and to guide and give direction to the secretariat, in implementing IEBC's mandate. In light of this, the respondents should do everything within their powers as conferred by law to ensure the Commission is properly constituted to avert falling into a constitutional crisis in the conduct of its important mandate.
10. It is the petitioner's case that failure by the Selection Panel to fast track the process of interviewing applicants for the positions of the commissioners of IEBC and hence the delay in holding the by-election for Banissa Constituency threatens to violate the express provisions of article 101(4) the Constitution which requires the holding of the by-election within 90 days of occurrence of the vacancy. This is supported by the IEBC which contends that the delay has stalled the dispensation of its constitutional mandate as provided under article 88(4) to inter alia conduct or supervise referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament. Similarly, the state of affairs has made it impossible for the IEBC to review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, and of wards periodically as required under article 89.
11. As I embark on consideration of the petition, it is necessary to resolve the issue of the letter dated April 27th 2023, which the respondents claim was obtained illegally and should be expunged from the record. They relied on section 49 of the Parliamentary Services Act and article 50(4) of the Constitution. Section 49 prohibits the giving of evidence of proceedings in the Commission without leave. It provides as follows:
 1. A member or an officer of the Commission or any person employed to take minutes or evidence before the Commission or any committee shall not give evidence elsewhere in respect of the contents of those minutes or evidence or of the contents of any document laid before the Commission or that committee or in respect of any proceedings or examination held before the Commission or that committee without special leave first obtained from the chairperson.
 2. The special leave referred to in subsection (1) may be given by the vice-chairperson in the absence or other incapacity of the chairperson.
12. The prohibition is directed at a member or officer of the 3rd respondent or any person employed to take minutes or evidence before it or its committees. It also relates to proceedings before the 3rd respondent or any of its committees as the case may be. In light of what section 49 provides, I have difficulty finding its relevance to the matter herein.
13. Article 50(4) provides as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.



14. The writer of the said letter is the clerk of the Senate who is also the Secretary to the 3rd respondent and is addressed to the Chairman of the Selection Committee. The Respondents contend that the letter was obtained in a manner that violated their right to privacy and should thus not be used in evidence.
15. The right to privacy of communication is protected under article 31(4) which provides that every person has the right to privacy, which includes the right not to have the privacy of their communications infringed. Both the writer and the addressee of the letter are persons within the definition of “person” under article 260. As such, their right not to have the privacy of the letter in question infringed is protected under the Constitution. The manner in which the said letter was obtained violated this right.
16. In the case of Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR, the Court of Appeal considered a matter in which the superior court evidence obtained in an unlawful manner, and stated:
 84. We therefore agree with the learned judge that it would be detrimental to the administration of justice and against the principle underlying article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned “conscientious citizens” or “whistleblowers” might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.
17. The letter in question in the matter before me, was neither addressed to the petitioner nor copied to him. It is not clear how he obtained this letter and the court has not been told how the same was obtained. The only conclusion that can be drawn is that the letter was obtained unlawfully and in a manner that violated the Respondents’ right to privacy. Duly guided by the Court of Appeal in the cited case, I find and hold that the said letter which was obtained unlawfully, without the authority of the writer or addressee, can not be allowed to remain on the record. Using the letter as evidence would be detrimental to the administration of justice and of course militate against the principle underlying Article 50(4). Accordingly, the said letter dated April 27th 2023 is hereby expunged from the record.
18. The respondents made an oral application seeking that this matter be stayed pending the hearing and determination of Petition No E104 of 2023 which petition raises matter that are substantially and materially the same as those in the instant petition. Although they did not avail the said petition, they told the court that the petitioner therein sought a declaration that the IEBC (Amendment) Act No 1 of 2023 is unconstitutional and that anything done thereunder is invalid, null and void ab initio.
19. As can be seen, the instant petition is principally concerned about the delay by the Selection Panel in concluding the process of recruitment of the chairperson and commissioners of IEBC so that they can get on with the business of the by-election for the member of the National Assembly for Banissa Constituency. Whereas the court recognizes that the Selection Panel was appointed pursuant to the law under challenge in Petition No 104 of 2023, my view is that the outcome of this petition will not have any bearing on the other petition. In any event, were the IEBC Act be ultimately found to be unconstitutional, the court seized with the matter will no doubt make appropriate orders. Accordingly, I find no basis for staying this matter as sought.
20. Article 101 of the Constitution provides for the election of members of Parliament. Clause (4) stipulates the procedure for filling a vacancy in the office of a member of Parliament as follows:

Whenever a vacancy occurs in the office of a member of the National Assembly elected under article 97(1)(a) or (b), or of the Senate elected under article 98(1)(a)—



- (a) the respective Speaker shall, within twenty-one days after the occurrence of the vacancy, give notice in writing of the vacancy to the Independent Electoral and Boundaries Commission; and
- (b) a by-election shall be held within ninety days of the occurrence of the vacancy, subject to clause(5).

Clause (5) provides that where a vacancy occurs within the 3 months immediately before a general election, shall not be filled.

21. The facts herein are that a vacancy did occur in the office of the Member of the National Assembly or Banissa Constituency on March 29th 2023. Once such a vacancy occurs, the provisions of article 101(4) are brought into effect. The sequence of events is that the Speaker of the National Assembly shall within 21 days after the occurrence of the vacancy notify the IEBC in writing, of the vacancy. The IEBC shall then conduct a by-election within 90 days of the occurrence of the vacancy. The only rider is that such vacancy may not be filled if the same occurs within 3 months immediately before a general election.
22. The by-election to fill the vacancy herein ought to have been conducted by June 29th 2023 as per the timelines set out in article 101(4), given that the vacancy occurred on March 29th 2023. The elections were to be conducted by the IEBC pursuant to its mandate under article 88(4). However, there are no commissioners of the IEBC, a situation that was subsisting even prior to the demise of the deceased herein. The Selection Committee was appointed by the President vide gazette notice dated February 29th 2023.
23. Paragraph 3 of the First Schedule makes provision for the procedure for selection of nominees as follows:
 1. The selection panel shall, within seven days of its appointment, invite applications from qualified persons and publish the names of all applicants and their qualifications in the Gazette, two newspapers of national circulation and on the website of the Parliamentary Service Commission.
 2. The selection panel shall consider the applications, shortlist and interview the applicants.
 3. The interviews under subparagraph (2) shall be conducted in public.
 4. After conducting interviews under subparagraph (2), the selection panel shall select two persons qualified to be appointed as chairperson and nine persons qualified to be appointed as members of the Commission and shall forward the names to the President for nomination of one person for appointment as the chairperson and six persons for appointment as members.
 5. The President shall, within seven days of receipt of the names under sub-paragraph (4), forward the list of nominees to the National Assembly for approval in accordance with the [Public Appointments \(Parliamentary Approval\) Act](#) (cap 7F).
24. The law requires the Selection Panel to within 7 days of its appointment, invite applications from qualified persons interested in the position of commissioners of IEBC. Upon receipt of applications, IEBC is required to publish the names of all applicants and their qualifications in the Gazette, 2 newspapers of national circulation and on the website of the 3rd respondent. All interviews of the shortlisted applicants are to be conducted in public. Thereafter the Selection Panel shall forward to the President, the names of 2 persons qualified to be appointed as chairperson for the nomination of 1 person. Also to be forwarded to the President are names of 9 persons qualified to be appointed as



commissioners, for nomination of 6 persons. Within 7 days of receipt of the names, the President is to forward the list of nominees to the National Assembly for approval. Paragraph 4 directs the President to within 7 days of receipt of the names approved by the National Assembly, by notice in the Gazette, appoint the Chairperson and the members of the Commission.

25. It is noted that no time frame has been fixed for the process of receiving and considering applications, shortlisting, interviewing applicants and selecting the names to be forwarded to the President. Where no timelines have been given to do a specific thing, section 58 of the [Interpretation and General Provisions Act](#) provides that its shall be done without unreasonable delay as follows:

Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.

26. Similar provisions are contained in the [Constitution](#) for the performance of any act in respect of which no time frame is prescribed by the [Constitution](#). Article 259(8) which provides:

If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.

27. The by-election for Banissa Constituency was to be held by June 29th 2023, as required by the [Constitution](#), given that the vacancy arose on March 29th 2023. By that date, the Chairperson and Commissioners of IEBC ought to have been in office in order to give direction to the Secretariat on the conduct of the by-election and to supervise the same.

28. The period of 90 days within which a by-election must be held is ring-fenced by the [Constitution](#) in article 101(4)(b). The rationale for the strict constitutional time frame in filling vacancies must surely be to ensure that no electoral unit and the people thereof, shall remain unrepresented for more than 90 days. This was the holding in the case of [Mbae v Speaker, County Assembly of Nakuru & another; others \(Interested Party\)](#) (Constitutional Petition E004 of 2022) [2022] KEHC 3313 (KLR) (7 July 2022) (Judgment), where a 3-Judge bench stated:

the [Constitution](#) explicitly envisions that the only time that a by-election will not be held is the ninety days before a general election ring-fenced to ensure that the IEBC has sufficient time and resources to prepare for the General Elections. From this exposition, it is possible to conclude that the constitutional intention is that no ward, constituency or county would remain unrepresented in the County Assembly or Parliament for more than ninety days. A purposeful reading of the [Constitution](#) is, therefore, one that coheres the disparate provisions of the [Constitution](#) to yield that result.

29. Given the prompt mechanism provided by the [Constitution](#) to fill vacancies that arise in electoral units, the delay in finalizing the selection and eventual appointment of commissioners of IEBC is unreasonable and has resulted in a constitutional crisis. Further the political rights under article 38 of the constituents of Banissa Constituency to be represented have been violated by this state of affairs.

30. Besides conducting and supervising elections, the delimitation of electoral units also falls within the mandate of the IEBC under article 89, which provides inter alia, as follows:

1. ...

2. The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.



3. The Commission shall review the number, names and boundaries of wards periodically.
 4. If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.
31. IEBC is required to review the names and boundaries of constituencies at intervals of not less than 8 years, and not more than 12 years. Any review must however be completed at least 12 months before a general election of members of Parliament. The IEBC is also required to review the number, names and boundaries of wards periodically. The functions of the IEBC are further stipulated in section 4 of the *IEBC Act*. Under article 88(5), IEBC must exercise its powers and perform its functions in accordance with the *Constitution* and national legislation.
 32. It is not disputed that the last review of boundaries was done in March 2012. By dint of article 89(2) the next review ought to be conducted and concluded by February 2024. Without the appointment of the commissioners, there is no commission to discharge the critical mandate conducting and supervising by-elections as well as the review of boundaries. The delay in the recruitment of the chairperson and members of IEBC, has thus undermined the constitutional role of the IEBC.
 33. IEBC submitted that after being sworn in on March 2nd 2023, the Selection Panel commenced the recruitment process. They advertised and called for applications to be received by March 28th 2023. The exercise has however not been completed, thereby hampering the work of the IEBC, specifically with regard to the by-elections of Banissa constituency. Also affected is the review of names and boundaries of constituencies and wards. The last delimitation was conducted on March 6th 2012 and IEBC is under a constitutional duty to undertake and complete review of names and boundaries by February 2024.
 34. Neither the people of Kenya nor Parliament envisaged a situation where there would a vacancy in the office of the chairperson and all commissioners of the IEBC at the same time and a for an extended period of time. Indeed Paragraph 1(1) of the First Schedule of the *IEBC Act* makes adequate provision for the timely filling of vacancies in the said offices as follows:

At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the *Constitution* or this Act, the President shall appoint a selection panel consisting of seven persons for the purposes of appointment of the chairperson or member of the Commission.
 35. In the case of *Independent Electoral and Boundaries Commission & 4 others v Ndii & 312 others; Ojwang & 4 others (Amicus Curiae)* (Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021 (Consolidated)) [2021] KECA 363 (KLR) (20 August 2021) (Judgment) (with dissent, the Court of Appeal had this to say about the prompt filling of vacancies in IEBC:
 369. ...Given the important constitutional mandate of IEBC, the *IEBC Act* had a robust mechanism for the prompt filling of any vacancies. The scheme of the statute and the regulations was that, by providing for prompt mechanism for filling vacancies, then at all times and as much as was possible, IEBC should be in its full complement of membership.
 370. Given its important constitutional mandate, IEBC should carry out its functions with all hands on deck. To allow the quorum of the Commission to oscillate with the actual number of members at any time would be to countenance a possibility that for as long as the numbers did not fall below three, then the appointing authority needed not promptly or at all trigger the process of filling the vacancies.



36. The Court of Appeal emphasized the important of role of IEBC required the full complement of commissioners with all hands on deck. The current state of affairs in IEBC however, is that notwithstanding its very important constitutional mandate, there is not a single hand on deck by way of commissioners. For IEBC, a critical constitutional commission, to remain without commissioners since January 2023, is untenable. This goes counter to the provisions of article 249 of the Constitution which requires IEBC and other commissions and independent offices of which IEBC is one, to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism.
37. The court has been told that there the minority coalition is opposed to the work of the Selection Panel and that the same should be halted pending formulation of an alternative way of filling of vacancies in the IEBC. Further that the President did on April 2nd 2023, propose that the issue of composition of the selection panel be a subject of a bi-partisan parliamentary political settlement which are between the 2 major political coalitions in Parliament. The Selection Panel that under the political question doctrine, this court lacks jurisdiction determine this matter which is a quasi-political process that is reposed first in the Selection Panel, the National Assembly and the President.
38. The court is aware and takes judicial notice of the bi-partisan talks, named the National Dialogue Committee which have been co-chaired by Hon Kimani Ichungwa, the leader of the Majority in the National Assembly and Hon. Kalonzo Musyoka, a key leader in minority coalition. The question to ask then is whether the court should decline jurisdiction over the question of recruitment process of the chairperson and other commissioners of the IEBC by the Selection Panel, which has been put off indefinitely, so that the same may be determined by the National Dialogue Committee.
39. Black's Law Dictionary, Tenth Edition defines the political question doctrine as:
The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government.
40. Matters which are best resolved through legislative and the executive interventions should be allowed to benefit from such resolution before or without intervention by the courts. The political question thus goes to the justiciability of a matter before court. Our courts have dealt with this judicial principle of the political question as an aspect of justiciability of a matter.
41. In the case of Kiriro Wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR, a 3-Judge bench of this court considered the political question doctrine as an aspect of the concept of non-justiciability of a matter and stated:
99. The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security. [See generally Ariel L. Bendor; Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?]
100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government. [See generally



42. There are instances where the court's intervention in line with its constitutional mandate under article 165(3) of the Constitution is necessary and over the Court cannot decline jurisdiction. In William Odhiambo Ramogi & 2 others v Attorney General & 6 others [2018] eKLR, 5-Judge considered such a situation and stated:
89. Coming to the present case, it is thus evident that there are constitutionally permissible situations where this court may interfere in the policy decisions of the government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the Constitution, or in violation of other provisions of the Constitution. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the Petitioners is non justiciable, even though it may concern the political process, or the internal workings of other government branches.
43. The reconstitution of the IEBC is clearly a political question that is best resolved in a political process. However, while a political settlement on the reconstitution of the IEBC would be ideal, the prolonged period in which the recruitment process has been pending, has resulted in the continued violation of the rights of the people of Banissa Constituency to be represented in the National Assembly. In light of this, I respectfully reject the notion that the political question doctrine should override the very explicit constitutional provisions and that the prevailing circumstances should be allowed to continue to threaten and infringe on rights guaranteed by the Constitution. The holding of by-elections in Banissa constituency is a constitutional process with strict timelines. Similarly, the review of the names and boundaries of electoral units has strict timelines. Given that the deadline for the said review is looming, the threat of violation of the provisions of article 89 of the Constitution is very real. Additionally, the establishment and functions, composition, appointment and terms of office of commissioners of the IEBC is stipulated in the Constitution. As such, compliance with the Constitution should not be suspended for the sake of political expediency. The intervention of this court is therefore justified, more so, because the bi-partisan talks are, to the best of my knowledge, not anchored in either the Constitution or the law.
44. Article 2 of the Constitution stipulates the supremacy of the Constitution and binds all persons and all State organs at both levels of government. Article 23 of the Constitution confers upon this court the authority to uphold and enforce the Bill of Rights in the Constitution. This court exercises unlimited jurisdiction under article 165 pursuant to judicial authority that is derived from the people of Kenya and vested in it under article 159. The court is further enjoined under article 258 to uphold and enforce the Constitution and under article 259, to interpret it in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.
45. If this court were to fail to intervene in the present circumstances by declining jurisdiction, it would cede not only its authority, but fail to protect the Constitution as envisaged in the cited provisions. I therefore do not subscribe to the notion that under no circumstances can court intervene where there is violation or threatened of the Constitution.
46. Having considered the foregoing, I am satisfied that the petitioner has made a case for the intervention of the court. Accordingly, I make the following orders:



1. A declaration be and is hereby issued that pursuant to the provisions of article 101(4) as read with article 103(1)(a) of the Constitution, a vacancy arose in the seat of Member of the National Assembly for Banissa Constituency on 29/3/2023 when the then sitting Member died and the Independent Electoral and Boundaries Commission had a constitutional obligation to hold a by-election in the said constituency by the 29.6.23 being 90 days from the date of the said vacancy.
2. A declaration be and is hereby issued that failure by the selection panel for the recruitment for nominees for appointment as the chairperson and members of the Independent Electoral and Boundaries Commission in view of the vacancy in the office of the Member of the National Assembly for Banissa Constituency has violated the express provisions of article 101(4) of the Constitution of Kenya, 2010.
3. A mandatory order be and is hereby issued to the selection panel for the recruitment for nominees for appointment as the chairperson and members of the Independent Electoral and Boundaries Commission take immediate measures and/or steps to undertake the nomination exercise and to submit for appointment successful applicants for the positions of members and chairperson of the Independent Electoral and Boundaries Commission as to make it possible for the Commissioners to be in office.
4. There shall be no order as to costs.

DATED AND DELIVERED VIA MS TEAMS THIS 26TH DAY OF JANUARY 2024

M. THANDE

JUDGE

