



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: W.M. MUTUNGA, CJ; NANCY BARAZA, DCJ; TUNOI, IBRAHIM, OJWANG, WANJALA & NDUNG’U, SCJJ)

CONSTITUTIONAL APPLICATION NO. 2 OF 2011

IN THE MATTER OF ADVISORY OPINIONS OF THE COURT UNDER ARTICLE 163(3) OF THE CONSTITUTION

-AND-

IN THE MATTER OF SECTION 21(2) OF THE SIXTH SCHEDULE OF THE CONSTITUTION

-AND-

IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION AS THE APPLICANT

ORDERS

The implementation process of the **Constitution of Kenya, 2010** has given rise to several motions in Court, beginning with a Petition in the High Court, of *19th April, 2011*, by which the petitioners sought a declaration that the next general election for President, National Assembly, Senate, County Assemblies and County Governors “*shall be held at the same time, on the second*

Tuesday of August, 2012” [Constitutional Petition No. 65 of 2011]; followed by an application, the Notice of Motion of *28th April, 2011* in the Supreme Court [Constitutional Application No. 2 of 2011] seeking the Supreme Court’s Advisory Opinion interpreting Articles 101(1), 136(2)(a), 177(1)(a) and 180(1) of the Constitution, and Clause 9(1) of the Sixth Schedule to the Constitution, and further seeking a determination of the election date.

What has come up for consideration today is a Preliminary Objection to the application. We have no doubt that the subject-matter of the application is an important and urgent one, and, to set the stage for further progress in that regard, we will today determine the Preliminary Objection, while reserving our reasons to a later date, upon notice.

Upon reading the application and attendant affidavits, as well as the written submissions, and upon hearing the oral submissions by learned counsel, we have focused our attention firstly, on the nature of the jurisdiction of the High Court in determining a justiciable matter when seen in parallel with the invocation of the Supreme Court’s Advisory Opinion jurisdiction; secondly, on the situations in which the Constitution authorizes the giving of an Advisory Opinion; and thirdly, on the practical considerations that should guide the Court’s decision to render an Advisory Opinion.

We will be guided by certain principles which have clearly emerged from the submissions: the High Court is, by Article 165(3)(d) of the Constitution, entrusted with the original jurisdiction to hear and determine any question entailing the interpretation of the Constitution; it is the obligation of the Supreme Court, as the ultimate interpreter of the Constitution, to protect and reinforce the conferment of first-instance jurisdiction upon the High Court; the Supreme Court has provided in its Rules that those organs entitled to seek an Advisory Opinion, are to exhaust their internal recourses before seeking an Opinion; subject to those principles, the Supreme Court will exercise its discretion appropriately, on a case-to-case basis, in accepting requests for an Advisory Opinion.

We hereby *Order* and direct as follows:

(1) We decline to give our Advisory Opinion on the next general election.

(2) We reserve the reasons, to be set out in a Ruling upon notice.

(3) Responding to the High Court’s request, of *13th October, 2011* for directions, the matter herein shall be placed before the Constitutional and Human Rights Division of that Court, for hearing on priority and on a day-to-day basis.

(4) High Court Petition Nos. 123 of 2011, 65 of 2011 and 185 of 2011 shall be listed for mention and directions before the Head of the High Court’s Constitutional and Human Rights Division on *18th November, 2011*.

DATED and DELIVERED at NAIROBI this 15th day of November, 2011.

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W.M. MUTUNGA

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NANCY BARAZA

**CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT**

**DEPUTY CHIEF-JUSTICE AND DEPUTY
PRESIDENT OF THE SUPREME COURT**

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P.K. TUNOI

M.K. IBRAHIM

JUDGE OF THE SUPREME COURT

JUDGE OF THE SUPREME COURT

.....

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J.B. OJWANG

S.C. WANJALA

JUDGE OF THE SUPREME COURT

JUDGE OF THE SUPREME COURT

.....

N.S. NDUNGU

JUDGE OF THE SUPREME COURT



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