REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 371 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES NOS. 1, 2, 3, 10, 19, 22, 23, 27 (1), (3), (6) & (8), 81 (B), 94 (1), (5, 97 (1), 100 (A), 165, 261 (1), (2), (3), (5), (6) (A) & (B), (7), (8)

AND

IN THE MATTER OF FAILURE BY THE STATE AND PARLIAMENT TO TAKE LEGISLATIVE AND OTHER MEASURES TO IMPLEMENT THE PRINCIPLE THAT NOT MORE THAN TWO-THIRDS OF THE MEMBERS OF ELECTIVE OR APPOINTIVE BODIES SHALL BE OF THE SAME GENDER

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND PROTECTION OF RIGHT TO EQUALITY AND FAIR REPRESENTATION OF THE PEOPLE

BETWEEN

CENTRE FOR RIGHTS EDUCATION AND AWARENESS.....1ST PETITIONER

COMMUNITY ADVOCACY AND AWARENESS TRUST (CRAWN TRUST)....2ND PETITIONER

KENYA NATIONAL HUMAN RIGHTS COMMISSION.....3RD PETITIONER

versus

THE SPEAKER THE NATIONAL ASSEMBLY.....1ST RESPONDENT

SPEAKER OF THE SENATE.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3R DRESPONDENT

and

KENYA HUMAN RIGHTS COMMISSION.....1ST INTERESTED PARTY

FEDERATION OF WOMEN LAWYERS- KENYA (FIDA).....2ND INTERESTED PARTY

AND

NATIONAL GENDER AND EQUALITY COMMISSION.....1ST AMICUS CURIAE

LAW SOCIETY OF KENYA.....2ND AMICUS CURIAE

JUDGEMENT

Introduction

The core issue raised in this petition is whether or not Parliament has failed to fulfil an obligation the Constitution imposes on it. The specific question is whether or not Parliament has passed legislation that gives effect to the two thirds gender rule. If not, Parliament is in breach of its constitutional obligation, and the petitioners ask this Court to invoke provisions of Article 261 of the constitution and allow the reliefs sought in the petition.

As Dr. Willy Mutunga, former Chief Justice of the Republic of Kenya observed:-[1]

"In 2010 Kenya adopted a new modern transformative constitution that replaced both the I969 Constitution and the post Colonial Constitution of 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.

The making of the Constitution Kenyan 2010 is a story of ordinary citizens striving and succeeding to overthrow the existing social order and to define a new social, economic, cultural, and political order for themselves. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence.

In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: reconstitution or reconfiguration of a Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution; a vision of nationhood premised on national unity and political integration, while respecting diversity; provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state and society in Kenya. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution."

Our system of government is based upon a secular democratic faith which, in the words of

Abraham Lincoln, is "that government of the people, by the people, and for the people shall not perish from this earth." The basic tenets of that faith are embodied in the Constitution which specifically provide at Article 2 (1) that "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the

Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. These principles are binding on 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 public policy decisions.

Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary.[2]

The judiciary has a special role in our system with respect to constitutional interpretation. The reason is not simply that "[i]t is emphatically the province and duty of the judicial department to say what the law is." That famous line from *Marbury vs. Madison*,**[3]** in the context of 1803, was not an assertion of interpretive supremacy but a claim of interpretive parity: the courts "as well as other departments" are bound by the Constitution and must interpret it when a dispute so requires. Yet two centuries later, the judiciary's unique (though not exclusive) competence and authority to interpret the Constitution have become widely accepted "as a permanent and indispensable feature of our constitutional system." In this way, judicial review itself exemplifies the adaptation of our constitutional system to the structural principle of checks and balances and to the Constitution's purposes of "establishing Justice" and "securing Liberty and Equality for all.

This petition revolves around the interpretation and application of the provisions of Article 261 of the constitution which provides that:-

261. *(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.*

(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.

(3) The power of the National Assembly contemplated under clause (2), may be exercised—

(a) only once in respect of any particular matter; and

(b) only in exceptional circumstances to be certified by the Speaker of the National Assembly.

(4) For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified.

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.

(7) If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

(8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the

periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament.

(9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

Schedule five of the constitution provides for time frames within which the various legislations were to be enacted and in the case of the legislation relating to implementation of the two thirds gender rule, the prescribed period is five years from the effective date of the constitution.

Also relevant to this case are the clear provisions of Article 100 of the constitution on the Promotion of representation of marginalized groups which provides that:-

100. *Parliament shall enact legislation to promote the representation in Parliament of—*

(a) women;

(b) persons with disabilities;

(c) youth;

(d) ethnic and other minorities; and

(e) marginalised communities.

The Constitution requires that all constitutional obligations "must be fulfilled." It would be wrong, to step back from exercising a power the Constitution imposes on an organ of the state. It is also important to mention that upon being sworn as members of the National Assembly/Senate, the members take the oath of office with words to the effect:-

"I,……....., having been elected a member of the Senate/National Assembly do swear (in the name of the Almighty God) (solemnly affirm) that I will bear true faith and allegiance to the People and the Republic of Kenya; that I will obey, respect, uphold, preserve, protect and defend this Constitution of the Republic of Kenya; and that I will faithfully and conscientiously discharge the duties of a member of Parliament. (So help me God)."

The petitioners case

The petitioners aver that women are among the marginalized groups in Kenya who have not had equal protection and benefit of the law and that they have suffered political exclusion and denied rights to participate effectively in the public affairs of the Republic of Kenya and that both appointive and elective bodies across the entire spectrum of public sector, women constitute less than one third of the elected or appointed persons.

The petitioners further also aver that the Constitution of Kenya, 2010, under its various Articles, sought to address the gender imbalance and that the full implementation of the principle that would guarantee gender balance and inclusivity was to be achieved through the enactment of a legislation that ought to have been in place by 27th August, 2015.

The petitioners further aver that Parliament failed to enact the legislation required under the Constitution for purposes of ensuring gender balance hence it invoked the relevant provision of the constitution and extended the period for enacting the law by one year which extension lapsed on 27th August, 2016, again without the required law being enacted, hence the petitioners case is that the first and second Respondents have failed, refused and or neglected to perform their constitutional obligation to pass the necessary legislation to realize the principle that not more than two thirds of the National Assembly and the Senate shall be of the same gender.

The petitioners state that the Constitution[4] vests all sovereign power in the people of Kenya which power must be exercised in accordance with the constitution either directly or indirectly through democratically elected representatives,

and that the people of Kenya elected members of the 1st and 2nd Respondent to whom they donated the sovereign power to be exercised on their behalf in various aspects including the passage of legislations contemplated under the constitution in order to bring the constitution into full operation and that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government[5]and that every person has an obligation to respect, uphold and defend the constitution[6] and that the constitution spells out 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 public policy decisions[7] and that among the national values and principles are inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.[8]

The petitioners cited Article 260 of the Constitution which defines “marginalized group” to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4),and averred that sex is one of the grounds referred to therein.

The petitioners also invoked among others the provisions of Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and Article 27(6) provides that to give full effect to the realization of the rights guaranteed under the article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

It is also the petitioners case that Article 27(8) provides that in addition to the measures contemplated in clause (6),the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender and also cited Article 81(b) which sets down in mandatory terms one of the principles that the electoral system is required to comply with which is that “not more than two-thirds of the members of the elective public bodies shall be of the same gender.”

The petitioners state that Article 100 promotes the representation of marginalized groups and provides that Parliament shall enact legislation to promote the representation in Parliament of, among other groups, women while Schedule 5 of the Constitution provides that the enactment of legislation to ensure the full implementation of Article 100 shall be within five years from the effective date and further **Article 261** provides that parliament shall enact any legislation required by the Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

Also cited is Article 261(5) which provides that if Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

The petitioners recalled that the Supreme Court in its advisory opinion[9] on the realization of the two-thirds gender principle stated that the deadline for the implementation of the principle was to be on 27th August, 2015 and that to the extent that the question of implementation of the two-thirds gender principle is provided for and required under Article 27 under the Bill of Rights for the promotion of equality between sexes and to secure freedom from discrimination on the basis of sex, the question is a human rights issue the failure to comply with which amounts to a violation of the rights of women.

It is the petitioners case that that parliament having failed and or refused to enact the legislation contemplated under Articles 27, 81(b) and 261, the only option left is to petition this Honourable court under articles 261(5),(6) and (7), hence this petition.

On 6th October 2016, the Kenya Human Rights Commission, an independent constitutional body established pursuant to article 59 (4) of the constitution successfully applied to be enjoined in this case as the third petitioner. In an affidavit sworn by Patricia Mande Nyaundi, it associated itself fully with the petitioners case and added that among the most pivotal promises of the transformative constitution negotiated and endorsed by the Kenyan people in a referendum on the 4th of August 2010 and subsequently promulgated on the 27th of August 2010 was equality for all, non-discrimination, inclusiveness, gender equity, human rights and the protection of the marginalized and that the constitution enshrined specific national values and principles which include inclusiveness, non-discrimination, equality and human rights.[10] She also averred that the constitution enshrined provisions to secure gender equity, equality and

non-discrimination to the intent that historical discrimination and disempowerment of women in political life should be eliminated. She also averred that Kenya is a signatory to a myriad of international human rights instruments on gender equity and Kenya has continued to lag behind in women representation in parliament in the region and that the need for balanced representation is informed by the principle that inequality is core to the realization of human rights and that gender equity and equality is not optional but is a fundamental human right and a mandatory value and principle which the Kenyan people fully expect to be enjoyed, hence the enactment of the necessary legislation is essential and further failure to enact the said legislation is a serious violation of the constitution of Kenya which the first and second Respondents are obliged and swore to fully defend[11] and that the said failure is a blatant usurpation and callous subversion of the sovereign will of the people of Kenya.[12]

First Interested Party

On behalf of the first interested party, the Kenya Human Rights Commission (KHRC), a Non-Governmental Organization whose mandate is to secure human rights in states and societies through fostering human rights, democratic values, human dignity and social justice is the affidavit of George Kegoro, its executive director filed on 24th October 2016 in which he avers *inter alia* that Kenya is a signatory to various international, regional and sub-regional instruments, namely, the Universal Declaration of Human Rights, The Beijing Declaration and Platform for Action, The African Union Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) and the Solemn Declaration on Gender Equity in Africa and that Kenya has to uphold equality and non-discrimination principles and make effort to attain gender representation and that the constitution domesticates its commitment to safeguard human rights and fundamental freedoms and entrenches the concept of gender equality in article 27 (8) which obligates the state to take legislative and other measures to implement the two thirds gender principle and article 81 (b) which qualifies article 27 (8) by providing that "not more than two thirds of the members of elective or appointive bodies shall be of the same gender" and that the realization of equality between women and men and the advancements of rights of special interest groups contemplated under article 100 is a matter of human rights and a condition for realization of social justice. The rest of the affidavit echoes the averments by the second interested party and the petitioners.

The Second Interested Party

On 14th September 2016, Federation of Women Lawyers Kenya (FIDA), a non-profit, non-partisan, membership, public benefits organization whose mandate is to create a society that respects and upholds women's rights was enjoined in these proceedings. Christine Ochieng, its executive director, avers that the constitution of Kenya adopted regional and international human rights principles and that article 10 states that national values and principles of governance bind all state organs, state and public officers. She averred that the two thirds gender principle promotes equality, equity, human rights and protection, non-discrimination and protection of the marginalized. She recalled various initiatives taken to realize the two thirds gender rule and averred that Parliament has systematically and blatantly refused to enact the necessary legislation leaving the state in a pending crisis and that parliament has failed the women of Kenya by disregarding national values and principles of governance and by failing to abide by the constitution.

Amicus curiae

On 6th October 2016, National Gender and Equity Commission and the Law Society of Kenya were enjoined in these proceedings as the first and second *amicus curiae* respectively.

On record on behalf of the first *amicus Curiae* is the affidavit of Winfred Osimbo Lichuma filed on 17th October 2016 in which she averred *inter alia* that the Supreme Court in its advisory opinion[13] observed *inter alia* that the legislative measures ought to be put in place for the realization of the two thirds gender principle in Parliament as per article 81 (b) by 27th August 2015. She recalled the efforts made by a Technical Working Committee appointed by the Honourable Attorney General which culminated in a Bill but Parliament failed to pass it and that following the failure by Parliament, the first *amicus Curiae* wrote to the president of the Republic of Kenya advising on steps to be taken to ensure that the bill was reintroduced in parliament for further consideration to avoid a constitutional crisis and also wrote an advisory to the speakers of the two houses on the ramification of the failure by parliament to enact the necessary legislation as stipulated in the advisory opinion rendered by the Supreme Court[14] as read with High Court Petition no. 182 of 2015.

The First and second Respondents' Response

The first and second Respondents filed identical affidavits sworn by Michael Sialai and Mohamed Ali Mohamed, respectively Senior Deputy Clerks of the National Assembly and the Senate stating that the first Respondent and second Respondent have been improperly joined in this case as principal Respondents, which amounts to mis-joiner, that the duty of the Speaker is to preside over sittings of Parliament and debates of the national assembly and the Senate as stipulated in the constitution, hence the Speaker does not introduce legislation, hence they cannot be said to have failed to pass the contemplated legislation. Consequently, the orders sought cannot be enforced against the Speakers of the two houses.

It is also averred that Parliament has already enacted legislation to give effect to the two thirds gender rule through the Election Laws (Amendment) Act 2016 under section 28 to provide for fiscal initiatives to Political Parties in order to assist in implementing the two thirds gender principle and that 15% of the Political Parties Fund is now to be distributed among parties based on the number of elected special interest candidates and that there is no provision in the fifth schedule requiring parliament to pass legislation to give effect to Article 81 of the Constitution. However, I must point out that with regard to this last averment, schedule five of the constitution clearly provides for five years from the effective date of the constitution, which period could only be extended only once for a further period of one year, and that Parliament did extent the said period to August 27th 2016 which deadline also passed.

The first and second Respondents urged the court to consider the consequences of the orders sought in this petition and public interest. Again, I must point out that the reliefs sought are clearly provided for in the constitution.

Also on record are grounds of opposition stating *inter alia* that the issues in this petition raised are *res judicata* having been determined in petition number 182 of 2015 and that the jurisdiction of this court under article 261 should not be invoked to entrench a constitutional crisis and that the court should respect the doctrine of separation of powers.

Third Respondents Replying affidavit

On behalf of the Honourable Attorney General, Maryann Njau-Kimani, the secretary, justice and constitutional affairs of the Attorney General's office swore the affidavit filed on 15th February 2017 in which she averred *inter alia* as follows, that in 2013, the Honourable Attorney General foreseeing the likely constitutional crisis that could portend Parliament in the event that the two thirds gender principle was not achieved sought the Supreme Court's Advisory opinion[15]and that the Supreme court rendered its opinion and gave Parliament up to August 27th 2015 to come up with the necessary legislation but Parliament could not meet the said deadline and extended it for one year to 27th August 2016, but still parliament did not pass the Bill and proceeded to explain the steps the office of the Attorney General took and stated that the office of the Attorney General has done all that was within their constitutional powers to facilitate the enactment of the relevant legislation.

Submissions by the petitioners advocates

In their submissions in response to the argument that this case is *res judicata* on grounds that the issues raised in this petition were raised and determined by the Hon. Lady Justice Mumbi Ngugi in *Centre for Rights Education and Awareness vs The Attorney General and Another***[16]** counsel for the first and second petitioners submitted that the issue in the said case was whether the Attorney General and the Commission on the Implementation of the Constitution had adequately discharged their mandate under Article 261(4) of the Constitution and the court rendered itself thus:-

"One cannot describe the steps that the AG and CIC have taken as they emerge from their affidavits as reasonable and practicable, or as intended to achieve the timeline in the Advisory Opinion. There is thus an apparent failure on the part of the respondents to exercise their constitutional mandate under Article 261(4) as directed in the Advisory Opinion."

Counsel correctly submitted that the issue now before this court is whether parliament has discharged its mandate under article 261(1) and if not, what are the consequences for such failure under article 261(5), (6), (7) of the Constitution hence under no circumstances can these sets of questions be one and the same question to be confronted with a plea of *res judicata* and added that the general rule is that *res judicata* must be invoked very sparingly in

constitutional petitions and in support of this position counsel cited the cases of *Wycliffe Gisebe Nyakina vs Attorney General*;**[17]** *Okiya Omtata vs AG.*[18]

Counsel submitted that the current petition raises different issues; the prayers sought are different; the parties are different; and what is invoked is the jurisdiction of the High Court under Article 261(6) on the basis that Parliament has failed to pass the legislation within the stipulated timelines. In fact, this is the first ever application invoking the jurisdiction of the High Court under Article 261(6) of the Constitution from the date of its promulgation and that whereas what was alleged in the earlier petition was a threat of violation, the current claim is that the violation has since crystallized because the deadline plus its extension have since lapsed without the legislation being put in place. Also, the claim of *res judicata* cannot settle in the face of a continuing violation of the constitution.

On whether the 1st and 2nd Respondents have been properly joined in this Petition, counsel cited *Judicial Service Commission vs Speaker of the National Assembly & 8 others***[19]**where a bench of five high court judges had the following to say on the question of joinder of the speaker of the National Assembly to proceedings involving acts or omissions of the National Assembly:-

83. ..... a petition shall not be defeated by reason of the joinder or misjoinder of parties. ...

88. ..... the National Assembly is not a juristic person. Its actions are taken and communicated through the Speaker, not through the entire House. It follows, therefore, that there is nothing remiss in civil processes under the law which question acts of the National Assembly being instituted against the Speaker, or in orders emerging there from being served upon the Speaker.

89. Indeed, the practice in this jurisdiction has shown that the Speaker can be joined as a party or respondent in matters pertaining to the National Assembly. The latest illustration of this is the ***Advisory Opinion No. 2 of 2013*** *in* ***Speaker of the Senate & Another v Hon. Attorney-General & Another & 4 Others [2013] eKLR*** *which pitted the Speaker of the National Assembly and the Speaker of the Senate in a dispute regarding the role of the Senate in Parliamentary Bills that would impact on devolved government. In that matter, there was no argument that the Speakers of both Houses were not properly before the Supreme Court."*

Counsel observed that when confronted with an option to go to court on the question of the interplay between the functions of the National Assembly and the Senate, the 1st and 2nd Respondents herein went to court in their respective names as set out in *Speaker of the Senate & Another vs Hon. Attorney-General & Another & 4 Others.***[20]** It is, therefore, not open to the respondents to approbate and reprobate at the same time regarding their juridical status in relation to court proceedings.

On jurisdiction, counsel submitted that the question before this court is whether the Respondents have enacted or failed to enact legislation required to implement the constitution within the time-frame set out in article 261 of the Constitution. Article 261(5) provides that if Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

Counsel also submitted that this court is bound to take into account the aspiration of all Kenyans toward a government based on the essential values of *human rights*, *equality*, freedom, democracy, *social justice* and the rule of law. The court is further bound by the idea that the Constitution is the supreme law of the land, binding on all persons and all State organs at either level of government. In that regard, any act or *omission* in contravention of the Constitution is invalid.

Counsel also submitted that under Article 2(6) any treaty or convention ratified by Kenya forms part of the laws of Kenya. Kenya is a party to a number of treaties that guarantee gender equity and gender equality.

Article 10 of the Constitution declares and sets out the National Principles of governance which bind all State organs, state officers, public officers and all persons whenever any of them interprets the Constitution, enacts, applies or interprets any law, makes or implements public policy decisions. The relevant national values and principles of governance to this Petition include human dignity, equity, social justice, inclusiveness, equality, human rights, non-

discrimination and protection of the marginalized among others.

Counsel also correctly submitted that the Bill of Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies and whose objective is to preserve the dignity of individuals and communities and promote social justice and the realization of the potential of all human beings and that article 20 declares that human rights apply to all persons, and that every person is entitled to enjoy such rights to the greatest extent possible consistent with the nature of the right or fundamental freedom. Additionally, the Court, in interpreting the Bill of Rights has to promote the values that underlie an open and democratic society based on human dignity, *equality*, equity and freedom, and shall also promote the spirit, purport and objects of the Bill of Rights.

Also cited is Article 20(3)(a) and (b) which specifically requires the Court in enforcing the Bill of Rights to *develop the law* to the extent that it does not give effect to a right or fundamental freedom and also to adopt the interpretation that *most favours* the enforcement of rights and fundamental freedoms. The charge to develop the law through constitutional interpretation is repeated in Article 259(1)(c) and added that the constitution embodies a new understanding of judge-made law that is more faithful to reality and charged with implications for the Constitutional project reflected in the preamble in the form of the aspiration of all Kenyans for a government based on the essential values of *human rights*, equality, freedom, democracy, *social justice* and the rule of law.[21]

Counsel also submitted that the theory of a holistic interpretation of the Constitution developed by the Supreme Court requires an interpretive approach that takes into account, alongside a consideration of the text and other provisions in question, non-legal phenomenon such as Kenya's *historical*, *economic*, *social*, *cultural*, and *political* context.[22] The implication to this petition is that this court in resolving the gender representation question presented to it in this Petition, can only successfully do so by examining the relative significance of social, economic, cultural, and political factors that boost or hinder women's legislative representation. The court is therefore beholden to take judicial notice of and to remedy the prevalence of discrimination against women due to factors embedded in the country's *historical context* and *political economy* which make it difficult for women to access equal opportunities.

Counsel recalled that the Supreme Court *in the matter of Gender Representation in the National Assembly and the Senate***[23]** acknowledged the historically unequal power relations between men and women in Kenyan society. Counsel submitted that by failing to implement the measures contemplated under Article 27 and 100, the Respondents have also failed in their obligation under Article 21(1) which indicates that the State and every state organ have an obligations to **observe, respect, protect, promote and fulfill** the rights of men and women to equality under Article 27.

Counsel for the third petitioners submissions were essentially similar to the submissions by the first and second Respondents and added that for the doctrine of *res judicata* to apply, the matter must be directly and substantially in issue in the two suits[24] and that the parties must be the same or litigating under the same title and that the matter must have been finally decided in the previous suit[25] and that none of these elements have been satisfied, and that *res judicata* should not stand on the face of violation such as being alleged in the present case.[26]

Counsel reiterated that the respondents have breached their constitutional obligations and violated fundamental human rights enshrined in the constitution and cited the international and regional conventions cited by counsel for the first and second Petitioners.

Submissions by counsels for the first and second interested parties

Counsels for the interested parties adopted submissions by counsels for the petitioners. Counsel for the second interested added that parliament has failed in its duty to implement the provisions of article 27 and 100 of the constitution while counsel for the first interested party submitted that Kenya has an obligation to promote gender equality and inclusivity.

Submissions by counsels for the Respondents

Counsels for the first Respondent and second Respondents and the third Respondent's written and oral submissions are strikingly identical. They insisted that the speaker of the National Assembly and the Senate have been wrongfully

sued as principal respondents in this petition,[27] that the national assembly has enacted legislation to give effect to the two thirds gender rule through the Election Laws (Amendment) Act, 2016, and section 28 amended the Political Parties Act to provide for fiscal incentives to political parties in order to assist in implementing the two thirds gender principle under which 15% of the political parties fund is now to be distributed among parties based on the number of elected special interest candidates and that the national assembly has initiated several legislative initiatives that seek to further implement the two thirds gender principle and urged the court to consider what they described as the grave consequences of dissolving parliament pursuant to article 261 (7) of the constitution. Counsel for the third Respondent reiterated that the Hon. Attorney General did all that could have been reasonably done in the circumstances, hence he has not failed, refused or neglected to act and accordingly an order of mandamus should not issue against him.

I must point out that I have carefully followed the steps taken by the Honorable Attorney General as enumerated in the Replying Affidavit of Maryann Njau-Kimani including seeking an advisory opinion from the Supreme Court and the various initiatives taken by the Honourable Attorney General to ensure that the requisite legislation is enacted and I am persuaded that the Honourable Attorney General performed his duties including highlighting the consequences in the eent of Parliaments failure. In my view the blame and or failure to act lies squarely on the door steps of Parliament who as observed in this judgment failed, refused and or neglected to perform its constitutional mandate.

Issues for determination

I now address the issues raised in this petition.

Whether the defence of *res judicata* applies in this case

Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can

be pleaded by way of estoppel in the subsequent case.

As Somervell L.J. stated [28] *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. I have carefully examined the facts pleadings in this case and the facts in question and the decision referred to by the Respondents counsels and I am clear in my mind that the issues now raised in this petition are not the same issues raised in Pet No 182 of 2015.

It is quite clear that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. For a defense of *res judicata* to succeed,***[29]*** the court must be satisfied that not only are the parties the same, but the issues raised are unquestionably similar. I am not persuaded that the issues in this case are unquestionably similar to the issues in Pet No. 182 of 2015 hence the defence of *res judicata* raised by the Respondents fails entirety.

Whether the 1st and 2nd Respondents have been properly joined in this Petition.

Interestingly, this same argument raised by counsels for the Respondents was raised in *Judicial Service Commission vs Speaker of the National Assembly & 8 others***[30]** where as correctly submitted by counsels for the petitioners, the same issue was ably considered and sufficiently answered by a five judge bench of this court. I stand guided by the said decision. In the addressing the said issue, the court in the said case also considered the provisions of **Rule 5 (b)** and **(c)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[31] which state as follows:-

"(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful

whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit."

The position that the National Assembly is not a juristic person is to me unquestionably the correct interpretation of the law. It also happens to the position and practice in other jurisdictions where the Speaker is sued instead of suing Parliament. Examples:- South African cases of *My Vote Counts NPC vs Speaker of the National Assembly and Others* cited below, *Economic Freedom Fighters vs Speaker of the National Assembly and Others***[32]** *and Democratic Alliance vs Speaker of the National Assembly and Others***[33]** and the *Lesotho case of All Basotho Convention & 2 Ors vs The Speaker of National Ass.***[34]**

While still on this issue, I find myself obliged to emphasize that the Kenyan judiciary must guard against the development of a two-tracked system, one that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles governing exercise of judicial authority. In my view those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.[35] My strong view is judicial review and the exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test cannot stand court scrutiny.

To elaborate this point further, although the *Lancaster House Constitution* contained a Declaration of Rights, its enforcement mechanisms, particularly rules of civil procedure and the law relating to *locus standi* (legal standing), jointer or non-jointer of parties, necessary parties to a suit, and procedural technicalities posed a great challenge to human rights litigation. This is so because the *Lancaster House Constitution* and laws of procedure and pleadings adopted the traditional common law approach. The Lancaster House Constitution failed to recognise the importance of broader rules of standing, access to justice and the need to determine cases without undue regard to procedural technicalities. Contrary to this, the Constitution of Kenya 2010 broadens the scope and prescribes the principles to guide a court in the exercise of judicial authority.

Conduct of judicial proceedings and exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions.[36]Rule **3(1)** of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[37] provides that the overriding objective of the Rules is to facilitate access to justice for all persons as required under Article **48** of the constitution.

Rule **(3**) provides that the rules shall be interpreted in accordance with Article **259 (1)** of the constitution and shall be applied with a view to advancing and realizing-*(a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in the constitution.*

Rule **8** provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Also relevant is the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General***[38]**

"..... To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad". (Emphasis added)

The fundamental duty of the court is to do justice between the parties. I find that argument of mis-jonder or non-joinder of parties raised by the Respondents counsels has no merits or legal basis and the same must fail.

On the issue jurisdiction

The applicant seeks to bring directly before this Court its assertion that Parliament has failed to fulfil a constitutional obligation by not passing legislation the Constitution obliges it to enact within the time frame set out in article 261 of the constitution. Does this Court have competence under the Constitution to consider the claim"

The jurisdiction of this court is expressly provided under article 261 (5) of the constitution which provides that "If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter."

The constitutional court of South Africa in *My Vote Counts NPC vs Speaker of the National Assembly and Others*[39] stated that "we are mindful that it is this Court that is the final arbiter on adherence to the Constitution and its values. On this, in *Doctors for Life*, Ngcobo J says:-

"But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

I find that the above passage is relevant to this petition.

On separation of powers

Counsel for the first and second Respond urged the court to respect the doctrine of separation of powers. My response to this is simple. Where a constitutional obligation is impugned, as here, the Constitution itself mandates the intrusion. This Court does not seek to prescribe to Parliament that it ought to legislate in a particular manner, but Parliament must legislate in a way that gives effect it to its constitutional obligations.

I also find that the said argument cannot stand on the face of the clear provisions of article 261 (5), (6), (7), (8) and (9) of the constitution and the powers of judicial review vested in the High court now entrenched in the constitution.

The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to the courts to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred.

Also relevant is the holding in *Trusted Society of Human Rights Alliance & 2 Others vs the A.G. & 2 others*[40] where it was held that:-

"....there is nothing like supremacy of parliament outside the constitution. There is only supremacy of the constitution. Given that the constitution is supreme, every organ of state performing a constitutional function must perform it in conformity with the constitution. Where the state fails to do so, the court as the ultimate guardian of the constitution will point out the transgression."

Has Parliament failed to enact the necessary legislation

The Constitution entrenches the principle of equality and requires the state to adopt affirmative action programs and policies to "redress any disadvantages suffered by individuals or groups because of past discrimination." More specifically, it requires that elective and appointive bodies should be composed of "not more than two-thirds of either gender." The Constitution of Kenya recognizes women, youth, persons with disabilities and ethnic minorities as special groups deserving of constitutional protection.

The constitution espouses the rights of women as being equal in law to men, and entitled to enjoy equal opportunities in the political, social and economic spheres. Article 81 (b) which refers to the general principles of Kenya's electoral system states 'the electoral system shall comply with the following principle - (b) not more than two-thirds of the members of elective public bodies shall be of the same gender. Article 27 goes further to obligate the government to develop and pass policies and laws, including affirmative action programs and policies to address the past discrimination that women have faced. The government is required to develop policies and laws to ensure that, not more than two-thirds of elective or appointive bodies shall be of the same sex.

On 11th December 2012, the Supreme Court of Kenya delivered a majority decision that the realization of the two-thirds gender principle under Article 81 (b) is progressive. In its ruling, the Supreme Court directed that Parliament is under an obligation to have a framework on realization of the two third Gender Rule by **27th August 2015**. The Hon. Attorney General Githu Muigai had filed a request in the Supreme Court for an Advisory Opinion as to whether the two-thirds gender principle was to be realized by the first general elections (under the new Constitution) i.e. in March 2013, or over a longer period of time.

Parliament failed to meet the deadline stated in the advisory opinion but extended it by one more year, which also lapsed before the required legislation could be passed and that the said period cannot be legally extended, so that window closed.

The constitution is clear that the government should take steps to implement the two third gender rule. Article 27 (8) provides that the "state shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be comprised of one gender."

The constitution upholds the equality of both male and female genders in the society. Article 27 (3) states that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.'

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 fulfill** the right of men and women to equality under Article 27.

Determination

Article 2(1) of the Constitution provides that *'The Constitution is the Supreme Law of the Republic and binds all persons.* Article **259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The Constitution of Kenya gives prominence to national values and principles of governance.

The court is bound to adopt the interpretation that most favours the enforcement of the right to equality and non-discrimination of men and women in Parliament. In this regard, I do not agree with the assertion by the Respondents counsels that the amendments to the election laws qualifies to be construed even in the slightest manner to qualify to be the desired legislation to give effect to the two thirds gender rule and on this issue I find myself persuaded by the submissions rendered by counsel for the first and second petitioners and counsels for the interested partied and the *amicus curiae* that Parliament has failed to enact the required legislation to implement the measures contemplated under Article 27(6) hence a gross violation of Article 21(3) and 100 of the Constitution.

Counsels for the petitioners cited several international and regional conventions on the rights of women and emphasized that gender equity is a Human Rights issue. In addition to Kenya being a signatory to the said instruments, Article 2(5) of the Constitution expressly imports the general rules of international law and makes them part of the law of Kenya. Equality of rights under the law for all persons, male or female, is so basic to democracy and commitment to Human Rights. Parliament has a constitutional obligation to enact the requisite legislation and failure to do so within the stipulated period is in my view unacceptable and a blatant breach of their constitutional duty and mandate of Parliament and the provisions of article 261 must come into play. As mentioned earlier, Members of Parliament swore to obey,

respect, uphold, preserve, protect and defend the constitution. They are in blatant breach of this solemn oath.

The Constitution of Kenya represents a high watermark of consensus and compromise in our

history- reflecting the best in our traditions, providing a considered response to the needs of

the present and being resilient enough to cope with the demands of the future. The basic values of the constitution can have meaning only when the constitutional vision becomes a reality. But no constitution is self executing. Hence, Parliament being the legislative organ of the state has been mandated by the constitution to execute its legislative duties and in this particular case it was given a specific time frame, so failure to legislate as required within the set time frame is a gross violation of the constitution and an act of abdicating from its constitutional mandate.

Law is the vehicle by which society makes some of its most basic decisions and courts are the institutions whose major task is to defend and preserve the order of things. Courts are important part of the institutions which society has designed to set its norms with. Every organ of the state derives its authority from the constitution and has to act within the limits of that authority. It is for the court to uphold the constitutional values and enforce the constitutional limitations. Judicial review does not mean supremacy of the judiciary, but of the constitution. That is called constitutional supremacy and this court has a constitutional duty to uphold it. As Alexander Hamilton noted; the courts "were designed to be an intermediate body between the people and their legislature" in order to ensure that the people's representatives acted only within the authority given to Congress under the Constitution."

The Constitution is the nation's fundamental law. It codifies the core values of the people. Courts have the responsibility to interpret the Constitution's meaning, as well as the meaning of any laws passed by Parliament. This by any means does not suppose a superiority of the judicial to the legislative power. But it means that the power of the people is superior to both; and that where the will of the legislature, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Court judgments must reflect the nation's best understanding of its fundamental values. The preamble to our constitution among others recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In a recent decision of this court,[41] I observed that:-

*"Our Constitution is highly valued for its articulation. One such astute drafting is the fact that the Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.***[42]**

*The Constitution of Kenya, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of Kenya have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All sovereign power belongs to the people, and it is entrusted by them to specified institutions and functionaries, namely, Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the judiciary and independent tribunals***[43]** *with the intention of working out, maintaining and operating a constitutional order."*

In interpreting the constitution, we must develop an interpretation that respects the endurance of our Constitution and explains how its text and principles retain their authority and legitimacy over decades and centuries. Preserving the document's meaning and its democratic legitimacy requires us to interpret it in light of the conditions and challenges faced by succeeding generations. In a recent decision of this court[44] I rendered myself as follows:-

*"The disposition of issues relating to interpretation of statutes and determining constitutional questions must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be had hoc. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand.***[45]**

I use the term *constitutional fidelity* to describe the above approach of constitutional interpretation. To be faithful to the Constitution is to interpret its words and to apply its principles in ways that sustain their vitality over time. Fidelity to the Constitution requires judges to ask not how its general principles would have been applied today, but rather how those principles should be applied in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society.

The constitution itself is very clear on the question of equality between men and women. The constitution is very clear on the steps that were to be taken to give full effect to the realization of the two third gender rule. The constitution requires the state to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Article 27 (8) requires that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies are of the same gender. The period allowed for passing the desired legislation lapsed without the legislation in question being in place. Parliament extended the period by one year but again it failed to enact the required legislation. The extension also lapsed and that widow closed. The effect is that there is total failure on the part of Parliament to perform a constitutional obligation.

The enacting agent is necessarily Parliament, which the Constitution makes the sole repository of national legislative power. Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament fails, refuses and or neglects to enact the required legislation, as has happened in this case, then Parliament will not only have violated the constitution, but it will also have violated the fundamental rights and freedoms of the citizens guaranteed under the constitution. Refusal to enact the required legislation amounts to denial of the fundamental rights guaranteed to the citizens.

A second concern is Parliament's indispensable role in fulfilling constitutional rights. Ngcobo J in *New Clicks* pointed out that "[l]egislation enacted by Parliament to give effect to a constitutional right ought not to be ignored."[46] The Constitution's delegation of tasks to the legislature must be respected, and comity between the arms of government requires respect for a cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights. The courts and the legislature act in partnership to give life to constitutional rights."[47] The respective duties of the various partners and their associates must be valued and respected if the partnership is to thrive.

Parliaments failure to enact the required legislation amounts to failure to recognize the important task conferred on the legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights.

Among the reliefs sought by the petitioners is a declaration that unless the law contemplated under article 81 (b) is enacted and implemented before the next general elections scheduled for 8th August 2017 the resultant National Assembly and Senate if non-compliant with the constitutional requirement of minimum and maximum gender thresholds shall be unconstitutional hence null and void. I entirely agree with this proposition because it represents the correct position of the law in line with article 27 (8) of the constitution and such a Parliament will be susceptible to legal challenge.

However, the above prayer needs to be examined within the provisions of Article 261(8) & (9) which provides as follows:-

(8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament.

(9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

The above provisions are clear as to what would follow if the court invokes the provisions of article 261 (7). I must add that the constitution does not anticipate a situation whereby article 261 (7) is invoked and there is failure to comply. This will be not only unconstitutional, but a recipe for chaos.

Guided by the various articles of the constitution cited above and having considered the facts of this case carefully, and having fully considered the submissions made by the advocates for parties in this case, and bearing in mind the need to promote the purposes, values and principles of the constitution, and the need to advance the rule of law, human rights and fundamental freedoms in the Bill of Rights, I find that this petition has merits and that the reliefs sought are warranted. I am satisfied that that the first and second Respondents have failed, refused and or neglected to perform their constitutional mandate prescribed in the constitution. Consequently, this petition succeeds. I allow the petition and order as follows:-

(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*

Orders accordingly

Signed, Dated and Delivered at Nairobi this **29th** day of **March** 2017

John M. Mativo

Judge

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[1]Willy Mutunga, The 2010 Constitution of Kenya and its Interpretation: *Reflections from the Supreme Court Decisions*, University of Fort Hare Inaugural Distinguished Lecture Series, October 16, 2014

[2] Ibid

[3] 5 U.S. 137 (1803), was a landmark United States Supreme Court case in which the Court formed the basis for the exercise of judicial review

[4] Article 1

[5] Article 2

[6] Article 3

[7] Article 10

[8] Article 10 (b)

[9] In Reference number 2 of 2012

[10] Article 10

[11] Article 3

[12] Article 1

[13] Supra

[14] Ibid

[15] Ibid

[16] High Court Constitutional Petition No. 182 of 2015

[17] {2014} eKLR

[18] {2014} eKLR

[19] {2014 eKLR

[20] Advisory Opinion No. 2 of 2012 {2013} eKLR

[21] Counsel cited Dennis M Davis and Karl Klare in “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 South African Journal on Human Rights 403, 409-10 AND ALSO the Court of Appeal through Musinga J in ***Equity Bank Limited v West Link Mbo Limited [2013] eKLR at 52*** held that “every provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking, thus there cannot be a legal void, a situation where the court is unable to grant a justiciable relief because of interpreting the law pedantically and concluding that it has no jurisdiction to grant such an order”.

[22] See In the Matter of the Kenya National Human Rights Commission [2014] eKLR at 26

[23] {2012} eKLR

[24] Counsel cited Nicholas Njeru vs AG & Others {2013}eKLR

[25] See Uhuru Highway Development Ltd vs Central Bank & 2 Others -Civil App No. 3 of 1996

[26] See Lenaola J in Okiya Omtata Okoiti & Another vs The A.G. & Another Pet No. 593 of 2013

[27] Counsel cited Administrator of Oshwal Academy vs Beresa Ltd {2014}eKLR

[28] In Greenhalgh v Mallard (1) (1947) 2 All ER 257

[29]See Gordon vs Williams {1994} 31 JLR 43

[30] {2014} eKLR

[31] Legal Notice No. 117 of 28 Juneth 2013

[32] CCT 143/15

[33] CCT 171/15

[34] {2017} LSHC 1, Judgment Date: 23 February, 2017

[35] Professor James Thuo Gathii's has posed the warning in *"The Incomplete Transformation of Judicial Review" quoted in "*The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today" http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/

[36] Article 159 (2) (d)

[37] Supra

[38] {1911} KB 418

[39] (CCT121/14) [2015] ZACC 31 (30 September 2015)

[40] {2012}eKLR

[41] The Law Society of Kenya vs K.R.A & Another, Pet. No. 39 of 2017, delivered on 14th March 2017

[42] Article 10 (1) (a)-(e)

[43] Article 1 (1), (2), & (3) of the constitution of Kenya

[44] Jonnah Tusasirwe & Others vs Council of Legal Education & Another Pet N. 505 of 2016Consolidated with Petition No. 509 OF 2016, Victoria Modong Taban & Others vs Hon. Attorney General & Others and Amanya Cohen-Interested Party

[45] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[46] Cited in My Vote Counts NPC vs Speaker of the National Assembly and Others, Note 37 Supra

[47] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14.*