REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 378 OF 2017

IN THE MATTER OF: AN APPLICATION BY NATIONAL SUPER ALLIANCE (NASA)

KENYA FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

UNDER SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND ORDER L111 CIVIL PROCEDURE RULES

IN THE MATTER OF: A DECISION OF THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION (I.E.B.C.) DATED 29TH MAY 2017

IN THE MATTER OF: THE AWARD OF BALLOT PAPER PRINTING

ENDERTO AL GHURAIR PRINTING AND PUBLISHING LLC

IN THE MATTER OF: ARTICLES 10, 38 (2), 47, 88 AND 88

AND 227 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT (NO. 4 OF 2015)

AND

IN THE MATTER OF: THE AWARD OF BALLOT PAPER PRINTING

TENDER TO AL GHURAIR PRINTING AND PUBLISHING LLC

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (I.E.B.C.).....RESPONDENT

AND

AL GHURAIR PRINTING AND PUBLISHING LLC.....1ST INTERESTED PARTY

THE ATTORNEY GENERAL.....2ND INTERESTED PARTY

THE JUBILEE PARTY.....3RD INTERESTED PARTY

DR. EKURU AUKOT & THIRD PARTY ALLIANCE.....4TH INTERESTED PARTY

SAMUEL WAWERU.....5TH INTERESTED PARTY

STEPHEN OWOKO OGANGA.....6TH INTERESTED PARTY

AND

EX PARTE APPLICANT....THE NATIONAL SUPER ALLIANCE (NASA) KENYA

JUDGEMENT

1. **Introduction**

1. Kenya is scheduled to have a General Election which includes Presidential elections on 08/08/2017. That date is a matter of unusual Constitutional detail at Articles 101(1); 136(2); 177(1)(a); and 180(1) of the Constitution. It is a product of rich, painful history and context. As per the Constitution, these elections must be conducted under a system that is constitutionally-prescribed to be “free”; “fair” and “credible”. This unusual detail is also part of our Constitutional text not part of the brooding omnipresence of derivation of penumbral rights guaranteed by implications in the Constitution. Similarly, this explicit right bequeathed to Kenyans by the Constitution is fecund in its history and context. Lastly, these free, fair and credible Presidential Elections which are constitutionally scheduled for 08/08/2017 must be conducted by an independent body: the Independent Boundaries and Elections Commission (“IEBC”). Again, the constitutionally-prescribed independence of that body is a product of our rich legal and political history of elections in our Country.

2. In the present case, these three primary constitutional dictates are at issue. They meet at the intersection of the procurement of a supplier for Election Materials and Ballot Papers for the Presidential Elections. The question presented is not who, in the face of these (and other relevant Constitutional and statutory provisions) is given the power and function to conduct the elections but the manner in which they do so – and what and how other Constitutional values and statutory requirements should come into play in their conduct of those elections. Differently put, in a constitutionally-constrained time-line for conducting elections, how much leeway and deference must be accorded to the IEBC to conduct the Presidential Elections and what that constrained Constitutional context dictates for the Constitutional and other Statutory requirements in its decision making on matters related to the Procurement of Election Materials and Ballot Papers for the Presidential Elections.

3. The advertent way in which we have tentatively described and contextualized the suit before us immediately gets to one of the key issues taken before us in this suit: whether the suit should be governed and resolved by resort to (transcendental) Constitutional principles or whether it should be resolved by resort only to the traditional principles of

Common Law Judicial Review. Before we return to this first question of applicable law, we will first, very briefly describe the suit as filed before us.

4. This case challenges the manner in which the IEBC sourced for a supplier of Election Materials and Ballot papers for the general elections, and, particularly the Presidential Elections scheduled for 8th August 2017. The basic argument by the Applicant is that the IEBC (the Respondent) has failed to comply with important and mandatory Constitutional provisions and has, in addition, misapplied important statutory provisions in the Public Procurement and Disposal Act (hereinafter "PPAD Act"). At the core of its complaint, the Applicant seeks the quashing of the decision by the IEBC to award the tender for the printing of Election Materials and Ballot Papers for the Presidential Elections to the 1st Interested Party.

5. The Respondent and the Interested Parties (other than the 4th Interested Party) are opposed to the Application on various grounds which we will describe shortly. These grounds range from jurisdictional objections, to technical arguments to substantive grounds. Jurisdictionally, the two main objections are that the PPAD Act is a self-contained dispute system that does not permit an aggrieved party to approach the High Court for relief before that party can demonstrate that it exhausted the mechanisms for dispute resolution under the Act. The second jurisdictional objection is that the Court should refuse to exercise jurisdiction in the matter in due deference to the autonomy, institutional competence and expertise of the IEBC as the body charged with the function and clothed with authority to conduct General Elections in Kenya. The IEBC and these Interested Parties further argue that the reliefs of Judicial Review the regime under which the Applicant has invoked the Court's jurisdiction are therefore not available in the circumstances of this case.

6. The 1st, 2nd, 3rd and 5th Interested Parties have also raised various technical objections regarding the form of the Application. We have described these objections below. Finally, the IEBC and the 1st and 3rd Interested Parties have opposed the Application on substantive grounds: First, that the suit is **not** made out on the evidence presented by the Applicant and the 4th Interested Party. Second, the 1st, 2nd and 3rd Interested Parties argue that the Applicant has misunderstood the applicability of the Constitutional principles it urges on procurement matters in the context of Presidential Elections. Third, the IEBC and all the Interested Parties (other than the 4th Interested Party) argue that even if the Application is successful the orders prayed should not be granted on public interest grounds anyway.

7. In the next section, we will briefly summarize the various parties' respective cases in more detail before we identify the issues that we have distilled that need analysis and resolution by this Court. However, it is important to clarify one issue at the outset. While the Application as originally filed seemed to generalize the complaint as one impugning the award of tender to print Election Materials and Ballot Papers for all the six Elections (Presidential; Gubernatorial; Senatorial; Member of Parliament; Women Representative; and Member of County Assembly), during arguments both at the leave stage and at the hearing of the main Motion, all parties were in agreement that the Application before us concerned only the award of the tender of printing of Election Materials including Ballot Papers for Presidential Elections only. This is the only aspect of the case that we will discuss and decide as it is the only matter was placed before us and argued. **To be clear, there was no challenge before us in the suit as framed respecting the award of the tender for the printing of Election Materials and Ballot Papers for the elections of Governors, Senators, Members of Parliament, Women Representatives, and Members of County Assembly, which will also be held simultaneously with the Presidential Elections on 8th August, 2017.**

B. **The Applicant's Case**

8. The Applicant's case is that the IEBC did not facilitate public participation and or consultation with the relevant stakeholders while awarding the tender for the purchase of Election Materials including Ballot Papers for Presidential Elections for forthcoming general elections scheduled for 8th August 2017. It states that the Respondent only communicated the decision through a media briefing on 5th June, 2017 in which it stated that it had made a decision to award a direct tender to the 1st Interested Party, and that it had signed a contract with the first interested.

9. The Applicant states that the said decision was made in total disregard of national values and principles in Article 10 of the Constitution, specifically, without granting members of the public and or relevant stakeholders their constitutionally guaranteed opportunity to contribute to the said decision and that had the Respondent involved the Applilcant and other stakeholders, it would not have arrived at the said decision.

10. Additionally, the Applicant alleges that the IEBC made the said decision while aware of the negative perceptions the public had concerning the first interested party. The Applicant is apprehensive that the said decision was pre-determined, made in bad faith and in contravention of the constitutional percept's of transparency and accountability and ignored critical factors that call to question the integrity and impartiality of the interested party to deliver election materials that will facilitate free and fair elections, hence the decisions violated Article 227 of the constitution, and may prejudice the legitimate expectations of millions of Kenyans for free, fair and democratic elections.

11. It is the Applicant's case that the decision is illegal, biased and or unfair administrative action in that it was actuated by ulterior motives or purpose calculated to prejudice the legal rights of the Applicant, and, indeed, other Kenyans. Further, that the decision ignored and or failed to take into account relevant considerations and or took into account irrelevant considerations and was an abuse of discretion.

12. The Applicant also alleges that His Excellency the President of Kenya Hon. Uhuru Kenyatta met with officials of the Dubai Chamber of Commerce which delegation the Applicant believes was led by the chairman of the 1st Interested Party on 5th October 2016 to discuss among other things the strengthening of economic ties between Kenya and the U.A.E. and that the President had on previous occasions met the chairman of the 1st Interested Party and members of the Lootah family for undisclosed reasons. The applicant states that the president being a contestant in the forthcoming general elections in which he is seeking a second term in office, has vested interests in the planning of the elections.

13. The Applicant also states that over the years elections in Kenya have been marred by serious electoral malpractices that have affected the integrity of the outcomes thereof and resulted in decisions that do not reflect the popular will of the people. Chief among such root causes has been the printing of excess ballot papers and results forms, ballot stuffing, tampering with and substitution of results. One way to address these electoral malpractices which the Applicant finds threatening to the Republic, was through the commandment in the Constitution of Kenya, 2010 that all state organs are bound by the national values and principles of governance including public participation and inclusivity and that when a state organ contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

14. It is also alleged that the 1st Interested Party has been involved in printing of ballot papers in Zambia and Uganda where such elections have been marred by malpractices that have called into question the integrity of the elections and that the IEBC applied double standards in that it allegedly disqualified another tender on grounds of negative perception by the political class yet it went ahead to award the tender to the 1st Interested Party. The Applicant also cited public interest and insisted that no prejudice will be occasioned to the IEBC if the orders sought are granted.

15. Norman Magaya**,** in a replying affidavit filed and dated 28th June 2017 averred that the previous law suits referred to by the IEBC challenging the tendering process were a direct consequence of the deliberate unlawful acts and dilatory conduct of the IEBC and that the circumstances under which the 1st Interested Party was engaged were never disclosed. He insisted that the IEBC was under an obligation to consult with and or facilitate public participation before and during the evaluation process considering the public interest in the general elections.

16. He also noted that the IEBC has failed to disclose material documents including the evaluation committee's report and that the media briefing was held well after the contract had been signed, hence it was inconsequential for purposes of Articles **10** and **227** of the Constitution.

17. In response to the 1st Interested Party's affidavit, he averred that the selection was motivated by bias and irrational considerations aimed at eliminating competition and giving it undue advantage in the procurement process, and that mismanagement of the procurement process of election materials has been the cause of unnecessary suspicions that has negatively impacted the credibility of elections generally in Kenya. The printing of ballot papers form an integral part of any electoral process and any improprieties in the process must be called out and addressed well in advance in order to maintain confidence in the relevant institutions and the process and that the election system must be free, fair and administered in a impartial, neutral, efficient, accurate, verifiable, secure, accountable and transparent manner.

3. **Respondents' case**

18. Ezra Chiloba, the Chief Executive of the IEBC (Respondent) in his Replying affidavit filed on 27th June 2017 averred

that on 17th August 2016, the IEBC commenced the process of procuring election materials for the August 8th 2017 Elections. However, the award was challenged in the Public Procurement Administrative Review Board ("Review Board") but it was dismissed. The Coalition for Reforms and Democracy successfully challenged the award in court.[1] The IEBC was directed to restart the process in compliance with the Constitution, the PPAD Act[2] and the relevant laws.

19. A second tender was annulled by the Review Board on 19th May 2017, barely 80 days to the general elections and the Review Board recommended the IEBC to commence procurement afresh using such method at it may consider appropriate taking into account the time then left to the elections. However, a petition[3] was filed in court seeking to stop the IEBC from engaging in direct procurement but was dismissed, barely 72 days to the elections, hence the IEBC opted for direct procurement under section 103 (2) (b) of the PPAD Act.[4]

20. Thus, the IEBC made a decision on 29th May 2016 to procure the Election Materials including Ballot Papers for Presidential Elections by way of direct procurement from the 1st Interested Party, a decision that was arrived at considering that the 1st Interested Party had supplied materials for all by-elections, and that it had the capacity, has modern machines, emergency production ability, experience and qualified personnel, is financially stable, experience in African countries, competitive prices and an existing two year contract. A contract has since been signed between the IEBC and the 1st Interested Party. Additionaly, the IEBC avers that the Ballot Tender issue was discussed by the relevant committee of the National Assembly, which involved all political parties.

21. He also averred the IEBC met the Hon. Raila Odinga, Hon. Raphael Tuju and Hon. Moses Wetangula on 24th May 2017 and briefed them and a further meeting was held at the Inter-Continental Hotel on 15th June 2017 in which the Applicant was represented, hence, there were reasonable consultations. He insisted that procurement is confidential and cited section **67** of the Act which creates a offence in the event of disclosure, and that section **103** of the PPAD Act which deals with public procurement does not provide for public participation.

22. He further averred that the Applicant is challenging the award on the basis of unproven claims based on newspaper reports, and that the role of the court in a judicial review process is to look at the process through which the decision in question was arrived at and not the merits of the decision and that the IEBC considered all the relevant factors before arriving at the decision. He also averred that the Applicant has not demonstrated that the decision is illegal, irrational or procedurally flawed.

23. He also stated that the IEBC has already issued a letter of credit to the 1st Interested Party; that there are sufficient safeguards in place to guard against interference with the ballot papers; that if the elections are not held as scheduled this may precipitate a constitutional crisis.

24. In a further affidavit filed on 27th June 2017, Mr. Chiloba exhibited minutes of special plenary meetings of the IEBC held on 26th My 2017 in which the IEBC approved the direct procurement, and its minutes of 29th May 2017 in which the decision to award the tender to the 1st Interested Party was made.

D. **1st Interested Party's Case**

25. On record is the Replying affidavit of Ganapathy Lakshmanan, the General Manager of the 1st Interested Party in which he avers that the 1st Interested Party has been engaged in ballot papers and election materials printing business for over 10 years. It has supplied voting materials to various countries including Uganda, Zambia, Central African Republic, Nepal, Haiti, Guinea, Libya, Madagascar, Iraq, Burundi, Egypt, Sudan, South Sudan and Rwanda. It has also worked with United Nations Development Programme (UNDP) in delivering election materials to countries where the UN in providing assistance and that it has been providing services to a wide range of clients among them the IEBC since 2014.

26. Mr. Lakshmanan also avers that the 1st Interested Party was informed by the IEBC that it had been identified for purposes of supply of ballot papers for elections, Election Results declaration forms by way of direct procurement for a period of two years including the forthcoming 2017 General Elections. This communication was contained in a letter dated 31st May 2017 and it immediately confirmed its interest.

27. Thereafter a tender document (Ref No. IEBC/53/2016-2017) dated 2nd June 2017 for the supply and delivery of election materials as and when required basis for two years was duly received. It completed and returned the sealed tender documents and in June 2017, its representatives met with the IEBC for negotiations, and thereafter the tender was awarded to it and an agreement was signed on 8th June 2017. Thereafter, the 1st Interested Party submitted a time plan for delivery of the materials.

28. Mr. Lakshmanan also avers that it has since incurred costs and committed huge resources into the procurement of the materials. He denied any relationship between Majid Saif Al Ghurair and the 1st Interested Party and questioned the media reports relied upon by the Applicant. It is also averred that the IEBC proceeded under the provisions of section 103 (b) of the PPAD Act due to the urgency of the matter, that the challenged decision met the requirements of articles **10** and **227** of the Constitution. Also, he averred that the process of decision making was settled by the court of appeal[5] and that no evidence of secrecy was adduced and that there was delay in filing this suit.

E. **2nd Interested Party's Case**

29. The 2nd Interested Party, the Hon Attorney General did not file an affidavit, but filed written submissions and also made oral submissions in court which are considered later in this judgement.

F. **3rd Interested Party's Case**

30. On behalf of the 3rd Interested Party is the affidavit of Mary-Karen Sorobit, the Deputy Executive Director of Legal Affairs filed on 27th June 2017. In the affidavit, she avers *inter alia* that the general elections must be held on the second Tuesday in August in every fifth year. This date, Ms. Sorobit avers, is embedded in the Constitution, and that this case will, if entertained, jeopardize the effective planning of the elections and potentially plunge the country into a constitutional crisis and undermine the sovereign will of the People of Kenya.

31. Ms. Sorobit states that the Applicant has not made a case to warrant the orders sought; that the allegation made are vague; unclear and unsubstantiated; and that there is nothing to show how the integrity of the elections will be affected. She stated that she is not aware of any provisions of the PPAD Act that require public participation, regarding evaluation and award of tender, and insisted that it is not possible to build a consensus and invite public participation. Ms. Sorobit also averred that it is not possible to separate presidential elections from the other five elections. She also stated that the newspaper reports relied upon are not reliable and denied the there was a meeting between the 3rd Interested Party's leaders and representatives of the 1st Interested Party.

G. **4th Interested Party's case**

32. Mr. Ekuru Aukot, the party leader of the Thirdway Alliance Kenya and a presidential candidate averred that on 15th June 2017 he was invited by the IEBC at the Intercontinental Hotel whereby the IEBC disclosed that it had made the decision to award a direct tender to the first Interested Party for printing of election materials for the presidential elections scheduled for 8th August 2017. In the said meeting, concerns were raised about awarding the tender to the 1st Interested Party when it was clear Hon. Uhuru Kenyatta had met representatives of the company in more than one occasion.

33. He added that faced with the said complaints, the Chairman of the IEBC promised to respond later the same day. However, he did not, but subsequently, IEBC's Chairman wrote to all presidential agents confirming that they would be invited to travel to Dubai on 22nd June 2017 to witness the printing of Ballot papers but the said date has since passed and no such invitation has been extended to them. He also averred that the 3rd Interested Party admitted that the President met representatives of the 1st Interested Party, but where quick to point out that the Al Ghurair Group is distinct from the 1st Interested Party, but a look at the company's website reveals that the 1st Interested Party is the printing arm of Al Ghurair Group.

34. His position is that the IEBC did not involve all stakeholders while making the award as provided under article 10 of the constitution, that the decision is shrouded in secrecy and was made in circumstances that do not at all inspire confidence in the fairness and integrity of the upcoming presidential elections.

35. He proposed that the 1st Interested Party prints all other ballot papers except for presidential elections so as to avoid lengthy litigation with IEBC which can affect the credibility of the elections. He urged the Court to take notice of the role an incumbent has in an election and cited previous elections where the incumbent was contesting and there was violence, hence the Presidential Ballot Papers ought to be printed by a neutral printer agreeable by all the parties. He proposed either the government printer under strict supervision by the IEBC and all the stakeholders or the UN/International partners to supervise the printing by a international printer and further proposed rigid security measures which should include packaging supervised by agents at the printers premises and opening/breaking the seals at constituency level also in the presence of agents.

H. **5th Interested Party's Case**

36. The 5th Interested Party filed Grounds of Objection stating that the application violates order 53 Rule 7(1) of the Civil Procedure Rules, 2010, that the issues raised are *res judicata* as they could have been raised in **JR 637 of 2016**, that no violation of Article 47 has been proved, and that the challenged decision has not been annexed. He also stated that the contract has already been executed, hence there is nothing to prohibit and there is no basis for issuing an order or mandamus.

I. **6th Interested Party's Case**

37. Stephen Owoko Oganga**,** a registered voter and chairman of the Independent Candidates Lobby Group in his affidavit filed on 29th June 2017 averred that the public is not supposed to participate in the tendering or overseeing the tendering process or printing of the ballot papers, that the tender printing process is on course and cannot be reversed, that the decision to single source was done in good faith owing to the time factor. He also averred that political parties or contestants are not supposed to micro manage the IEBC and that cancelling the tender will cost the country huge economic loss nor is there sufficient time to-redo the process. He further averred that the Applicants have not come to court in good faith.

J. **Questions for Determination**

38. From the detailed descriptions of the Parties' positions and submissions, the issues that recommend themselves for determination in this Application are the following eleven:

a. First: is the suit bad in law and is the Court divested of Jurisdiction under the doctrine of exhaustion of remedies" The question here is whether the Applicant ought, first, to have filed its grievance before the **Public Procurement Administrative Review Board.**

b. Second: is the Court otherwise divested of jurisdiction in view of the nature of the Application and the reliefs sought" Differently put, are there prudential or other policy-based reasons why the Court should decline to exercise jurisdiction in this particular case"

d. Third: Is the Applicant disentitled to the reliefs it seeks due to material non-disclosure and lack of candour"

d. Fourth: Is the applicable and governing (doctrinal) law Constitutional principles and doctrines emanating thereunder or traditional Common Law Principles and doctrines of Judicial Review"

e. Fifth: Is the Application fatally defective because the Applicant failed to annex to its Application the impugned decision as required under Order 53 Rule 7 of the Civil Procedure Rules"

f. Sixth: Is the suit barred by the doctrine of *res judicata*"

g. Seventh: Did IEBC consider extraneous and illegal considerations in its determination to award the tender to the 1st Interested Party or was the decision otherwise actuated by bias"

h. Eighth: Was the IEBC constitutionally obliged to facilitate public participation as part of the tender process for the printing of Election Materials including Ballot papers for Presidential Elections"

i. Ninth: If the answer to (h) above is in the positive, was there sufficient public participation in the award of the tender to print Election Materials including Ballot Papers for Presidential Elections"

j. Ten: Should the Court Decline to Grant the Reliefs Sought on Public Interest Grounds"

k. Eleventh: What orders should the Court grant"

39. As presented above, these eleven issues comprise the entirety of the case as presented by the parties to the Court. The consequential organization of the issues also allows the Court to deal with the eleven issues in a manner that is clear and permits the Court conceptual clarity as it determines the issues. We will now deal with each of the issues *in seriatim*.

K. ***Jurisdictional Questions***

40. **The 2nd, 3rd and 5th Interested Parties raised two distinct objections on jurisdictional grounds which we propose to deal with first since they are potentially dispositive. In the first place, the 3rd Interested Party argues that the Court should decline to hear the Application under the doctrine of exhaustion. The argument here is that the PPAD Act has a self-contained dispute resolution system and that any party aggrieved by a procurement process ought, first, to file an appropriate claim for relief at the Public Procurement Administrative Review Board. The second objection to the jurisdiction of the Court is broader and more conceptual and amounts to what we have described as "prudential" jurisdictional objections: that this is precisely the kind of case that the Judicial Branch should decline to hear in a nod to the salutary principle of separation of powers and the need to exhibit judicial deference to the autonomous and expert organs of State. We will deal with these two objections next.**

K.1- Is the Suit Bad In Law Under the Doctrine of Exhaustion"

41. The issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The Court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in ***Speaker of National Assembly v Karume [1992] KLR 21*** in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is ***Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR***, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute

resolution.

44. Many decisions of the High Court and the Court of Appeal – including many cited by the 3rd Interested Party – are to the same effect. They include: ***Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR***; ***R vs Ministry of Interior and Coordination of National Government & Others ex parte ZTE Corporation (Judicial Review Case No. 441 of 2013); R vs Chief Registrar of the Judiciary & Others ex parte Riley Services; R v Public Procurement Administrative Review Board & Another Ex Parte Avante International Technology Inc. [2013] eKLR; R v National Housing Corporation Ex Parte Ernie Campbell & Company [2016] eKLR*.**

45. We have read these cases carefully and considered the salutary decisional rule of law they announce. It is important to pay attention to the rationale and policy justification for the doctrine in order to determine its outer limits. As the High Court announced in the ***In the Matter of the Mui Coal Basin Local Community [2015] eKLR,*** the rationale is thus:

The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system. The dispute resolution mechanism provided under the Public Procurement and Disposal Act represents the first category of dispute resolution mechanism created under a statute envisaged by the Constitution while the procedures by the Commission on the Administration of Justice established under Article 59(4) of the Constitution would represent the latter category.

46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the ***Shikara Limited Case (supra)***, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in the case before us, the alternative statutory forum envisaged in the PPAD Act, namely the Public Procurement Administrative Review Board, in an earlier suit involving at an attempt to award the same tender, referred some of the issues raised to the High Court for hearing and disposition since the Review Board was persuaded that resolution of the issue involved serious questions of constitutional and statutory interpretation. In referring the issues to the High Court in that earlier iteration of this dispute, the Review Board had this to say:

In matters of election and whether the provisions of the Elections Act and the Elections Laws (Amendment) Act of 2016 [applies], it is only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with jurisdiction to consider such matters. The Board on the other hand is only vested with powers to deal with procurement disputes although in doing so the Board is bound to consider provisions of the Constitution and any other statute in so far as the same relates to procurement.

48. This approach taken by the Review Board, which is consonant with the one we adopt here is same one suggested by the Court of Appeal in ***R vs National Environmental Management Authority [2011] eKLR*** where the Court explained that:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary

for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…

49. Additionally, this Court, in ***Misc App No. 637 of 2016*** while upholding the position adopted by the Review Board, held that a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article 227 of the Constitution, and who has no other recourse known to law, (as the IEBC concedes the Applicant does not have), must in our view find recourse in the High Court which is the Court entrusted under Article 165(2)(d) with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. In our view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this Court of one of its core mandate under Article 165(2)(d) of the Constitution. This was the view of the Court of Appeal in ***Al Ghurair Printing and Publishing LLC vs. Coalition for Reforms and Democracy & 2 others [2017] eKLR*** in which Musinga, JA relied on ***Communications Commission of Kenya & 5 Others [2014] eKLR, Anisminic vs. Foreign Compensation Commission [1969] 2 AC 147 and Habre International Co. Ltd vs. Kassam and Others [1999] 1 E.A. 125*** and opined that:

"*In our view, if the 1st Respondent's application had been filed under the provisions of PPAD Act only, simply challenging the decision by the Review Board and no more, then perhaps the 1st respondent would qualify to be referred to as an "aggrieved party". However, the Board and IEBC acknowledged that some of the issues raised by the 1st Respondent were outside the jurisdiction of the Review Board. Only the High Court was able to determine them…The mode of procurement of public goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, perhaps out of the realization that huge amounts of public resources are spent in procuring goods and services."*

50. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.

51. Firstly, section 165(1) of the PPAD Act provides that the persons who may seek administrative review are a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations. Section 2 of PPAD Act defines a "candidate" as meaning "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" while a "tenderer" is defined by the same a section as meaning "a person who submitted a tender pursuant to an invitation by a public entity". As the subject of this application was a direct procurement, clearly the Applicant did not fit the definition of either a "candidate" or a "tenderer" and therefore could not seek administrative review. It follows that the alternative remedy of making a request for review was unavailable to the Applicant in this case.

52. We agree with the decision in ***Misc. Application No. 637 of 2016 – Republic vs. Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reform and Democracy*** that where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. We are therefore of the view that the alternative remedy provided under the PPAD Act would be a mirage in so far as the Applicant is concerned. In those circumstances the provisions of section 174 of the PPAD Act comes into play. The said provision provides that the right to request a review under the Act is in addition to any other legal remedy a person may have.

53. It follows that a person who is not competent to request for review, has an avenue of other legal remedies including an application for judicial review and constitutional petition. In our view a person who would otherwise be locked out

from invoking the provisions of the PPAD Act is not barred from seeking alternative remedy under other provisions of the law. Indeed, this was the position adopted by this Court in ***Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR*** where the Court explicitly expressed itself thus*:"…any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights."*

54. Therefore, looking at our case law on the doctrine of exhaustion, the statutory schema provided under the PPAD Act and especially the wordings on which parties have a right to file a review application thereunder; the public interest involved and the polycentricity of the issues involved in this case, we find that the suit is properly filed before the Court. We do so on the basis of two mutually reinforcing grounds: First that Applicant who had valid concerns regarding the impugned tender process was **not** an "aggrieved party" within the meaning of section 174 of PPAD and could therefore not invoke the jurisdiction of the Review Board *suo motto* to ventilate its concerns. Hence, the only avenue open to the Applicant was to approach the Court. This situation needs to be contradistinguished from the position in ***R v IEBC & Another Ex Parte Coalition for Reform and Democracy & 2 Others Misc. Application No. 637 of 2016*** – the earlier case that is related to the present dispute. In that earlier case, the *Ex Parte* Applicant had been able to gain audience at the Review Board as an Interested Party only because an aggrieved party within the meaning of PPAD had appropriately invoked the jurisdiction of the Review Board.

55. The second reason we have concluded that the suit is properly filed before us is based on our analysis of the case, context and circumstances of the case. We are persuaded that the Application raises issues that are centrally outside the application of PPAD Act and which are bequeathed to the High Court namely the proper interpretation and application of certain Articles in the Constitution and how they intersect with the PPAD Act. As the Public Procurement Administrative Review Board stated in the ***Ex Parte Cord Case***, these are issues that are outside its mandate and which, therefore, have to be raised before the High Court.

K.2 Are There Prudential or Other Policy-Based Reasons Why the Court Should Decline to Exercise Jurisdiction in This Particular Case"

56. Mr. Ahmednassir, SC, Counsel for the 3rd Interested Party, submitted at length about the need for the Court to submit to a doctrine he called *"Judicial Restraint"* or synonymously "Orthodox Judicial Deference." To a great extent, the arguments by the Learned Attorney General, Prof. Githu Muigai, largely focused on this as well. It is not entirely clear what exact doctrine of constitutional interpretation Mr. Ahmednasir was referring to as "Judicial Restraint" but it would appear that he oscillated between two different meanings assigned to the phrase.

57. The first one – is an obvious one and a necessary corollary to the concept of the Rule of Law: that all decisions including those by judges are subject to the rule of law and judges must, in their interpretive role, subject themselves to a conception of adjudication which filters out their "personal" and "subjective" views and their own personal visions of freedom in place for a constrained approach which is grounded in reasoned argument and structured by the Constitutional text. Probably the best description of this kind of judicial function is the one cited by Mr. Ahmednassir: Prof. Karl Klare in his magnificent piece on ***Transformative Constitutions: Legal Culture and Transformative Constitutionalism***. Prof. Klare says as follows:

This essay focuses on adjudication as one branch of the law-making processes of democratic societies. I take for granted the perhaps controversial assumption that because adjudicators can never be totally constrained by their legal sources, because no one has yet devised or likely to devise a system of total constraint consistent with democratic values-adjudication is, inevitably, a site of law making activity….Among types of law making, adjudication is, or is supposed to be the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule and principle….But judges still, and will always confront the conflicting pulls and tensions (what we used to call the "dialectics" of freedom and constrain. On the one hand, there is a grand constitutional text replete with broad phrases and redolent with magnificent hopes to overcome past injustice and move toward a democratic and caring society.

Yet, on the other, just about everyone takes for granted that adjudication is not and cannot be infinitely plastic and open-ended, that judges and lawyers are not completely at large to say and do as they please by the lights of whatever personal vision of freedom they hold….[W]e balk at the idea of transformative adjudication because this suggests an

invitation to judges, as distinct from legislators to attempt in their work to accomplish political projects. To the contrary the rule of law ideal enjoins judges to check their politics at the courthouse door. Judges are appointed neutrally to enforce the laws set down by others, not to make politics. They are supposed to provide legal interpretation of texts, which means filtering out, as best as they can, their "personal" or "subjective views", or, what is taken to be the same thing as their "political values" and ideological preconception….

58. Here, what Prof. Karl Klare is railing against, is, in fact, a form of *Lochnersism*: a form of judicial activism in which court decisions are made based upon presumed rights not specifically addressed by existing (Constitutional) law, especially when influenced by political or personal beliefs. The term is culled from the (in)famous US Supreme Court decision in ***Lochner vs. New York***,[6] which declared unconstitutional a law that limited bakers to a maximum 10-hour work day and 60-hour work week based on a transcendental concept of "liberty of contract". Indeed, what Prof. Klare was concerned about in his article was the possibility that a largely counter-majoritarian class of judges would use their sense of class morality to torpedo the majoritarian Constitutional values embedded in the South African Transformative Constitution. In short, Prof. Klare is voicing the opinion that Judges should not constitutionalize their moral views in the guise of Constitutional interpretation.

59. The second meaning of "Judicial Restraint" seems to be more contested one: that judges must, in exercising their judicial authority, practice judicial deference: treat the decisions of other Constitutional organs with deference due to the legitimacy, autonomy and expertise of these other organs. It is not clear what outer limits Mr. Ahmednasir would suggest for this "Judicial Deference" but Prof. Githu Muigai suggested the familiar and accepted definition of Judicial Review as the appropriate approach. That approach is epitomized by the following paragraph in ***Susan Mungai vs. The Council of Legal Education & 2 Others:-***[7]

"[A] Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of ***Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation***[8] *….[I]t would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body …. for the court to substitute its own view from that of the [public body] to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision …. by issuing a mandamus to compel [a particular action by a public body]…. it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."*

60. This same view is reiterated in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd***[9] cited to us by the Honourable Attorney General. In that case, the Court of Appeal held that:-

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

61. Hence, where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:- (i) where there is an abuse of discretion; (ii) where the decision-maker exercises discretion for an improper purpose; (iii) where the decision-maker is in breach of the duty to act fairly; (iv) where the decision-maker has failed to exercise statutory discretion reasonably; (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (vi) where the decision-maker fetters the discretion given; (vii) where the decision-maker fails to exercise discretion; (viii) where the decision-maker is irrational and unreasonable. See ***Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze***[10]

62. If this is the meaning attached to "Judicial Deference," this Court is happy to adopt it. But it would seem that Mr. Ahmednasir prefers a different meaning. He cited, at length, a book by Jaime Arancibia entitled ***Judicial Review of***

Commercial Regulation for the proposition that the Judiciary should pay heed to an administrative organ's expertise and institutional autonomy as well as the need for administrative efficiency in adopting a non-interventionist stance. The basic idea is that the administration of public affairs should be conducted by the government rather than by the Courts.

63. Jaime Arancibia describes Judicial Restraint in the field of Judicial Review thus:-

"…[T]his doctrine [of Judicial Restraint] has emerged largely as a preferred mechanism for protecting decisions made by executive bodies which are especially qualified and competent in their field of practice. It is argued that regulators are expert decision-makers to which Parliament has provided specific duties and procedures to deal with complex issues in a manner which is more sensitive to the difficulties that can arise in the commercial system. It is for this reason that they are able to react quickly to new circumstances, to provide accurate and consistent interpretations of technical terms, and to take into account the impact of market intervention on all the subjects involved. In addition, these bodies are thought not to be as restricted in time to analyze detailed data and information as the courts. Hence it is recognized that the adoption of the a deferential standard of review would be the best way in which the operation of the supervisory jurisdiction may be reconciled with the needs of fast-moving markets, since it readily captures the benefits of leaving skilled, flexible, and responsible authorities to perform their tasks undisturbed." (pgs 55-56)

64. However, if Mr. Ahmednasir hoped to persuade the Court to adopt this "deferential approach" on the basis of Mr. Jaime Arancibia's scholarly arguments, he probably should have cited a different author. Mr. Arancibia is firmly of the view that English Courts have missed the mark by adopting this "deferential approach", contrary to the views Mr. Ahmednasir propounded before us. Hence, Mr. Arancibia concludes his chapter on "The Orthodox Deferential Approach" with a scathing criticism of the approach as incompletely theorized and largely illegitimate in a democratic society. He says thus:-

"At this point, however, it is necessary to assert that arguing that judicial deference expresses a mode of relation between judges and decision-makers which ensures the imposition of informed decisions and safeguards the interests of good administration does not, on its own, establish the legitimacy of the orthodox approach within the legal framework. In spite of its claimed importance for the market regulation system, this doctrine is unduly simplistic because it manifestly overlooks the need to afford adequate protection to the interests of the applicant who is seeking to avoid the consequences of an act which may be in excess of power. It must be recalled that the notion of individual justice is essential to a proper model of judicial review, in order that citizens may be effectively protected from arbitrary administrative decisions. More specifically, this means that judicial power must be exercised in a manner which is neutral and independent so that parties may be entitled to an impartial and full hearing on the issue and to be granted effective relief should the judge come to the conclusions that the contended decision is unlawful….Consequently, it is possible to argue that the application of the orthodox approach – which postulates regulatory expertise and effectiveness almost as the comprehensive criterion to determine the intensity of judicial review ….clearly renders the supervisory jurisdiction of the courts unworkable in terms of legal theory, because it wrongly neglects the normative basis that justifies judicial review in a form that pays due regards to the submissions of the litigant."

65. This approach to Judicial Review propounded by Jaime Arancibia is certainly more in keeping with the theory of Constitutional interpretation and the scope of Judicial Review adumbrated in our Constitution. Our Constitution neither endorses judicial restraint or expansive judicial activism: it simply creates the Judiciary as the institution through which the people of Kenya have bequeathed their sovereign power to exercise judicial authority and then mandates that Judiciary, and specifically, the High Court, to enforce the Bill of Rights. In doing so, the Constitution does not constrain the Judiciary to self-limit itself so as to create administrative autonomy or institutional capacity of coordinate organs under the banner of "Judicial Restraint." Instead, the Constitution requires the Judiciary to subject all actions by all public bodies to rationality analysis to ensure all such actions and decisions are made in accordance with the law.

66. In this connection, acquiescing to the invitation by Mr. Ahmednassir to adhere to a doctrine of Judicial Restraint would be constitutionally impermissible to the extent that it would entail a reluctance to exercise clearly mandated authority granted to the Court. We are of the view that once a party properly pleads a case, that party is entitled under our Constitution to receive a decision on its merits. We would agree with Prof. James Gathii, the Wing-Tat Lee Chair of International Law at Loyola University Chicago School of Law, in his book, ***The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis***, who stated as follows regarding the scope of Judicial Review in Kenya:-

"This dual system of Judicial Review – Constitutional and common law – is perhaps a function of the divisions of the High Court. It could also be that the Judicial Review Division's docket is largely comprised of cases challenging subordinate agencies and further that its remedial remit has been whether to issue the prerogative orders of certiorari, mandamus and prohibition rather than test the constitutionality of laws or of government conduct. If this is the case, then perhaps the Judicial Review Division is exercising administrative review rather than Constitutional review. Even if this is the case, one must take into account Article 47 of the Constitution which guarantees a right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. By constitutionalizing administrative justice as a right and removing it from the Common Law, the 2010 Constitution has created a large new swath of judicial decision-making authority that is within the four corners of the power of the Judicial Review Division. Article 47 of the 2010 Constitution explicitly requires that all public agencies to safeguard the administrative rights of citizens, and to ensure that they are within the terms of their legal authority.

*In my view, Article 47 of the 2010 Constitution makes Judicial Review based on the common law outdated."***[11]**

67. In other words, the only deference that the Court can exercise is one permitted by the Constitution – and, in particular, in accordance with Article 47 of the Constitution which constitutionalizes judicial review as a fundamental right. Having this in mind, we are unable to adopt any judicial theory of Constitutional interpretation by which the Court denies itself clearly enunciated authority and obligation to review administrative decisions. There is simply no Constitutional basis for such a doctrine under our constitutional schema. In any event, we find little prudential reason that recommends such a doctrine under our Constitution. As Jaime Arancibia ably demonstrates, the "orthodox judicial deference" is susceptible to solid and principled objections and is already under serious attack even in the United Kingdom whence it was plucked. Even if that were not so, that approach, as demonstrated above would not apply in Kenya by virtue of the Constitutional basis of judicial review as opposed to Common Law basis.

68. In our view, therefore, the issues that the Court has been asked by the Applicant to address in this Application are appropriately justiciable and properly before the Court. **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to *'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' and the jurisdiction 'to hear any question respecting the interpretation of the Constitution.'* **Article 23** provides that; *"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."*

69. Article **165 (6)** provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." Article **165 (7)** provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

70. The concept of judicial review under the Constitution of Kenya 2010 is similar to that under the Constitution of South Africa where it was held in ***Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*****[12]** that "[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

71. As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Court decisions should show strands of the recognition of the Constitution as the basis of judicial review.

72. Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision

of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution. Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

73. **Article 2(1)** of the **Constitution** provides that *'This Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.*' Further, Article 20(1) states that, "*the Bill of Rights applies to all law and binds all state organs and all persons".* The definition of a state organ is found at **Article 260** which states that a State Organ is; **"***a commission, office, agency or other body established under this Constitution. "* It is not in dispute that the IEBC is a commission established pursuant to the provisions of the constitution.

74. As a creature of the Constitution, the Court has a duty, like other State organs, to protect, promote and fulfil the values, principles and purposes of the constitution. In doing so, the Court must be guided by the principles set out in **Article 159** which include, among other things, protecting and promoting the purpose and principles of the Constitution. The purpose includes those values recognized by the preamble to the Constitution as 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."*

75. In the words of Chief Justice Marshall of the U.S.A, in ***Cohens vs. Virginia***:-[13]

"*It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."*

76. In line with **Article 20(4),** the Courts must also seek to promote, as the Constitution demands, the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights. **Article 259(1)** provides for the manner in which the Constitution should be construed*: The Constitution shall be interpreted in a manner that—(a) promotes its purposes, values and principles;(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;(c) permits the development of the law; and(d) contributes to good governance.*

77. **Article 22(1)** gives every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. **Article 258** further gives every person the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. The Court is enjoined by the Constitution under **Article 20(3)**, in giving effect to the rights enshrined in the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Further, **Article 20(2)** provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

78. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty this Court may be asked to review the proceedings complained of and set aside or correct them. Broadly, in order to establish review grounds it must be shown that the Respondent failed to apply his mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice.[14]

79. Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fides* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the body misconceived the nature of the discretion conferred upon it and took into account irrelevant considerations

or ignored relevant ones; or that the decision of the was so grossly unreasonable as to warrant the inference that the decision maker failed to apply his mind to the matter.

80. If a public body exceeds its powers, the Court will exercise a restraining influence. And if, whilst ostensibly confining itself within the scope of its powers, it nevertheless acts *mala fides* or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable except on the assumption of *mala fides* or ulterior motives, then again the Court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the Court has no functions whatsoever. It has no more power than a private individual would have to interfere with the decision merely because it is not the one at which it would have itself arrived.[15]

81. In our view, judicial restraint cannot be used to authorizes a judge to ignore the Constitution's plain words in order to avoid the outcome those words would require in a particular situation.[16] Judges are not supposed to rewrite laws, worse still the Constitution. Ordinarily, such actions would be condemned as a usurpation of the legislative role, an unconstitutional violation of the separation of powers.

82. In any event, the basic idea that courts must police the boundaries of administrative power is firmly based on the constitutional principle of the rule of law. The function thus ascribed to the judiciary *vis a vis* the limitation of executive actions is crucial to promote the virtues of legality, fairness, and reasonableness which this principle has traditionally embodied.[17] The judge is required to examine the legal framework within which the challenged decision was undertaken. This enhances the role of the courts as the guardians of the law and protectors of individual rights.

83. In our view, therefore, the issues that the Court has been asked by the Applicant to address in this Application are appropriately justiciable and properly before the Court. We find that this Court not only has jurisdiction, but it will be an abdication of its constitutional mandate to hold otherwise.

L. **Is the Applicable Law Constitutional Principles or Judicial Review Principles"**

84. . Is there a distinction between judicial review remedies and constitutional remedies" This is a necessary question to ask because Counsel for the 5th Interested Party (Mr. Kinyanjui) was categorical in his arguments that the Applicant chose to ground its suit under Judicial Review jurisdiction. In other words, Counsel argued, the Applicant did not bring this suit as a Constitutional Petition. The suit, the argument goes, should, therefore, be governed only by the traditional principles of Common Law Judicial Review and not by the more general Constitutional principles. In short, Counsel for the 5th Interested Party argues that there is a sharp distinction between Judicial Review simpliciter and a Constitutional Petition which alleges unfair administrative action: both the form of suit as well as the body of law and legal principles applicable are different. Counsel for the 5th Interested Party argued that once a party chooses the form of suit, that party is bound to invoke only pre-dominantly the legal principles and doctrines applicable to the form the party has chosen. Here, Mr. Kinyanjui argued, the Applicant has chosen Judicial Review Simpliciter as its form of suit, it therefore should rely on traditional Common Law Judicial Review principles to make out its case and not "trespass" into the arena of Constitutional principles and adjudication.

85. In order to determine this issue, one ought to appreciate the current Constitutional dispensation. This argument in our view found favour before the promulgation of the current Constitution in ***Republic vs. The Hon. Chief Justice & Others ex parte Roseline Nambuye***[18] and ***Republic vs. The Commissioner of Police Ex Parte Nicholas Gituku Karia.***[19]

86. That the position suggested by Mr. Kinyanjui was the position pre-2010 and is no longer good law was appreciated by the Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others***,[20] as hereunder:-

"We have considered the rival submissions on the issue of an alternative remedy. The respondents' submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the 2010 Constitution. The law has now changed and the provisions of Article 22 (3) and 22 (4) of the Constitution as read with Article 47 of the Constitution and Sections 5 (2) (b) and (c) and Section 7 (1) (a) and (2) of the Fair Administrative Action Act suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by

Petition under the Rules made pursuant to Article 22 (3) of the Constitution. (See Legal Notice No. 117/2103 Protection of Rights and Fundamental Freedoms - Practice and Procedure Rules, 2013).

52. Of significance is Section 5 (2) of the Fair Administrative Action Act which stipulates that:

"(2) Nothing in this section shall limit the power of any person to –

(a)…..

apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or institute such legal proceedings for such remedies as may be available under any written law."

53. Article 47 of the Constitution as read with the provisions of Section 5 (2) of the Fair Administrative Action Act establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to Section 9 (2),and (4) of the Fair Administrative Action Act, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of Article 47 of the Constitution and Section 12 of the Fair Administrative Action Act. The common law principles of administrative review have now been subsumed under Article 47 Constitution and Section 7 of the Fair Administrative Action Act. In this regard, there are no two systems of law regulating administrative action - the common law and the Constitution - but only one system grounded in the Constitution. The courts' power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution.

54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in Section 2 (a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in Articles 47 and 10 (2) (c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in ***Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR*** *it is clear that they -Articles 47 and 50(1)- have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."*

87. Across the borders, the same position obtains in England (which arguably does not have a Constitutionalized right to fair to fair administrative action) as was stated by Lord Denning in ***O'Reilly vs. Mackman[21]*** as follows:-

"Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty."

88. In our case in Kenya, this machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

In any proceedings brought under Article 22, a court may grant appropriate relief, including–

i. a declaration of rights;

ii. an injunction;

iii. a conservatory order;

iv. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

v. an order for compensation; and

vi. an order of judicial review.

89. . The Constitution provides in Article 47 as follows:-

i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

ii. 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.

90. As we held above, it is therefore clear that the right to fair administrative action is no longer just a judicial review remedy but a Constitutional one as well. As was appreciated in ***Re Bivac International SA (Bureau Veritas)***[22] judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. In our view it is no longer possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted.

91. It is therefore clear that one of the grounds for invoking judicial review jurisdiction under the current Constitution is the violation of or the threat of violation of the Constitution.

92. At the very best the argument by Mr. Kinyanjui about the supposed bifurcation between the principles of Common Law Judicial Review and principles of constitutional law adjudication can be understood as one of form – and, therefore, as a technical argument. In can, therefore, attract the response that our case law had developed to the issue non-compliance with procedural technicalities in matters touching on the application and interpretation of the Constitution. This was exemplified in ***Nation Media Group Limited vs. Attorney General***[23] where it was held that:-

"Procedure is a handmaid to justice. Procedure requires that proper provision of the law upon which the application is grounded, be cited. However, where a non-existent provision of the law is cited but after a careful reading of the body of the application and the prayers sought the court is able to tell with certainty the nature of the application, such an application should not be struck out for incompetence. This would be a drastic step to take, not at least in the Constitutional Court. A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice. The very Constitution that imposes a duty on the Court to administer justice without undue regard to technicality. As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing… The Courts, generally, while hearing applications under the process of judicial review, may it be under the Constitution or under Order 53 of the Civil Procedure Rules are faced with serious issues involving Civil and Constitutional rights and liberties of a person and that is why it is elevated as a special jurisdiction even under the Civil Procedure Rules. While protecting fundamental rights, the Court has power to fashion new remedies as there is no

limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal."

93. The importance of fair administrative action as a constitutional right was emphasised by the South African Constitutional Court in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others[24]*** where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:-

"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…"

94. Consequently, we expressly though respectfully reject the contention that this application ought to be disallowed on the basis that the grounds relied upon are best suited for a constitutional petition and not judicial review application. In doing so, on this question, we associate ourselves with the analysis provided by the Court in ***R v Kiambu County Executive & 3 Others ex parte James Gacheru Kariuki (Kiambu Judicial Review No. 4 of 2016)***, where the Court had the following to say about the relationship between suits expressed to be brought under Order 53 of the Civil Procedure Rules and those expressed to be brought under Article 47 of the Constitution as read together with Fair Administrative Action Act:

Our Constitution of 2010 took a decidedly anti-formalist turn. Whereas our previous jurisprudence might have been enamoured of arcane formalist logic on process before one could be permitted to perfect a substantive claim, our 2010 Constitution self-consciously rejects such an approach to adjudicating substantive claims especially those involving public interest. In the case of judicial review, the Constitution of 2010 introduced two new important provisions.

First, in Article 47, the Constitution expressly constitutionalizes administrative justice as a right and removes it from the clutches of Common Law. Indeed, the FAAA is the legislation required to implement Article 47 of the Constitution.

Second, in Article 23, the Constitution, in spelling out the authority of the High Court to uphold and enforce the Bill of Rights, expressly permits the Court to grant any appropriate relief including an order for judicial review (Article 23(3)(f).

[The Court's] reading of these two provisions is that they have the functional effect of blitzing the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya Law Reform Act) and those based expressly on the Constitution. In a straightforward petition to enforce the Bill of Rights under Article 23 of the Constitution, the High Court can issue an order for Judicial Review. Conversely, one can found a substantive suit challenging the exercise of administrative power under Article 47 of the Constitution or the FAAA which is the statute enacted to perfect that Article.

M. **Is The Application Fatally Incompetent for Not Annexing the Decision the Applicants Are Seeking to Be Quashed"**

95. The next issue we wish to deal with is whether the omission to exhibit the decision sought to be quashed is fatal to these proceedings. It is alleged by the 5th Interested Party that as the Applicant has not exhibited the decision sought to be quashed this Application is incompetent and on that score ought to be disallowed. It is true that under Order 53 rule 7 of the ***Civil Procedure Rules*** the Applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. We have read the cases cited by the 5th Interested Party in support of the position that failure to exhibit an order sought to be quashed is

fatal and have noted the reasoning therein.

96. However, in *R**epublic vs. The Commissioner of Lands Ex parte Lake Flowers Limited***,[25] it was held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

97. A similar position was adopted by Nyamu, J. (as he then was) in ***Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another[26]*** in which the Learned Judge held that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

98. In our view the requirement that a decision be exhibited serves two purposes. *Firstly*, it is meant to confirm that a decision in actual fact exists and that the Court is not being asked to quash a non-existent decision. *Secondly*, it is meant to confirm whether the Applicant is within the statutory timelines prescribed for the purposes of an application for *certiorari*. Where therefore it is conceded that there exists a decision and that the said decision falls within the prescribed time for challenging the same, the omission to exhibit the same is curable under Article 159(2)(d) of the Constitution.

99.. Accordingly, whereas in this case the decision sought to be quashed was not exhibited, since it is not in doubt that the decision in fact exists, to dismiss the Application simply on the technical ground that the decision was not exhibited would amount to elevating procedural rules to a fetish. We therefore decline to determine this Application based merely on the failure to exhibit the decision sought to be quashed.

N. **Is the Applicant Disentitled to the Reliefs it Seeks Due to Material Non-Disclosure and Lack of Candour"**

100. It was contended that the Applicant is not entitled to the reliefs sought due to non-disclosure of material facts. According to the IEBC, the Applicant failed to disclose that there were meetings held between the Applicant and the IEBC in particular on 24th May, 2017.

101. The law on this issue is clear that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the *ex parte* orders so obtained. This was appreciated by Ibrahim, J (as he then was) in ***Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya[27]*** where the learned Judge held that:-

"It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy)."

102. This same position was taken in ***Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 Others[28]*** that:-

"It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."

103. We think these two cases enunciate the correct legal position and we expressly adopt them as the decisional law on the issue. However, what is material and what is not must depend on the particular circumstances of the case. This issue was deliberated upon at length in ***Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others[29]*** where the Court of Appeal stated:-

"…In considering whether or not there has been relevant non-disclosure and what consequence the court should attach

to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not in every omission that the injunction will be automatically discharged. A locus pentitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed." [Emphasis added].

104. In this case, it is clear that the so called consultation only took place between the applicant herein, the 3rd interested party, the Jubilee Party and the IEBC. The 4th interested party, Dr Ekuru Aukot, himself a presidential candidate and the political party fronting him, the Third Way Alliance, were clearly not consulted. The initial approach adopted by the IEBC that the 4th interested party was not a candidate at the time of the said consultation on 24th May, 2017 was clearly untenable since it is not in doubt that as at that time there was no presidential candidate for the forthcoming general elections. That line of defence was therefore promptly abandoned midstream by the IEBC.

105. The other view espoused by the IEBC was that the two parties that were consulted represent the largest constituency of supporters in the country's political arena since they are in effect groupings of several political interests in the country. With due respect to the IEBC, as an independent arbiter in the electoral process it ought to treat all candidates equally and ought not to take actions that may be seen to be biased towards some candidates or political parties at the expense of the others contesting for the same positions. This must be so since section 25(e)(v) of the ***Independent Electoral and Boundaries Commission Act***, No. 9 of 2011, obliges the IEBC in fulfilling its mandate, in accordance with the Constitution, to observe, *inter alia* the principle that free and fair elections are administered in an impartial, neutral, efficient, accurate and accountable manner.

106. In the circumstances even if we were to find that the Applicant did not disclose material facts, we would as required under Article 23(1) of the Constitution, have found that the failure to disclose the fact of the meetings between the Applicant, the Applicant and the 3rd Interested Party is not fatal to this Application having considered all the facts before us, in particular the magnitude of the issues raised in this application and our mandate to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights such as the right to fair administrative action entrenched in Article 47 of the Constitution.

107. According to the IEBC, the leaders of the Applicant were consulted before the decision to single-source was arrived at. What constitutes consultation was discussed in the South African case of ***Maqoma-vs-Sebe & Another***,**[30]** where Pickard, J. observed *inter-alia* that:-

"It seems that 'consultation' in its normal sense without reference to the context in which it is used, donates a deliberate getting together of more than one person or party…in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word 'consultation' in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a

reciprocal basis."

108. The Applicant contends that the meeting of 24th May, 2017 was a formal exercise by the IEBC and the Applicants' principals which was a formality by the IEBC and was in no way intended to genuinely obtain the views of the Applicant in the procurement process. In this case however, the crux of the matter is that there was no sufficient consultation and public participation in so far as the Applicant's case is concerned. Having considered the circumstances of this case we are not convinced that there was non-disclosure of material facts since it is not just non-disclosure that matters but the material alleged to have been concealed must be crucial for the determination of the dispute. In this case considering the circumstances and the context, we are unable to positively say that the Applicant was guilty of material non-disclosure. In any event, given the magnitude of the issues raised herein, the nature of the case, and the ramifications of the determination of this case, we are of the view that this matter ought *not* to be determined solely on the basis of the alleged non-disclosure considering the grave issues involved in the process under scrutiny.

O. **Is the suit *res judicata*"**

109. It was contended on behalf of the 5th interested party that these proceedings are *res judicata* in light of the earlier proceedings in ***Republic vs. Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reforms and Democracy*.[31]**

110. The doctrine of *res judicata* was defined in the case of *Lotta vs. Tanaki*[32] where the Court remarked as follows:-

"The doctrine of res judicata is provided for in …. the Civil Procedure Code… and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".

111. In the cases of ***Mburu Kinyua vs. Gachini Tuti*[33] *and Churanji Lal & Co vs. Bhaijee*[34]** it was held that:-

"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of* Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 *the then East African Court of Appeal stated as follows:

"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

112. In ***Misc. Application No. 637 of 2016****,* the Applicant was the Coalition for Reforms and Democracy**.** In the instant case, the Applicant is the National Super Alliance. For *res judicata* to be successfully invoked the former suit must have been between the same parties or parties claiming under them and they must have litigated under the same title in the former suit. It was not shown to us that the Coalition for Reform and Democracy (CORD) is the same person and National Super Alliance (NASA). Nor have we been informed that at that time the former was litigating on behalf of the later assuming the later entity was in existence.

113. In any event, it is our finding that the subject of this suit is different from the suit in the former suit. The former case arose from an open tender while the instant case is in respect of a direct procurement. The issue of direct procurement was therefore not the issue in the former case and could not have arisen at that time. It is therefore clear that the cause of action before us had not arisen at the time the earlier application was being heard and determined.

114. We therefore find that the doctrine of *res judicata* is inapplicable to bar these proceedings.

P. **Did IEBC Consider Extraneous and Illegal Considerations in Its Determination to Award the Tender to Al Ghurair or Was the Decision Otherwise Actuated by Bias"**

115. In its first substantive ground seeking orders for Judicial Review, the Applicant and the 4th Interested Party make three related but distinct allegations. First, the Applicant and the 4th Interested Party make the argument that the 1st Interested Party and the President of the Republic of the Republic of Kenya who is the Party Leader of the 3rd Interested Party have close associations which makes the 1st Interested Party an inappropriate choice for the award of a tender to print Election Materials and Ballot Papers for Presidential Elections which His Excellency the President is a candidate. Second, the Applicant also argues that the 1st Interested Party lacks integrity and should, therefore, never have been awarded the tender for the printing of Election Materials. Third, the Applicant argues that the IEBC was actuated by bias in its award of the tender for the printing of Election Materials and Presidential Ballot Papers to the 1st Interested Party. We will next analyzet each of these grounds below.

116. First, the Applicant and the 4th Interested Party make the argument that the 1st Interested Party has links with His Excellency the President of the Republic of Kenya who is also a Presidential candidate in the forthcoming elections. This, the Applicant argues, makes the 1st Interested Party an unsuitable candidate for the contract to print Presidential Ballot Papers. This is because, the Applicant insists, there is a reasonable presumption that the association between the 1st Interested Party and the President will likely cause the former to somewhat favour the latter through ballot stuffing hence rigging the elections and torpedoing free and fair elections. This allegation, if substantiated, would, of course, be a serious one and potentially dispositive. As a factual allegation, it behooved the Applicant to table the evidence to substantiate it to the required standards of proof.

117. The allegation that the Applicant and the 4th Interested Party sought to prove in furtherance of their theory of close association between the President and the 1st Interested Party is as follows. First, they argue that the 1st Interested Party is the printing and publishing arm of Al Ghurair Holdings Limited which has branch offices in Abu Dhabi, Nairobi, Afghanistan and representative offices in Mozambique, Nigeria and Ethiopia. The Applicant attached a print-out from the Company's website to this effect.

118. The Applicant also attached an extract of the public register of Al Ghurair Holdings Limited. It indicates that the Al Ghurair Holdings Limited was registered on 26/09/2012 as Company Number 1267 with its registered addresses at Unit 03, Level 1, Currency House, Tower 2, Dubai International Financial Centre, Dubai, 5326, United Arab Emirates. The extract further shows that its sole shareholder is Abdullah Al Ghurair Holding Limited. According to the public registers, the Company has the following directors:-

i. Al Ghurair Sultan Abdulla Ahmad Al Ghurair

ii. Ibrahim Abdulla Ahmad Al Ghurair

iii. Abdulaziz Abdulla Al Ghurair

iv. Ahmad Abdulla Juma Binbyat

v. Rashid Abdulla Ahmad Al Ghurair

vi. Sultan Butti Bin Mejren Al Marri

vii. Rashed Saif Saeed Al Jarwan Al Shamsi

viii. Ali Rasheed Ahmad Lootah.

119. The Applicant, then, sought to show that the President of Kenya, Uhuru Kenyatta, met with the Chairman of the 1st Interested Party. To do this, the Applicant attached some media print-outs. One of them, marked as Exhibit D in the Affidavit of Norman Magaya, showed that the President met, at State House Nairobi, with one H.E. Majid Saif Al Ghurair who is named as the Chairman of the Dubai Chamber of Commerce. According to the newspaper report, the said Majid Saif Al Ghurair was leading a delegation of the Chamber of Commerce. The 4th Interested Party has gone ahead and attached actual photos from another Newspaper which shows images of the President shaking hands with a person they describe as the Chairman of the 1st Interested Party.

120. On its part, the 1st Interested Party and the 3rd Interested Party have taken a two-pronged approach to these serious allegations.

121. First, the 1st Interested Party and the 3rd Interested Party have denied that President Kenyatta ever met with the Chair or CEO of the 1st Interested Party. They sought to show that the 1st Interested Party is a different entity than the Al Ghurair Group that the person named as Majid Saif Al Ghurair heads. To this extent, the 1st and 3rd Interested Parties attached print-outs from Wikipedia showing that the 1st Interested Party is a subsidiary of an entity known as Ghurair Investments LLC (which is also known as Abdallah Al Ghurair Group of Companies. The two Interested Parties also annexed Wikipedia print-outs showing that the Majid Saif Al Ghurair who met the President heads another company known as Al Ghurair Group (which is also known as Saif Al Ghurair Group).

122. The point which the 1st and 3rd Interested Parties wished to make is a simple one: that there was no alleged meeting between the President and the leader of the 1st Interested Party. They further argue that the allegation of such a meeting is spurious and in bad faith: a simple on-line research coupled with making inquiries would have confirmed to the Applicant's the falsity of their views.

123. Secondly, the 1st and 3rd Interested Parties make an evidential argument. They begin from the position that it is an elementary rule of evidence that he who asserts has the burden of proof. In this case, they argue, the Applicant has claimed that the President met with the Chairman of the 1st Interested Party. It was, therefore, incumbent upon the Applicant to prove to the required standards of proof that this fact was true. However, the 1st and 3rd Interested Parties argue, the Applicant and 4th Interested Party have simply failed to produce the evidence required to prove such serious allegations.

124. The 1st and 3rd Interested Parties argue that the Applicant and 4th Interested Party have only relied on newspaper cuttings to prove the alleged association between the President and the 1st Interested Party. They argue that evidence from the newspaper cuttings is both inadmissible and, even if admissible is of extremely low probative value

125. We have looked at all the evidence presented by the parties in this regard. Suffice it to say that we have not seen any evidence that rises to the degree of proof demanded by our jurisprudence and rules of evidence that indisputably shows that there was an alleged meeting between the President and any official associated with the 1st Interested Party.

126. We agree with the 1st and 3rd Interested Parties that the evidence tabled falls below the threshold to prove an allegation as serious as that made by the Applicant and the 4th Interested Party. We expressly hold that the newspaper cuttings and various other media print-outs are insufficient to discharge the high burden placed by the law on the Applicant to prove its allegations. In doing so, we adopt the reasoning by various decisions by our Superior Courts on the admissibility and probative value of such newspaper cuttings and media-printouts. The dangers of relying on such

evidential mode to prove contested factual matters is obvious and is particularly demonstrated in this case. In addition to denying the other party an opportunity to confront the author of the documents to test the veracity of the contents, it is also possible for a party to stage manage or otherwise influence the production of such documents in an effort to influence the Court to conclude that the allegations are credible. For example, in this case, some of the leaders associated with the Applicant are cited in the newspapers articles making the allegations that are repeated in the Application. The newspaper cuttings containing the allegations by these same leaders are then cited as proof and evidence of these allegations!

127. Hence, on this point, we rely on our case law in holding that the allegations of the close associations between the 1st Interested Party and the President have not been proven. In particular, we rely on ***Andrew Omtata Okoiti & 5 Others –vs- Attorney General & 2 Others***[35] where the High Court held as follows: -

"This case however, can hardly go far because the Petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative values of such cuttings are not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burdens, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from ***3rd*** *parties. It would be an injustice in this trial to use such insufficient evidence to prove a case as critical as abuse of resources. The Petitioners ought to have done more in the form of reliance on documents and materials of higher probative value than the newspaper cuttings."*

128. Additionally, we rely on ***Kituo Cha Sheria & another –vs- Central Bank of Kenya & 8 Others***[36] where the Court pronounced itself as follows: -

"As correctly pointed out by the Attorney General and the 1st respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of ***Wamwere vs The A.G*** *and* ***Randu Nzau Ruwa and 2 Others –vs- Internal Security Minister and Another (2012) eKLR.*** *If I may borrow the words of the court in the* ***Ruwa*** *case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents."*

129. Finally, we rely on ***William Muriithi Nyuiri Wahome & 2 others –vs- Attorney General***[37] where this Honourable Court held as follows: -

"Have the Petitioners made out a case for violation of the foregoing rights" In answering this question, I must first state that it is now well settled that newspaper cuttings are inadmissible in Petitions such as the present one and that is a position that has been affirmed by this Court on several occasions and on that basis, ***Section 35*** *of the Evidence Act…"*

130. This same fate befalls the allegations made by the Applicant and the 3rd Interested Party that the 1st Interested Party did not have integrity and that this should have been a reason for the IEBC not to award the tender to them. Suffice it to say that the only two pieces of evidence that the Applicant sought to rely on as demonstration of this lack of integrity is, first, the alleged meetings and associations between the 1st Interested Party and the President which we have concluded above, falls short of the standard of proof required.

131. The second piece of evidence that the Applicant relied on as demonstration of this alleged lack of integrity is a paragraph in the IEBC's Media Briefing Statement of 10/06/2017. That paragraph reads as follows:-

Al Ghurair*: The second [option] was for the Commission to engage Al Ghurair. All Ghurair has supplied ballot papers for all the by-elections since 2014. They had also been successful in the open tender that was eventually terminated by the High Court. The risk under this option was the fact that the company had started receiving negative publicity.*

132. The Applicant argues that this paragraph demonstrates that the IEBC was aware that the 1st Interested Party had integrity issues. To accentuate its point, the Applicant has attached media print-outs covering elections held in Zambia

and Uganda where the 1st Interested Party was a tenderer for Ballot Papers. The argument seems to be that the 1st Interested Party's award of tenders to print ballot papers even in these other countries was controversial.

133. We expressly find that the cited paragraph which shows the self-evaluation of the IEBC about the 1st Interested Party as well as the media print-outs insufficient to make out the very strong charge that the 1st Interested Party lacks integrity. First, the statement "The risk under this option was the fact that the company had started receiving negative publicity", does not at all, in context, indicate that the IEBC had concluded that the 1st Interested Party had integrity issues. Such a reading of the plain words used would require some healthy interpretive imagination to render that conclusion. It would also be an unfair one to the 1st Interested Party.

134. Second, as we stated above, the media print-outs are hardly sufficient evidentially to prove the lack of integrity on the part of the 1st Interested Party.

135. Next, we will answer the question whether the IEBC was otherwise obsessed with giving the tender to the 1st Interested Party and conducted the whole process with a pre-determined decision to award it to them. If the Applicant can successfully demonstrate this, it would, in essence, have shown bias by the IEBC in the award of the tender hence making the decision susceptible to quashing for being administratively unfair.

136. The Applicant argues that the manner in which the whole tendering process was done leaves no doubt in the mind of any reasonable person objectively considering the process that the whole process "was symptomatic of bias and irrationality on the part of the IEBC in favour of the 1st interested party.

137. To demonstrate this alleged bias, the Applicant gives the history of the tender process for ballot printing by the IEBC. They say that sometime around the 17th of August 2016, the IEBC initially advertised the impugned tender as an open tender and awarded the same to the 1st Interested Party. In its view, that award was hurriedly and deliberately concluded in order to seal the award to the 1st interested party at all costs. The award was nullified by the High Court on 13th February 2016 for reasons *inter-alia* that the accounting officer who purported to sign the contract had no authority to do so. According to the Applicant, the tender was subsequently subjected to restricted tendering with the participation of only 13 firms including the 1st interested party and was yet again awarded to the 1st interested party. The award was again challenged at the Public Procurement and Administrative Review Board and eventually nullified by the Board on grounds that the evaluation criteria used by the IEBC was *not objective and incurably defective.*

138. It was after this second nullification by the Public Procurement and Administrative Review Board that the IEBC made the decision to award the tender by direct procurement. By this time, the Applicant argues, it was *fait accompli* that it would be awarded to the 1st Interested Party hence the arguments of bias.

139. It is important to get the facts right as the IEBC and the 1st Interested Party urge us: the restricted tendering ended *not* with the award of the tender to the 1st Interested Party but it was nullified before the award.

140. Be that as it may, does this procedural and legal history of the Ballot Printing Tender process demonstrate bias on the part of the IEBC or a pre-determined animus or obsession to award the tender to the 1st Interested Party"

141. We accept that this history demonstrates troubling questions on the competence of the IEBC to navigate the admittedly murky and complex waters of tendering of Ballot Papers. As the Review Board told the IEBC after the second bungled attempt at procurement:

[T]he procurement process and the tender document used in this case are so fundamentally flawed that the same cannot pass the test set out in the Constitution and the PPDA. Mildly put, the Board is afraid that the process which was conducted which was conducted by the Procuring Entity (IEBC) cannot be termed as a procurement process as known to the Constitution and the Act. The process was to say the least a sham and embarrassing and was conducted with such casualness, and lack of diligence to the level that and therefore (sic) give rise to the future electoral disputes and in further view of the possibility of the award given pursuant to the flawed procurement process being challenged before the Board or the Court at a time when there is little or no time to conduct a fresh procurement process, it would be in the interest of the general public and the [IEBC] itself if this procurement process was annulled and terminated at this stage

to enable the IEBC to put its act together.

142. Needless to say, two bungled attempts to procure for ballot papers in circumstances which the expert Review Board found to evince embarrassing levels of incompetence on the part of the IEBC is not recipe for enhancing confidence in an already jittery and distrustful public. As we hold elsewhere in this judgment, this state of affairs should have inculcated in the IEBC the need to adopt a process that encapsulate robust constructive engagement with all the stakeholders, in order to adhere to the standards set in the Constitution including Article 81 of the Constitution which requires the IEBC to conduct free and fair elections which among other things must be "transparent" as well as the requirements in Article 86 of the Constitution that the IEBC must devise an electoral system which is "is simple, accurate, verifiable, secure, accountable and transparent."

143. However, we are unable on the basis of the facts before us, to conclude that the process followed by the IEBC unmistakably points to the conclusion that the IEBC was actuated by bias and other improper considerations in awarding the tender to the 1st Interested Party. We agree with the Applicant that the test of bias is reasonable apprehension and that there is no requirement to prove actual bias in order to succeed under this ground of judicial review. The test is that stated in ***Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge[38]*** wherein Lakha, JA stated that: -

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit…There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

144. However, we do not think the test of bias is so loose that one can simply say that apprehension by some political parties that the tendering process was not impartial, without more, would meet the threshold. While it is not necessary to prove actual bias, the circumstances, facts and evidence must unmistakably point to likelihood of bias or actual bias or form a clear basis for the conclusion that a reasonable perception of likely bias is warranted.

145. In this case, the circumstances, facts and evidence placed before us do not lead to the conclusion that there was bias or that the tender process was carried in such a way that it was result-oriented and carefully tended to ensure the only outcome was that the 1st Interested Party will end up with the tender.

146. There is one aspect of the case that we wish to deal with here before we leave the allegations about bias, improper motives and improper associations. It is the argument made by the Applicant that the only evidential burden it had was to place before the Court sufficient materials to demonstrate that there are reasonable apprehensions of bias or lack of integrity or improper association. That once the Applicant has reasonably raised the specter of any of these improprieties, the burden shifts to the IEBC and the 1st Interested Party to disprove these improprieties.

147. With respect, we cannot agree with that assessment of the legal requirements. The Applicant has come to Court alleging these improprieties. The Applicant is legally required to table admissible evidence proving these allegations. An Applicant cannot table impugned evidence, inadmissible evidence or evidence of low probative value and then require the other party to disprove the allegations on the ground that the evidence presented, however, infinitesimal, raises apprehension of bias or lack of integrity on the part of the IEBC or the 1st Interested Party.

Q. **Was the IEBC Constitutionally Obligated To Facilitate Public Participation As Part of the Tender Process for the Printing of Election Materials and Ballot Papers for Presidential Elections"**

148. That brings us to the issue of public participation.

149. Article 10 (1) of the constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

150. Sub-article (2) (a) and (c) provides that "The national values and principles of governance include— (*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (*c*) good governance, integrity, transparency and accountability.

151. Article 10 of the Constitution expressly provides that public participation is one of the national values and principles of governance that 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. These values and principles of governance are the foundation of our Republic since 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.

152. In our view, Article 10 of the Constitution is one of the Articles that make a paradigm shift between the retired Constitution and the Constitution of Kenya 2010 - a value-oriented Constitution as opposed to a structural one. Its interpretation and application must not therefore be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in Article 10 of the Constitution. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by Ojwang, JSC, in ***Joseph Kimani Gathungu vs. Attorney General & 5 Others***:-***[39]***

"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions."

153. As was appreciated by the majority ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***:-***[40]***

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

154. This Court is therefore required in the performance of its judicial function to espouse the value system in the

Constitution and to avoid the structural minimalistic approach. It is in this respect that Article 20(3)(a) provides that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Apart from that Article 259 of the Constitution decrees that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law; and contributes to good governance.

155. In our view the value system in which our Constitution is structured is steeped in our history and this value system was a reaction to the historical deficiencies that rendered the system of governance under the retired Constitution inadequate to meet the expectations of the people of the Republic of Kenya. As was held by a majority in the Court of Appeal decision of ***Njoya & 6 Others vs. Attorney General & Others (No. 2)***,[41] quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles. That purposive approach was explained by the Supreme Court ***In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012*****,** where it was held that a purposive approach would take into account the agonized history attending Kenya's constitutional reform.

156. In ***Murungaru vs. Kenya Anti-Corruption Commission & Another***,[42] it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed ***In Matter of the Kenya National Human Rights Commission, Advisory Opinion***,[43] where the Supreme Court opined that:-

"…But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is the 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 light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

157. The Supreme Court expressed this same position in ***Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others*** **[44]**where it stated thus:-

"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on – "RECOGNISING 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." And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "Legal Culture and Transformative Constitutionalism," South African Journal of Human Rights, Vol. 14 (1998), 146 thus wrote [at p.147]: "At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent." The scholar states the object of this South African choice: "By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law." The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".

158. It is therefore our view that the constitutional provisions of Article 10 dealing with the national values and principles of governance are partly steeped in historical context. It is our view that public participation is necessary for the purposes of the realisation of the spirit of Articles 38 and 81 of the Constitution which espouse a free, fair, credible and transparent election. In order to realise this goal, the preparations leading to the elections must meet the minimum standards articulated in Article 81 of the Constitution that election system must be free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. In addition Article 86 of the Constitution enjoins the IEBC to ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

159. It is our view that it is not sufficient that elections be conducted regularly. Such elections must meet both the constitutional and statutory threshold. We appreciate that we have no power to interfere with the election date or period prescribed in Articles 101(1), 36(2)(a), 177(1)(a) and 180(1) of the Constitution. However as was held by the Supreme Court in ***Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others***:[45]

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

160. It is therefore our view that the said values and principles cannot be treated as lofty aspirations. To paraphrase the decision in ***Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others,***[46] Kenyans were very clear in their intentions when they entrenched Article 10 in the Constitution. In our view, they were singularly desirous of cleaning up our politics and governance structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 10 be enforced in the spirit in which they included it in the Constitution. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the said provisions should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. It follows, therefore, that 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 must defer to Article 10 of the Constitution.

161. It is particularly important to note that Article 10(2) employs the word "include" which in our view means that the principles identified under the said Article are not exclusive. However, the fact that the Constitution expressly identifies some of them is a pointer to the importance the Constitution and the people of Kenya attach to the specified values and principles of governance enumerated therein. It is therefore our view that in order to justify their exclusion in matters falling under Article 10, assuming it is possible to do so in the first place, the burden is indeed heavy on the person desiring to do so considering that Article 10 is one of the provisions protected under Article 255 of the Constitution whose amendment can only be achieved by way of a referendum.

162. It was alleged that public participation does not apply to procurement of election materials and presidential ballot papers. In our view, if an explicit textual response was needed to put that argument to flight, it is to be found in Section 3 of the PPAD Act. That section provides as follows:

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

a. the national values and principles provided for under Article 10;

b. the equality and freedom from discrimination provided for under Article 27;

c. affirmative action programmes provided for under Articles 55 and 56;

d. principles of integrity under the Leadership and Integrity Act, 2012[47]

e. the principles of public finance under Article 201;

f. the values and principles of public service as provided for under Article 232;

g. principles governing the procurement profession, international norms;

h. maximisation of value for money;

i. promotion of local industry, sustainable development and protection of the environment; and promotion of citizen contractors.

163. As is readily obvious this Section of PPAD Act provides that public procurement and asset disposal by State organs and public entities shall be guided by the values and principles of the Constitution and relevant legislation and proceeds to expressly identify the national values and principles provided for under Article 10. In this case it was contended that to make a blanket finding that there must be public participation in each and every procurement would cripple state organs from carrying out their duties. We appreciate that the manner in which public participation is to be conducted must take into consideration the context in which the procurement is being undertaken.

164. Dealing with this issue, it was held by the South African Constitutional Court in ***Doctors for Life International vs. The Speaker of the National Assembly & Others***[48] that:-

"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "(a) taking part with others (in an action or matter);…the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something…it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation."

165. As was appreciated by **Sachs, J**. in the South African case of the ***Minister of Health vs. New Clicks South Africa (Pty) Ltd*:-**[49]

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case." [Emphasis supplied]

166. A similar position was adopted in ***Doctors for Life International vs. The speaker of the National Assembly and Other***s (***supra***) cited with the approval in ***Robert N. Gakuru & Others vs. Governor, Kiambu County*** [50]that:-

"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to

fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes".

167. A word of caution was, however, given in the ***Gakuru Case*** when the Court stated that:-

"….Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively."

168. The essence of public participation was captured in the case of ***Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others***,[51] in the following terms:-

"…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."

169. We therefore expressly hold that public participation must apply to all procurements though the degree and form of such participation will depend on the peculiar circumstances of the procurement in issue. In our view, the Constitution and the PPAD Act, have infused in them mechanisms adequate to ensure open participation of the public in the procurement process.

170. Therefore public participation is not a mere cosmetic venture or a public relations exercise. In our view, whereas it is not to be expected that a public agency or State Organ would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a procurement affecting the provisions of the Bill of Rights ought to be undertaken and in what manner, would be to negate the spirit of public participation as enshrined in the Constitution. This is more so where what is sought to be undertaken is a direct procurement in which case section 103(1) of the PPAD Act allows direct procurement only where that method is not resorted to for the purpose of avoiding competition. This must be so since Article 227(1) of the Constitution requires that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Transparency, competitiveness and cost effectiveness are at the core of a procurement process and must be infused in any process of procurement with the degree depending the nature of the procurement in question. It is however our view that these principles cannot be disregarded as being inconsequential.

171. IEBC, however, argued that since Article 227 specifically deals with procurement, unless the national and principles of governance in Article 10 of the Constitution are expressly imported into Article 227, the said values and principles do not apply to procurement processes. With due respect, this argument fails to appreciate the nature of our constitutional framework which we have stated is a value oriented one. Article 10, being the foundation of our nation as encapsulated in Article 4(2) of the Constitution, it is an express requirement under Article 10(1)(a) that in interpreting or applying the Constitution, all State organs, State officers, public officers and all persons are bound by the national values and principles of governance including public participation.

172. As was restated by the Supreme Court in Advisory Opinion No. 2 of 2013 - ***The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR***, while citing with approval the decision in the Ugandan Case of ***Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3):***

"*The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."*

173. Accordingly, Article 227 cannot be read as a stand-alone provision while disregarding Article 10 of the Constitution. Moreover, the said Article 227 empowered Parliament to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented. In the exercise of that power Parliament enacted the PPAD Act under which section 3(a) mandatorily decrees that Public procurement and asset disposal by State organs and public

entities be guided by *inter alia* the national values and principles provided for under Article 10. Therefore whether one looks at the issue from the constitutional point of view or from a statutory angle, the values and principles of national governance must guide any public procurement and asset disposal by State organs and public entities.

174. It was contended that there is no law or framework setting out the manner in which that participation would be achieved. For instance, there is no guidance on matters such as how public views are to be sought or collected, how they will be evaluated and how the overwhelming views will be determined. In the circumstances, the IEBC took the view that it cannot be faulted for failing to undertake an exercise that is not provided for in the relevant statute and in respect of which there are no guidelines or legislative framework or regulatory guidelines. In effect what the IEBC is contending is that without an enabling statute, regulatory guidelines or legislative framework the principles in Article 10 become a dead letter of the law.

175. On our part, we decline to subscribe to this school of thought. The enforceability of the constitutional provisions does not depend on whether or not Parliament has enacted a facilitative legislation, guidelines or framework. We hold the view that the national values and principles of governance enunciated in Article 10 of the Constitution are themselves justiciable whether or not there is a facilitative legislation, guidelines or framework. Whereas such legislation or legislative framework could be a useful guide to an agency or State Organ, it does not derogate from the core or essential content of the Constitution. Indeed, such legislation, guideline or legislative framework must conform to the constitutional requirements. This Court cannot shirk from its constitutional mandate of protecting the Constitution simply because Parliament has failed in its obligations to enact legislation, rules or legislative framework. We associate ourselves with the holding in ***Republic Ex Parte Chudasama vs.The Chief Magistrate's Court, Nairobi And Another [2008] 2 EA 311***, that:

"In Kenya, the functions and remedies of orders of certiorari, mandamus and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the right or duties or liberty of any person. The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not of mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

176. As was rightly stated in ***Republic vs. Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,*** while it is the responsibility of the Court not to unduly interfere with the Executive when it lawfully exercises its powers and performs its functions, the High Court has the responsibility for the maintenance of the rule of law. Therefore, there can be no gap in the application of the rule of law and that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. The Court went on to state that as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See ***M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170***.

177. In ***Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238***, it was held that the law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. The law, it has been held, is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. See ***Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.***

178. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the Applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and

want of remedy are reciprocal. See ***Rookes vs. Barnard [1964] AC 1129.***

179. We therefore affirm the holding in ***Nation Media Group Limited vs. Attorney General [2007] 1 EA 261*** that:

"The Judges are the mediators between the high generalities of the Constitutional text and the messy details of their application to concrete problems. And Judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary they are applying the language of these provisions of the Constitution according to their true meaning. The text is "living instrument" when the terms in which it is expressed, in their Constitutional context invite and require periodic re-examination of its *application to contemporary life."*

180. In The ***Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012***, it was held by a majority as follows:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her."

181. It is therefore our view and we hold that the absence of a facilitative legislation, guidelines or legislative framework on public participation in public procurement processes does not bar us from enforcing the national values and principles of governance in Article 10 of the Constitution. Neither does it absolve the IEBC from adhering to those national values and principles.

182. It was suggested that one of the principles guiding procurement is non-disclosure of information relating to the procurement and therefore the issue of confidentiality militates against public participation in procurement matters in general. This submission was based on sections 5(1) and 67(1) of the PPAD Act which provide as hereunder:-

5(1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

67(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

a. information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

b. information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

c. information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

d. the contents of tenders, proposals or quotations.

183. It is clear from the foregoing provisions that section 5 which gives priority to the provisions of the PPAD Act only applies where there is a conflict between that Act and any other legislation. It does not apply where there is a conflict between the Act and the Constitution. We however do not find that any such conflict exists.

184. Our view is that since direct procurement method, which was the method adopted herein, was a restriction on the

scope of the application of the principle of competitiveness and as the law expressly bars the adoption of such a method if the intention is to defeat competition, before such a method is adopted, the procuring entity must involve the public in its decision to opt for direct procurement. We however hasten to clarify that direct procurement does not necessarily violate the constitutional requirement of competitiveness as long as the constitutional and statutory threshold is met in the process and proper procedures followed.

185. In our view, in the initial stages, it cannot be said that the principle of confidentiality which kicks in ***during or after procurement proceedings*** bars the application of the principle of public participation. This position is supported by the fact that section 67(3)(b) of the said Act expressly excludes from the confidentiality principle disclosure for the purpose of law enforcement. To our mind, an example of such disclosure is where the application of the provisions of the Constitution requires such disclosure in order to meet the constitutional threshold of public participation. We hold the view that where the violation strikes at the heart of our democratic process, which according to the preamble to the Constitution is one of the aspirations of the people of Kenya, the issue of the confidentiality cannot be successfully invoked in order to sanitize a process that does not meet the basic tenets of democracy. We are of the view that public participation in direct tendering is a mandatory component of the principles of transparency and accountability acclaimed in Article 227 of the Constitution.

186. We emphasize that in matters touching on the democratic process of the country, public participation be it a legislative or procurement process is mandatory as it is necessary for the purposes of free, fair, credible and transparent elections. We adopt Ngcobo, J's views in ***Doctor's for life International vs. The Speaker National Assembly and Others*** (supra) to the effect that:-

"General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy."

187. As was held in ***Gakuru*** (supra):-

"Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."

188. By its action of holding consultative meeting(s) with some of the parties, the IEBC clearly appreciated that consultation was necessary for the success of the conduct of credible elections. Therefore there can be no doubt in our minds that public participation being one of the values and principles of governance applies when the IEBC herein is procuring election materials including ballot papers in respect of presidential elections and we so find and hold.

R. **Was There Sufficient Public Participation In The Award Of The Tender To Print Ballot Papers For Presidential Elections"**

189. We have established from a proper analysis of applicable Articles of the Constitution including Articles 10, 38, 81, 86 and 227 of the Constitution as well as the provisions of the PPAD Act including Section 3 thereof lead to the conclusion that the IEBC was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process of tendering for the printing of Election Materials and Ballot Papers for the Presidential Elections to be held on 8th August, 2017.

190. Indeed, our analysis of these provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government. As we remarked above, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.[52] There is nothing in the evidence before us to demonstrate that the omission to include the Applicant and the 4th Interested Party in public participation was justifiable or necessary. No serious argument was made before us to warrant a finding that an Article 24 analysis was required to make a finding whether the limitation was "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" and taking into account the other factors enumerated in Article 24 of the Constitution.

191. On the contrary, we are persuaded from our analysis above that a correct reading of the Constitution ties the obligation by the IEBC to facilitate public participation with respect to fundamental decisions related to the conduct of the General Elections (or referendum) to be a necessary corollary to the political rights of all citizens enumerated in Article 38 of the Constitution. In that case, any limitation or exclusion of the right to be consulted where appropriate and to participate can only be limited upon the satisfaction of the conditions placed in Article 24 of the Constitution – including the requirement that the limitation be by law. Suffice it to say that there has been no showing of such satisfaction of Article 24 test. Consequently, the IEBC was not at liberty to limit or exclude the political rights of the Applicant and 4th Interested Party.

192. That leads us to the next logical question, then, which is whether the IEBC can be said to have in any meaningful sense met the threshold appropriate for public participation in the award of the tender for printing Election Materials and Ballot Papers for Presidential Elections to be held on 8th August, 2017. Differently put, what was the threshold for public participation which would have been appropriate for this exercise and was it met by the IEBC in the circumstances of this case"

193. It appropriate to begin by reiterating the very practical advice by Justice Sachs in the South African case of ***Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others***[53] where at para. 630, he noted that *"..... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*

194. In the ***Mui Basin Case (supra)***, a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:

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.*

195. We will now apply these elements to the facts of the present case. How did the IEBC demonstrate that there was sufficient public participation in the award of the tender for the printing of Election Materials and Ballot Papers for Presidential Elections"

196. The IEBC adopted a two-pronged approach. In the first approach, as analysed above, the IEBC contested that any public participation was required. According to the IEBC, Article 227 of the Constitution as read together with Sections 103 and 104 of the Act do not envisage public participation in the choice of a supplier in direct procurement. The IEBC argued that direct procurement envisages direct discussions between a procuring entity and the bidder and the suggestion that the public should have been involved in the direct procurement process would defeat the very essence of speed and orderly implementation of such a mode of procurement.

197. The IEBC further argued that in enacting the PPAD Act, Members of Parliament deliberated on and provided the circumstances under which direct procurement is to be resorted to (Section 103) and the procedure to be followed (Section 104). The procedure set out did not include participation of the public and/or public consultation. It only requires that even when using direct procurement, a procuring entity is required to issue a tender document and to evaluate the tender received from the bidder.

198. We have already held above that some of public participation is required when a public entity is procuring goods or services whichever method is elected for so doing and that the type, intensity and level of public participation would vary according to the circumstances.

199. In the second prong of its approach to this question, the IEBC sought to demonstrate that there was "transparency and accountability" in the tender process. The IEBC pleaded the following facts in aid of this argument:

a. That on 24th May, 2017, the IEBC met with the "stakeholders" including the Applicant's representatives during which it informed them of the need to directly procure the Election Material from a supplier.

b. That after the contract was entered into, the IEBC invited the Presidential candidates for a meeting on 15th June 2017 and briefed them on the progress of the procurement. The brief is Annexture A of the Verifying Affidavit.

c. That it is a matter of public notoriety that the IEBC's Chairperson has been giving briefings to the public via press conferences on a regular basis on the progress of the election preparations.

d. That on 12th June 2017, the IEBC's Chief Executive Officer appeared before the Justice and Legal Affairs Committee of the National Assembly to discuss the procurement when the Committee was considering the request for release of funds in relation to the contract entered into with the 1st Interested Party.

e. That in addition to the above, Article 254 of the Constitution has an in built accountability mechanism for Independent Commissions including the Applicant. By that provision, the Applicant is required to:-

a. Submit a report to the President and to Parliament as soon as is reasonably practicable after the end of each financial year;

b. Submit a report to the President and the National Assembly at any time as they may require on a particular issue; and

c. Publish and publicize any report required under the provisions of Article 254 of the Constitution.

200. The IEBC argued that these steps clearly show that the IEBC was cognisant of its duty to act in a transparent and accountable manner and took steps to inform the public of the progress of procurement.

201. Looking at the efforts made by the IEBC to facilitate public participation and stakeholder engagement in this particular case against the standards established in our cases, we are unable, with respect, to conclude that the IEBC did anything that rises to the level of public participation which would be constitutionally demanded by an issue that implicates as many of the fundamental rights of citizens as well as the structure of our Republican government.

202. First, we note that the only efforts to truly involve the public – including leaders of Political Parties other than the Applicant and the 3rd Interested Party was in the form of one way "updates" given by the Chairperson of the IEBC to the public. Even then, the only meaningful "update" on this specific question of the award of the tender for the printing of Ballot Papers for Presidential elections was the "media briefing" held on 5th June, 2017. This was after the decision to procure the supplier for the Election Materials and Ballot Papers for Presidential Elections by direct procurement had already been made (before 24th May, 2017) and, after the decision to award it to the 1st Interested Party had already been made (on 29th June, 2017). The purpose of the "media briefing" therefore cannot be said to have been to facilitate public participation in any meaningful term of the constitutional value. If ever, one needed an example of "mere formality" referred to in cases litigating the limits of public participation, this may easily be a poster boy for it.

203. Second, even though the IEBC claims that its officials met "stakeholders" on 24th May, 2017 to inform them of the decision to award the tender by direct procurement, no evidence whatsoever was tabled to demonstrate who these "stakeholders" were.

204. Third, while it is conceded that the IEBC met with representatives of the Applicant and the 3rd Interested Party to inform them that a decision had been made to utilize direct procurement as the method to procure Election Materials and Ballot Papers for Presidential Elections to be held on 8th August, 2017, there was no explanation whatsoever why the 4th IEBC who is a Presidential Candidate as much as the party leaders of the Applicant and the 3rd Interested Parties was left out of that meeting if the purpose was to meet the constitutional requirements. There was no demonstration whatsoever that there was an attempt to meet with the other Presidential aspirants who were known to have declared interests to run by that time and/or their party representatives. As remarked above, there is no respectable or legally justifiable basis for the distinction between the representatives of the two Presidential candidates who met with the IEBC and those that did not. This would imply that if the meeting of 24th May, 2017 was organized as part of the IEBC's efforts to meet its constitutional obligations, it simply does not pass muster: a patently discriminatory programme of public participation can simply not meet the constitutional threshold.

205. Lastly, we must point out that while we cannot tell the IEBC how to fashion its own programmes of public participation, the IEBC must be clear that the right to be involved which we have held is a corollary to the exercise of Article 38 rights of the citizenry, are owed to all Kenyans and not just to declared Presidential aspirants.

206. Hence, while the obligation to facilitate public involvement maybe fulfilled in different ways and is open to innovation, a programme of public participation must be inclusive as opposed to exclusive. An agency or public organ must demonstrate reasonable efforts made to craft an inclusive programme of public participation which is appropriate for the scale of the issue involved.

207. In this particular case, considering the above principles and the material before us, we are not satisfied that there was sufficient public participation to meet the constitutional threshold.

S. **Should the Court Decline to Grant the Reliefs Sought on Public Interest Grounds"**

208. It was contended that in deciding whether or not to grant the reliefs sought herein, this Court ought to take into account public interest. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in ***Rwanyarare & Others vs. Attorney General***,[54] it was held with respect to Uganda that judicial power is derived from the sovereign people of Uganda and is to be administered in their names.

209. Similarly, it is our view and we so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. We therefore associate ourselves with the decision in ***Konway vs. Limmer[55]*** which held that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

210. We are of the firm view that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore, the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination and fashioning appropriate relief.

211. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms. These twin principles are aimed at placing the parties before the Court on equal footing so that the Court can see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See ***Suleiman vs. Amboseli Resort Limited***.***[56]***

212. A good place to begin our analysis would be the decision in ***East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another*** **[57]**where the Court of Appeal set out the principle of public interest:-

"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"

213. We appreciate the position adopted by Author **Francis Bennion** in ***Statutory Interpretation***,**[58]** that:-

"it is the basic principle of legal policy that law should serve the public interest. The court…should therefore strive to avoid adopting a construction which is in any way adverse to the public interest."

214. Having said that, it is, however, trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in ***Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya***[59] thus:-

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

215. Thus, we agree with the decision in ***Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited***[60] where the court opined as follows:-

"We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum. We have considered the instant application and the importance of the subject project to future generations."

216. From the above analysis, therefore, the correct legal position is that where there is a conflict between adhering to the letter and the spirit of the Constitution and the statutory provisions on one hand and the public interests on the other, it is only when strict adherence to the statutory edict will militate against the spirit of the Constitution that public interest may prevail. Where, however, public interest may be protected notwithstanding the upholding and promotion of the letter and spirit of the Constitution, the allegations of public interest must give way to the letter and spirit of the Constitution.

217. The Constitution expresses the will of the people and that will must be respected at all times. Where the people provide that they ought to be consulted before decisions affecting them are made, that position must be upheld at all times and this Court will not readily listen to the argument that since a decision has been taken it would be chaotic to undo the same. This is what Mutunga, CJ had in mind in Petition 23 of 2014 between ***Nicholas Kiptoo Arap Korir Salat and Independent Electoral and Boundaries Commission and Others*** where the Learned President of the Supreme Court held that all Courts must consider the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability. The IEBC's action is, in our view the kind of attitude that the Learned Chief Justice founds as smacking of "*judicial utado*"" which according to him was a worrying form of impunity. This was the position reflected in ***Resley vs. The City Council of Nairobi***,[61] where the Court held that:-

"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed (sic)…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed.."

218. In this case, the IEBC's and the 2nd Interested Party's main public interest argument is that the Presidential and General Elections are less than thirty eight (38) days away. Hence, they argue, if the orders sought are granted, it will be impossible for the Presidential and General Elections to be conducted on the 8th of August 2017. In the circumstances, the grant of the orders sought will not be in the public interest as the failure to hold the general elections

will likely result in serious disruption of public order and a constitutional crisis.

219. This is because, the IEBC and 2nd Interested Party argue, timelines for the preparation and conducting of the General Election are constitutionally provided and that the IEBC is already following a very stringent timetable in relation to the various indispensable steps leading up to the General and Presidential Elections. It is therefore critical that no hurdle be placed on the ability of the IEBC to follow that timetable as the inevitable consequence would be deferral of the elections which would portend serious consequences to the entire populace.

220. The IEBC argues that the orders sought herein would, if granted have a substantial impact on governance of the country after 8th August, 2017 as well as questions in relation to the term of Parliament and various constitutional office holders. Both Counsel for the IEBC and the Honourable Attorney General warned the Court that the ramifications of not being able to hold the elections within the rigid constitutional timelines would clearly be far reaching. Indeed, Mr. Karori cited **Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508**, for the proposition that when an order for Judicial Review is likely to materially affect general elections in such a magnitude that it will likely affect the electoral process, the Court should be reluctant to grant relief. The Learned author states as follows in the cited paragraph:

"*The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles would dictate that where to grant the orders of judicial review even if merited is likely to affect the general elections in such a magnitude that it is likely to substantially and materially and adversely affect the electoral process, the Court would be reluctant to accede to the applicant's prayers."* (Underlining added)

221. We are not adherents to the radical judicial expression of deontology: ***Fiat justitia ruat cælum*** ("*Let justice be done though the heavens fall*"). We have expressly stated above that a proper constitutional understanding – especially of Articles 1 and 159 of the Constitution as well as the interpretive theory in Article 259 of the Constitution obligates us in cases such as this to balance the public interest and the private interest in determining whether to grant orders and in fashioning appropriate remedies. In doing so, the Court cannot eschew a consequentialist analysis of the likely effects of the orders it grants.

222. However, balancing between the public interest and the rights of successful litigants before the Court is a fact-intensive inquiry. It must be based on facts and permissible inferences of the likely consequences of granting the orders. It is not enough for a party to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought are granted. A party seeking to rely on this doctrine of public interest to innoculate its otherwise unlawful actions against Judicial Review orders bears a heavy burden to demonstrate that it will burden under the yoke of impossibility if the merited orders are granted. As aforesaid, in balancing the competing aspects, the nature of the right which was breached and its importance in the constitutional scheme of rights must be considered.

223. In this case, we have anxiously considered the arguments by the IEBC and the 2nd Interested Party about the constitutional crisis that they say will be precipitated if the orders sought are granted. In our view, the only basis for the parade of horribles that the IEBC and the 2nd Interested Party laid before us for the inference that truly catastrophic consequences will flow if the orders sought are granted, is the internal timelines generated by the IEBC. Those timelines, as presented, suggest that if the decision by the IEBC to award the tender for the printing of Election Materials and Ballot Papers for the Presidential Elections is quashed, then it would be impossible for the IEBC to conduct Presidential Elections on 8th August, 2017 as constitutionally required.

224. We accept that the IEBC is clothed with the mandate and autonomy to handle its own operational matters and that the IEBC is expected to have the expertise to generate operational programmes – including timelines -- for conducting the Presidential Elections. However, for the IEBC to persuade the Court that these operational imperatives are such that they should deny a successful party relief for a constitutional violation when the IEBC itself was the author of the operational difficulties it finds itself in, the IEBC must place before the Court materials from which the Court can make the permissible inference that the scenario warned against is more likely to happen and that, therefore, public interest militates in favour of denying the orders. The IEBC cannot simply expect the Court to accept as an article of faith its hypothesis on how a constitutional crisis will be precipitated without more.

225. After due and anxious consideration of all the facts and circumstances of the case and even while exercising due deference to the expertise and autonomy of the IEBC, we are not persuaded that operational difficulties will cause it to be unable to meet its constitutional obligations to conduct free, fair and credible Presidential Elections on 8th August, 2017 if the Court grants effective relief to ensure that the important constitutional value of public participation is implemented in the award of the tender for the printing of Election Materials including Ballot Papers for the Presidential Elections. Of course, as we make clear below, the IEBC is solely responsible for making whatever decisions it needs to meet its constitutional obligations and exercise its mandate – including fashioning its own programme of public participation.

226. To reiterate, we are not persuaded that public interest militates against the grant of Judicial Review orders in the circumstances of this case as it has not been demonstrated to us that the grant of the orders will ineluctably make it impossible for the IEBC to conduct Presidential Elections on 8th August,, 2017 as constitutionally-mandated.

T. **SUMMARY OF FINDINGS**

227. We have dealt in the preceding sections with the issues which were raised before us in this application. What remains is to summarise our findings in this application and our disposition of the Application. Consequently we find that:-

1. That this Court has the jurisdiction to entertain and deal with this Application and that neither the doctrine of exhaustion nor prudential doctrine of judicial deference divests the Court of that jurisdiction in the circumstances of this case.

2. The Application is not fatally defective.

3. That this suit is not res judicata.

4. That there are no separate bodies of law or principles in the adjudication of Judicial Review Simpliciter Applications and Constitutional Petitions – but that the same principles emanating from the Constitution apply.

5. That there was no material non-disclosure sufficient to disentitle the Applicant from the reliefs sought herein.

6. That the IEBC did not consider extraneous matters and was not otherwise actuated by bias in arriving at its decision to award the tender for the printing of Election Materials including Ballot Papers for Presidential Elections to the 1st Interested Party.

7. That public participation was required in the award of the procurement tender for the printing of Election Materials including Ballot Papers for Presidential Elections and that the IEBC was obligated to facilitate that public participation.

8. That, in the circumstances of this case, IEBC failed to facilitate sufficient public participation in the award of the procurement tender for the printing of Election Materials including Ballot Papers for Presidential Elections.

9. That this failure to facilitate sufficient public participation in the award of the procurement tender for the printing of Election Materials including Ballot Papers for Presidential Elections made that award constitutionally infirm.

10. That considerations of public interest do not militate against the grant of the reliefs sought in the Application in the circumstances of this case.

U. **DISPOSITION AND REMEDIES**

228. The Applicant has sought various orders from this Court with regard to the acts of the IEBC. Prayers (a) and (b) in the Application are directed expressly to the award of the tender for the printing of Election Materials including Ballot Papers for the Presidential Elections. Prayer (c) in the Application, on the other hand, seeks prohibition restraining the

Applicant (we take this to mean the IEBC) from considering and or awarding the tender and contract to the 1st interested party and/or its affiliates for the printing of Election Materials including Ballot Papers for the Presidential Elections for the forthcoming August 8th, 2017 elections.

229. We are of the view that for this Court to prohibit the award of the tender to the 1st interested party generally, the applicant ought to have sought an express order quashing such a tender. In this case the applicant has only sought to quash the award of the tender for the printing of presidential ballot papers.

230. The parameters of judicial review remedy of prohibition were set out by the Court of Appeal ***in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996*** as follows:

Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings……Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter." [Emphasis added].

231. We had a little bit of difficulty understanding what exact prayers the Applicant was seeking in prayer (c) of the Application. We understood the prayer to be requesting from an order from the Court prospectively prohibiting the IEBC from considering and/or awarding the tender and contract to the 1st Interested Party for the printing of Election Materials including Ballot Papers for the General Elections. As we stated at the beginning of this judgment, we understood the suit as framed and argued to involve a contest of the award of the tender for the printing of the Election Materials and Ballot Papers for the Presidential Elections only. As such an order for prohibition cannot issue respecting the award of the tender for the printing of election materials for other elections except the Presidential Elections.

232. Secondly, if we narrowed the prayer for prohibition to the Presidential Elections only, we understand the prayer for prohibition to be asking the Court to order IEBC not to consider the 1st Interested Party in the procurement of a supplier for the printing of Election Materials including Ballot Papers for the Presidential Elections. Differently put, the Application is asking the Court to bar IEBC from considering the 1st Interested Party from participating in any future procurement process for the supplier for printing of Election Materials including Ballot Papers for the Presidential Election to be held on 8th August 2017.

233. With respect, we cannot grant that order as framed. While this Court has a duty to ensure that the IEBC performs its duties and functions in accordance with the Constitution and statutes, the Court does not have the authority to direct or instruct the IEBC on how to perform its functions. That would be usurpation of the constitutional role of the IEBC. The Court will therefore decline that invitation especially given the findings we have made in this Judgment about the role of the 1st Interested Party in the bungled procurement processes. We therefore decline to grant prayer (c) of the Application.

234. According to ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not

to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief." [Emphasis added].

235. In this case, as we analysed above, we are not satisfied, based on the material placed before us, that it is impossible or impracticable for the IEBC to comply with the constitutional and statutory provisions with respect to the procurement of the printing of Election Materials and Ballot Papers for the Presidential Elections in order to conduct a free, fair and credible Presidential Elections on the 8th August, 2017.

236. Bearing in mind the provisions of the Constitution at Article 23 and section 11 of the ***Fair Administrative Action Act, 2015*** both of which give the Court jurisdiction and wide latitude to grant appropriate relief, the orders we deem appropriate in the circumstances of this case and which we hereby issue are as follows:

a. We hereby issue an order of certiorari removing into this Court for the purposes of being quashed the decision of the Independent Electoral and Boundaries Commission (IEBC) awarding the tender for the printing of election materials including ballot papers for the Presidential elections scheduled for 8th August 2017 to the 1st Interested Party herein which decision is hereby quashed.

b. An Order of mandamus compelling the Independent Electoral and Boundaries Commission (IEBC) to commence *de novo* the procurement process for the award of the tender for the printing of election materials for the Presidential elections scheduled for 8th August 2017 in accordance with the Constitution, provisions of the Public Procurement and Asset Disposal Act and the relevant election laws so as to ensure that free, fair, credible and transparent elections are conducted on the said date.

c. Due to the public nature of these proceedings we will make no order as to costs.

Dated and Delivered at Nairobi this 7th day of July, 2017.

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JOEL NGUGI

JUDGE

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G. V. ODUNGA

JUDGE

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JOHN M. MATIVO

JUDGE

[1] Judicial Review Application no. 637 of 2016

[2] Act No. 33 of 2015

[3] Pet No. 241 of 2017

[4] Supra

[5] Al Ghurair Printing and Publishing Co Ltd LLC vs CORD and 2 Others, CIV APP No. 63 of 2017 and Misc App No. 637 of 2016

[6] 198 U.S. 45 (1905)

[7] **Constitutional Petition No. 152 of 2011**

[8] {1947} 1 KB 223

[9] Civil Appeal No. 185 of 2001

[10] Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.

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[14] Johannesburg Consolidated Investment Company v Johannesburg Town Council 1903 TS at 115

[15] Futhi P. Dlamini and Others v The Teaching Service Commission and Others, Appeal Case No 12/2002 para [18]

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[19] Nairobi HCMA No. 534 of 2003 (HCK) [2004] 2 KLR 506.

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[21] {1982} 3 WLR 604, 623

[22] {2005} 2 EA 43 (HCK)

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[24] (CCT16/98) 2000 (1) SA 1, at paragraphs 135 -136

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[27]{2005} 1 KLR 242

[28] {2013} eKLR

[29] Civil Appeal No. 210 of 1997

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[31] Misc. Application No. 637 of 2016

[32] {2003} 2 EA 556

[33] {1978} KLR 69; {1976-80} 1 KLR 790

[34] {1932} 14 KLR 28

[35] {2010} eKLR

[36] {2014} eKLR

[37] {2016} eKLR

[38] Civil Appeal No. 79 Of 1998 [1995-1998] 1 EA 134

[39] Constitutional Reference No. 12 of 2010

[40] Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 at para 54

[41] {2004} 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR

[42] Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733

[43] No. 1 of 2012; [2014] eKLR at paragraph 26

[44] Advisory Opinion Reference No. 2 of 2013 [2013] eKLR

[45] {2014} eKLR

[46] Petition No. 229 of 2012,

[47] No. 19 of 2012;

[48] (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC)

[49] {2005} ZACC

[50] {2014} eKLR

[51] CCT 86/08 [2010] ZACC 5

[52] See e.g. Daly v SSHD [2001] UKHL 57 §§24-32 and ACCC/C/2008/33

[53] 2006 (2) SA 311 (CC)

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[55] {1968} 1 All ER 874

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[57] {2007} eKLR

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