**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 212 OF 2018**

**ISAIAH BIWOTT KANGWONY.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT**

**THE ATTORNEY GENERAL.....2ND RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner herein, who describes himself as a male adult of sound mind filed this Petition against the 1st respondent (hereinafter "the commission"), a constitutional body established pursuant to Article 88 of the constitution, and the 2nd respondent, the Honourable Attorney General, challenging the legality of the Commission, as presently constituted, following the resignation of four of its commissioners.

The petitioner seeks the following orders;

**1. A DECLARATION does issue to the effect that the current composition of the Independent Electoral and Boundaries Commission is illegal and unconstitutional as a result of the resignation of four commissioners and hence the Commission lacks the requisite quorum to conduct and/or carry out its business.**

**2. A DECLARATION does issue to the effect that the current composition of the Commission is illegal and unconstitutional as a result of the resignation of four Commissioners and hence, the Commission as constituted cannot hold and/or supervise any such elections moreover, the By-elections for Baringo South Bobasi Chache Ward; and for Member of County Assembly North Kadem Ward scheduled for 17th August, 2018.**

**3. A DECLARATION does issue to the effect that the current composition of the Commission is illegal and unconstitutional as a result, any purported By-elections to be held by the Commission, shall be null and void.**

**4. AN ORDER does issue to the effect that all such administrative action taken by the Commission in regard to the preparations of the intended By-elections for Baringo South Constituency; Bobasi Chache Ward are illegal, unlawful and null and void and contrary to the provisions of Article 47 of the Constitution.**

**5. AN ORDER awarding costs of the Petition to the Petitioner.**

**6. Any other orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners' fundamental rights and freedoms.**

**The Petitioner's Case**

2. The petitioner's case, which is supported by his affidavit sworn on 6th June 2018 and further affidavit dated 21st June 2018, is that vide a **Gazette Notice .Vol. CXX-No. 62** dated 28th May 2018 attached as annexture **IBK-1** to the said affidavit, the Commission initiated the process of conducting by-elections in various elective positions that had fallen vacant due to the death of a Member of Parliament and the nullification of elections by various courts. He highlighted the affected electoral areas as Baringo South Constituency, North Kadem Ward and Bobasi Chache Ward.

3. The gist of the petitioner's case is that following the resignation of four (4) commissioners namely; **Ms. Roselyne Akombe, Ms. Consolata Maina, Mr. Paul Kurgat,** and **Ms. Margret Mwachanya** the current composition of the Commission does not comply with the provisions of the Constitution and Sections (4), (5) and (7) of the Second Schedule of the Independent Electoral and Boundaries Commission Act (hereinafter "**the Act**") and that the Commission therefore lacks the requisite quorum to conduct any business and/or to undertake its constitutional mandate.

4. The petitioner states that he is apprehensive that the people of Baringo South Constituency, North Kadem Ward and Bobasi Chache Ward shall be subjected to a sham electoral process not sanctioned by a properly constituted commission thereby compromising the integrity and validity of the intended by-elections.

**Petitioner's submissions**

5. ***Mr. Ochieng' Oginga***, learned counsel for the petitioner, who appeared together with ***Dr. Khaminwa S.C.*** submitted that the current composition of the commission contravenes the provisions of Article 27(8) of the constitution, also known as the two-thirds gender rule, which provides that ***"…..the State shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be of the same gender".***

6. Counsel urged the Court to adopt a progressive approach to the interpretation of the Constitution which gives effect to the constitutional values and principles which the framers of the Constitution envisaged when they drafted the Constitution. In this regard counsel proposed a three-pronged approach in the interpretation as follows;

i. Interpret the provisions in a manner that avoids constricting the Constitution.

ii. Interpretation ought to give effect to the will and aspirations of the people.

iii. Interpretation that gives effect to the intention of the framers of the Constitution and legislators.

7. Counsel referred to several authorities on the interpretation of the Constitution and submitted that the IEBC Act, which was enacted in 2011 and revised in 2016, was in tandem with Article 250 of the Constitution regarding the composition of constitutional commissions. He added that Section 3 of the Act outlines the objects and purpose of the Act, and that among the aspirations of Kenyan people was the principle of inclusion and equality. According to the petitioner, a reading of Article 250(1) and 27 of the Constitution shows that it was not the intention of Parliament that members of a constitutional body shall be of the same gender. Stating that Article 250(1) prescribes the minimum number of commissioners to be three members, ***Mr. Oginga*** submitted that the Court ought to breathe life into that provision so that even in the case of 3 members, they must not be of the same gender as this would contravene the constitutional values and aspirations of the people of Kenya.

8. In ***Dr. Khaminwa's*** submissions on behalf of the petitioner, he referred to the provisions of Article 259 of the Constitution and urged the court to interpret the Constitution in a manner that promotes its function and purpose. He submitted that Article 250 of the Constitution is a general provision applicable to all commissions while the IEBC Act is a constitutional statute which must be interpreted in conformity with Article 259. He further submitted that the IEBC Act is clear, at schedule 5, that the minimum quorum of the Commission shall be 5 commissioners and that under Article 88(4) of the Constitution, the functions of the

Commission are so vast that they cannot be performed by the 3 remaining commissioners which justifies the statutory provision that decisions be made by a minimum of five commissioners.

9. He also submitted that since 4 commissioners had resigned, the remaining 3 cannot conduct the business of the Commission and emphasized that there is no way the Commission, as presently constituted, can continue to render valid decisions. He suggested that the Commission must therefore be disbanded as the remaining 3 commissioners, who are all of the male gender cannot continue to function legally and constitutionally in the face of the glaring breach of the two third gender rule. He maintained that allowing the Commission, as currently constituted, to function would amount to an infringement of the constitutional rights of the contestants and the electorate in the upcoming By-elections as shown in the impugned Gazette Notice.

**The Respondents' case**

10. In response to the petition, the Respondents filed the Replying Affidavit of the 1st respondent's chairman, **Wanyonyi Wafula Chebukati,** dated 19th June 2018 and written submissions dated 12th July 2018. The Respondents' case was highlighted in oral submissions by ***Ms. Awuor***, learned counsel for the 1st Respondent, who submitted that the Speaker of the National Assembly wrote to the Commission notifying it of vacancies in the elective seats that in accordance with the law, the 1st respondent published the vacancies in the Kenya Gazette. It was submitted that the vacancies were therefore not occasioned by a decision of the Commission so as to warrant the filing of the instant petition.

11. ***Ms. Awuor*** also submitted that the instant petition offends the *sub judice* rule and that this court therefore lacks the jurisdiction to entertain it in view of the fact that it raises similar issues as the issues raised in an earlier case of **Okiya Omtatah Okoiti vs. the Independent Electoral and Boundaries Commission & Others Petition Number 165 of 2018** ( hereinafter "the **Okiya Omtatah** case") which is still pending before Mwita, J.,wherein the main issue for determination is the is of the legality of the composition of the Commission following the resignation of some of its members. Counsel submitted that by-elections are administrative issues that do not involve the Commissioners directly as under Sections 10 and 11 of the IEBC Act, it is the Commission's secretariat that is charged with the function of executing the elections while the commissioners merely play the oversight role. Counsel added that under Section 19 of the Election Act the Commission is required to transmit vacancy notices to the affected constituencies after which the Returning Officers take over the execution of the conduct of the by-elections in line with the provisions of the Elections Act and the Elections (General) Regulations 2012.

12. She further submitted that since Article 250 of the Constitution stipulates that the minimum number of commissioners in the constitutional commissions is 3, the validity of that article of the constitution cannot be subject to challenge in view of the supremacy of the Constitution. In this regard, ***Ms. Awuor*** submitted that Paragraph 5 of the 2nd Schedule of the IEBC Act is unconstitutional as it offends Articles 250(1) and 248(2) (c) of the Constitution. Counsel cited several authorities in support of the submission on the supremacy of the Constitution.

13. She further submitted that by dint of the provisions of Section 7(3) of the Act the Commission remains properly constituted notwithstanding the vacancies that were occasioned by the resignation of some of its members.

**Analysis and Determination**

14. I have carefully considered the pleadings herein, submissions by counsel for the parties and the authorities that they relied on. The petition challenges the legality of the constitution of the Commission, which currently has only 3 male commissioners, following the resignation of four (4) of its members. The first issue that presents itself determination is that of the jurisdiction of this court to entertain the petition in the face of the allegations by the respondent that the suit is *sub judice* on the basis that it raises similar issues as those raised in the **Okiya Omtatah** case which is currently pending before Mwita, J. It is only after settling the issue of jurisdiction that this court will, depending on the outcome thereof, venture into the merits and other issue raised in the petition. The other issues for determination are:

a) Whether the commission, as currently constituted, is illegal and unconstitutional and therefore incapable of overseeing the upcoming by-elections.

b) Whether the petitioner is entitled to the orders sought in the petition.

**Jurisdiction**

15. It is trite law that jurisdiction, in any matter coming up before a court, is a fundamental issue that must be resolved at the beginning because it is the fountain from which the flow of the judicial process originates. As was aptly stated by Nyarangi, J.A. in the celebrated case of ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd.*** [1989] KLR 1

***"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

On *res sub judice,* Section 6 of the Civil Procedure Act, Cap. 21 (CPA) provides that:

***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

The term '***sub-judice'*** is defined in ***BLACK's LAW DICTIONARY 9$^{TH}$ EDITION*** as:

***"Before the Court or Judge for determination"***

16. The purpose of the *sub judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party who seeks to invoke the doctrine of *res sub judice* must establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

17. Where the test of *res sub judice* is established or met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined. The practice in our courts has however been to consolidate such suits for hearing and determination.

18. In the present case, the 1st respondents drew the attention of this court to the case of **Okiya Omtatah** case that is pending before Mwita J. A copy of the pleadings in the said case was attached to the 1st respondent's replying affidavit and marked as annexture **"WWC1"**. I have perused the pleadings in the said case and I note that it raises the issue of the legality of composition of the Commission following the resignation of four of its commissioners. Indeed at paragraph 5 of the petition it is stated:

**"5. At the point of filing this petition, the respondent is composed of only three commissioners, following the voluntary resignation of four commissioners."**

19. I further note that one the prayers sought in the Okiya Omtatah case is for a declaration that: **"That the current three-member Commission is lawfully and properly constituted pursuant to Article 250 (1) of the Constitution; its operations are not to be hampered by the resignation of the four commissioners; and any business it conducts in the discharge of its lawful mandate under the constitution and statute is legitimate and valid in law."**

20. When the instant petition is considered side by side with the Okiya Omtatah case, the glaring and undeniable fact is that both cases were precipitated by the resignation of the four commissioners of the 1st respondent and while the instant petition seeks the declaration that the Commission is, following the said resignation, unlawfully constituted, the earlier petition seeks a declaration the Commission is properly constituted despite the resignations. I however note that the two petitions have been filed by different petitioners and in the instant case, there is the new twist of the upcoming by–elections which are slated, according to the impugned Gazette Notice, for 17th August 2018, exactly one week from the date of the delivery of this judgment, in which case I find that the

subject matter in the petitions is not entirely the same and neither are the parties. It is therefore my finding that this Court has jurisdiction to entertain the petition.

**Composition of the Commission**

21. The petitioner challenged the current composition of the Commission on account of the number of the commissioners and the two third gender rule. The respondents' contention, on the other hand, was that the gender issue does not arise as the composition of the IEBC was occasioned by voluntary resignations of four commissioners, among them women. The respondents argued that it cannot therefore be said that the appointing body did not comply with the two-third gender principle during the recruitment and maintained that the remaining commissioners should not be victimized on account of the resignations. The respondents maintained that under Section 7(3) of the IEBC Act, the Commission remains properly constituted notwithstanding a vacancy in its membership.

Article 27 of the Constitution provides that;

***27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***27(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***

***27(8) In addition to the measures contemplated in clause 6, the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointed bodies shall be of the same gender***.

22. The Supreme Court of Kenya considered the two-third gender principle in the context of the composition of the membership of the Judicial Service Commission (JSC) in **Advisory Opinion No. 2 of 2012 In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate [2012]eKLR** wherein the learned justices, upon noting that the said commission had both elected and appointed commissioners, pointed out that the two-third gender rule was immediately realizable in the context of the JSC because of the appointive slots, such that the JSC would always have three women members out of eleven which falls short of the two-third rule. The Judges however noted that Article 27(8) of the Constitution bestows upon the State the responsibility to take *further action* to enable the attainment of the two-third gender rule so that the number of women would rise from three to at least four, which meets the two-third threshold. This being the case, the learned Justices termed the realization of the three female members of the JSC is immediate but the attainment of the four members is progressive. The Court emphasized that whether a right is to be realized progressively or immediately is not a self-evident question but is dependent on factors such as language used in the normative safeguard, or in the expression of principle, the mechanisms provided for attainment of gender equity, the nature of the right in question, the mode of constitution of the public body in question among other factors.

23. In the present case, it is not disputed that the composition of the Commission, before the resignation of the four commissioners, had complied with the two-third gender principle; hence the appointing body cannot be faulted in that regard. The issue of the two-third gender rule has been raised by the petitioner following the resignation of the four commissioners and my finding is that the wording of the Constitution at Article 27(8) is that the two third gender principle needs to be observed during the election or appointment process, in which case, I find that the petitioner ought to hold his horses and raise the gender issue during the recruitment of the new commissioners to fill in the vacant positions created by the resignations. It is therefore my finding that raising of the issue of the two- third gender rule, in the circumstances of this case, is misplaced. My finding that the two-third gender principle is only applicable during the recruitment process is bolstered by the provisions of Paragraph 5 of the 1st Schedule of the IEBC Act which stipulates that:

***"In Short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two thirds of the members are of the same gender and shall ensure regional balance."***

**Vacancy in the Commission**

24. The petitioner stated that the Commission is currently not properly constituted on account of the vacancies created by the resignation of the four commissioners which has reduced its numbers to three contrary to the requirement, under Paragraph 5 of the Second Schedule of the Act that the quorum for the conducting of the business of the Commission be a total of 5 commissioners. The 1st respondent's case, on the other hand, was that the Commission cannot be said to be improperly constituted by the mere fact that there are vacancies.

25. Even though the issue of whether or not there are vacancies in the Commission was not contested by the parties, this court is still minded to consider the provisions of the law on how a vacancy may occur in the Commission and determine whether, on the facts presented before this court, it can be said that indeed vacancies were created following the alleged resignation of some of the commissioners. In support of his claim on the alleged resignations, the petitioner attached a signed copy of Ms. Roselyn Akombe's press statement (marked "**IBK-2**") and a copy of an unsigned joint statement of resignation by the other three Commissioners (marked "**IBK-3**").

Section 7A of the IEBC Act provides as follows on vacancy in the Commission;

**7A. Vacancy in the office of chairperson and members**

*(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—*

***(a) Dies;***

***(b) Resigns from office by notice in writing addressed to the President; or***

***(c) Is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.***

26. A reading of Section 7A (1) (b) of the Act clearly shows that ***resignation is by notice in writing to the President.*** Other than a copy of the press statement released by Ms. Roselyn Akombe and a copy of an unsigned joint resignation statement by her three colleagues, there was no other tangible evidence placed before this Court to demonstrate that there were vacancies created, through resignation, as is envisaged under Section 7A (1) (b) so as to enable me arrive at the conclusion that there are indeed, vacancies in the commission as alleged by the petitioner. My take is that the commissioners who issued the press statements regarding their alleged resignations were fully aware of the provisions of Section 7A (2) and (3) which provides for the steps that follow their resignation regarding the publishing of the occurrence of a vacancy and the immediate recruitment of the new commissioners.

**Section 7A (2)** provides;

***(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.***

**Section 7A (3)** provides;

***(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).***

27. In the instant case, no evidence been presented before this Court to show that the President has published a notice of vacancy as dictated by **Section 7A (2).** Section 7A (3) clearly states that the recruitment of a new chairperson or member can only commence after the declaration of vacancy by the President under subsection (2). From the above provision, one can say that the Act contemplated that vacancies could occur due to resignations and gave clear provisions on what action was to be taken by the appointing authority to facilitate the recruitment of new commissioners. Clearly therefore, the mere fact that there are vacancies in the commission does not mean that the Commission becomes unconstitutional and by extension, the mere fact that the appointing authority has not initiated the process of recruiting new commissioners does not mean that the commission as presently constituted, is not constitutional. Considering that the Commission still meets the minimum threshold of three members as envisaged under Article 250(1) of the Constitution.

28. From a legal standpoint therefore, and in light of the clear provisions on how a vacancy may be created in the commission, this court is unable hold that there is any vacancy in the Commission following the alleged resignations communicated through the press statements. My finding is that if indeed, the lawmakers intended that a vacancy, through resignation, may be communicated through any other means other than a letter addressed to the President, then the Act would have explicitly stated as much. Perhaps this case will serve as a wake-up call to lawmakers to reconsider the provisions relating to the resignations by commissioners with a view to plugging the gaps therein so as deal with the stalemate that is currently existing at the commission as a result of the commissioners opting to tender their resignations through the press instead of a letter addressed to the President as is required by the law.

29. Be that as it may, this court takes judicial notice of the fact that the issue of the resignation of the four commissioners, albeit without complying with the law on resignations, is an issue that has been in the public domain for some time now and is a matter that the court cannot ignore in determining the merits of this petition. The lingering question is whether the commission can be said to be improperly constituted purely on account of resignation of some of its commissioners. Section 7(3) of the Act provides that the Commission shall be properly constituted notwithstanding a vacancy. This position is confirmed by the provisions of Section 7A (4), (5) and (6) which stipulate as follows:

**Section 7A**

***(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.***

***(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.***

***(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.***

30. My finding is that the occurrence of a vacancy in the commission does not invalidate the composition of the commission and it is for this reason that the lawmakers enacted clear provisions regarding the prompt replacement of commissioners upon the resignation of any one of them.

**Paragraph 5 of the 2nd Schedule of the IEBC Act**

31. Is Paragraph 5 of the 2nd Schedule of the IEBC Act unconstitutional for offending Article 250(1) and Article 248(2) (c) of the Constitution" The said paragraph provides that;

*"**The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission."***

Article 250 (1), on the other hand, provides that; ***"each commission shall consist of at least three but not more than nine members."***

**Article 248 (2) (c)** lists the IEBC as one of the said commissions.

32. In determining the constitutionality of the impugned provisions, the rules of constitutional interpretation come into focus by providing guidelines on the manner of interpretation.

33. On the interpretation of the Constitution, the Constitution itself at Article 259 (1) lays down the principles that Courts must bear in mind and that must permeate the process of constitutional interpretation. Article 259(1) provides that***(1) This 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.***

34. Under Article 159 (2) (e) of the Constitution this court is mandated to protect and promote the purposes and principles of the

constitution. Through numerous judicial pronouncements, various courts have over the years developed principles of constitutional interpretation some of which I will highlight as follows:

In ***Paul Ssemogerere and Others vs. The Attorney General*** **Constitutional Appeal no. 1 of 2002) [2004] UGSC10)** it was held that:

***"it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole."***

In the case of ***Smith Dakota vs. North Carolina*** **192 US 268(1940)** the Supreme Court of the United States pronounced itself thus:

***"It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument."***

The above decision also held sway in the case of **Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC** the Constitutional Court put it thus;

***"The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness."***

35. The Court of Appeal of Tanzania concurred with this view in the case of **Attorney General of Tanzania v Rev. Christopher Mtikila [2010] EA 13** where it observed that the principle of harmony requires that the entire Constitution be read as one entity.

36. The Supreme Court also advocated a holistic interpretation of the Constitution **In the Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012)** where it stated;

***(a) "But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in 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 in each other, so as to arrive at a desired result."***

In **State v Acheson 1991 20 SA SOS** ***it was stated that:***

***(b) "The Constitution of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion"***

In the case of **Njoya & 6 Others v Attorney General & another [2004] eKLR** the Court stated;

***(c) "Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."***

37. Courts have also held that there is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved. This assumption is based on the fact that as peoples' representative, parliament usually enacts laws to serve people and therefore understands the problems that the laws are intended to solve. This was the view enunciated in the case of **Hambardda Dawakhana v Union of India Air (1960) AIR 554**, where the Supreme Court of India stated;

***(1) "In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation."***

38. It was stated in the case of **Ndyanabo v Attorney General of Tanzania [2001] EA 495,** the burden is on the person alleging that a statute is unconstitutional to prove the unconstitutionality or invalidity.

In **Ng Ka Ling & Another v The Director of Immigration (1999) 1 HKLRD 315.the Court stated;**

***(a) "It is generally accepted that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."***

39. Applying the above principles to the instant case, I will now consider whether the impugned provisions of the IEBC Act go against Articles of the Constitution as the petitioner had contended. In doing so, I am alive to the fact that the duty of the court is only to juxtapose the article of the constitution with the statute challenged and declare whether the legislation is in accordance with or in contravention of the Constitution as the Court should neither approve nor condemn a legislation. (See **US v Butler 297 US 1[1936]**).

40. As a starting point, I note that the IEBC Act is a creature of the Constitution. Articles 88 of the Constitution establishes the IEBC and provides under Clause 5 that the Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation, in which case the legislation in question is the IEBC Act among other laws governing elections. In my humble opinion the provision under Article 250(1) for a minimum of three members of the commission and a maximum of nine members shows that the framers of the Constitution gave the appointing authority the latitude to appoint number of commissioners as long as they did not exceed nine or go below three members.

41. In this case, the number of the commissioners was reduced following resignations and as I have already found in this judgment, the mere fact that some commissioners have resigned does not invalidate the composition of the commission. All that the reduction of the numbers does is to limit the operations of the commission especially in respect to raising the quorum required for the meetings.

42. Turning to the issue of the quorum of the commission as stated in Paragraph 5 of the second schedule of the IEBC Act, it is noteworthy that the issue of the quorum of the commission only arises during the conduct of the business of the commission. My humble view is that the issue of the quorum of the commission, even though tied to the commission's membership, is not per se an issue that should lead to a declaration that the commission is improperly constituted as quorum will can only be the subject of a challenge if the policy decisions of the commission are made without the requisite quorum.

43. In the instant case, the petitioner prays, inter alia, for a declaration that the commission is illegal and constitutional for lack of quorum as a result of the resignations. As I have already found in this judgment, the issue of the alleged resignation of the four commissioner was an issue that was neither here nor there and was not proved by any tangible evidence.

Blacks Law Dictionary (10th Edition) defines quorum as ***"the smallest number of people who must be present at a meeting so that official decisions can be made"***

In the case of **Katiba Institute & 4 Others vs. The Attorney General & 2 Others [2018] eKLR,** Mwita J. pronounced himself on the issue of the quorum of the commission as follows:

***a. "Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."***

44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five" The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed.

45. It is worth noting that in the instant case, the lack of quorum has been occasioned by vacancies in the commission which vacancies cannot be attributed to the fault of the remaining commissioners or the Commission so as to warrant the issuance of a declaration that the Commission is not properly constituted. In any event, the vacancies ought to have been addressed through the immediate recruitment of new commissioners as I have already found in this judgment.

46. In the present case, the petitioner argued that the current composition of the commission is unlawful and it cannot supervise the by-elections that are slated for 17th August 2018. My finding is that the conduct of elections or by-elections is not a matter that arises out of the resolutions or decisions made by the commissioners at a meeting of the commission but are dictated by the operation of the law following the declaration of vacancies by the speakers in the elective positions that are the subject of the elections or by-elections. Section 16 of the Elections Act stipulates as follows:

***Parliamentary elections***

***16. (1) Whenever a parliamentary election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation—***

***(a) in the case of a general election, at least sixty days before the date of the general election; or***

***(b) in any other case, upon the office of a Member of Parliament becoming vacant and on receipt of a notice issued by the respective Speaker under subsection (2).***

***(2) The notice referred to under subsection (1) shall be in the prescribed form and shall specify—***

***a. the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;***

***b. the day for the nomination of candidates for the parliamentary election; and***

***c. the day or days on which the poll shall be taken for the day specified for nomination under paragraph (b)***

***(3) Whenever a vacancy occurs in the National Assembly or the Senate, the respective Speaker shall issue a notice in***

***accordance with Article 101 of the Constitution.***

***(4) The Commission shall within twenty one days of receipt of the notice issued under subsection (2), transmit the notice to the relevant returning officer.***

A similar provision to the above section is contained in Section 19 of the Election Act in respect to vacancies in the office of the Member of County Assembly (MCA).

47. From the above provisions, it is clear that the Commission does not act on its own motion through board room decision in determining that an election is to be conducted or that a vacancy has occurred in the National Assembly, but acts only act upon receiving a notice, of such a vacancy, from the Speaker.

48. Having considered the petition, the Constitution and the law and having regard to my findings and observations in this judgment, I find that the instant petition lacks merit and the order that commends itself to me is the order to dismiss it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 10th day of August 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of**

Mr Hussein for Awuor for the 1st respondent

Miss Chibole for the 2nd respondent

Mr Ochieng Oginga for the petitioner

Court Assistant -Kombo