IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 148 OF 2017

BETWEEN

SPEAKER OF THE NATIONAL ASSEMBLY...APPELLANT

AND

CENTRE FOR RIGHTS EDUCATION & AWARENESS.................1ST RESPONDENT

COMMUNITY ADVOCACY & AWARENESS TRUST..................2ND RESPONDENT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.........3RD RESPONDENT

SPEAKER OF THE SENATE..4TH RESPONDENT

THE ATTORNEY GENERAL...5TH RESPONDENT

KENYA HUMAN RIGHTS COMMISSION....................................6TH RESPONDENT

LAW SOCIETY OF KENYA...7TH RESPONDENT

NATIONAL GENDER & EQUALITY COMMISSION................ 8TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 29*th March 2017* in CP. No. 371 of 2016)

****

JUDGMENT OF THE COURT

At the heart of this appeal is the question whether the ***Parliament*** has failed to enact, within the stipulated period, legislation that is required to fully implement the ***Constitution of Kenya, 2010*** and whether as a consequence, the default mechanism provided by ***Article 261*** of the Constitution, leading ultimately to dissolution of the Parliament, should now be invoked. By the impugned judgment delivered on 29th March 2017, the High Court ***(Mativo, J.)*** found in accordance with Article 261(6) of the Constitution that the Parliament had failed to enact legislation necessary to give effect to the constitutional requirement that not more than two-thirds of the members of the ***National Assembly*** and the ***Senat***e shall be of the same gender. For convenience we shall refer to that

constitutional requirement as "the gender rule" or "the gender principle". Accordingly, the High Court issued an order of *mandamus* directing Parliament and the ***Attorney General*** to take steps to ensure that the necessary legislation is enacted within 60 days from the date of the judgment, failing which the ***Centre for Rights Education and Awareness (the 1st respondent)***, ***the Community Advocacy and Awareness Trust (the 2nd respondent)***, or any other person, was at liberty to petition the ***Hon. the Chief Justice*** to advise ***His Excellency the President*** to dissolve Parliament. It is common ground that, although constitutional amendment bills have been published to amend the Constitution and actualize the gender principle as relates to the National Assembly and the Senate, the amendment has not been effected and a petition is now pending before the Chief Justice to advise the President to dissolve the Parliament.

The constitutional requirement that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender is one of the innovations of the Constitution of Kenya, 2010, intended to redress gender inequality in public offices and to give women, who traditionally have been a minority, a minimum presence in those offices. The majority of the Supreme Court adverted to this background as follows in ***In the Matter of the*** **Principle of Gender Representation in the National Assembly and the** ***Senate (Advisory Opinion No. 2 of 2012):***

"This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as "the socialization of patriarchy"; and its resultant diminution of women's participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of "national values and principles of governance" [Article 10]. ***Mutunga, CJ.,*** who rendered a dissenting opinion, was of the same mind as the majority regarding the history of gender inequality in Kenya, which he noted the Supreme Court was obliged, under the Supreme Court Act, to take into account. He delivered himself thus on the issue:

"The history of this disenfranchisement ashamedly started with the birth of this country. There was not a single female MP in the first legislature in 1963. These numbers have only been marginally improving: 4.1% female representation in Parliament in1997, 8.1% in 2002 and 9.8% in 2007. This is despite the female population being the majority, albeit slightly, at 50.44%. This history must have in the minds of Kenyans, particularly women, when they voted for a new constitution through a referendum and celebrated its promulgation on August 27, 2010."

Article 27 of the Constitution, which provides for equality and freedom from discrimination, has additional provisions which oblige the State to take measures for the realization of the rights guaranteed by that Article. The pertinent clauses provide as follows:

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

7. Any measures taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

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 appointive bodies shall be of the same gender.*”* (Emphasis added)

In addition to Article 27, ***Article 81*** of the Constitution, which provides general principles of the electoral system, provides as follows:

“81. The electoral system shall comply with the following principles-

(a)...

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender.”

A reading of Article 27 and 81 leaves no doubt in our minds that the Constitution contemplates that elective public bodies, including the National Assembly and the Senate, would in their composition, comply with the gender principle. But how are the ratios set by the Constitution to be achieved" In our view, there are three possible methods.

The first method is through elections, where voters in the exercise of their democratic will return into elective offices members with the gender mix required by the Constitution. This, however, is the method that has failed to work since independence and necessitated the writing of the gender principle into the Constitution. The other two methods become necessary where this first method fails and the exercise of the voters’ democratic right does not result in the gender ratios demanded by the Constitution.

The second method is set by the Constitution itself, but unfortunately only for the county assemblies, rather than for the National Assembly or the Senate. The Constitution contemplates that in democratic elections it is possible that the required minimum numbers based on gender will not be achieved. Hence for the county assemblies, ***Article 177(1) (b)*** provides a formula for achieving or satisfying the gender principle. For that purpose the Constitution provides that a county assembly is made up, firstly, of members elected by the registered voters of the wards, secondly the number of members of marginalised groups, including persons with disabilities and the youth as prescribed by an Act of Parliament; thirdly, the speaker who is an *ex officio* member, and lastly:

“the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender”.

Those special seat members are to be nominated by political parties in proportion to the seats they won in the election in the county. Through this formula, the Constitution ensures that in the event a county assembly has, for example less than one-third women, political parties, based on the votes attained in the election, will nominate the number of women required to attain the constitutional ratio. Equally, in the event that the county assembly returned after the election has less than one-third men, the political parties are to nominate the number of men required to achieve the prescribed gender ratio. This method works where the maximum number of members of the institution is not prescribed. It may not work where the Constitution has prescribed the maximum number of members of a House, as Articles 97 has done for the National Assembly and Article 98 for the Senate. By Article 97, the National Assembly is made up of 290 members elected by single member constituencies; 47 women elected by counties as single member constituencies; 12 members nominated by parliamentary political parties proportionate to their members in the National Assembly, to represent special interest such as the youth, persons with disabilities and workers; and the Speaker, who is an *ex officio* member. As for the Senate, by dint of Article 98 it is made up of 47 members elected by the counties as single member constituencies; 16 women nominated by political parties proportional to their members in the Senate; 2 members, a man and a woman to represent the youth; 2 members, a man and a woman, to represent persons with disabilities; and the Speaker, who is an *ex officio* member.

The last method is that contemplated by ***Article 27 (8)***, namely, resort to legislative and other measures to ensure that the constitutional ratio in elective bodies is attained. As we understand it, the 1st and 2nd respondents' main contention is that the Parliament has failed to take the contemplated legislative and other measures to realize the gender principle in the National Assembly and the Senate.

The Fifth Schedule to the Constitution prescribes the period within which legislation required to implement the Constitution is to be enacted. It is a contested issue in this appeal whether Article 81 of the Constitution imposes on the State the obligation to take legislative and other measures to ensure realization of the gender principle and why the Fifth Schedule is silent on the period within which those measures should be taken.

In ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** (supra), the Attorney General moved the Supreme Court for an advisory opinion on whether, in regards to the National Assembly and the Senate, the gender principle had to be satisfied in the elections that were scheduled on 4th March 2013, or whether it was to be realised progressively. None of the parties who were before the Supreme Court had any doubt that the gender principle prescribed by the Constitution had to be satisfied; the only question was when"

The majority of the Court held that the gender rule is to be achieved progressively rather than immediately. Relying on ***Article 20(3) (a)*** and ***(b)*** of the Constitution, which requires the courts to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours enforcement of a right or fundamental freedom, the Supreme Court concluded as follows:

"[79] Bearing in mind the terms of Article 100 [on promotion of representation of marginalized groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015."

For his part, ***Mutunga, CJ.***, took a dissenting view that the gender principle was intended to be realized immediately.

As is readily apparent, the date of 27th August 2015 was five years from the date of the promulgation of the Constitution and accords with the terms of the Fifth Schedule to the Constitution, which prescribes a period of five years within which to enact any other legislation required to implement the Constitution for which no period is provided by the Schedule.

We must however bear in mind that under Article 261(2) of the Constitution, the National Assembly has been granted power, by resolution supported by at least two-thirds of its members, to extend the period prescribed by the Fifth Schedule for enacting legislation, for a maximum period of one year. In addition, such extension can be done only once and in exceptional circumstances to be certified by the Speaker of the National Assembly.

A few months before expiry of the deadline set by the Supreme Court of 27th August 2015, the 1st respondent filed in the High Court ***Petition No. 182 of 2015*** against the Attorney General and the defunct ***Commission for the Implementation of the Constitution (CIC)***, contending that they had failed to take any measures to realize the gender principle in the National Assembly and the Senate as advised by the Supreme Court. The 1st respondent therefore prayed for, among others, a declaration that the Attorney General and the CIC had failed to take requisite action to implement the gender principle and were accordingly in breach of their obligation under Article 261(4) and an order of *mandamus* to compel them to prepare the relevant Bills for tabling in Parliament for purposes of realising the gender principle.

By a judgment dated 26th June 2015, ***M. Ngugi, J.,*** found in favour of the 1st respondent and issued the following orders:

"a. It is hereby declared that to the extent that the 1st and 2nd respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11*th December 2012 in Reference Number 2 of 2012, they have violated their obligation under Article 261(4) of the Constitution to "prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified".*

b. It is hereby declared that the foregoing failure, refusal and or neglect by the 1st and 2*nd respondent is a threat to a violation of Articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.*

c. An order of mandamus be and is hereby issued directed at the 1st and 2*nd* respondents directing them to, within the next forty (40) days from the date hereof, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article *100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012."*

The National Assembly thereafter invoked Article 261(2) of the Constitution and extended by one year, to 27th August 2016, the period within which measures should be taken to implement the gender principle. However, 27th August 2016 came and went without any measures in place to implement the gender principle. Truth be told, several initiatives were undertaken to implement the gender principle, including publication of constitutional Amendment Bills but the same were never passed by the Parliament. That remains the position up to now.

On 5th September 2016, the 1st and 2nd respondent petitioned the High Court for among others, a declaration that the National Assembly and the Senate had violated their obligation to enact the necessary legislation to give effect to the gender principle; an order of *mandamus* directing Parliament and the Attorney General to take steps to ensure that the required legislation is enacted within the period to be set by the court and to report progress to the Chief Justice; and an order that should the Parliament fail to enact the requisite legislation, the Chief Justice shall advise the President to dissolve Parliament. In support of the petition the 1st and 2nd respondent relied on the provisions of the Constitution on the gender principle, the advisory opinion of the Supreme Court, and the fact that even after the lapse of the time set by the Supreme Court and as extended by the Parliament, the requisite legislation had not been enacted.

The respondents to that petition were the Speaker of the National Assembly (the appellant), the Speaker of the Senate and the Attorney General. They opposed the petition vide a notice of preliminary objection, grounds of opposition and replying affidavits sworn by ***Michael Sialai, Senior Deputy Clerk*** of the National Assembly and ***Mohammed Ali Mohammed, Senior Deputy Clerk*** of the Senate. They pleaded *res judicata*, contending that the petition involved the same parties and raised the same issues that were raised, heard and determined in Petition No. 182 of 2015. They further pleaded misjoinder on the basis that both the Speakers of the National Assembly and of the Senate have no constitutional duty to enact legislation. Lastly the three respondents adverted to some measures that had been taken to realise the gender principle, such as the publication of the Constitution of Kenya (Amendment) Bills Nos. 3, 4, and 6, all of 2015 as well as the amendment of the Political Parties Act by the Election Laws (Amendment) Act, 2016 to distribute 15% of the Political Parties Fund to political parties in proportion to the number of candidates elected from special interest groups. In their view, that was sufficient incentive to elect more women into the National Assembly and the Senate. Lastly, they contended that it was not in public interest to dissolve Parliament on account of its failure to enact the required legislation on the gender principle and dissolution would only precipitate a constitutional crisis.

Several other parties were admitted into the petition by the Order of the High Court. The ***Kenya National Commission on***

Human Rights, which joined the 1st and 2nd respondent in supporting the petition was admitted as the 3rd Petitioner. The ***Kenya Human Rights Commission*** and the ***Federation of Women Lawyers (Kenya) (FIDA)*** were admitted as interested parties and maintained that Kenya was obliged to implement the gender principle. Lastly, the ***National Gender and Equality Commission*** and the ***Law Society of Kenya*** were admitted as *amici curie.*

Before the hearing of the petition, the appellant and the Speaker of the Senate, by two applications dated 19th and 20th January 2017 applied to the learned judge to certify that the petition raised substantial questions of law and to refer the same to the Chief Justice to empanel a bench of uneven number of judges to hear and determine the same. By a ruling dated 25th January 2017, the learned judge found that the petition did not raise any substantial question of law, the only issue being whether Parliament had enacted the required legislation to implement the gender principle. Accordingly he dismissed the two applications with costs.

Subsequently the learned judge heard the petition and by the judgment that is impugned in this appeal, allowed the same, and granted the following orders:

a. A declaration be and is hereby issued that the National Assembly and the Senate have failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender.

b. A declaration be and is hereby issued that the failure by parliament to enact the legislation contemplated under article 27 (6) & (8) and 81 (b) of the constitution amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution.

c. An order of mandamus be and is hereby issued directing Parliament and the Honourable Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of this order and to report the progress to the Chief Justice.

d. That it is further ordered that if Parliament fails to enact the said legislation within the said period of Sixty (60) days from the date of this order, the Petitioners or any other person shall be at liberty to petition the Honourable the Chief Justice to advise the President to dissolve Parliament.

e. That the Respondents do pay the costs of this petition to the petitioners.

The appellant was aggrieved and lodged this appeal. In the memorandum of appeal the appellant set forth 16 grounds of appeal, but during the hearing of the appeal, the appellant reduced them to five grounds, in which he essentially contends that the High Court erred by:

i. declining to refer the petition to the Chief Justice to constitute a bench of three judges to hear and determine the petition;

ii. by failing to find that there was misjoinder and non-joinder of parties;

iii. by failing to hold that there is no constitutional requirement to enact legislation under Article 81 of the Constitution;

iv. by holding that the National Assembly and the Senate had failed to enact legislation on the gender principle; and

v. by failing to hold that granting the petition would result in a constitutional crisis.

Prosecuting the appeal, ***Mr. Njoroge*** and ***Ms. Otieno***, learned counsel for the appellant submitted, on the first ground of appeal, that the learned judge was in error in holding that the petition did nor raise substantial questions of law. The appellant contended that Article 165 (4) of the Constitution allows empanelment of an uneven bench in matters of enforcement of the Bill of Rights or interpretation of the Constitution that raise substantial questions of law and that the rationale behind the provision is to bring more than one judicial mind to bear on the matter. In support of that contention, he relied on the report of the Committee of Experts that midwifed the Constitution and added that the petition raised substantial questions of law and of public importance regarding the interpretation and application of Articles 27(6) and (8), 81(b), 100 and 261 of the Constitution; whether Parliament had enacted the requisite legislation on the gender principle; and whether granting the orders sought in the petition would precipitate a constitutional crisis.

Turning to the second ground of appeal, the appellant submitted that the two Speakers were not proper respondents to the petition because it was not their duty to introduce Bills in Parliament for enactment and that both of them were in fact *ex-officio* members of Parliament, without any vote on legislation, by dint of Articles 97(1) (d) and 98(1)(e) of the Constitution. Enactment of legislation, it was contended, is the responsibility of members of Parliament under Article 109(5) of the Constitution. The appellant therefore urged us to find that the two Speakers were not proper parties to the Petition because they had not failed to discharge any obligation vested in them by the Constitution and that in effect the learned judge issued orders against Members of the National Assembly and the Senate who were not parties to the petition which was in violation of the right to fair hearing under Article 50 of the Constitution.

On the third ground of appeal, the appellant urged that Article 81 of the Constitution does not require enactment of any legislation. He contended that the Article merely sets out general principles of the electoral system and added that even the Fifth Schedule does not include Article 81 as one of the Articles under which legislation is required. In the appellant's view, no legislation could be enacted to implement the gender principle because the Constitution itself had prescribed the maximum number of members of the National Assembly and the Senate, which could not be exceeded through nomination in a quest to implement the principle. It was also the appellant's contention that in view of the political rights guaranteed by Article 38 of the Constitution, Kenyans cannot be compelled to vote on gender considerations, meaning that all that Parliament is required to do was to encourage women to contest for elective positions, which it had done by amendment to the political Parties Act.

On the penultimate ground of appeal, the appellant submitted that the learned judge erred by holding that Parliament had failed to implement the gender principle whilst it had enacted amendments to the Political Parties Act to give political parties incentives to support election of women candidates. On the authority of the judgment of the High Court in ***Commission for the Implementation of the Constitution v. Parliament and the Attorney General [2013] eKLR*** the appellant submitted that it is not for the court to determine the wisdom or otherwise of legislative measures or to dictate the form that the legislative measures should take.

Lastly the appellant submitted that the learned judge erred by failing to appreciate that invocation of Article 261(7) of the Constitution and dissolution of Parliament would result in a constitutional crisis, because Article 10 of the Constitution demands elections to be held on the second Tuesday in August every five years without an alternative date; it is not known whether the offices of President, Governors, and members of the 47 County Assemblies shall fall vacant upon dissolution of Parliament or whether the holders are to continue in office; the ***Independent Electoral and Boundaries Commission (IEBC)*** has not given guidance on the conduct of by-elections which are not provided for by the Constitution; the period within which the new Parliament should be elected and in office is not provided; and it is not known, in the vent of dissolution of Parliament, who shall discharge its constitutional functions, such as passing of the annual budget, vetting of state officers, oversight functions and passing of

legislation. All these eventualities, it was submitted, would result in a constitutional crisis, which it was in the public interest to avoid.

For all the foregoing reasons the appellant urged us to allow the appeal with costs and set aside the orders of the High Court.

The Speaker of the Senate, represented by ***Sheriffsam Mwendwa***, learned counsel joined the appellant in supporting the appeal and relied on written submissions that were word for ward similar to those made by the appellant, and which we have summarised above.

Mr. Ongoya and ***Mr. Mudany***, learned counsel, who appeared jointly for the 1st and 2nd respondent, opposed the appeal. They submitted that the appellant had not obtained a stay of execution of the judgment of the High Court, and having not complied with the judgment, was in contempt of court and should be denied audience by this Court until he purged the alleged contempt.

Moving on to the grounds of appeal, the two respondents submitted that there was no basis for complaint against the refusal of the learned judge to refer the petition to the Chief Justice to empanel an uneven bench, because after the dismissal of their application for an uneven bench, the 1st and 2nd respondents did not appeal against the ruling. It was contended that it was too late in the day to raise the issue in this appeal and that in any event the two respondents had not demonstrated any prejudice that they suffered as a result of denial of an uneven bench.

On the complaint of non-joinder and misjoinder, the two respondents submitted that the issue was a mere red herring. They relied on the judgment of the High Court in ***Judicial Service Commission v. Speaker of the National Assembly & 8 Others [2014] eKLR***, which held that the Speaker was a proper respondent in proceedings challenging acts or omissions of the National Assembly or the Senate. They also relied on the advisory opinion of the Supreme Court in the ***Speaker of the Senate & Another v. The Attorney General & Others [2013] eKLR***, where the two Speakers were litigating in their names on matters pertaining to the Parliament. They urged us to reject as impracticable the appellant's contention that in a suit against Parliament, all the members must individually be made parties.

Next the two respondents submitted that the learned judge was justified in finding that Parliament had failed to take measures to implement the gender principle because the legislation contemplated by section 81(b) had not been enacted. They dismissed the appellant's contention that the ***Election Laws (Amendment) Act 2016*** had implemented the gender principle, submitting that the amendment provided only for funding of political parties based on members of special interest groups elected on a political party's ticket, which was not synonymous with implementation of the gender principle. They added that special interest group is defined, in addition to women, to include persons with disabilities, youth, ethnic minorities and marginalized communities, meaning that under the amendment, a political party could be funded for having elected members of the special interest groups but without even a single woman.

The 1st and 2nd respondents further contended that Article 261 of the Constitution empowered the High Court, in express terms, to make the orders that it had made and that the court cannot therefore be faulted for doing exactly what the Constitution authorized. They cited Article 261 (5) and submitted that it empowered the trial court to make a declaration and direct Parliament and the Attorney General to take steps for enactment of the required legislation within specified period and to report progress thereon to the Chief Justice. In the event of failure to enact the legislation, it was contended, Article 261(7) required the Chief Justice to advise the President to dissolve the Parliament.

Lastly these two respondents submitted that complying with provisions of the Constitution cannot result in a constitutional

crisis. In their view, the real constitutional crisis was the deliberate refusal to enact legislation required by the Constitution, thus undermining the rule of law. The added that it was not the court which was responsible for dissolution of Parliament, but rather, it was the Constitution itself which provided for dissolution consequent on the failure of Parliament to enact legislation required by the Constitution. On the basis of the foregoing, the 1st and 2nd respondent urged us to find that the appeal has no merit and to dismiss the same with costs.

The ***3rd respondent***, the ***Kenya National Commission on Human Rights***, filed written submissions the substance of which was that the record of appeal is fatally defective for failure to contain all the relevant documents, and in particular an affidavit sworn on behalf of the Attorney General on 15th February 2017. On that ground alone we were urged to strike out or dismiss the appeal. It was also contended that the appellant was in contempt of court, having failed to comply with the impugned judgment, and that we should therefore deny him audience.

On the grounds of appeal, the 3rd respondent maintained that the appellant had not enacted the necessary legislation to implement the gender principle and that the Election Laws (Amendment) Act, 2016 was a mere incentive which did not implement the gender principle as required by Article 81(b) of the Constitution. This respondent further contended that the High Court has jurisdiction to issue the orders that it granted; that because the Supreme Court had already addressed the matter, the petition did not raise any complex issues so as to justify empanelling a three-judge bench; that there was no fatal misjoinder or non joinder of parties; and that there was no basis to apprehend a constitutional crisis by implementing the mandatory provisions of the Constitution.

The National Gender and Equality Commission also filed written submissions on which it relied. In its view, granted the provisions of Articles 27 and 81 of the Constitution, the Election Laws (Amendment) Act 2016 was only one of the measures that could be taken to implement the gender principle but was not sufficient on its own because it was not a gender specific legislation. It was contended that the totality of measures and legislation to be taken by the State under Article 27(6) must result in the kind of Parliament demanded by Article 81. The *amicus curie* invited us to adopt the "minimum core obligation" approach as applied to the Economic Social and Cultural Rights so to ensure that the gender principle is not stripped of its essence. It was contended that the gender principle was the minimum core of equality and freedom from discrimination and that the State could not escape its obligation unless it demonstrated that it had made every effort to use all the resources at its disposal to satisfy the constitutional requirement, which it had not done. In the opinion of the *amicus curiae,* it was sufficiently demonstrated that the Parliament had failed to take legislative and other measures to satisfy the requirements of Article 81(b) of the Constitution.

On non-joinder and misjoinder, the *amicus curiae* submitted that the two Speakers were the correct parties to the petition because, in its view, under the Constitution, the National Assembly (Powers and Privileges) Act, and the Standing Orders made thereunder, nothing can be done without the approval of the Speaker. It was contended that other than being the presiding officer of each House, the Speaker is also the representative of the House in relation to other organs of the State. This respondent relied on ***Judicial Service Commission v. Speaker of the National Assembly & 8 Others*** (supra) and urged us to find that the speakers were proper parties.

Lastly on whether granting the orders that were sought by the 1st and 2nd respondents would precipitate a constitutional crisis, the *amicus curiae* submitted that granting of orders allowed by the Constitution itself cannot lead to a crisis. It was contended that dissolution of Parliament under Article 261 was not any different from dissolution under Article 102 of the Constitution, which sets the stage for a general election. In the *amicus curie's* view, dissolution of Parliament under Article 261 results in by-elections to be held as provided by Article 101 of the Constitution.

All the other parties, namely the Attorney General, the Law Society of Kenya and the Kenya Human Rights Commission did not file submissions and did not address us on the appeal.

We shall now turn to consider the grounds of appeal in the order that the appellant presented them. We must, however, first dispose of the invitation by the 3rd respondent to strike out or dismiss the appeal for failure by the appellant to include all relevant documents in the record of appeal.

The record of appeal was lodged on 29th May 2017 and by dint of ***rule 90*** of the ***Court of Appeal Rules***, the appellant was obliged to serve all the respondents before or within seven days of the lodging of the record of appeal. If any of the respondents contended that the record of appeal was defective, ***rule 84*** of the rules of the Court required such respondent to apply to strike out the record of appeal within thirty days from the date of service of the record of appeal. The proviso to the rule provides expressly that applications to strike out the record of appeal cannot be brought after the expiry of the specified period.

The 3rd respondent did not file an application to strike out the appeal as required by rule 84 and is therefore precluded from inviting us, more than one year since the record of appeal was lodged, to strike out or dismiss the same. (See ***Broadway Trust Ltd v. China Young Tai Engineering Co Ltd, CA. No. 291 of 2012***).

A further reason why we cannot entertain the 3rd respondent's request is because ***rule 92*** of the rules of the Court allows a respondent who is of the opinion that the record of appeal is defective or insufficient to lodge a supplementary record of appeal containing any omitted documents. Nothing stopped the 3rd respondent from filing a supplementary record of appeal to bring on record the documents that are alleged to have been omitted. In any event, the affidavit that the 3rd respondent alleges was omitted was brought on record vide a supplementary record of appeal filed by the two Speakers on 21st July 2017. We accordingly conclude that the 3rd respondent's objection has no foundation in law and is wholly unmerited.

Turning to the first ground of appeal on empanelment of an uneven number of judges, it is not clear to us why and how the appellant purports to raise the issue in this appeal. The notice of appeal on record is against the judgment of the learned judge dated 29th March 2017. None of the parties addressed the issue of empanelment of judges and the learned judge did not determine that issue in the judgment, which is impugned in this appeal. As we have already noted, the record shows that the appellant and the Speaker of the Senate filed two identical applications dated respectively 19th January 2017 and 20th January 2017 requesting the learned judge to certify that the petition raised substantial questions of law and to refer the same to the Chief Justice to empanel an uneven bench of not less than three judges. The applications were based on the grounds that the petition raised complex questions of law and general public importance on the interpretation and application of Articles 27, 81, 100 and 261 of the Constitution, the role of Parliament in the actualization of the gender principle, and the constitutional crisis that would attend the granting of the reliefs sought in the petition.

The 1st respondent opposed the applications, contending that the issues raised in the petition were not complex; that the same had been heard by the Supreme Court which held that Parliament must take measures to actualize the gender principle on or before 27th August 2015; and that in their view the only issue in the petition was whether Parliament had taken those measures by the date set by the Supreme Court. By a ruling dated 25th January 2017, the learned judge dismissed the application with costs.

From the record, the appellant did not file a notice of appeal against that ruling. The only notice of appeal on record is against the judgment dated 29th March 2017. It bears emphasizing that the issue of empanelment of judges to hear and determine the petition was neither raised nor addressed in the judgment, the subject of this appeal. In the absence of a notice of appeal against the ruling of 25th January 2017, this Court does not have jurisdiction to hear and determine issues determined in the ruling. As the Supreme Court stated in ***IEBC v. Jane Cheperenger & 2 Others, SC, CA No 36 of 2014,*** without filing a notice of appeal, there can be no expressed intention to appeal.

Similarly, in ***Safaricom Ltd v. Ocean View Beach Hotel Ltd & 3 Others, CA. No. 325 of 2009***, this Court ***(Omollo, JA)*** reiterated that an intention to appeal is manifested by lodging a notice of appeal and in the absence of a notice of appeal, this Court has no jurisdiction to meddle in the decision of the High Court.

In the absence of a notice of appeal against the ruling of 25th January 2017, we have no basis to entertain a purported appeal against the issues determined by that ruling. Similarly this ground of appeal has no merit and we hereby dismiss the same.

The second ground of appeal is on non-joinder or misjoinder, the appellant's contention being that the two speakers were not the right respondents to the petition because they are *ex officio* members of the National Assembly and the Senate and that the duty to enact legislation is constitutionally vested in the Parliament rather than in the Speakers. In response, the 1st and 2nd respondents rely on the judgment of the High Court in ***Judicial Service Commission v. Speaker of the National Assembly & 8 Others, Pet. No. 518 of 2013*** where a three-Judge bench of the Court expressed itself as follows:

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

These respondents also rely on the advisory opinion of the Supreme Court in the ***Speaker of the Senate & Another v. The Attorney General & Others*** (supra), where the two Speakers were parties without any objection raised.

By dint of ***Articles 97*** and ***98*** of the Constitution, the Speakers of the National Assembly and the Senate are *ex officio* members of the Houses, meaning that they are members purely by virtue of their offices as Speakers. Indeed, under ***Article 122*** of the Constitution, the Speaker has no vote on any question proposed for decision in either House. The primary duty of the Speaker under ***Article 107*** of the Constitution and the ***Standing Orders*** is to preside over the relevant House of Parliament. ***Humphrey Slade***, independent Kenya's first Speaker, in a monogram titled "***The Parliament of Kenya***, East African Publishing House, 1967 wrote as follows regarding the Speaker:

"The Speaker is called "Speaker" because he is the spokesman and figurehead of the National Assembly. If that Assembly, as a whole, desires to make any representation to the President or to any other authority, or if the Speaker considers any such representation to be necessary in the interest of the Assembly as a whole, it is his duty to make it on behalf of the National Assembly. Likewise, he represents the National Assembly on all ceremonial occasions. Also in all proceedings of the Assembly where he presides, he is the spokesman of the Members, and it is his duty to enforce the rules of procedure which they have made, and to interpret and to give effect to their will..."

In our view, there are circumstances where the Speaker could be a proper respondent in a suit. For example, where what is in issue directly involves the speaker like where it is alleged in a suit that the Speaker was not qualified for election as such under Article 106(1) of the Constitution or where its is alleged that the Speaker allowed the passing of legislation in utter violation of the Constitution and the Standing Orders. A good example is found in the ***Speaker of the Senate & Another v. The Attorney General & Others*** (supra), where the heart of the dispute was the acts and responsibilities of the two Speakers. The matter arose out of the refusal of the Speaker of the National Assembly to refer to the Senate the ***Division of Revenue Bill, Act No. 31 of 2013***, so that the National Assembly considered it alone. The Speaker of the Senate contended that the refusal of the Speaker of the National Assembly to refer the Bill to the Senate was in violation of the Constitution because the Bill concerned County Governments. By dint of ***Article 110(3)*** it is the duty of the two Speakers to resolve whether a Bill concerns counties, whilst under ***Article 110(4),*** it is the duty of the Speaker of the House from which a Bill concerning counties originated to refer it to the Speaker of the other House. In short, the matter in the Supreme Court involved the discharge of functions vested by the Constitution in the Speakers and we cannot see how it could have been contended that there was misjoinder in that case.

The appellant, understandably, protests that the Speaker has no role in initiating bills and does not even possess a vote in support of or opposition to a Bill and for that reason, he cannot be sued for failure by Parliament to discharge its constitutional mandate to pass legislation. The "solution" that the appellant proffers is to sue individually each and every Member of Parliament. In our view, where it is alleged that the National Assembly or the Senate has violated the Constitution, the Speaker is a proper respondent, for the following reasons.

First, the Constitution vests the obligation to pass legislation collectively in the institution called "Parliament", and not on the Members of Parliament individually. Accordingly, we are not persuaded that there is any basis for the appellant's argument that the Members of Parliament must be sued individually for Parliament's failure to discharge its constitutional mandate. Secondly, the appellant's "solution" is not tenable and amount to a direct violation of ***Article 22*** of the Constitution, which demands minimal formalities and obstructions in a petition for enforcement of constitutional rights and fundamental freedoms.

Thirdly, before the promulgation of the Constitution of Kenya, 2010, it was the Attorney General who represented Parliament in litigation in Court. However, after 2010, the Constitution revamped the Executive and the Judiciary as independent arms of Government and expressly provided in **Article 156 (4) (b)** that the Attorney General shall represent the ***national government*** in court or in any other legal proceedings to which the ***national government*** is a party, other than criminal proceedings. That raises the question whether the Attorney General may represent Parliament in court proceedings. The three-Judge bench in **Judicial Service Commission v. Speaker of National Assembly & 8 Others** (supra) observed as follows regarding the issue, which we agree with:

"The Constitution does not define the national government, but it is implicit in its provisions that the national government is the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government. That being the case, any dispute in Court that involves either of these organs of state to which the people of Kenya have delegated their sovereign power are proceedings in which the AG has a constitutional duty to appear. We appreciate also that these are troubled and troubling times in the history of our country. We have a new Constitution that has brought an earth shaking change in our governance structures, and has consequently brought the organs of government, which are mandated to work together in the spirit of mutual respect and co-operation, into an unseemly conflict that does not augur well for the people of Kenya. The AG must find the middle ground that enables him to play his constitutional role as the principal legal advisor of the government, as the legal representative of the national government in proceedings before the Court, and to "promote, protect and uphold the rule of law and defend the public interest." In doing so, he must emphasize the core principle of our Constitution: that it is the Constitution that is supreme; and that all organs of state are bound by the provisions of the Constitution."

We note that the Attorney General was a party to the petition and actively participated in the proceedings.

Fourthly, the Speaker is also the chairperson of the ***Parliamentary Service Commission*** created by ***Article 127*** of the Constitution, with among others, the mandate of providing services and facilities to ensure the efficient and effective functioning of Parliament. As the person who chairs the body that is responsible for ensuring efficient and effective discharge of the mandate of the Parliament, we do not see why the Speaker cannot be a proper respondent where it is alleged that Parliament has failed to discharge its mandate under the Constitution.

Fifthly, ***Article 22*** of the Constitution, which provides for enforcement of the Bill of Rights, obliges the Chief Justice to make

rules of procedure to enable parties like the 1st and 2nd respondents, who allege that their rights under the Constitution have been denied, violated or infringed, to access the court for redress. ***Article 22(3)*** specifically demands that those rules shall ensure that formalities are kept to a minimum, to the extent of admitting proceedings on the basis of informal documentation. Pursuant to the above constitutional provision, the Chief Justice made the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*** whose overriding objective is, among others, to facilitate access to justice to all persons and to advance the realization of the rights and fundamental freedoms enshrined in the Bill of Rights as well as the values and principles of the Constitution. Rule 5 of the rules addresses the issue of non-joinder and misjoinder of parties. It is apt to reproduce the entire provision.

"5. Addition, joinder, substitution and striking out of parties

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

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

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

d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

i. order that the name of any party improperly joined, be struck out; and

ii. that the name of any person who ought to have been joined, or whose ***presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.***

e. Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents."

Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or non-joinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute.

Lastly, the assertion that individual Members of Parliament were denied the right to a fair hearing as guaranteed by Article 50 is a clear red herring. After the two Speakers were served with the petition, they responded to it in the form of detailed replying affidavits sworn by the Clerks of the National Assembly and the Senate on behalf of Parliament. Learned counsel also represented Parliament, through the two Speakers, throughout the proceedings in the High Court. Accordingly and for the foregoing reasons, we do not find any merit in this ground of appeal either.

The third and fourth grounds of appeal can be conveniently considered together because they involve the questions whether Article 81 of the Constitution obliges Parliament to enact any legislation and if the answer is in the affirmative, whether Parliament has failed to enact that legislation. The appellant's contention is that a plain reading of Article 81 and the Fifth Schedule does not disclose any requirement for Parliament to enact any legislation and that Article 81 merely contains general constitutional principle as regards the electoral system.

If we understand the appellant correctly, his view is that Parliament is only obliged to enact legislation when the Constitution expressly provides so, as for example, in ***Article 11 (3)*** which provides that "Parliament shall enacted legislation" on culture, ***Article 18*** which requires Parliament to enact legislation on citizenship, ***Article 50 (9)*** which requires Parliament to enact legislation providing for protection, rights and welfare of victims of offences, ***Article 72*** which requires Parliament to enact legislation to give effect to the provisions of Chapter 5 of the Constitution regarding environment and natural resources, among others. The appellant reasons further that because there is no provision in Article 81 requiring Parliament to enact any legislation and because there is no time-frame specified in Fifth Schedule for enactment of such legislation, Parliament is not required to enact any legislation on the gender principle.

In our view, there is no merit in the above argument. Firstly, the appellant ignores the related provisions of Article 27 (6) and (8) which oblige the State to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination and to implement the gender principle in elective and appointive offices. Secondly, the appellant's argument begs the question why the Constitution would include the gender rule as one of the principles of the electoral system, if the Constitution never intended it to be actualized or realized"

It has been stated time and again that the Constitution must be interpreted in a holistic manner. The decision of the Constitutional Court of Uganda in ***Olum v. Attorney General*** ***[2002] EA 508***, which is often quoted with approval by all levels of courts in this jurisdiction, states the entire Constitution has to be read as an integrated whole, with each provision sustaining rather than destroying the other, to the end that all constitutional provisions are construed as a whole in harmony with each other, without subordinating any one provision to the other.

In the same vein, ***Article 259*** of the Constitution demands that the Constitution must be interpreted in a way that promotes and gives effect to its purposes, values and principles and advances the rule of law and the human rights and fundamental freedoms that it guarantees. Not to be ignored is ***Article 20*** which guarantees the women of Kenya enjoyment of the rights guaranteed, among others by Article 27 (equality and freedom from discrimination) to the greatest extent consistent with the nature of the right or fundamental freedom and obliges the courts, in interpreting and applying the Bill of rights to develop the law to the extent that it does not give full effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

If we adopt those approaches in interpreting Articles 27 and 81 of the Constitution, the argument by the appellant that Article 81 comprises mere abstract principles that were not intended to be realized, is unsustainable. As we pointed out earlier in this judgment, the makers of the Constitution, when they drafted the Fifth Schedule, were well aware that there were other laws required to fully implement the Constitution which were not referred to in a specific Article, and that is the reason why they provided a period of five years for enactment of ***"any other legislation required by this Constitution."*** Lastly, to sustain the appellant's argument that no legislation is required by the Constitution to implement the gender principle is an invitation to disagree with the Supreme Court which expressly stated, in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** (supra) that legislative measures to implement the gender principle must be taken by 27th August 2015. The Supreme Court could not have reached that conclusion if, as urged by the appellant, the Constitution did not oblige Parliament to take measures to implement the gender principle. To accede to the argument is to make nonsense of the decision of the Supreme Court and to blatantly ignore the provisions of ***Article 163(7)*** of the Constitution on the binding nature of the decisions of the Supreme Court on other courts.

On the related question whether Parliament had taken the requisite legislative measures for the realization of the gender rule, all that the appellant points to is an amendment to section 25 of the Political Parties Act effected by section 28 the Election Laws (Amendment) Act, 2016. By that amendment 15% of the Political Parties Fund is to be distributed to political parties based on the number of a party's candidates from "special interest groups" in the preceding general election. The appellant contends that the amendment introduced financial inceptives for political parties to nominate women candidates if the parties wished to obtain 15% of the political parties fund. In the appellant's view, that constitutes adequate measures towards the implementation of the gender rule.

Section 2 of the Political Parties Act defines **"special interest groups"** to include women, persons with disabilities, youth, ethnic minorities and marginalized communities. The term is elastic and may include many other groups other than those that are specifically mentioned. Accordingly, as correctly argued by the 1st and 2nd respondents, the amendment was not specifically intended to incentivize political parties to nominate and elect women candidates. Political parties could get their funding if they nominated candidates from any of the categories of special interest groups to the exclusion of women. We must also add that as drafted, the "incentive" is not based an elected Member of Parliament from the special interest groups, but only a candidate. The incentive ends after nominating a candidate because the political party will be funded even if it does nothing else to ensure its candidate from the special interest groups is elected. Some incentive, indeed! We cannot but agree with the learned judge that the mere amendment of the Political Parties Act in the manner set out above does NOT amount to implementation of the gender principle.

On the last ground, the appellant has focused on what he claims to be an inevitable constitutional crisis should the judgment of the trial court be implemented. Article 261 of the Constitution sets out an elaborate default mechanism leading to the dissolution of Parliament, as many times as it takes, so long as it does not enact legislation required to implementation of the Constitution. The Article provides as follows:

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

Consequential legislation.

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

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

a. only once in respect of any particular matter; and

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

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

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

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

a) make a declaratory order on the matter; and

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

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

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

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

As we have already noted, Parliament has already extended the period for enactment of legislation to implement the gender principle. By dint of Article 261(3), that period can be extended by Parliament only once. The High Court has already issued a declaration under Article 261 (6) of the Constitution that Parliament has failed to enact the relevant legislation and gave it sixty days within which to enact the legislation. As of now, Parliament has not enacted any legislation and any interested party may petition the Chief Justice to advise the President to dissolve Parliament.

We ask ourselves, why did the Constitution deem it necessary to provide the default mechanism in Article 261" In our view, it was simply to guard against legislative inertia or inaction which would thwart or frustrate the fully implementation of the Constitution. This is borne out by the Final Report of the Committee of Experts (CoE), which drafted the Constitution, where it was stated thus:

"The new Constitution also set out a procedure to be followed if a law were not enacted within the scheduled time. The challenge was to ensure that the new laws envisaged by the new constitution are promptly enacted. ***Under Article 308 of the Bomas Draft, if Parliament failed to adopt a particular law within the time stipulated in the table, anyone could petition the High Court for a declaratory order instructing Parliament to enact the law within a specified period. If this was not done, Parliament would be dissolved...The new Constitution follows the Bomas approach in allowing the National Assembly to extend the time within which a Bill is to be passed, provided that the extension is justified by exceptional circumstances and has the support of at least two-thirds of its members. It also permits any person to petition the High Court to deal with a failure by the National Assembly to pass a law in time. If the National Assembly fails to abide by the court order, it will be dissolved and a new election held."*** (Emphasis added).

The appellant's submissions on this ground of appeal amount to the contention that the provisions of Article 261 of the Constitution are inconsistent with other provisions of the Constitution and therefore we must not implement Article 261. But as ***Mutunga, CJ***., aptly observed in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** (supra), ***"a Constitution does not subvert itself."*** The Constitution has never been about cold, lifeless logic. It sometimes embodies compromises, which on the face of it defy logic. But in those illogical provisions and compromises lies the peculiar, the real soul of our nation. It is, for example, the quest for banal logic that perceives fundamental contradiction in a secular Constitution providing for Kadhi's courts for the benefit of citizens who profess the Islamic faith. Seen superficially, the Constitution may seem to self-contradict, but it is aiming for higher values that may be not achieved on the footing of logic alone. We cannot also lose sight of the significance of the adoption of this very Constitution by the people of Kenya in a referendum. Mutunga, CJ, in the opinion we have just cited addressed the issue as follows:

"It is true the Constitution will present the courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects contested terrains, vested interested that are sought to be harmonized, and a status quo to be mitigated. These features in our Constitution should not surprise anybody, not the bench, or the bar or the academia."

It is on record that Parliament has undertaken several initiatives, including publishing constitutional Amendment Bills to implement the gender principle. It is equally a matter of public notoriety, which we are entitled to take judicial notice of, that none of those constitutional Amendment Bills has ever been debated or considered by Parliament seriously; they have all been lost due to lack of quorum in the National Assembly. That, to us does not speak of a good faith effort to implement the gender principle and is precisely the kind of conduct that the people of Kenya wanted to avoid by writing into the Constitution Article 261.

We have come to the conclusion that none of the grounds of appeal put forth by the appellant has any merit. For that reason, the appeal is dismissed in its entirety. The issues litigated in this matter are of such great public interest that it justifies an order that each party should bear its own costs. It is so ordered.

Dated and delivered at Nairobi this 5th day of April, 2019.

P. N. WAKI

....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

....

JUDGE OF APPEAL

K. M'INOTI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.

Read our Privacy Policy | Disclaimer