REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)
CONSTITUIONAL PETITION NO. E211 OF 2022
(Consolidated with Nairobi High Court Judicial Review Misc. No. E071 of 2022)

BETWEEN

1. CLIFF MARUBE OMBETA
2. ADRIAN KAMOTHO NJENGA…………,,,,,,,,,,,,,,,,,……… PETITIONERS

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION………………………………………… RESPONDENT

AND

1. UNITED DEMOCRATIC ALLIANCE
2. FIDA KENYA
3. KATIBA INSTITUTE
4. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW)
5. PARTY COMMUNITY ADVOCACY AND AWARENESS TRUST (CRAWN)
6. AFRICAN CENTRE FOR OPEN GOVERNANCE (AFRICOG)
7. INTERNATIONAL COMMISSION OF JURISTS (ICJ)
8. KENYA HUMAN RIGHTS COMMISSION (KHRC)
9. NATIONAL GENDER AND EQUALITY COMMISSION(NGEC)
10. OFFICE OF THE REGISTRAR
OF POLITICAL PARTIES……………………………INTERESTED PARTIES

JUDGMENT

Introduction:

1. The proceedings subject of this judgment were prompted by two notices issued by the *Independent Electoral and Boundaries Commission* (hereinafter referred to as '***the Respondent'***, or '***the IEBC***' or '***the Commission'***) calling for political parties to comply with the two-thirds gender principle in submitting their respective nomination lists for the National Assembly and the Senate to the Commission.

2. Each of the Petitioners filed separate proceedings which were later consolidated. They are **Petition No. E211 of 2022** *Cliff Marube Ombeta vs. Independent Electoral and Boundaries Commission & United Democratic Alliance Party (Interested Party)* and **Judicial Review Misc. Application No. E071 of 2022** *Adrian Kamotho Njenga vs. Independent Electoral and Boundaries Commission & Office of the Registrar of Political Parties & 9 Others (Interested Parties).* The matters were thereafter consolidated by an order of this Court made on 19th May, 2022 and Petition No. E211 of 2011 became the lead Petition. I will hereinafter refer the two matters as '***the consolidated Petitions'***.

3. The Petitioners variously decried that the impugned notices were unconstitutional and ought not see the light of the day. The notices were *vide* letters by the IEBC dated 27th April, 2022 and 5th May, 2022 respectively.

4. The letter dated 27th April, 2022 was addressed to all registered political parties and directed that the Commission was to reject any nomination list that did not comply with the two-thirds gender rule with notice to the political party. The letter dated 5th May, 2022 was addressed to the 1st Interested Party herein, *the United Democratic Alliance Party.* It communicated the Commission's decision to reject the party's nomination list and directed that the same be revised within 48 hours and in any event not later than Monday, 9th May, 2022 at 11:50 pm.

5. The principal decision by the Commission on the need for political parties to comply with the gender principle was, therefore, contained in its letter dated 27th April, 2022 which was addressed to all registered political parties. The letter dated 5th May, 2022 and any other were subsequent to the main one dated 27th April, 2022. I will hereinafter, therefore, refer to the letter dated 27th April, 2022 as '***the impugned notice'*** and the decision contained therein as '***the impugned decision'***.

6. On the 11th May, 2022 this Court, (***Hon. Ndung'u, J***.) granted the 2nd Petitioner leave to apply for an order of *Certiorari* to remove into this Court and quash the impugned notice. The leave was also to operate as a stay of the impugned notice.

7. The stay order was challenged by the 3rd Interested Party herein, *Katiba Institute*. It was through a Notice of Motion dated 19th May, 2022. The application was heard *inter-partes* and a ruling rendered on 2nd June, 2022. The application was disallowed and that paved way to the hearing of the consolidated Petitions, hence, this judgment.

8. Save for the 1st Interested Party, *the United Democratic Alliance Party*, the rest of the Interested Parties and the Respondent vehemently opposed the consolidated Petitions.

<u>The Petition No. E211 of 2022:</u>

9. This Petition was instituted by Cliff Marube Ombeta (hereinafter referred to as ***'the 1st Petitioner'***), a Member of the United Democratic Alliance Party and the successful party flag bearer for the Member of National Assembly seat, Bonchari Constituency within Kisii County.

10. The Petition is dated is 11th May, 2022. It was supported by the 1st Petitioner's Affidavit sworn on even date. He also filed an application by way of a Notice of Motion of even date.

11. Through the Petition and the application, *Cliff Ombeta,* the 1st Petitioner sought to challenge the operationalization of the two-third gender rule as contained in the impugned notice.

12. It was his case that his party, *United Democratic Alliance Party* had conducted nominations and issued to successful candidates, certificates of nomination and forwarded a list thereof to the IEBC. He posited that the impugned notice was unconstitutional for

trampling upon the rights of not only the 1st Petitioner, but all members of political parties.

13. The 1st Petitioner also challenged the IEBC's letter dated letter dated 5th May, 2022 for requiring the 1st Interested Party to revise its nomination list and forward it to IEBC within 48 hours, as arbitrary, unreasonable and inconsiderate.

14. It further was its case that, prior to nominations, and in line with Nairobi High Court Constitutional Petition No. 10 of 2017 ***Katiba Institute vs. Independent Electoral and Boundaries Commission*** (2017) eKLR (hereinafter referred to as '***the Katiba case***'), the IEBC never put in place any measures or mechanisms nor did it take any action in overseeing the achievement of the two-third gender rule by political parties.

15. The 1st Petitioner, therefore, was aggrieved that the impugned notice was illegal and unconstitutional for purporting to penalize innocent aspirants and voters by barring them from exercising political rights when in fact the IEBC had failed to facilitate compliance by devising administrative mechanisms to be used during party nominations.

16. On the foregoing factual and legal matrix, the 1st Petitioner sought the following reliefs;

    a) A declaration that the letters to the Interested Party by the Respondent dated 5th May, 2022 requiring the former to revise and their nomination lists within forty-eight (48) hours is ultra vires, illegal and unconstitutional.

    b) An order of permanent injunction barring the Respondent herein from rejecting the Interested Party's nomination lists as submitted to them which contains the Applicant's name and all other nominees under the United Democratic Alliance (UDA) ticket.

    c) An order of permanent injunction restraining the Respondent herein from excluding the Applicant, other nominated candidates under United Democratic Alliance (UDA) ticket from participating in the August 9th, 2022 General Elections on account of non-compliance with the two-third gender rule.

d) An order of permanent injunction restraining the interested Party herein from revising its list of nominated candidates as directed by the respondent on account of compliance or non-compliance with the third gender rule.

e) In the alternative, an order compelling the Respondent herein to accept the Interested Party's list of nominated candidates submitted therein for the purposes of participation in the August 9th, 2022 General Elections.

f) Any other orders that the Honourable Court may deem fit to grant.

g) Costs occasioned by this petition.

The 1st Petitioner's Submissions:

17. The 1st Petitioner further urged his case through written submissions dated 31st May 2022. He identified the issues for determination as follows;

    a. *Whether the Respondent's intentions as communicated vide its notice referenced as IEBC/CORP/PP/2022 and a letter dated 5th May 2022 threatens and or violates the 1st Petitioner's political rights.*

    b. *Whether the Respondent carried out its obligation as directed in HCC Petition No. 19 of 2017 Katiba Institute vs IEBC.*

    c. *Whether there exist sufficient legislative and other measures to actualize the achievement of the two-third gender rule.*

18. On the first issue, the 1st Petitioner submitted that the impugned notice was an invitation for the Court to countermand Article 1 on the sovereign power of the people, Article 38 of the Constitution on political rights of citizens and candidates and Article 81(a) of the Constitution on the general principles of the electoral system on freedom of citizens to exercise their political rights.

19. It was his case that IEBC 's exercise of the administrative action in comparison with the requirement under Article 27(8) will lead to the inescapable conclusion that it did not; promote the purposes of the

Constitution, advance the human rights and fundamental freedoms in the Bill of Rights and neither did it contribute to good governance.

20. In urging the Court to uphold the dictates of Article 38 the 1st Petitioner submitted that during the nominations exercise, electorates availed themselves in a free manner willingly and freely choose their representatives including the him by way of secret ballot.

21. He was emphatic that the Court must respect the will of the electorate. He relied on the decision in *Dickson Daniel Karaba -vs- John Ngata Kariuki & 2 Others* [2010] eKLR where it was observed;

> *…. In my understanding the whole process from the nomination of candidates to the final declaration of the candidate as the winner must be within the law and must as far as possible represent the wishes and the voice of the electorate. It cannot be said that one part was fair while the other part was conducted in a flawed manner. The basic tenet of democracy is that the will of the people must be respected and incorporated in all the branches and the process of the election… In deciding and determining whether the will of the electorate was respected and taken into consideration, it is essential to take into consideration all the issues in a wholesome manner.*

22. On the foregoing, the 1st Petitioner asserted that the IEBC through the impugned notice was seeking to overthrow the will of the people in that should their threat be actualized, they will have cut the electorates from the electoral process by seeking to remove those candidates nominated by the electorates and imposing new ones on them under the disguise of implementing the two-third gender principle.

23. On the second issue whether the IEBC carried out its obligations incompliance with the Katiba Case, the 1st Petitioner submitted that the Petition was not seeking to review the said decision rather, his grievance emanated from IEBC's failure to regulate the process by which parties nominate candidates for elections in accordance to Article 88(4)(e) of the Constitution.

24. Based on the foregoing failure by the IEBC to carry out administrative action to ensure political parties comply with the law,

the 1st Petitioner claimed that IEBC was not vested with the power to reject nomination lists by political parties since it had absconded its obligation and selectively complied with the Orders in the Katiba Case.

25. To buttress the foregoing position, reliance was sought form the decision in *Kitui Cha Sheria -vs- Independent Electoral and Boundaries Commission* where to was observed that: -

> *…. Having established a violation to the extent that the State failed in its obligations to the [petitioners], the Court is called upon to consider the relief. Article 23 empowers the Court to frame an appropriate remedy to vindicate the rights of the person aggrieved. The nature of relief to be granted is not merely a theoretical matter but a practical one that must depend on the circumstances of each case.*

26. In the end it submitted that at having failed to adequately prepare Political Parties, IEBC is barred by the doctrine of estoppel from ignoring its joint responsibility in the failure to realize the gender thresholds.

27. On the third issue regarding sufficiency of legislative and other measures taken to actualize the two-third gender rule, the 1st Petitioner submitted that based on Article 81 (b) and 27(8) of the Constitution, burden of implementation lies with Parliament.

28. The 1st Petitioner placed the failure at the doorstep of Parliament and to that end, relied on the decision in *Centre for Rights Edu cation and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR where it was observed: -

> *…. In my view, having failed, refused and or neglected to implement the measures contemplated under Article 27 and 100, Parliament has failed in its obligations under Article 21(1) which indicates that the State and every state organ have an obligation to observe , respect , protect , promote and fulfil the right of men and women to equality under Article 27.*

29. While further relying on the supreme Court decision in *the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR that made the finding that gender parity ought to be realised progressively, it was submitted that Parliament

should implement the said constitutional obligation without negating the sovereign power of the people minimizing the risk of violating the risk of the citizens under Article 38 and 81(a), and at the same time promoting the purposes of the constitution under Article 259(1).

30. In the end, the 1st Petitioner submitted that in the absence of requisite legal framework IEBC's impugned directive cannot suffice until such a time when the administrative mechanisms are put in place.

31. He urged the Court to rely in the decision in *Nubian Rights Forum & 2 others -vs- Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR where it was observed as follows: -

> *…. The proper remedy for the Court to grant when there is no or deficient regulatory framework is to stay the action until the duty bearers – Parliament - passes the regulatory framework.*

<u>The Judicial Review Misc. Application No. E071 of 2022:</u>

32. Adrian Kamotho Njenga, (hereinafter referred to as '***the 2nd Petitioner'***), a public-spirited Kenyan, an ardent defender of constitutionalism and an Advocate of the High Court of Kenya instituted the judicial review proceedings.

33. Upon filing the Chamber Summons dated 11th May, 2022 for leave to institute the judicial review proceedings, the 2nd Petitioner successfully sought that the leave do operate as a stay of the impugned decisions pending the determination of the matter. The 2nd Petitioner also filed a Verifying Affidavit he swore on 11th May, 2022 and a Statutory Statement in support of the Chamber Summons.

34. The Honourable Court considered the Chamber Summons and issued the following orders: -

> *1. That the matter be and is hereby certified as urgent.*

2. *That applicant herein be and is hereby granted leave to apply for an order of Certiorari to remove into this Honourable Court and quash the notice referenced as IEBC/CORRPP/2022, issued by the Respondent on 27th April, 2022.*

3. *That leave so granted do operate as stay of the notice referenced as IEBC/CORR/PP/2022.*

4. *That the substantive Motion be taken out and served within the next 3 days and be served together with submission in support.*

5. *That responses be filed within 3 days of service to be file contemporaneously with submissions by the respondent.*

6. *That mention on 18th May, 2022.*

35. The 2nd Petitioner then filed the substantive Notice of Motion where he sought the following order: -

> ***An Order of Certiorari to remove into this Honourable Court and quash the notice referenced as IEBC/CORR/PP/2022, issued by the Respondent on 27th April, 2022.***

36. The first salvo in opposition to the proceedings was the filing of a Notice of Motion dated 19th May, 2022 by the 3rd Interested Party herein, *Katiba Institute*, seeking the following orders: -

(a) *This application be certified urgent for ex parte directions in the first instance.*

(b) *The applicants be admitted to this matter as Interested Parties.*

(c) *There be no costs order on this application.*

37. The above Notice of Motion was fully heard and it was disallowed *vide* Ruling No. 2 delivered on 2nd June, 2022. The said ruling also disposed of the 1st Petitioner's Notice of Motion dated 11th May, 2022.

The 2nd Petitioner's Submissions:

38. The 2nd Petitioner further urged his case through written submissions dated 24th May 2022.

39. He argued that the decision-making process by IEBS was an administrative action and is the one that led to the publishing of the impugned notice.

40. While relying various decisions including *Municipal Council of Mombasa -vs- Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001, *Council for Civil Service Unions vs. Minister for Civil Service* [1985] A.C. 374 and the one in *Pastoli -vs- Kabale District Local Government Council and Others* [2008] 2 EA 300 on the parameters that guide a Judicial Review Court to quash an unfair administrative action, the 2nd Petitioner submitted that this Court has the obligation to examine the impugned notice as against the principles of illegality, irrationality and procedural impropriety.

41. The 2nd Petitioner reiterated that IEBC failed to devise an administrative mechanism to ensure that the two-third gender principle was realized among political parties during nomination exercises for Parliamentary election despite Orders of Court.

42. He submitted further that since the Interested Parties and Political Parties were not party to the Katiba Case, the Respondent was duty bound to bring it to the attention of all the parties not involved the orders therein.

43. He further asserted that in view of the election Calendar issued by IEBC requiring nominations to be concluded by 22nd April 2022, the impugned notice was issued contrary to the IEBC's own road map for elections since it was published after political parties had already concluded nominations.

44. He submitted that irrationality of the impugned notice derived from the fact that it placed the burden of failure to comply with the two-thirds gender principle on candidates and that it imposed communal punishment on all candidates by barring them from elections.

45. Further, the 2nd Petitioner stated that the notice was illegal as it was contrary to section 13 of the Elections Act which requires political Parties to nominate its candidates for an election at least ninety days before a general election.

46. In the end, the 2nd Petitioner stated that his application had satisfied the grant for an order of certiorari to quash the Respondent's impugned Notice.

47. Since the 1st Interested Party supported the consolidated Petitions, I will first deal with its case.

The 1st Interested Party's case:

48. The 1st Interested Party, *United Democratic Alliance Party* (hereinafter also referred to as ***'UDA'***), supported the Petition and the Judicial Review Application through the Replying Affidavit of its Secretary General *Veronica Maina*, deposed to on 22nd May, 2022.

49. She deposed that at all material times, the Commission and Parliament, as duty bearers had the obligated to take measures to formulate rules and regulations for purposes of actualizing the two-third gender principle during nomination in accordance with the Constitution in Articles 10, 27 and 47.

50. It was her case that there is no legal framework governing the attainment of the two-thirds gender rule in political party nomination process that would have guided the 1st Interested Party's nomination process.

51. She deposed that the Commission was seeking to implement the Katiba Case when the nomination exercise had been concluded, an unfair and unconstitutional situation.

52. It was her deposition that the act of replacing duly elected nominated candidates to achieve the two-thirds gender rule would result in mass electoral injustice, systemic discrimination and gross violation of the same constituting which the Respondent purports to protects and implement.

53. She impugned the Notice stating that he Commission neither communicated that the two-thirds gender principle would apply as a qualifier for political parties to participate in general elections nor did it take steps towards sensitization of the political parties on guidelines and mechanisms to achieve it.

54. She deposed that UDA took steps to be complaint with the Judgment in the Katiba Case by teaching and training electorates on nomination requirements, holding stakeholder workshops on nomination exercise including women, launching of the UDA Party Women League expanding rh pool of women candidates and training them on party primaries among other steps.

55. It was her case that despite coming up with measures, the Commission has not requested from UDA the said measures to ascertain if they are adequate.

56. She further asserted that despite coming up with measures and implementing them, there was no guarantee that it would yield the desired results of meeting the two-thirds gender rule upon nominations since it was an exercise dictated by universal suffrage.

57. She deposed that the 1st Interested Party conducted free fair and credible nomination process where candidates were given equal opportunities to run and be elected including women, youth and persons with disabilities and accordingly issued certificates to the successful candidates prior to the issuance of the impugned Notice by the IEBC.

58. In urging the Court to quash the impugned notice, it was her case that it was unfair for the Commission to punish and arbitrarily limit the political rights of the 1st Interested Party and its nomination candidates on the basis that it did not yield the desired two-thirds gender requirement.

The Submissions:

59. The 1st Interested Party filed undated submissions in further support of its cause. In describing the lateness of the impugned notice, it was submitted that Court should take judicial notice that the nomination

process was concluded on or before 26th April, 2022 and as such the political parties are unable to repeat the nomination process presently.

60. It pointed the improper conduct of the Respondents by stating that it cannot begin a process as mandated by the Constitution, abandon the same midway, then spring to the finish line and wait to reject a party list for non-gender compliance despite the abdication of their integral role in the process.

61. It was its case that in so far there are no IEBC rules, regulations, or guidelines on gender that would have guaranteed the result they want, or any allegation that the UDA Party has violated any of the Respondent's rules, they have no right or justification to reject the submitted party list.

62. The 1st Interested Party submitted that the implementation of the two-thirds gender principle by way of the impugned notice threatens and violates political rights and freedom from discrimination.

63. It was reiterated that the Commission was in an exercise that imposed unconstitutional demand upon parties to revise the party nomination list without providing any mechanism, guidelines or criteria.

64. The 1st Interested Party pointed out the gaps at the IEBC in reference to the decision *Machakos Constitutional Petition 2 of 2022, CEMIRIDE and Others -vs- ORPP and Others* where it was observed that: -

> *188. We have developed a culture of procrastination in election preparations and only wait to be jumpstarted when the elections are around the corner notwithstanding the fact that the elections date is predictable and stone carved in our Constitution…*

65. The Commission's decision was further faulted on the basis of the Supreme Court decision in the *Principle of Gender Representation in the National Assembly and the Senate*, where it was recognized that the enactment of a law in fulfilment of a constitutional objective cannot be an instantaneous activity, but a process that takes time,

entailing necessary measures and actions by responsible agencies. It was observed that: -

> *The concept of 'progressive realization' is not a legal term; it emanates from the word 'progress, 'defined in the Concise Oxford English Dictionary as 'a gradual movement or development towards a destination.'*

66. The 1st Interested Party also faulted the impugned notice and the letter dated 5th May, 2022 contrary to the Article 10 for want of public participation as well as several other Articles of the Constitution.
67. The UDA Party urged this Court to allow the consolidated Petitions.

<u>The 1st Respondent's case:</u>

68. The IEBC opposed the consolidated Petitions through the Replying Affidavit of *Chrispine Owiye*, the Director Legal Affairs, deposed to on 18th May, 2022.

69. He deposed that the consolidated Petitions were unmerited and misconceived in law on the grounds that, IEBC did not arrogate itself power to issue the impugned notice and any other subsequent notices.

70. It was his case that IEBC only issued the notices in compliance with the law and judgment of the High Court and, therefore, the dispute is an abuse of Court process.

71. He deposed that the dispute is an attempt to derogate the Commission's obligation imposed upon it by the Constitution in Article 88(4)(d) which regulates the process by which parties nominate candidates for elections.

72. It was his case that the Commission did not act act *ultra-vires* its mandate by issuing the Notices and as such the said notices did not contain a decision capable of being quashed.

73. Mr. Owiye further deposed that through its letter dated 29th November, 2018, the Commission wrote to all registered political parties advising them to act in conformity with the decision of the Court in Katiba case.

74. He urged his case further by deposing that upon issuance of the Katiba case judgment, the Commission embarked on a series of initiatives designed towards the implementation of that constitutional imperative including engagement with the Attorney General, Parliament, the Registrar of Political Parties, the Political Parties Liaison Committee (PPLC) on 8th May 2019, and National PPLC on 11th July 2019, of 3rd to 6th February 2021 inviting all registered Political Parties and their leaders, chairpersons and secretary Generals, independent offices and Commissions as well as the civil society to discuss the two-third gender rule and implications of the Katiba Institute Case.

75. He further deposed that a National PPLC Plenary workshop was held between 17-19 November, 2021 at the Great Rift Valley Lodge, Naivasha which invited all registered parties and their representatives to take part in the workshop which resulted in a report that was made available to all registered political parties on the obligation upon political parties in respect of the two-thirds gender rule.

76. On the foregoing therefore, Mr. Owiye stated that it was not true for the Petitioners to say that the Commission acted *ultra vires*. He maintained that it acted within the law.

The Submissions:

77. The Commission filed submissions dated 23rd May, 2022 to further support its case.

78. The deposition of Mr. Owiye was largely embellished in the submissions. In reference to various Political Parties Liaison Committee meetings, it was submitted that all political Parties were, at all material times, aware of the existence of orders in Katiba Case and were bound to comply.

79. It was submitted that the Commission's notice referenced as IEBC/CORR/PP/2022 issued on 27th April, 2022, was drawing the attention of all registered Political Parties of their existing legal

obligation to adhere to the two-thirds gender rule when submitting their candidates list.

80. It was its case that as at 5th May, 2022 a cross section of political parties had submitted lists that were not in compliance with the two-thirds gender rule and to that end the Commission in its letter dated 5th May, 2022, and in a Press Statement issued on 9th May, 2022 asked the 1st Interested Party and all political parties to comply with the two-thirds gender principle.

81. On the foregoing, it was submitted that the Commission not only fulfilled its constitutional and statutory mandate, but also complied with an Order of the High Court issued *in rem*.

82. The Commission argued that that decision determined the state of the law rather than the subjective rights of the parties before the Court.

83. To buttress the nature of orders issued in *rem* this Court was referred to the decision in *Edward R. Ouko Vs. Speaker of the National Assembly & 4 others* [2017] eKLR, which cited with approval the decision in *Kamunyu and Others Vs. Attorney General & Others* [2007] 1 EA 116 where it was observed;

> *….. In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.*

84. In contending that political parties are bound to comply with the two-thirds gender rule in their nomination process, it was submitted that Article 10 of the Constitution provides for values including equity, inclusiveness, equality, non-discrimination and protection of the marginalized. Support to that end was found in the Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) Vs. National Super Alliance (NASA) Kenya & 6 Others*, [2017] eKLR, where it was held that;

> *In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable….the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental but are justiciable and immediately enforceable.*

85. To bolster the position that the commission did not act ultra-vires, it was submitted that its actions were guided by Article 88(4)(d) of the Constitution which empowers it to ensure that nominations carried out by political parties in Kenya meet the requirements of the Constitution, and in particular- Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the Constitution.

86. Support on the foregoing mandate of the Commission was found on the decision in *Diana Kethi Kilonzo & Another Vs. Independent Electoral and Boundaries Commission & 10 Others* [2013] eKLR, where it was held that;

> *…. We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution as long as they comply with the Constitution and national legislation*

87. In the end, the Commission submitted that it carried out its administrative duty of brining to the attention of political parties the constitutional and legal obligation. The urged the consolidated Petitions to be dismissed.

<u>The 2nd Interested Party's case:</u>

88. The 2nd Interested Party, FIDA-Kenya, opposed the consolidated Petitions through the Replying Affidavit of *Anne Ireri,* its Executive Director, deposed to on 19th May, 2022.

89. It was its case that the 1st Interested Party's allegation that it submitted its nomination rules that were in full compliance with the Commission's requirements was a misdirection since if it was the

case, the 1st Interested Party would have taken measures to implement the two thirds gender principle.

90. It was her case that the Respondent was well within the law in requiring 1st Interested Party to comply with its notice in conformity with the judgment in the Katiba Case.

91. She deposed that political parties have the obligation to ensure there is compliance with the two-thirds gender rule by putting in place measures including formulation of rules and regulations.

92. On the foregoing, she stated that political parties cannot wilfully fail to comply with the orders of the Court in the Katiba Case and then seek to benefit from Court's protection in default of their non-compliance.

93. Ms. Ireri deposed that the proper remedy for the Petitioners would have been to appeal against the Katiba Case and pray for suspension of the implementation of the said Judgment.

The Submissions:

94. In its written submissions dated 20th May, 2022, the 2nd Interested Party submitted that the Respondent's letter dated 5th May, 2022 requiring compliance by political parties within 48 hours was not *ultra-vires* its mandate.

95. It was its case that the Commission was simply executing its constitutional and statutory mandate as per the terms of the Katiba Case.

96. It was submitted that the 1st Interested Party's failure in designing and implementing the two-thirds gender principle within its internal organization cannot be blamed on the Respondent.

97. It asserted that the Petitioner's claim that the Respondent failed to devise administrative mechanism is a deliberate distortion and or suppression of the facts and the law relating to the impugned judgment since the judgment placed upon the political parties the

obligation to actualize the two-thirds gender principle within six months.

98. It was her case that in absence of any evidence of challenge in implementing the Judgment, the 1st Interested Party could not be heard seeking stop its compliance five years from the date of the judgment.

99. It was submitted that the Petition was a clever manoeuvre to appeal against implementation of the Katiba Case which was against the principle of finality. Reliance was placed on the decision in *Signature Tours & Travel Limited_-vs- National Bank of Kenya Limited*; the Court stated that: -

> *…. A Court's decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their presentations concluded unless they elect to forego the opportunity.*

100. Finally, in urging the Court not to allow the consolidated Petitions, the 2nd Interested Party implored the Court to be guided by the decision in *Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi* and invent or enlarge remedies with a view to securing and vindicating the gender principle.

<u>The 3rd -8th Interested Party's case:</u>

101. The 3rd - 8th Interested Party opposed the consolidated Petitions through the Replying Affidavit of *Chritstine Nkonge,* the Executive Director of the 3rd Interested Party, deposed to on 22nd May, 2022.

102. From the onset, she deposed that the consolidated Petitions were inconsistent with public record for seeking an irregular stay of execution of the Katiba Case.

103. She deposed that contrary to the 1st Petitioner's contention that IEBC's power under Article 88 does not extend to excluding non-compliant political parties, the IEBC has the obligation under Article 88(4)(d) to ensure that nominations carried out by political parties meet the requirements of the constitution.

104. In making the argument that the judgment in the Katiba Case was in *rem*, she deposed that it would be discriminatory to excuse the Petitioners' party or any other party from complying with the judgment yet 43 out of 81 political parties had complied.

105. It was her case that allowing the consolidated Petitions requires the Court to contradict and ignore Article 91(1)(f) which commands every political party to *"respect and promote human rights and fundamental freedoms, and gender equality and equity*, Section 110(1) of the Elections Act that establishes the Electoral Code of Conduct and Paragraph 5 thereof and section 9(1) of the Political Parties Act requiring the Constitution or rules of every political party to provide for all the matters specified in the Second Schedule to the Act including, under paragraph 24 to 26 among other provisions of law.

106. In rebutting the 2nd Petitioner's claim that there was no mechanism for realization of the gender principle rule, Ms. Nkonge deposed that IEBC's has since maintained a public notice on its website publicizing the Electoral Code of Conduct, notifying every political party, Independent Candidate and every person participating in an election or referendum under the Constitution and the Elections Act to subscribe to and observe the Electoral Code of Conduct.

107. Reference was further made to IEBC's twitter post of December 2018, the press conference of 9th August, 2021, its website public post of 18th August, 2021. The tweet of January 2022 all of which were aimed at notifying the public that the political parties ought to comply with the two-thirds gender principle.

108. On a different line of argument, *Ms. Nkonge* deposed that the 2nd Petitioner was an official of the United Democratic Party and not as a neutral public spirited individual.

109. She purposed to lend credence to her position by referring to IEBC's letter of 5th May, 2022 to UDA on the engagements it had had with UDA and maintained the position that the claim by the 2nd Petitioner that IEBC did not engage political parties is unfounded.

110. In asking the Court not to allow the consolidated Petitions she deposed that public interest will be harmed and allowing it will result in an unconstitutional Parliament necessitating an expensive by-election to reconstitute both Houses fully. It was her case that public interest would be served better by compelling the few remaining political parties to comply.

The Submissions:

111. The 3rd – 8th Interested Parties filed written submissions dated 22nd May, 2022. It largely reiterated the deposition in the Replying Affidavit of Ms. Nkonge.

112. It was submitted that both disputes were an abuse of Court process since they have no backing of the law. Court was referred to the decision in the Court of Appeal decision in *Muchanga Investments Limited -vs- Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] eKLR.

113. It was submitted that, IEBC, a State organ, is bound to implement the judgment in the Katiba Case because it forms part of the law applicable to the elections. It was stated that "All State organs and State officers must understand that law comprises of the provisions of Constitutions and Acts of Parliament and decisions of superior Courts.

The 9th Interested Party's case:

114. The 9th Interested Party, National Gender and Equality Commission, opposed the consolidated Petitions through the Replying Affidavit of its Chairperson, *Dr. Joyce Mwikali Mutinda* deposed to on 23rd May, 2022.

115. She deposed that the consolidated Petitions lacked merit and were an abuse of Court process. She stated that they offend the doctrine of *res-judicata*.

116. She deposed that notice was issued to all political parties through the IEBC's letter of 27th April 2022 which requested all political parties of the need to comply with the Judgment in the Katiba Case.

117. While referring to a report by the National Democratic Institute on Gender analysis of the 2017 Kenya General Elections and the one she deposed that the last two general elections showed that if women were given opportunity by Political Parties to compete with men, in compliance with the two-third gender rule, more women are likely to be directly elected.

118. It was her case that from the report, almost equal success rate for both genders is indicative that the electorate is not discriminative on either gender.

119. She further stated that the Commission was aware of the Katiba case decision through various stakeholder participation where they were reminded of the obligation to ensure nomination list of 2022 ought to be compliant with the two-thirds gender principle.

120. She deposed that it was not the Commission to take proactive steps to realize the gender requirement rather, political parties were to formulate policies, strategies of nomination to ensure the principle is achieved.

The Submissions:

121. In its written submission dated 25th May, 2022 The 9th Interested Party stated that it was not up to the IEBC to dictate which method or methods including direct, indirect, consensus or direct nominations that political parties were to use in complying with the Katiba Case.

122. It was its submission that Political Parties were informed of the gender requirement on 28th February, 2022 by the 9th Interested Party in liaison with '*Reinvent Programme'* in the consultative meeting dubbed *Promoting meaningful and greater participation of Special Interest Groups (SIGs)* in the political party processes in readiness for the 2022 general elections .

123. The 9th Interested party was of the firm position that non-compliance by political parties could not be excused since it was order in *rem.* To that end, reliance was placed on the decision in *Trusted Society*

of Human Rights Alliance -vs- Cabinet secretary For Devolution and Planning & 3 Others (2017) eKLR where it was *inter-alia* observed: -

> *… It is essential for the maintenance of the rule of law and order that the authority and dignity of Courts is upheld at all times.*

124. In making the argument that IEBC was not to come with administrative mechanisms, it was argued that different political parties have different modes of conducting nominating exercises. As such, it was not the role of IEBC to dictate to parties how they were to comply with the Katiba Case.

125. It posited that the totality of the consolidated Petitions call this Court to strike them out *in limine*.

126. It also urged this Court to give the 43 non-compliant political parties a reasonable time to comply or suffer the consequence of not participating in the 9th August general elections.

The 10th Interested Party's case:

127. The 10th Interested Party, *Registrar of Political Parties* did not take part in this matter.

Issues for Determination:

128. On careful reading of the material presented before Court by the parties including the submissions and the decisions referred to, I discern the following issues for determination: -

    (a) Whether the threshold for seeking redress through a Constitutional Petition has been attained.

    (b) In the event issue (a) is answered in the affirmative, a brief look at the principles of constitutional interpretation.

    (c) Whether the impugned decision was in contravention of Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures.

(d) Whether the impugned decision was in contravention of Articles 4(2), 27, 38 and 91 of the Constitution.

129. I will deal with the issues in *seriatim*.

Analysis and Determination:

(a) Whether the threshold for seeking redress through a Constitutional Petition has been attained:

130. This issue was raised by the 3rd Interested Party herein, Katiba Institute. It contended that the consolidated Petitions did not raise any constitutional issues for determination.

131. In as much as the issue was not responded to by the rest of the parties, it is still worth consideration since it is on the jurisdiction of this Court.

132. Given the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. See: ***Anarita Karimi Njeru vs. Republic*** (1979) KLR 154.

133. Upon the promulgation of the Constitution in 2010, *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as '***the Mutunga Rules***') were later on enacted.

134. These rules make provision for the contents of Petitions in Rule 10 thereof.

135. Further, the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** had the following on Constitutional Petitions: -

> *Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking*

this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

136. As to what a constitutional issue is, the South African Constitutional Court decision in ***Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others*** (2002) 23 ILJ 81 (CC) comes in handy. The Court, rightly so, delimited what it entails in light of the jurisdiction of a Constitutional Court as follows: -

> *The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of… Constitution,* ***constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State…. the interpretation, application and upholding of the Constitution are also constitutional issues. So too …. is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights.*** *If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction…*

137. In the United States of America, a *constitutional issue* refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

138. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which *confronts the various protections laid out in a Constitution*. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate *the link between the aggrieved party, the*

provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.

139. In the words of **Langa, J** in ***Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC)***: -

> *… When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values…*

140. I have perused the consolidated Petitions in this matter. They no doubt comply with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in ***Communications Commission case*** (supra).

141. A reading of the consolidated Petitions brings forth the allegations of contravention of several provisions of the Constitution and the manner in which the impugned decisions contravene each of such provisions.

142. This Court, therefore, finds and hold, which I hereby do, that the consolidated Petitions raise constitutional issues worth further consideration.

143. Since the first issue is now answered in the affirmative, I will deal with the rest of the issues.

(b) <u>Principles of constitutional interpretation:</u>

144. As various constitutional provisions are at the heart of the consolidated Petitions, it is appropriate to briefly look at the principles guiding the interpretation of the Constitution.

145. The High Court in ***David Ndii & others v Attorney General & others*** [2021] eKLR (famous referred to as '***the BBI case'***) captured with precision the manner in which our transformative Constitution ought to be interpreted. The Learned Judges presented themselves thus: -

399. *One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:*

a. First, *the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in* ***In the Matter of the Kenya National Commission on Human Rights,*** Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR *thus (at paragraph 26):*

> *But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.*

b) Second, *our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle in* **Re Interim Independent Election Commission** [2011] eKLR, *para [86] thus:*

> *The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*

c) Third, *the Constitution has provided its own theory of interpretation to protect and preserve is values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in In* ***In Re the Speaker of the Senate &***

Another v Attorney General & 4 Others, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR. *(paragraphs 155-157):*

> *[155] In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and Jasbir Singh Rai& 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.*
>
> *[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court*

as the searchlight for the illumination and elimination of these legal penumbras.

d) Fourthly, *in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the* **Communications Commission of Kenya Case**. *It stated thus:*

> ***[356]*** *We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.*
>
> ***[357]*** *We begin with the concurring opinion of the CJ and President in* ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Supreme Court Petition No. 2B of 2014 *left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus:*
>
>> *[232] …References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.*
>>
>> *[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian*

of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.

400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these Consolidated Petitions……

146. With such a background, a consideration of the next issue follows.

(c) Whether the impugned decision was in contravention of Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and <u>administratively fair procedures:</u>

147. As a recap and for purposes of clarity on this issue, I must point out that the impugned decision arose out of the judgment in the Katiba case.

148. The Katiba case was yet another attempt to attain the two-third gender rule through nomination lists by political parties for the positions in the National Assembly and the Senate.

149. The Court in the Katiba case rendered judgment in the following terms: -

1) A declaration is hereby issued that Political Parties are bound by the provisions of Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the Constitution and hence any action undertaken by them, including nomination process for candidates for members of parliament, must comply with the requirements of those provisions.

2) A declaration is hereby issued that the power conferred to the respondent in Article 88(4) (d) of the Constitution of "Regulation of the process by which parties nominate candidates for elections" obligates the respondent to ensure that nominations carried out by

Political parties meet the requirements of the constitution, especially Articles 10, 19, 20, 27, 28, 56 and 91(1).

3) *A declaration is hereby issued that Articles 10, 19, 20, 27, 28, 56 and 91(1) of the Constitution obligate the Respondent to reject any nomination list of a political party for its candidates for the 290 Constituency based elective positions for members of National Assembly and 47 County based positions for the member of the Senate that do not comply with two-third gender rule.*

4) *An order is hereby issued directing Political parties to take measures to formulate rules and regulations for purposes of actualizing the two-third gender principle during nominations for the 290 constituency based elective positions for members of National Assembly and 47 County judgment. In default, the respondent. The Independent, Electoral and Boundaries Commission, shall devise an administrative mechanism to ensure that the two-third gender principle is realized among Political parties during nomination exercise for Parliamentary Elections. For avoidance of doubt, and in order to avoid disruption, this order shall not apply to the General Elections due on 8th August, 2017.*

5) *That will be no order for costs.*

150. In the judgment, the power of the Commission to regulate the process by which political parties nominate candidates for elections under Article 88(4)(d) of the Constitution was affirmed. The Court further declared that the Commission was obligated to reject any nomination list of a political party that does not comply with the two-third gender principle.

151. Being alive to the fluidity of the attainment of the two-thirds gender principle in Kenya over time, the Court did not stop at only making declarations. It went on to make a further order, it is Order No. 4, which is already captured above.

152. The Order 4 had two limbs. The first limb was directed to political parties. The parties were ordered to take measures to formulate rules and regulations towards compliance with the gender principle within 6 months of the decision. The second limb was directed to the Commission. It was a default limb to the first one. The Court directed

the Commission to devise administrative mechanisms to ensure compliance with the gender principle.

153. From the record, it is apparent that the political parties did not comply with their part of the order. As such, the Commission had to step in and ensure compliance with the judgment by devising administrative mechanisms to that end.

154. According to the Commission, the impugned decision is the administrative mechanism it settled for in ensuring compliance. It is, therefore, the constitutionality of that administrative mechanism which the Petitioners are challenging in the consolidated Petitions. The consolidated Petitions, hence, have nothing to do with challenging the judgment in the Katiba case. The Petitioners are only questioning whether the Commission in taking steps to comply with the judgment in the Katiba case by way of the impugned decisions acted within the Constitution and the law.

155. The instant issue under consideration, hence, mirrors the impugned decision against Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures. I will first deal with the aspect of public engagement.

156. The concept of public participation and stakeholders' consultation was discussed in great detail in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 ***William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others*** (2020) eKLR where the Court stated as follows: -

> *116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.*
>
> *117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -*

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

118. *Expounding on Article 10 of the Constitution, the Court of Appeal in* ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others,*** *Civil Appeal No. 224 of 2017; [2017] eKLR held that:*

> *In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.*
>
> *Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.*

119. *Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in* ***Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR*** *while referring to the South African decision in* ***Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05)***

[2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) *adopted the following definition of public participation: -*

> *According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.*

120. *Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The* ***Black's Law Dictionary*** *10th Edition defines 'consultation' as follows: -*

> *The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.*

121. *Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in* ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR*** *quoted with approval Ngcobo J in* ***Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)*** *as follows: -*

> *……The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say….*

122. *In a Three-Judge bench the High Court in consolidated* ***Constitutional Petition Nos. 305 of 2012, 34 of 2013*** *and* ***12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*** *the Court addressed the concept of consultation in the following manner: -*

> *…. A public participation programme, must…show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining*

inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

123. *Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.*

124. *The importance of public participation cannot be gainsaid. The Court of Appeal in* ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** *(supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -*

> *The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.*

125. *In* ***Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)****, the South African Constitutional Court stated as follows: -*

> *A commitment to a right to…public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…*

126. *The South African Constitutional Court in* ***Poverty Alleviation Network & Others v President of the Republic of South***

Africa & 19 others, CCT 86/08 [2010] ZACC 5 *discussed the importance of public participation as follows: -*

> ***....****engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision****.***

127. *Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in* ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** *(supra) referred to* ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** *stated as follows: -*

> *the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.*

128. *In* ***Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*** *(supra) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -*

a) *First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

b) *Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

c) *Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See* ***Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012****. In relevant portion, the Court stated:*

> *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*

d) *Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*

e) *Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

157. Having settled the nature and importance of public engagement, I will now consider whether the impugned decisions ought to have been subjected to public participation and/or stakeholders' consultations.

158. The threshold for whether decisions made by public entities ought to be subjected to public participation and/or stakeholders' consultations was discussed in **Mombasa High Court Constitutional Petition No. 159 of 2018** (supra) and also in Nairobi High Court Constitutional Petition No. E283 of 2020 ***Law Society of Kenya vs. The Attorney General & Others*** (unreported).

159. In **Mombasa High Court Constitutional Petition No. 159 of 2018** (supra) the Court dealt with the manner in which a state corporation ought to exercise statutory power. The Court defined the requisite threshold as follows: -

> *133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.*
>
> *134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal*

day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. *The issue is not foreign to our Courts. In* ***Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR,*** *the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process.* ***Rika, J,*** *expressed himself as follows: -*

> *Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in Robert N. Gakuru& Others v. Governor Kiambu County & 3 others [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving*

some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

160. The Court in ***Nairobi High Court Constitutional Petition No. E283 of 2020*** dealt with the manner in which the President ought to **re-assign** ministerial responsibility from one Ministry to another. The Court, building up on the position in ***Mombasa High Court***

Constitutional Petition No. 159 of 2018 *(supra)* had the following to say: -

> 130. *Whereas the above decision dealt with a state corporation exercising statutory power, the threshold adopted by the Court apply in the circumstances of this case in equal measure. In other words, a decision taken in exercise of executive authority may have to be subjected to public participation or not depending on its resultant effect. As held in the above case, if the decision 'only impacts on the normal and ordinary day-to-day operations of the entity……Subjecting …. to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.'*
>
> 131. *The converse is also correct. As held 'the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.'*
>
> 132. *There is further justification to the position that executive decisions which transcends into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public ought to be subjected to Article 10 of the Constitution. The justification finds refuge in Article 132(3)(c) of the Constitution which requires that any assignment of ministerial responsibility to a Cabinet Secretary ought* ***not to be inconsistent with any Act of Parliament****. Therefore, the exercise of the executive power under Article 132(3)(c) of the Constitution is not absolute. The exercise of such authority is subject to the law.*
>
> 133. *I see another justification. It borrows from the argument which I developed on the concept of ministerial responsibility by Constitution or statute. In the discussion, I settled for the*

position that if the Constitution or a statute assigns ministerial responsibility to a specific Cabinet Secretary then any re-assignment of such responsibility to another Cabinet Secretary must be preceded by appropriate amendments to the Constitution or statute.

134. The position is fortified in that any amendment to the Constitution or statute must be preceded by public participation. Indeed, Courts have variously held that Parliament and County Assemblies must carry out elaborate public participation as the case may require. It also depends on the nature of the matter under consideration.

135. …..

136. …….

137. Therefore, if any re-assignment of ministerial responsibility provided for by the Constitution or a statute must be subjected to public participation, as the case may be, then even in instances where the Constitution or the law is silent on the assignment of ministerial responsibility, any ***re-assignment*** *of such responsibility must as well be preceded by public participation. The element of public participation must, therefore, be undertaken in any decision re-assigning ministerial responsibility. I say so because re-assigning ministerial responsibility affects an earlier decision which assigned the responsibility to another Cabinet Secretary. The re-assignment cannot hence be done unilaterally. It must be preceded by public participation.*

138. The decision to re-assign ministerial responsibility is one which transcends the borders of internal operational decisions in exercise of the executive authority into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. For instance, if a decision deals with reshuffling of the Cabinet, renaming of ministries and state departments, among like others, then such a decision is purely a decision on the internal operations of the executive and need not to be subjected to public participation.

161. The above decisions sufficiently settled the aspect of the threshold required to subject decisions by public entities to public engagement. Whereas not all decisions by public entities ought to be subjected to public participation, there are those decisions which transcend the

ambit of internal operational decisions of the public entity into the arena of public purview. Such are the decisions which must be subjected to public engagement.

162. In this case, the impugned decision had a direct effect on a larger section of the general public. The political parties, members of political parties and the candidates nominated by their respective parties for positions in the National Assembly and the Senate who exercised their political rights to universal suffrage, all stood to be gravely and adversely affected by the impugned decisions.

163. The nature of the impugned decision was, therefore, not an internal operational one. The decision transcended the borders of a purely internal decision into the public arena. Such decision ought to have been preceded by public participation or, at the very least, stakeholders' engagement.

164. The Respondent and the 2nd to 9th Interested Parties posited that the Commission undertook steps towards effecting the judgment in the Katiba case and successfully came up with the impugned decision.

165. Through the disposition by *Mr. Chrispine Owiye*, the Commission outlined the engagements it had with the Hon. Attorney General, Parliament, the Registrar of Political Parties, the Political Parties Liaison Committee (PPLC), independent offices, Commissions as well as the civil society in effecting the judgment.

166. According to the Commission, the engagement with the Hon. Attorney General and Parliament towards coming with guiding legislations on the matter bore no fruits. The Commission, however, engaged the other stakeholders.

167. At this point in time, and before I take up the discussion further, I must point out that elaborate efforts to realize the two-third gender principle had been initiated before. I will deal with three such initiatives.

168. *First* was the Supreme Court Advisory Opinion No. 2 of 2011 ***In the Matter of the Principle of Gender Representation in the***

National Assembly and the Senate (2012) eKLR. The Court stated that Article 81(b) of the Constitution being a general provision, could not replace Articles 97 and 98 of the Constitution which had not ripened into a specific enforceable right with regard to composition of National Assembly and Senate.

169. The Court further held that the two-third gender principle could, therefore, not be enforced immediately; it was, but a process that takes time, entailing necessary measures and actions by responsible agencies.

170. The Supreme Court also stated that the rights under Article 27(6) and (8) of the Constitution could only be fully realized using legislative as well as other measures and over a spaced period of time by means of policy and other measures. The Court advised that a framework giving effect to the two-third gender rule should be in place by 27th August, 2015.

171. In implementing the judgment of the Supreme Court and with a view to meet the deadline, the Hon. Attorney General set up a Working Group to develop an appropriate framework for the realization of the two-third gender principle.

172. The Working Group accomplished its assignment and came up with some recommendations on how Parliament was to meet the gender rule. The principal recommendation was for Parliament to carry out legislative amendments in respect to five legislations. The legislations were the ***Political Parties Act, the Elections Act, the Independent Electoral and Boundaries Commission Act, the National Gender and Equality Commission Act*** and ***the County Governments Act***.

173. Parliament was duly advised. However, the House did not carry out the said assignment. The position is as is to date.

174. *Second*, in an effort to compel Parliament to discharge its mandate over the matter, a Petition was thereafter successfully filed in the High Court. It was Constitutional Petition No. 371 of 2016 ***Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others*** [2017] eKLR.

175. In its judgment rendered on 29th March, 2017, the High Court made the following orders: -

> ***(a) A declaration be and is hereby issued that the National Assembly and the Senate have failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender.***
>
> ***(b) A declaration be and is hereby issued that the failure by parliament to enact the legislation contemplated under article 27 (6) & (8) and 81 (b) of the constitution amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution.***
>
> ***(c) An order of mandamus be and is hereby issued directing Parliament and the Honourable Attorney General to take steps to ensure that the required legislation is enacted within A PERIOD OF SIXTY (60) DAYS from the date of this order and to report the progress to the Chief Justice.***
>
> ***(d That it is further ordered that if Parliament fails to enact the said legislation within the said period of SIXTY (60) DAYS from the date of this order, the Petitioners or any other person shall be at liberty to petition the Honourable the Chief Justice to advise the President to dissolve Parliament.***
>
> ***(e) That the Respondents do pay the costs of this petition to the petitioners.***

176. Again, nothing came to fruition. However, an appeal to the Court of Appeal was lodged against the High Court decision. It is Nairobi Court of Appeal Civil Appeal No. E339 of 2021 ***The National Assembly and The Senate vs. The Hon Chief Justice of the Republic of Kenya and 2 Others***. The appeal is pending determination.

177. *Third*, as a result of the reluctancy or otherwise on the part of Parliament to enact the necessary legislation or effect the amendments, the then ***Hon. Chief Justice D. K. Maraga*** on 21st

September, 2020, and in compliance with Constitutional Petition No. 371 of 2016, issued an advisory to the President of the Republic of Kenya to dissolve Parliament for non-compliance with the judgment.

178. Instantaneously, Court proceedings were initiated in the High Court against the advice to dissolve Parliament. The implementation of the advisory to dissolve Parliament was, hence, stayed pending further orders of an expanded Bench of the High Court. The matter is also still pending.

179. Flowing from the foregoing, it is apparent that all the three attempts to entrench the two-thirds gender principle did not, or have so far, not succeeded.

180. Hope was, however, not lost. The Katiba case was instituted and yielded yet another opportunity towards the realization of the gender principle. It is the mode of realization of the gender rule as proposed in the Katiba case that prompted the current proceedings.

181. In taking this discussion further, it is important to clarify that **there is no shred of doubt that the two-third gender principle is constitutionally-anchored and that it must be realized. The challenge, however, seems to be the process towards such realization.**

182. That being the case, the Commission in an attempt to satisfy the judgment in the Katiba case after the political parties failed to comply as ordered, came up with the impugned decision.

183. It is the impugned decision which, has been demonstrated not to have been an internal operational decision of the Commission, but called for public engagement.

184. Having failed to make any headway with the Hon. Attorney General and Parliament, the Commission then decided to engage the political parties and other stakeholders. From the record, the engagements dealt with the implementation of the judgment in the Katiba case.

185. Paragraph 16 of the Replying Affidavit of Chrispine Owiye lists some of the meetings. In proof of the meetings, the Commission annexed

copies of the invitation letters. Whereas the invitation letters showed that the issue of the two-third gender rule was one of the agenda items in the meetings, that was it. There were no minutes or resolutions on the deliberations, if at all any were reached at. Further, there is no evidence of those who attended the meetings.

186. Given the elusive nature of the issue, and in order to attain any meaningful consultation, and without even venturing into the adequacy of mode of consultation adopted, the Commission ought to have demonstrated what transpired in those meetings. I say so because the issue at hand is not a straight-jacket one. It raises serious legal issues which cannot be overlooked. That calls for serious deliberations and policy decisions, if not legislative, to be made.

187. The 1st Interested Party has denied having been invited to any of the meetings. In the absence of any evidence of those who attended the meetings, this Court is now at loss as to whether the meetings were ever held in the first instance.

188. Having said so, it comes to the fore that although the nature of the impugned decision called for public engagement, there was no such or any meaningful consultation which was undertaken by the Commission prior to coming up with the impugned decision.

189. In sum, the manner in which the impugned decision was made by the Commission impugned Article 10 of the Constitution for want of public participation and/or stakeholder consultations.

190. The next consideration is whether the impugned decision violates **Article 47** of the Constitution and the Fair Administrative Actions Act.

191. Article 47 of the Constitution states that:

> *(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

192. The legislation that was contemplated under Article 47(3) is the **Fair Administrative Actions Act**, No. 4 of 2015.

193. Section 5(1) thereof provides that: -

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice—

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within which such appeal shall be lodged.

194. Section 2 of the Fair Administrative Actions Act defines an '*administrative action'* and an '*administrator*' as follows: -

'***administrative action'*** *includes –*

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

*'**administrator**' means 'a person who takes an administrative action or who makes an administrative decision'.*

195. The Court of Appeal in ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** addressed itself to Article 47 of the Constitution as follows: -

> *Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.*

196. In South Africa, the Constitutional Court in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1*** ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court expressed itself as under: -

> *Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative*

justice. These standards will, of course, be informed by the common law principles developed over decades…

197. The High Court in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR*** added its voice on the issue, and, as follows: -

> *25. In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*
>
> *These are: -*
>
> *a.* ***Illegality*** *- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b.* ***Fairness*** *- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*
>
> *c.* ***Irrationality and proportionality*** *- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****: -*
>
> > *If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...*

198. Flowing from the above discussion, there is no doubt that the impugned decision is an administrative action. I say so because the decision affected the legal rights and interests of political parties and the general public. Therefore, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

199. On the *legality* of the impugned decision, there is no doubt that the Constitution and the law accords the Commission the power to conduct elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.

200. On whether the impugned decision was *reasonable* or *arbitrary*, a look at the concept of arbitrariness is crucial.

201. The Court of Appeal in ***Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR*** referred to the **Black's Law Dictionary 8th Edition** that defined arbitrariness in the following manner: -

> *in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.*

202. The High Court in ***Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR*** referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -

> *the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.*

203. The Supreme Court of China in ***Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188*** had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

> *The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-*

rational, not done or acting according to reason or judgment, depending on the will alone.

204. The term '*arbitrariness*' had earlier on been defined by the Court (Supreme Court of China) in ***Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212*** when it comprehensively observed as follows;

> *The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.*

205. The impugned decision and any other subsequent decision calling for revision of the nomination party lists so as to accord to the gender principle had far reaching effects on *inter alia* the political rights in Articles 38 and 91 of the Constitution.

206. The decisions brought to the fore complex and unanswered questions. They include the legal basis for limiting the political rights and whether that was in line with Article 24 of the Constitution, the legal basis of substituting a duly nominated candidate of one gender who lost with that of the other gender who was successful where both competitively participated in the nomination process, how compliance is to be achieved in constituencies where the underrepresented gender does not show interest for parliamentary positions, the legal basis for altering the freely expressed political choices derived through a democratic process in order to meet the gender rule, among many others.

207. There is yet another challenge posed by the impugned decision. It relates to the constitutional and statutory timelines towards the General election. According to the Commission, all nomination

processes were to be concluded on or before 26th April, 2022. However, the impugned decision was made on 27th April, 2022.

208. The argument by the Respondent and the Interested Parties, save the 1st Interested Party, that the Court in the Katiba case had already made it clear that the Commission ought not to accept any nomination lists not in parity with the gender rule is not sustainable. The reason is simple. Such argument is made in disregard of the duty bestowed upon the Commission under Order No. 4 of the judgment.

209. Parties cannot be allowed to cherry-pick and hold to parts of a decision which seem to favour them and conveniently leave out those parts which are not in their favour. It is the duty of parties, and this Court, to look at the judgment as a whole.

210. There is also the timing of the impugned decision. From the record, the Commission encountered challenges in attaining the two-third gender rule when it involved the Hon. Attorney General and Parliament. It then decided to do it otherwise through stakeholder engagement. In doing so, the Commission again did not make any meaningful headway since there remains no evidence of adequate consultation or at all.

211. Despite such position, the Commission, and with a view to create an impression that it was out to entrench the gender rule, and just before the General election, hurriedly sprung up with the contested decision. In doing so, the Commission was well aware that it was yet to conduct any meaningful engagement and that no consensus had been reached by at least the political parties in the manner in which the gender principle was to be realized more so since there was no legislation or any State policy direction to that end.

212. Be that as it may, there were other better ways which the Commission ought to have considered in its effort to realize the gender principle with the party nominations. For instance, the Commission has a duty to ensure that each political party forwarded its nomination rules and regulations to it. On receipt, the Commission must approve the rules and regulations before a political party may carry out its party nominations. One of the requirements in the rules and regulations is that they must be in

consonance with the Constitution and the law. That include the gender principle. The Commission, then, has the power to reject any rules and regulations which do not meet the required constitutional and legislative threshold.

213. In this case, the Commission cleared the political parties' nomination rules and regulations. Save for the 1st Interested Party, the Commission did not state whether the rules and regulations by the other political parties had provisions for the two-third gender rule and whether the Commission was satisfied that the political parties had put in place satisfactory mechanisms to attain the requirement.

214. Had the Commission stood firm and rejected any nomination rules and regulations by any political party which did not provide for the manner in which the two-third gender principle would be realized at the party level, it would have really bolstered its effort towards the realization of the gender rule. However, the Commission let that opportunity slide out of its legal hands.

215. The Commission also failed to appreciate the efforts undertaken by individual political parties towards attaining the gender principle. For instance, all the efforts undertaken by the 1st Interested Party, as deposed to by the party's Secretary-General, were never considered or at all in arriving at the impugned decision.

216. In light of the foregoing, the totality of it all is that the impugned decision was, therefore, not well thought out. The road to the impugned decision on the part of the Commission was too winding and long and that called the Commission to accord the matter adequate time, engage appropriately and build consensus, at least among the political parties and stakeholders. The Commission failed to do so. The result is that the impugned decision was arrived at rather prematurely.

217. In the unique circumstances of this matter, the impugned decision, and any other subsequent decision, can only be described as unreasonable, arbitrary, inconsiderate, unfair and unproportional.

218. The impugned decision, therefore, was not in line with Article 47 of the Constitution for want of reasonableness and procedural fairness.

219. In coming to the end of the consideration of this issue, the following findings come to the fore: -

(a) There was no sufficient public engagement or at all in arriving at the impugned decision. That contravened Article 10 of the Constitution.

(b) The impugned decision was an administrative action which did not attain the test in Article 47 of the Constitution for want of reasonableness and procedural fairness. The decision was, hence, unreasonable, arbitrary, inconsiderate, unfair and unproportional.

220. In the end, this Court finds and hold that the impugned decision contravened Article 10 of the Constitution for want of public participation and Article 47 of the Constitution as read with the Fair Administrative Actions Act for want of reasonableness and procedural fairness and as such the decision was unreasonable, arbitrary, inconsiderate, unfair and unproportional.

221. I will now consider the last issue.

(c) Whether the impugned decision contravene Articles 4(2), 27, 38 and 91 of the Constitution:

222. The preceding issue has demonstrated how the impugned decision did not pass the constitutional muster in Articles 10 and 47 of the Constitution.

223. In this issue, the Court will consider whether the impugned decision is in consonance with Articles 4(2), 27, 38 and 91 of the Constitution.

224. Article 4(2) of the Constitution provides that the Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.

225. Article 27 of the Constitution is on equality before the law and freedom from discrimination whereas Article 38 provides for political rights. Article 91 of the Constitution provides for the basic requirements for political parties.

226. Given the discussion in the foregoing issue, there is no doubt that the approach taken by the Commission in arriving at the impugned decision has far reaching effects and renders no answers to many critical questions arising from the implementation of the two-third gender rule. All such has been elaborately captured above.

227. The effect of the impugned decision is to directly interfere with various other rights and fundamental freedoms which are guaranteed in the Constitution. For example, the rush manner in which the impugned decision was made trampled upon the political rights of individuals under Article 38 of the Constitution to the extent of interfering with the freedom to make political choices in nominating candidates in a political party, the freedom to join and form a political party as well as the basic requirements for political parties under Article 91 of the Constitution.

228. Further, the implementation of the impugned decision contravenes the duty imposed upon political parties in Article 91 of the Constitution to abide by the democratic principles of good governance and to promote and practise democracy as well as the duty to respect the right of all persons to participate in the political process, including minorities and marginalised groups. For the fact that Parliament is yet to pass the necessary legislation on the two-third gender rule and given that the impugned decision fails to provide the manner in which the decision will safeguard the already crystallized political rights, the impugned decision corrodes the duty to promote the objectives and principles of the Constitution as well as the rule of law.

229. It is on the foregoing basis that the impugned decision further infringes Article 27 of the Constitution to the extent that it fails to accord the political parties and its members equal treatment on the realization of the political rights as opposed to the rest of the Kenyans and as such the parties and their members fail to benefit from the intention of the Constitution and, more so, the equality before the law.

230. The net effect of this discussion is that the impugned decision is not in consonance with the dictates of Articles 27, 38 and 91 of the Constitution. It further violates other national values and principles of governance provided for in Article 10 of the Constitution including human dignity, equity, social justice, human rights, non-discrimination, good governance, integrity, transparency and accountability.

231. In sum, the impugned decision further offends Articles 4(2), 27, 38 and 91 of the Constitution and is constitutionally infirm.

Disposition:

232. As I come to the end of this judgment, I must reiterate what my colleague Judges have previously said of the Commission on how it handles sensitive matters especially towards the tail-end of an election cycle and just before a General election.

233. The Commission has previously been faulted for not acting well in time. That is so in this matter. Being aware that the political parties had failed to comply with the judgment in the Katiba case and that the Hon. Attorney General and Parliament were not supportive of its efforts, the Commission's antennae ought to have been raised. It was incumbent upon the Commission to undertake appropriate steps towards the impugned decision rather than making arbitrary decisions.

234. The Commission ought to have continued to engage the general public and the stakeholders and in the end come up with an understanding with the political parties on how the decision in the Katiba case will be implemented. The understanding would have most likely provided for the inclusion of the gender requirement in the political parties' nomination rules and regulations and the manner in which the requirement will be attained.

235. By doing so, the Commission would have created an opportunity to decline to accept any nomination rules and regulations which do not provide for, not only the recognition of, but also the attainment of the gender principle. In that, the impugned decision would not have

been necessary and the Commission would have fully implemented the decision in the Katiba case.

236. It is, however, not lost to the Commission. There is still an opportunity for the Commission to attain the gender rule through the nomination of candidates in political parties. That can be easily attained in the next election cycle.

237. This Court also notes that even though the attainment of the gender rule through the nomination of candidates in political parties in itself may not translate to the attainment of the desired gender balance in Parliament, it would, nevertheless, be a big stride towards the progressive realization of the gender principle and even as Parliament also deals with the matter.

238. I believe I have said enough to be able to determine this matter. I must now bring this conversation to a halt.

239. In the end, and from the above findings and conclusions, the disposition of the consolidated Petitions is as follows: -

(a) A declaration do hereby issue that the decision contained in the letter dated 27th April, 2022 by the Independent Electoral and Boundaries Commission to all registered political parties requiring the compliance with the two-third gender principle in the submission of the political parties' nomination lists contravenes Article 10 of the Constitution for want of public participation and Article 47 of the Constitution as read with the Fair Administrative Actions Act for want of reasonableness and procedural fairness. The said letter further violates Articles 27, 38 and 91 of the Constitution as it amounts to a direct derogation of political rights.

(b) A declaration do hereby issue that the decision contained in the letter dated 5th May, 2022 by the Independent Electoral and Boundaries Commission to the United Democratic Alliance Party requiring the party to revise its nomination list within 48 hours

and in compliance with the two-third gender principle amounted to a further contravention of Articles 10, 27, 38, 47, 38 and 91 of the Constitution.

(c) An order of Certiorari be and is hereby issued, calling into this Court, and quashing the the letters dated 27th April, 2022 and 5th May, 2022 by the Independent Electoral and Boundaries Commission. The said letters and the decisions therein are hereby quashed.

(d) As the Petition is a public interest litigation, each party will bear its own costs.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **13th** day of **June, 2022.**

A. C. MRIMA
JUDGE

Judgment virtually delivered in the presence of:

Mr. Elias Mutuma, Learned Counsel for the 1st Petitioner.

Mr. Adrian K. Njenga, Learned Counsel for the 2nd Petitioner.

Mr. Kipkogei, Mr. Melli and **Miss Kisia,** Learned Counsel for the Respondent.

Miss. Nyuguto and **Miss. Caroline Kamende**, Learned Counsel for the 1st Interested Party.

Mr. Steve Ogolla and **Miss Kimeu**, Learned Counsel for the 2nd Interested Party.

Mr. Dudley Ochiel, Learned Counsel for the 3rd to 8th Interested Parties.

Mr. Mbiti, Learned Counsel for the 9th Interested Party.

Jared Ouma – Court Assistant.