1. RANDU NZAI RUWA

2. ROBERT CHARO TUKWATUKWA

3. OMARI BABU SULEIMAN.....PETITIONERS

VERSUS

1. THE SECRETARY, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

3. THE CLERK TO THE NATIONAL ASSEMBLY

4. THE REGISTRAR OF SOCIETIES

5. THE COMMISSION ON REVENUE ALLOCATION

6. THE MINISTER FOR TRANSPORT

7. THE MINISTER FOR ENERGY

8. THE MINISTER FOR ENVIRONMENT AND MINERAL RESOURCES

9. THE MINISTER FOR PLANNING

10. THE ATTORNEY GENERAL.....RESPONDENTS

R U L I N G

Introduction and Procedural Matters

1. Since the promulgation of the Constitution, 2010, a new paradigm in the discussion on fundamental freedoms, and the political and socio-economic rights of the people of Kenya has emerged. In respect to political rights new frontiers of protection and new vistas of liability have materialised which parties have taken cognisance of. An era of "**people supremacy**" is at hand, where all sovereign power belongs to the people of Kenya to be exercised in accordance with the Constitution. These proceedings exemplify the extent of some of these new constitutional frontiers.

2. This is a constitutional matter which, by its nature, has drawn sustained public interest and media attention. The Applicants, on behalf of a body known as Mombasa Republican Council ("MRC"), ultimately, are seeking this court\'s determination that the rights of the people in the six counties of

Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta (hereinafter referred to as the "**Coast Region")**, to determine their political and socio-economic destinies, have been infringed upon in various ways by the Respondents. They seek the court\'s intervention through constitutional applications praying for multifarious reliefs of declaration and injunction directed at the Respondents.

3. The proceedings were commenced by the Applicants by way of Notice of Originating Motion (**"the Originating Motion"**) dated 31st January, 2012, and filed on 2nd February, 2012. The Originating Motion, also described by the Applicants as a Petition, is supported by the affidavit of Randu Nzai Ruwa sworn on 1st February, 2012. Annexed to the affidavit is a letter of authority dated 31st January, 2012, given to the three Applicants by twenty one persons who describe themselves as members of MRC in the six counties of the Coast Region. Also annexed, is another letter dated 31st January, 2012, by the other two Applicants authorising one member of **"our group**", namely Randu Nzai Ruwa, to swear the affidavit and execute all court proceedings on behalf of the others.

4. The Originating Motion seeks sixteen substantive orders which we reproduce hereunder as follows:

"1. THAT this Application be set for hearing inter-partes within seven days of the date of service of this Application on the Respondents, or so soon thereafter as Counsel for the Applicants may be heard on an application on behalf of the Applicants FOR:

I (A) A DECLARATION THAT the on-going action(s), initiatives and processes set in motion by the 1ST AND 2ND RESPONDENTS herein to comply with their obligations under Section 4(a) (b), (c), (d), (f) and (g) of the Independent Electoral and Boundaries Commission Act contravene natural justice and the spirit and letter of Constitution of Kenya (2010), in particular Articles 89(2), 93) and (4) thereof;

(B) A DECLARATION THAT for one public body to succeed another, both the predecessor body and successor body must rank pari passu at law;

(C) ***A DECLARATION THAT the 2ND RESPONDENT, the Independent Electoral & Boundaries Commission (IEBC) does not rank pari passu with the now defunct Interim Independent Boundaries Review Commission (IIBRC) And the 2nd RESPONDENT is consequently not a valid successor to the IIBRC;***

(D) ***A DECLARATION THAT the legal principles attendant and applicable to succession in title to movable and immovable property as contemplated by Section 34 Independent Electoral & Boundaries Commission Act cannot be extended to succession to constitutive legal mandates, responsibilities and authority, as contemplated by the purported use by the 2ND RESPONDENT of the IIBRC Report;***

(E) A DECLARATION THAT the Parliament of the Republic of Kenya has And had no authority to circumstances the IEBC mandate to review names and boundaries of constituencies and wards as set out in Article 89(2) and (3) of the Constitution of Kenya (2010) by purporting to distinguish in Section 2(1) between the "first review" as carried out by the defunct IIBRC And the review of names and boundaries of constituencies and wards, by the 2ND RESPONDENT, as constitutionally mandated;

(F) A DECLARATION THAT the 2ND RESPONDENT has no authority whatsoever to rely on Or to ratify the IIBRC report so as to discharge the mandatory duties conferred on the 2ND

RESPONDENT by the Constitution of Kenya (2010);

(G) A DECLARATION THAT pursuant to Article 89 (4) of the Constitution of Kenya (2010), all on- going actions(s), initiatives and processes set in motion by the 1st and 2nd Respondents herein to review of names and boundaries of constituencies and wards cannot And shall not take effect for purposes of the first election under the Constitution of Kenya (2010);

II. (A) A DECLARATION THAT the on-going action(s), Initiatives and processes set in motion by the 1ST and 2ND RESPONDENTS herein to comply with their obligations to review names and boundaries of constituencies and ward disenfranchise the Petitioners herein contrary to Section 25(a) of the Independent electoral & Boundaries Commission Act, contrary to natural justice and contrary to the spirit and letter of the Constitution of Kenya (2010), in particular Articles 38(1)(c) thereof;

(B) A DECLARATION THAT any general election carried out subsequent to the on-going review of names and boundaries of constituencies and wards by the 2nd Respondent in the absence of any or an proper participation by the petitioners herein as required by Section 25 (a), (c) and (d) of the Independent Electoral & Boundaries Commission Act shall not be a free and fair election as it shall inherently contravene Article 81 (a) of the Constitution Of Kenya (2010);

(C) ***A MANDATORY INJUNCTION compelling the 1ST AND 2ND RESPONDENTS to facilitate the exercise by Petitioners herein of exercise their political rights under Article 38 of the Constitution of Kenya (2010) by conducting a Referendum on the question of the proposed self determination of the indigenous peoples resident in the Coast Province of the Republic of Kenya;***

III. ***(A) A DECLARATION THAT the executive authority vested in the Coalition Government established under the Constitution Of Kenya Amendment) Act (No. 3 of 2008) and the National Accord & Reconciliation Act (No: 4 of 2008) is transitional in nature, as per Article 2(1) of the 6th Schedule to the Constitution of Kenya (2010) And consequently the said transitional executive authority does not encompass authority to compose of and/or divest the Republic of Kenya of its publicly held land, property and/or assets both latent and patent;***

(B) A DECLARATION THAT all acts of disposal and/or divestiture of public held land, property and/or assets conducted and/or effected during the term of the Coalition Government, to wit, between 28th February, 2008 and the final announcement of all the results of the first elections for parliament under the constitution of Kenya (2010) are null and void;

(C) ***In the alternative to III(A) and (B) above but without prejudice thereto, A DECLARATION THAT the executive authority vested in the Coalition Government established under the Constitution Of Kenya (Amendment) Act (No: 3) of 2008) and the National Accord & Reconciliation Act (No: 4 of 2008) expired on the 27th day of August, 2010 upon enactment of the Constitution of Kenya (2010) And consequently any and all attempts by the Coalition Government to dispose of and/or divest the Republic of Kenya of its publicly held land, property and/or assets both latent and patent subsequent to the enactment of the constitution of Kenya (2010) are null and void*** *ab initio****;***

(D) A DECLARATION THAT all on-going actions(s), initiatives and processes set in motion by 6th, 7th and 8th RESPONDENTS herein to privatise government parastatals or functions thereof in the absence of consultation with iether the government Or the business community and stakeholders in, Or the residents of the County within which such government parastatal (s) are

situate contravenes the provisions of Articles 6(1) & (2), 46, 47, 174, 175(b) of the Constitution of Kenya which divides the territory of Kenya into forty seven (47) distinct Counties, each of whose territorial integrity must be respected and protected for the benefit of the residents, business community and stakeholders of such County;

2. THAT this Honourable Court do make such Orders, issue such Writs and give such directions as it deems appropriate to prohibit the Respondents from initiating, proceedings with and/or concluding the privatization of the Port of Mombasa until the provisions of the Constitution are fully observed and the participation of the Mombasa Country is ensured;

3. ***THAT this Honourable Court do further make such Orders, issue such Writs and give such Directions as it deems appropriate for the purposeof enforcing and/or securing the proper administration of justice, having regard to all the circumstances, by the aforesaid Respondents in their administrative and quasi administrative roles.***

4. ***THAT the Costs of this this Application be provided for."***

No prayer appears to have been sought against the 4th and 5th Respondents, directly or by implication.

5. In the concluding paragraph of the Originating Motion, ground (q) states as follows:

"The Petitioners herein do bring the present Originating Motion in the capacity provided under Section (sic; Article) 22 (2) (a) (b) and (c) of the Constitution of Kenya."

The Article cited above concerns the enforcement of the Bill of Rights and the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

We shall shortly discuss the nature or form of the instruments - the Originating Motion - by which the applicants have instituted these proceedings.

6. On 10th April, 2012, the Applicants filed a second motion under, *inter alia*, Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, and under the Elections Act and the Constitution, seeking several interlocutory reliefs. For purposes of this determination we will refer to that application as (**"the Interlocutory Motion**").

The reliefs sought in the Interlocutory Motion include:

"

1. ***THAT this Application be certified as "Urgent" and that service hereof be dispensed with in the first instance;***

2. ***THAT this Honourable Court be pleased to issue an Order injuncting the 1st and 2nd Respondents either by themselves, their returning officers and/or their servants Or agents from:***

(a) ***initiating, proceeding with, concluding and/or taking any further steps Or procedures respecting the presidential and/or senatorial, national parliamentary, county gubernatorial and/or Country Assembly elections for all elective seats situate within Mombasa, Kwale, Kilifi, TanaRiver, Lamu and Taita Taveta Counties;***

(b) ***publishing in the Gazette and or in the electronic and print media of national circulation any notice of the holding of presidential and/or senatorial, national parliamentary, Country gubernatorial and/or County Assembly elections for all elective seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties; And***

(c) ***receiving from any and all political parties nominations of candidates for the holding of presidential and/or senatorial, national parliamentary, County gubernatorial and/or County Assembly elections for all elective seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties.***

(d) ***holding and or proceeding to hold presidential and/or senatorial, national parliamentary, County gubernatorial and/or Country Assembly elections for any or all elective seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties;***

Until the hearing and determination of this Application inter partes;

3. ***THAT this Honourable Court be pleased to issue an Order injuncting the 1st and 2nd Respondents either by themselves, their returning officers and/or their servants or agents from:***

a) ***initiating, proceeding with, concluding and/or taking any further steps Or procedures respecting the presidential and/or senatorial, national parliamentary, Country gubernatorial and/or County Assembly elections for all elective seats situate within Mombasa Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties;***

b) ***publishing in the Gazette and or in the electronic and print media of national circulation any notice of the holding of presidential and/or senatorial, national parliamentary,County gubernatorial, and/or County Assembly elections for all elective seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties; And***

c) ***receiving from any and all political parties nominations of candidates for the holding of presidential and/or senatorial, national parliamentary, Country gubernatorial and/or County Assembly elections for all elective seats situate within Mombasa, Kwale, kilifi, Tana River, Lamu and Taita Taveta Counties;***

d) ***holding and/or proceeding to hold presidential and/or senatorial,national parliamentary, Country gubernatorial and/or Country Assembly elections for any or all elective seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties;***

Until the hearing and determination of the main claim herein;

4. ***THAT this Honourable Court be pleased to issue an Order injuncting the 3rd Respondent either by himself and/or his servants Or agents from issuing any notice and/or other proceedings relating tot the declaration of vacancy in respect of parliamentary seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties in the period between the termination***

of the term of the current parliament and before the commencement of the term of the next parliament as elected under the Constitution of Kenya (2010) Until the hearing and determination of this Application inter partes;

5. ***THAT this Honourable Court be pleased to issue an Order injuncting the 3rd Respondent either by himself and/or his servants Or agents from issuing any notice and/or other proceedings relating to the declaration of vacancy in respect of parliamentary seats situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties in the period between the termination of the term of the current parliament and before the commencement of the term of the next parliament as elected under the Constitution of Kenya (2010) Until the hearing and determination of the main claim herein;***

6. ***THAT this Honourable Court be pleased to issue an Order injuncting the 6th, 7th, 8th and 9th Respondents either by themselves and/or their servants or agents from:***

(a) initiating, proceeding with, concluding and/or taking any further steps Or procedures respecting the divestiture and/or disposal of publicly held land, property and assets, both latent and patent, now belonging to the Republic of Kenya situate within Mombasa, Kwale, Kilifi Tana River, Lamu and Taita Taveta Counties;

And

(b) initiating, proceeding with, concluding and/or taking any further steps Or procedures respecting the privatization of any government parastatals and/or state corporation situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita-Taveta Counties;

Until the hearing and determination of this Application;

7. ***THAT this Honourable Court be pleased to issue an Order injuncting the 6th, 7th, 8th and 9th Respondents either by themselves and/or their servants or agents from:***

(a) initiating, proceeding with, concluding and/or taking any further steps Or procedures respecting the divestiture and/or disposal of publicly held land, property and assets, both latent and patent, now belonging to the Republic of Kenya situate within Mombasa, Kwale, Kilifi Tana River, Lamu and Taita Taveta Counties;

And

(b) initiating, proceeding with, concluding and/or taking any further steps Or procedures respecting the privatization of any government parastatals and/or state corporation situate within Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita-Taveta Counties;

Until the hearing and determination of the main claim herein;

8. ***THAT this Honourable Court be pleased to issue an Order injuncting the 7th and 8th Respondents either by themselves and/or their servants Or agents from initiating, proceedings with, concluding and/or taking any further steps Or procedures respecting the divestiture and/or disposal of publicly held minerals, oil, grant and/or ratification of oil***

exploration leases, and oil extraction and/or exploitation and/or producing leases and any related assets, both latent and patent, now belonging to the Republic of Kenya and situate within and/or off the shores of Mombasa, Kwale, Kilifi TanaRiver, and Lamu Counties;

Until the hearing and determination of this Application inter partes;

9. ***THAT this Honourable Court be pleased to issue an Order injuncting the 7th and 8th Respondents either by themselves and/or their servants Or agents from initiating proceedings with, concluding and or taking any further the steps Or Procedures respecting the divestiture and/or disposal of publicly held minerals, oil, grant and/or ratification of oil exploration leases, and oil extraction and/or exploitation and/or production leases and any related assets, both latent and patent, now belonging to the Republic of Kenya and situate within and/or off shores of Mombasa, Kwale, Tana River, and Lamu Counties;***

Until the hearing and determination of the main claim herein Or enactment of the Mining bill now pending before parliament, whichever comes earlier;

10. ***THAT this Honourable Court be pleased to issue a Order compelling the Petitioners and the Respondents herein, to maintain the status quo ante until the hearing and determination of the main claim herein; And***

11. ***THAT this Honourable Court be pleased to make such orders as it may deem appropriate as to the costs of this Application."***

(It is noted that prayers 10 and 11 above, were incorrectly numbered as 9 and 10 in the Interlocutory Motion).

7. The concluding paragraphs of the Interlocutory Motion indicate as follows:

"xx. That within the definition of "public property" also falls all the relevant parastatals within the Coast Region, including but not limited to the Kenya Ports Authority, the Kenya Maritime Authority, the Kenya Marine Fisheries Authority and so on...

..xxii ***The Petitioners herein do bring the present Originating Motion in the capacity provided them under Section (sic, Article) 47 of the Constitution of Kenya 2010."***

8. Article 47 of the Constitution, 2010, cited above, concerns the right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. Although the Applicants also describe the Interlocutory Motion as a Petition, it cannot strictly speaking, be said to be a Petition under the relevant rules for the following reasons:

First, it is not drafted in the wording of a petition or in terms of Form D Rule 12 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** made by former Chief Justice E. Gicheru (hereinafter "**the Gicheru Rules**"). Those Rules are made applicable, *mutatis mutandis*, under the Constitution, 2010, pursuant to Section 19 of the Sixth Schedule thereof.

Secondly, it is not a petition at all in that it does not contain allegations or instances of breaches of the Bill of Rights in the required format. Instead, it is an urgent application for interlocutory orders pending the determination of the application. It is, in fact, clearly an application under Rule 20 of the

Gicheru Rules, for conservatory or interim orders.

Form D, which is the appropriate form for Petitions under the Gicheru Rules, requires that:

"...the allegations upon which the Petitioner(s) rely must be concisely set out in consecutively numbered paragraphs"

Such allegations or statements of assertion or accusations of breaches by the Respondents in respect of the fundamental rights of the Applicants are not clearly and concisely set out in the Applicant\'s Motions.

9. Notwithstanding these formal technical irregularities, we have admitted the Applicant's Motions so as to deal with the substantive issues in the applications for striking out. We have taken this course in light of Articles 159(2) (d), and 22(3) (b) and (d) of the Constitution, which oblige this court to take cognisance of the following:

"159 (2) (d)... justice shall be administered without undue regard to procedural technicalities

"Art 22(3) The Chief Justice shall make rules providing for the court proceedings referred to in this article which satisfy the criteria that.....

a)…

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; ...

d) ***the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities."***

10. In admitting the motions of the Applicants, we have taken a wide and purposive approach to ensure that, as far as possible, the substance of the applications may be dealt with. Accordingly, we shall hereafter refer to the Applicant\'s first Notice of Originating Motion dated 31st January, 2012, as **"the Originating Motion",** and the Applicants\' second Notice of Motion application dated 10th April, 2012 as "**the Interlocutory Motion**". We shall refer to the Applicants thereof, as **"the Applicants"** throughout, and whenever referring to both motions of the Applicants together, we have referred to them as "**the Applicants' Motions**".

11. When the Interlocutory Motion first came before Honourable Justice Tuiyott on 11th April, 2012, he recused himself on the ground that **Msa. Misc. Application Number 468/2010 Randu Nzai Ruwa and 20 Others vs (1) The Internal Security Minister and (2) The Attorney General,** was then pending before him. A ground common to both that application and the present applications for determination herein, was the allegation that the Applicants lacked capacity to bring the proceedings. He therefore forwarded the matter to the Resident Judge, Honourable Justice Mwera, who after hearing the parties directed that the file be forwarded to the Chief Justice to empanel a 5 judge bench, as there were issues regarding constituency boundaries arising in that application.

12. The Chief Justice empanelled the present bench of five, on 6th July, 2012. When the bench first sat on 29th August, 2012, the parties were requested to indicate whether they objected to Justice Tuiyott, or any other judge, sitting on the bench. Counsel for all the parties stated they had no objection

to any member of the bench sitting.

13. It is worth pointing out that at the hearing on 6th November, 2012, Counsel for the Applicants withdrew their applications as against the 3rd Respondent, the Clerk to the National Assembly. None of the parties objected to the withdrawal. The court therefore, took the view that the 3rd Respondent could properly, on application, be withdrawn from the proceedings.

The Present Applications for Determination.

14. What is presently before us for determination are the two applications by the Respondents for striking out both the Originating Motion and the Interlocutory Motion. The parties had agreed that these applications be heard first. The court had then granted liberty to the parties to amend their applications and to file such replies as were requisite and such written skeletal submissions as they deemed necessary, in readiness for the hearing of the present applications to strike out. The hearing was scheduled for 6th November, 2012.

15. At the time of the hearing, the following documents had been filed by parties:-

By the Applicants:

1. Notice of Originating Motion dated 31st January, 2012 with supporting affidavit of Randu Nzai Ruwa deponed on 1st February, 2012 and annexures thereto (“the Originating Motion);

2. Notice of Motion dated 10th April 2012, with Supporting Affidavit of Randu Nzai Ruwa deposed on even date and annexures thereto (“the Interlocutory Motion”).

3. Petitioners List of Authorities dated 14th May, 2012

By the 1st and 2nd Respondents:

1. Notice of Motion dated 29th October, 2012, with Supporting Affidavit of Mohammud Jabane deposed on 29th, October, 2012;

2. List of Authorities dated 5th November, 2012

By the 4th to 10th Respondents:

1. Notice of Motion dated 17th April, 2012 with Supporting Affidavit of Mutea Iringo deponed on 12th April, 2012

2. Written submissions dated 5th November, 2012, and annexed authorities

3. Supplementary List of Authorities dated 9th November, 2012

4. Grounds of opposition dated 25th September, 2012.

16. The first application for striking out was that dated 17th April, 2012 filed by the Attorney General on behalf of the 4th-10th Respondents. It is a Notice of Motion application stated to be **"Under the inherent jurisdiction of the court".** We shall refer to it herein as **"the First Motion**". It seeks the striking out of the Originating Motion filed on 7th (sic; 2nd) February, 2012, on the following grounds:

"a) That the application has been made by persons who are members of and representing the proscribed organisation known as Mombasa Republican Council and as such they lack capacity to institute this suit as it is an outlawed organisation.

b) That the application raises various causes of action which cannot be heard in one application

c) That some of the issues raised in the Notice of Originating Motion are res judicata yet others are sub-judice

d) That the application is scandalous, frivolous and vexatious and an abuse of the court."

17. The First Motion, supported by the affidavit of Mutea Iringo, the Acting Permanent Secretary in the Ministry of State for Provincial Administration and Internal Security, annexed a 116 page bundle of documents.

18. The second application for striking out is dated 5th May, 2012, and was filed by the 1st and 2nd Respondents. It was brought by way of Notice of Motion, and was amended with leave of the court, by an Amended Notice of Motion dated 29th October, 2012. We will refer to it throughout as "**the Second Motion**". It seeks orders that the Originating Motion of 31st January, 2012 and the Interlocutory Motion of 10th April, 2012 be struck out with costs to the 1st and 2nd Respondents.

19. There are fourteen grounds in support of the Second Motion which, for brevity, we will not recite. We have instead incorporated them among the issues for determination as they fit well into the clusters of issues we have identified. The Second Motion is supported by the Affidavit of Mohamed Jabane, the 2nd Respondent\'s Manager of Legal Services made on 29th October, 2012, and two annextures.

20. The Applicants filed Grounds of Opposition to both the Respondents\' motions, on 25th September, 2012. All parties filed lists of authorities and copies of authorities relied upon.

The Issues for Determination Arising from the Pleadings and Submissions

21. After perusing all the pleadings and upon hearing the parties\' submissions, we formed the opinion that the under-listed issues arise for determination:

1. **Whether the Respondents\' motions are irregular and incompetent**

2. **Whether the Originating Motion raises issues that are *sub judice* and *res judicata.***

3. **Whether the Applicants\' motions are frivolous, vexatious and an abuse of process of the court.**

4. **Whether the Applicants\' motions are incompetent on account of their multifarious breadth and nature of the causes of action underlying them.**

5. **Whether the Applicants have the capacity and legal standing to bring their Motions before the court.**

6. **Whether the protection of Constitutional rights is available only to individuals and not to**

groups on a collective basis.

The Parties Representations and Analysis thereof

22. We now deal with each of the issues for determination on the basis of the parties\' submissions.

Whether the Respondents Motions are irregular and incompetent.

23. This issue is raised in Paragraph 4 of the Applicants\' Grounds of Opposition. Applicants\' Counsel argues that both the Respondents\' motions for striking out were filed before either of the Applicants had filed a substantial response to the Originating Motion. Consequently, argues counsel, the Respondents have by default admitted the validity of the claims in the Originating Motion by dint of Order 2 Rule 11 of the Civil Procedure Rules. That Rule provides that:

"....any *allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading, or a joinder of issue under Rule 10 operates as a denial of it".*

24. Applicant\'s Counsel also argued that the Originating Motion was not brought as a suit in terms of the Civil Procedure Act as alleged by the 2nd Respondent\'s counsel. He pointed out that the rules applicable to the proceedings were the "**Gicheru Rules**". Rule 16 of those Rules, mandatorily oblige a respondent to respond to a petition by way of a replying affidavit. That not having been done by any of the Respondents, argues counsel, their applications to strike out are improperly and incompetently before the court.

Counsel for the 1st and 2nd Respondents maintained that the proceedings are properly defined as a suit. In this case, that the Applicants have filed a representative suit in respect of which no leave has been granted by the court.

25. Rule 16 of the Gicheru Rules, which counsel relied upon, provides as follows:

"The Attorney General or the Respondent as the case may be, shall within fourteen days of service of the petition, respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit" (underlining ours)

This rule relates to applications invoking the enforcement jurisdiction of the court. Under the repealed constitution, the rule referred to the court\'s jurisdiction to enforce claims of contravention of fundamental rights and freedoms. This had to be done, as pointed out earlier, by way of **petition** in the form set out in form D in the Schedule to the Gicheru Rules. Pursuant to Rules 11 and 12, thereof, fundamental rights and freedom are litigated by way of Petition.

26. As already noted, the two applications filed and served by the Applicants are the Notice of Originating Motion and the Second Notice of Motion. Under Rules 2 and 3 of the Gicheru Rules, an Originating Notice of Motion is intended for and used to invoke the High Court\'s supervisory jurisdiction in respect of proceedings in subordinate courts and courts martial. Form A - Originating Notice of Motion - is used for such proceedings. The present proceedings are not of a supervisory nature and should therefore, have been commenced under petition.

The question is: whether there is a fundamental judicial distinction between a Petition and a motion is an arguable point.

27. That point was not argued before us and may be moot. However, we are conscious that, from the general perspective of moving the court for a remedy, there are no substantial differences between a Petition and a Motion. That notwithstanding, it is clear from the applicable Gicheru Rules, that a petition under Form D should state in the title and at the outset the fundamental rights and freedoms alleged to have been contravened, including a citation of the respective constitutional provisions. This is not required of a Notice of Originating Motion, which invokes the court\'s supervisory jurisdiction.

28. Although, as stated, these points were not argued by the parties, it is essential for clarity that the court should point out that there are formal and procedural differences between an Originating Motion and a Petition under the Constitution pursuant to the Gicheru Rules. A motion, once filed, has the inherent characteristic of inviting the *court* to move on a specified day whether *exparte* or *inter partes.* A petition, on the other hand, automatically invites the filing of a substantive a reply within fourteen days before the fixing of the hearing by court (Gicheru Rule 16 and 18). Where the Respondent fails to file a response, the petitioner may set down the matter for hearing. Further, during the pendancy of a Petition, the court may hear a Chamber Summons application for interim orders (Rule 20).

29. In this case, if the Applicants had filed a Petition, they were entitled to fix the matter for hearing in default of a response by the Respondents. We have no indication that this was done. So it is clear that neither the Applicants nor the Respondents strictly followed the stipulations provided under the Gicheru Rules in filing their pleadings.

30. This court has therefore taken the view, earlier pointed out, that central to the administration of justice under the Constitution, 2010, is the concept of determining the substantive merits of the matter. The court should thus not be bogged down or be side-tracked by procedural technicalities. This court\'s obligation under Article 159(2) is to ensure that:

"(a) justice shall be administered without undue regard to procedural technicalities."

We note that no rules specific to enforcement of the Bill of Rights under the Constitution 2010 have been made by the Chief Justice under the Constitution 2010. However, the Gicheru Rules noted earlier are saved under Section 19 of the Sixth Schedule to the Constitution, and made applicable to constitutional applications under the Constitution, 2010. These Rules must, however, be read or applied in conformity with Article 22(3) to the intent that formalities relating to constitutional proceedings are kept to a minimum. Accordingly, we have overlooked the procedural mis-steps made by all the parties in their pleadings in this matter.

31. Further, we have taken the view that although the Respondents' First Motion and the Second Motion do not represent substantive responses to the Applicants\' Originating Motion and the Interlocutory Motion, we have deemed them as constituting interlocutory objections to the Applicants\' Motions. Those Motions, not being Petitions in the strict sense, Rule 16 of the Gicheru Rules does not apply thereto. Ultimately, on this issue therefore, we are unable to find or hold that the Respondents\' motions are so irregular and incompetent, that they cannot be properly heard before this court.

Whether the Originating Motion raises issues that are *sub-judice* or *res judicata*.

32. The State Counsel raised this issue. It is explained in paragraphs 6 and 7 of the Affidavit of Mutea Iringo. There, the deponent raises two points: First, is the issue of the *proscription* of MRC which was the subject of **Msa Misc. Application Number 468/2010,** (*ibid*) and also the issue concerning the non-registration of MRC; Second, is the issue whether the privatisation of Mombasa Port is *res judicata* in light of **Msa Misc Application Number 16 of 2011 Randu Nzai & 2 Others vs Kenya Ports**

Authority, The Privatisation Commission, The Minister For Transport and the Attorney General(Respondents) and the Kenya Maritime Authority and the **County of Mombasa (Interested Parties).**

33. Counsel for the Applicants responded by arguing as follows: First, that the alleged "illegality" question was resolved by the decision of the court delivered on 25th July, 2012 in **Msa HC Misc 468 of 2010**, and consequently the question of s*ub-judice* does not arise. Secondly, counsel argued that the Originating Motion cannot be *res judicata* or *sub-judice* on the ground that **"no suit has ever been heard and determined where in the totality" of matters in issue therein"** are directly in issue in the Originating Motion.

34. It is clear that at the time when Counsel for the State filed the First Motion to strike out, this court had not made a decision in **Msa Misc Application No. 468/2010 Randu Nzai Ruwa & 2 Others vs The Internal Security Minister and the Attorney General.** That decision is annexed to the Respondents\' Amended Motion. Whilst the alleged "**illegality**" of the MRC Applicants\' may, at the time of filing the First Motion, have been an issue raised by the State and therefore then sub-*judice,* that question was not found by the court in that case to have been an issue for determination. The central matter for determination in **Misc Appl 468/2010** was the legality or otherwise of the **proscription** of the MRC, and the present matter is therefore neither *res-judicata*, or *sub-judice*

35. The second point, that of *sub-judice,* relates to the question concerning the proceedings as to the privatisation of Mombasa Port. That aspect was the subject of **Misc Applic. No. 16 of 2011** (*ibid*). In those proceedings, as in the present matter, declarations were sought against the privatisation of the Port of Mombasa and other statutory bodies. From the annexure at page 77 of the First Motion, the Originating Motion in that case was filed on 31st January 2011, whilst the present proceedings were filed on 2nd February, 2012. The former proceedings were therefore pending, when the present proceedings were filed, and contain at least one similar issue.

36. This court is, however, not aware of any decision determining the privatisation question in the earlier proceedings. That notwithstanding, counsel for the Applicants stated from the bar that the Transitional Authority Act at Section 34, has **"overtaken the prayer for transfer of public assets,"** which issue was, therefore, no longer being pursued herein.

37. Wehave perused the **Transition to Devolved Government Act**,**Chapter 1 of 2012**, **("TDGA")** which establishes a Transition Authority at Section 4, and sets out the Authority\'s functions at Section 7. These include devolution to County Governments of various functions (Section 7 (2) (f) and (g)) pursuant to Section 15 of the Sixth Schedule of the Constitution. That Schedule refers to Article 185 of the Constitution which establishes the legislative authority of a county. At Section 7(2)(f) and (g) of the TDGA, the Transition Authority is empowered to:

"…….

(f) make recommendations for the effective management of assets of the national and county governments

(g) provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period."

As this is a power devolved to the counties, our understanding is that the Applicants are content that their local interests in that regard will be taken into account. Having conceded that they were no

longer pursuing the issue of transfer of public assets in Coast Region, there is no longer any complaint by the Applicants thereon.

We, therefore, take it that Counsel for the Applicants is asserting that the facet of the transfer of public assets is no longer being pursued herein, and therefore cannot be *sub-judice*. We so find and hold.

38. On the basis of the above reasoning, this court does not consider that either *sub-judice* or *res judicata* have been established for purposes of striking out the Applicants\' Originating Motion or the Interlocutory Motion.

Whether the Applicants\' Motions are frivolous, vexatious and an abuse of the process of the court.

39. The 1st and 2nd Respondents at paragraph (h) in the Second Motion state that the Applicants Motions are scandalous, frivolous and/or vexatious and an abuse of the court process. Counsel did not further this argument during oral submissions.

On his part, Counsel for the Applicants stressed that the petition could not be frivolous for two reasons. First, when the matter first came before Hon. Justice Tuiyott, he stated that it was weighty. Second, that the Chief Justice thought the matter serious enough to empanel a 5 judge bench to consider the petition.

40. We need not expend much time on this point. We may take judicial notice that these proceedings have generated great public interest and notoriety, both in public debate and by way of media attention.

41. We note from the record of proceedings that after hearing the parties on 7th June, 2012, Honourable Justice Mwera directed that in view of the broad matters raised as to constituency boundaries, jurisdiction and *locus standi,* the matter ought to be referred to the Chief Justice to set up a 5 judge bench.

42. The question then, is whether, upon the invocation of Article 165(4) by the setting up of a 5 judge bench, the court is bound to entertain and determine the matters as substantial questions. What does it mean when the court certifies a matter under Article 165(4):-

"... as raising a substantial question of law under [Article 165(3)(b) infringement of the Bill of Rights] or [Article 165 (3)(d) jurisdiction to hear any question respecting the interpretation of this Constitution] [and requesting that it] shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice""

43. This point was dealt with by the five judge bench in **Jeanne W. Gacheche and 6 others vs The Judges and Magistrates Vetting Board and 2 Others [2012] e KLR.** There, it had been argued that where five judges had previously certified a matter as raising a substantial question, the court was bound to entertain and determine the matter as a substantial question. The court, however, held to the contrary as follows:

"We however hasten to clarify that we do not think that the certification of a matter as raising a substantial question under Article 165(4) does ipso facto confer jurisdiction upon the court. In our view, such certification is but a preliminary procedural step that is undertaken before such substantial questions can be substantively heard and determined. It is therefore not the position

that certification...substantively determined the issued whether this court has jurisdiction"

44. We agree with the court\'s holding in those circumstances. Here, the point raised was that the applications are frivolous, vexatious and an abuse of the court process. However, the Respondents\' counsel did not demonstrate how the matters raised in the Originating Motion and the Interlocutory Motion were frivolous i.e. without substance and fanciful; vexatious i.e. lacking *bona fides* and hopeless or offensive; and an abuse of court process i.e. embarrasses or delays a fair trial or misuses the court process. We are therefore unable to agree with the Respondents that the Applicants\' Motions be struck out for being frivolous, vexatious or an abuse of the court process.

Whether the Applicants\' Motions are incompetent on account of the multifarious breadth, and nature and multiplicity of the causes of action underlying them.

45. Counsel for all the Respondents raised this issue in variant forms. They stated that the causes of actions underlying the issues could allegedly not be entertained in one application. We identify the various concerns that were specified by parties, in the following clusters:

a) Some disputes seek remedies that are not constitutional

b) Some reliefs are in relation to disputes of a statutory nature

c) Some reliefs are not limited to those envisioned under Article 89

d) Some parties are unconnected to some of the causes of action.

We will deal with each of the above categories by discussing an illustrative example in each.

46. On disputes that seek remedies that are allegedly not constitutional: The State Counsel highlighted, as an example, prayer II C of the Originating Motion which seeks a mandatory injunction pursuant to Article 38 to compel the 1st and 2nd Respondents to:

"Conduct a referendum on the question of the proposed self determination of the indigenous people resident in the Coast Province of the Republic of Kenya."

Counsel argues that only Parliament through a parliamentary initiative under Article 256, or the people of Kenya through a popular initiative under Article 257, can initiate a referendum, and that the court has no such jurisdiction.

47. On causes seeking reliefs in relation to disputes that are of a statutory nature: Counsel for Respondents argued, as an example, that Prayers I, B and C of the Originating Motion concern whether the Interim Independent Boundaries Review Commission (IIBRC) and the Independent Electoral Review Commission (IEBC) are bodies that are or were ranked *pari passu;* and whether the latter could legally be the successor of the former and conduct or continue the former\'s mandate. They argue that the question of a declaration inhibiting that eventuality was not a constitutional question before the court.

48. On reliefs that are not limited to those envisioned under Article 89: Counsel for the 1st and 2nd Respondents argued in the Second Motion that:

"…

(d) The [Originating] Motion is not pegged to any specific constituency and is therefore general and not amenable to any response.

(e) The [Originating] Motion is based on grounds which are unnecessarily prolix and without substance.

(f) The [Originating] Motion is not limited to the relief provided under Article 89 of the Constitution."

49. Article 89 concerns delimitation of electoral units and provides the processes for so doing by the IEBC. Further, Article 89 (10) provides for an aggrieved person to seek review in the High Court for any decision by IEBC within 30 days of such decision. Whilst the Respondents argue that it is too late in the day to seek such review, the Applicants contend that their Application goes to the root of the process that underpinned and initiated the review. Indeed, their Application was filed on 2nd February, 2012 over a month before the IEBC published its boundaries review report on 6th March, 2012. As such, the Applicants were not seeking to review the IEBC report, but challenging the process leading to its commencement.

50. There was also a complaint by 1st and 2nd Respondents that some of the issues raised by Applicants do not concern some of the other Respondents. In their Second Motion at paragraph (l) the Respondents state:

"…(l) The other parties joined in this [Originating] Motion have no connection with the determination of boundaries."

As earlier stated, the prayers sought by the Applicants were very broad and all-encompassing. They range from political to socio- economic rights and include fundamental rights; and not just issues relating to IEBC. As such, they necessarily involve numerous parties concerned with the effectuation or implementation of matters affecting such rights.

51. As far as the 1st and 2nd Respondents were concerned, they argued that they should not have been drawn into arguments which went beyond the question of delimitation as provided under Article 89 of the Constitution. Overall, however, it was complained by all the Respondents that: the Applicants\' Motions were not pegged to any specific constituency; were prolix; contain a mix of political agenda, property divestiture and other irrelevant issues not germane to delimitation; and that it was not possible to discern with sufficient specificity what the petitioners were seeking.

This brings to the fore two interrelated issues or points. The first concerns the general wide scope and broadness of the issues canvassed by the Applicants. The second concerns the manner of their drafting, that is, the alleged imprecision and justiciability of the matters complained of.

52. We will not go into the merits of the arguments raised by the Respondents in respect of the four broad clusters of issues illustrated above. Our view is that any determination thereof would amount to our determining the substantive issues peremptorily for purposes of striking out, whilst in fact they go to the substance of the Applicants\' applications. They cannot be determined at this stage for purposes of striking out the Originating Motion and the Interlocutory Motion.

53. Our view is informed by and premised on the fact that the constitutional jurisdiction of this court is extremely broad. Such jurisdiction encompasses the following five areas:

a) *Unlimited original jurisdiction* in criminal and civil matters under Article 165 (3) (a);

b) *Determinative jurisdiction* on rights and fundamental freedoms in respect of their denial, violation, infringement or threats thereto - Article 165 (3) (b);

c) *Appellate jurisdiction* to hear appeals from a decision of a constitutional tribunal - except an Article 144 tribunal appointed to remove the President under Article 165(3)(c);

d) *Interpretative jurisdiction* on questions of the Constitution under Article 165(3) (d);

e) *Supervisory jurisdiction* over subordinate courts and any person body or authority exercising a judicial or quasi judicial function except a superior court under Article 165(6).

This court can hear any matters, however broad or interrelated, falling within the corners of its quinary jurisdictional limits shown above.

54. Given that the Applications herein may be under the court\'s determinative jurisdiction under Article 165 (3) (b), or its interpretative jurisdiction (Article 165 (3) (d)), and that the scope of such jurisdiction is as wide as there are rights and legislation, it seems to us absurd to strike out a motion on the grounds that it spans too many areas of dispute or causes of action. It is true that the Applicants\' Originating Motion and the Interlocutory Motion appear so broad in reach as to be clumsy, and inelegant, and could have been brought under a neater, better drafted package. That, however, cannot constitute appropriate grounds for striking them out. The mere fact that a constitutional application may be rendered somewhat convoluted by invocation of multifarious causes of action and branches of anticipated remedies, although it may lead to some level of discombobulation in the approach to its determination, should not ordinarily result in striking out peremptorily at an interlocutory stage. We so hold.

55. We are fortified in our conclusion herein upon consideration of the relevant test as regards imprecision in framing violations and the potential inability of a respondent or the court to fathom the constitutional issues arising therefrom, and remedies relevant thereto. The test is found in the discussion in the **Mumo Matemu** case, namely, the **Trusted Society of Human Rights Alliance vs AG and 2 others and Mumo Matemu & Another** [2012] eKLR. One of the issues in that case was whether the constitutional petition had to be framed with **"reasonable precision"** and adjudicate only over issues that are **"phrased as justiciable controversies."** On this point the three-bench court stated as follows, at page 13; Paragraphs 46 and 47.

"**46....** ***we are of the opinion that the proper test under the new constitution is whether a petition as stated raises issues that are so unsubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so they can adequately prepare their case....***

47.. while the present petition might not be the epitome of precise, comprehensive, or elegant drafting, our view is that the complaints raised by the petitioner are concrete enough to warrant substantive consideration by the court...."

56. It is the same in this matter. The causes of action alleged to give rise to the alleged violations may be numerous with multifarious facets. They may not fall into neat categories or may be inelegantly drafted. The real question, though, is whether they are fashioned in such a manner as to give adequate notice to the Respondents about the nature of the claims made to enable a clear response. As already stated, we think so, and the elaborate and detailed reactions in the First and Second Motions of the Respondents so confirm. Accordingly, we decline to strike out the Applicants\' Motions on the grounds of alleged broadness, imprecision, or lack of specificity.

Whether the Applicants have the capacity and legal standing to bring their motions before the court.

57. This question was perhaps the most contentions of all the matters raised by the Respondents. It was raised in the following forms:

- By 1st and 2nd Respondents – in the Second Motion they stated that:

" a) The Mombasa Republican Council is the alleged Society on behalf of whose members the Petitioners purport to bring those proceedings.

b) The petitioners lack the** locus standi **to bring these proceedings as they have done.

c) To hear and entertain the complaints of the members of an illegal and unlawful society would be tantamount to offering legitimacy and recognition to such an entity."

- By the State Counsel in the First Motion, who stated that:

"That the application has been made by persons who are members of and representing the proscribed organisation known as the Mombasa Republican Council and as such they lack capacity to institute this suit as it is an outlawed organisation."

58. In his written and oral submissions, the State Counsel veered away from the issue of proscription of MRC, to lack of capacity or *locus standi.* He argued that the proceedings were brought on behalf of MRC – an entity that is legally non-existent. He pointed to the letters from the Registrar of Societies dated 7th March, 2011 and from the then Independent Electoral & Boundaries Commission dated 8th March, 2011, both annexed to the Affidavit of Mutea Iringo at pages 18 and 19 of the First Motion. In each case, the Registrar of Societies and the Registrar of Political Parties both indicate that the MRC is not registered as a society or political party, respectively.

59. Counsel concedes that the rules on *locus standi* have been significantly relaxed, but asserts that the Applicants must show:

- that the matter complained of is of some public interest;

- that they were injured over and above the general public;

- The purposeful approach should therefore be to grant *locus* to any person acting in **"good faith with minimal personal interest in a matter of public interest to seek judicial intervention to ensure the sanctity of the constitution."** He cited **RM vs Attorney General & 4 Others** [2010] eKLR (High Court Nairobi Petition 705/2007) for this proposition.

60. Counsel for the State also argued that good faith was an element lacking in the applications of the Applicants. According to counsel, the elements evidencing absence of good faith included: that the Applicants had filed a multiplicity of suits over generally the same issues; that they had refused to register, and therefore legalise their status, despite advice from the court; and that they are engaging in unlawful and criminal activities including the widely reported use of the slogan ***"Pwani Si Kenya."*** As such, the Applicants should not be allowed to proceed with their application unless they are agitating for enforcement of constitutional rights personal to them.

61. On his part Counsel for the 1st and 2nd Respondents pointed out that the Applicants had expressly brought the Originating Motion as MRC or on its behalf as its members. They had attached the MRC Constitution and in their deposition, had admitted that MRC was not a registered body. As such, Counsel argued, it was not a legally recognised entity on whose behalf proceedings could be brought. At page 10 of the Second Motion is an annex to the Affidavit of Mohamud Jabane, Manager of Legal Services of the 2nd Respondent, being a letter from IEBC dated 24th September, 2012 in which the Registrar of Political Parties confirms that MRC is not a registered political party.

62. Further, counsel argues that this Court\'s decision in **Misc Application Number 486/2010 (Supra)** did not clothe MRC with legality. Counsel also pointed out the following paragraphs from the Court\'s decision in that case:

Paragraph 66: ***"What is conceded by the petitioner (Applicants herein) is that they are engaged in the secession debate*** …***the position of the state is that the push for secession is a threat to peace national security, and has the potential of dismembering the country."***

Paragraph 71: ***"As we have said, we are of the firm view that the Constitution does not contemplate or allow for secession. It is hardly surprising therefore that many Kenyans, who overwhelmingly endorsed a unitary state would be shocked and disturbed by the secession agenda of MRC..."***

On this, Counsel argued that if the Applicants were pursuing an objective that is unconstitutional, they were engaged in unlawful activities. He continued reference to the court\'s sentiments as follows:

Paragraph 72: ***"What would be of great concern to this court is that the agitation for secession must be expressed as a fair and acceptable democratic discourse [and] should not offend Article 33 of the Constitution..."***

Paragraph 80: "***On our part we have looked at the evidence presented by the parties before us and have come to conclusion that MRC is a political movement. On their own admission the petitioners in paragraph 3 of Mr. Ruwa\'s affidavit state:***

\'We are a peace initiated group aimed at attaining our rights on matters of land natural resources, economic and political freedom and advancement of the indigenous coastal people.\'

...Accepted by both sides is that central to its objective is secession. Secession is a political agenda."

63. Relying on the above findings of the court, Counsel argued that the petitioners have no *locus* to ventilate alleged rights of a group that operates amorphously and is unregistered. We were referred to **Kenya Bankers Association and Others vs Minister for Finance and Another (No. 4)** [2007] 1 KLR 61 where the *locus standi* of KBA to challenge the Central Bank Act was upheld because:

- It is permitted by the Trade Unions Act and the Constitution of the Association.

- The members of the Association are defined and ascertainable.

- It is convenient and prevents multiplicity of suits. The Court further held that what gives *locus standi* is a minimal personal interest and such an interest gives a person a *locus* even though it is quite clear that he would not be more affected than any other member of the population.

- In constitutional issues and public interest cases, the person who challenges the *locus standi* of a person complaining of constitutional violations or injury to a public interest, must show that a grave and overwhelming injustice will be done if the complaining party is allowed to litigate.

64. The 1st and 2nd Respondent were of the view that given the findings of the court in **Misc App 486/10** as to the unconstitutional agenda of MRC, the nation as a whole and constitutionalism in Kenya, would suffer a negative impact if the Applicants were allowed to litigate.

65. On *locus standi* and the competency of the Applicants to bring their Originating Motion and Second Notice of Motion we make the following observations:

66. First, we examine the nature of the persons or body making the applications. As deponed in the Affidavit of Randu Nzai Ruwa in support of the Originating Motion, he states at paragraph 2:

"That together with the 2nd and 3rd petitioners herein, I did serve as an official of the now defunct Mombasa Republican Council ….AND it is in the interests of the residents and voters, and stakeholders in all the counties situated within the Coast Province that we the petitioners do bring this originating motion as provided for under Section (sic, Article) 22 (2) (b) (c) and (d) of the Constitution."

67. In the Originating Motion itself, paragraph (q) states that the petitioners bring it under Section (sic; Article) 22 (2) (a), (b) and (c) of the Constitution.

68. Reading the two together, we take it that the basis of the Originating Motion is Article 22 (2)(a) (b) (c) and (d). The Applicants seek to enforce the Bill of Rights as members of what they call the \'**defunct**\' MRC. Article 22(2) (a), (b), (c) and (d) stipulates the persons who have a right to institute enforcement proceedings as follows:

"(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -

a) a person acting on behalf of another person who cannot act in their own name;

b) a person acting as a member of, or in the interest of, a group or class of persons.

c) a person acting in the public interest

d) an association acting in the interest of one or more of its members."

69. Annexed to the said Affidavit is a letter of authority "RNR 1(A)" dated 31/1/2012 from the members of MRC. It states:

"We members of the Mombasa Republican Council from all six counties borne in the twenty one (21) constituencies in the Coast Region, as per membership list attached authorise the following three members to act on our behalf on matters of the Independent Electoral Boundary Commission (IEBC) reference suit against the Kenya government and any other matters of the law and the courts that may arise..."

Twenty one persons indicated as drawn from each of the constituencies in the six counties of the Coast Region are stated to represent the said counties therein.

70. The Affidavit of Randu Nzai Ruwa in support of the Interlocutory Motion goes further and annexes over 1,600 pages containing 32,281 signatures of the members of MRC who are said to support the Interlocutory Motion.

71. Under Article 260 of the Constitution, read together with Article 259(4) (b), a **"person"** is defined to "**include but is not limited to a company, association or other body of persons whether incorporated or un-incorporated**."

There is no argument that the Applicants are "**persons**" within the meaning of Article 260, in that they are either natural persons or juristic persons.

The next question is, do the Applicants fit into the categories in Article 22(2)(a) (b) (c) or (d) as asserted under which they brought their Applications"

72. Before we proceed to discuss this substantive question, it may be of assistance to point out our approach to Article 22.

Article 22 is worded in similar terms as Section 38 of the South African Constitution which provides:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

a) anyone acting in their own interest;

b) anyone acting on behalf of another person who cannot act in their own name;

c) anyone acting as a member of, or in the interest of, a group or class of persons;

d) anyone acting in the public interest; and

e) an association acting in the interest of its members."

73. That provision is often referred to as the "**standing**" provision.

In **Giant Concerts CC against Rinaldo Investments (Pty) Ltd and 6 Others [2012] ZACC 28,** the Constitutional Court of South Africa stated (paragraph 32):

"…in determining a litigant\'s standing, a court must, as a matter of logic assume that the challenge the litigant seeks to bring is justified..."

The court also quoted the Supreme Court of Appeal\'s judgment in **Rinaldo Investments (Pty) Ltd vs Giant Concerts CC and Others** [2012] 3 All SA 57 where that court expressed itself thus:

"... standing determines whether this particular litigant is entitled to mount the legal challenge: a successful challenge to a public decision can be brought only if the right remedy is sought by the right person in the right proceedings. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. (underlining ours)

The court further stated the object of standing in the following terms at page 20. (paragraph 37):

"***The object of the standing requirement was that courts \'should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to the issue before it.\' "***

74. We have approached Article 22 with the same broad expansiveness, latitude and flexibility, in order to ensure, as far as possible that we adopt an interpretation that most favours the enforcement of a fundamental right or freedom. We are enjoined to take this course under Article 20(3) of our Constitution.

75. We now consider what the Applicants presented. From the documentation availed, the Applicants do not fit into the category in Article 22(2) (a) as a person or persons **"acting on behalf of another person who cannot act in their own name."** The Applicants have not so stated or shown that there are persons on whose behalf they act who cannot act in their own name or names. This provision caters for those many situations where a person acts as a formal legal representative on behalf of another - such as a person or guardian acting in *loco parentis* instead of, or in the absence of, the parent of a child - who cannot act on his own.

76. Do the Applicants fit into the category under Article 22 (2) (b), that is, **"person(s) acting as a member of or in the interest of a group or class of persons"**" Neither the terms **"group**" or "**class**" are expressly defined in the Constitution. The nearest reference to the definition of the word "group" is under Article 260, in which "**marginalised group"** is defined as follows:

"...a group of people who, because of laws or practices before, on or after the effective date, were disadvantaged by discrimination on one or more of the grounds in Article 27(4)."

Article 27 (4) on its part provides for non-discrimination by the state in the following terms:

"(4) The *state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."*

77. Neither of the Applicants' Motions are brought under Article 27(4). The Originating Motion is stated to be brought under Articles 2(5); 6 (1) and (2); 21(2) and (3); 38(1) (c); 46; 47; 81(a); 89(2), (3) and (4); 174 (a), (c) (d) (e) and (g); 75 (b) Sixth Schedule, The Universal Declaration of Human rights and the UN Declaration on the Rights of Indigenous people.

The Interlocutory Motion is stated to be brought under the Civil Procedure Act, Civil Procedure Rules, the Elections Act and Sections (sic, Articles) 6(1) and (2); 21 (2) and (3); 22 (2) (a) (b) and (c); 46; 47; 97 (1) and (b) 98 (1) (a); 174 (a) (c), (d), (e) and (g); 175 (b) and 177 (1) (a), the Universal Declaration of Human rights, and all other enabling laws.

78. The Applicants\' Motions do not allege any discrimination under this Article 27(4) in relation to marginalised groups. They have not described themselves as a marginalised group. They do not assert or identify the laws or practices because of which they became disadvantaged by discrimination on any of the grounds in Article 27(4). However, they do allude in the body of the Motions that various actions and processes which they allege against the Respondents are discriminatory infringements and affect, specifically, the people in the Coast Region, although not on any of the grounds under Article 27 (4).

79. As earlier noted, Article 22(2) (b) entitles:

"a person acting as a member of, or in the interest of, a group or class of persons"

to seek enforcement of the Bill of Rights. The **"Group"** rights at a certain level may be distinguished from **"association"** rights under Article 22(2)(d). An **"associatio**n" is defined in the concise Oxford Dictionary as:

"[an] organised body for a joint purpose"

Thus, a group of persons who may not be organised for a joint purpose may bring an action through one or more of them under Article 22(2) (b). If they can be described as an organised body for a joint purpose, they will fall into the category of an association seeking to rely on Article 22(2)(d), and may be limited by its organisational objects. The objects or purpose of a group may determine the *locus standi* of the Applicants. Under Article 3(1) of the Constitution **"every person has an obligation to respect, uphold and defend this Constitution".** So, if the objects or purpose of a group or class of persons or association are contrary to the Constitution; their very existence would have to be tested under other parameters as to its constitutionality, because under Article 2 the Constitution is the **"supreme law**" and

"any law...and any act or omission in contravention of this Constitution is invalid."

80. Can the Applicants be said to be a person or persons acting in the public interest in terms of Article 22 (2) (c)" **"Public interest"** is generally defined as:

"something to which the public, community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular, localities, which may be affected by the matters in question [it is] interest shared by citizens generally in affairs of local, state or national government." (emphasis ours) See Black\'s Law Dictionary.

We have reverted to this basic definition from which it will be evident that public interest appears broad, and would be such as is shared by citizens generally. Public Interest is further defined in the Legal Dictionary of the free online legal dictionary website (legal-dictionary.the freedictionary.com) as follows:

"Anything affecting the rights, health, or finances of the public at large

Public interest is a common concern in the management and affairs of local, state and national government.

It does not mean mere curiosity but is a broad term that refers to the body public and the public weal... "

The public weal is that which is best for everyone, or for the public at large, or for the general populace. It is clear from the Affidavit of Randu Nzai Ruwa, however, that that was not the Applicants' approach.

81. In the Canadian case of **Downtown Eastside Sex Workers United Against Violence Society vs Canada (Attorney General)** 2010 (reported in *Canadian Lawyer* magazine), the question of public interest standing was clearly described. The Plaintiffs in that case banded together in an organisation of current and former sex workers who brought a court claim, not as individuals, but as a corporate entity along with an individually named former sex worker. They challenged the Criminal Code provisions dealing with prostitution as being contrary to their rights under the Charter of Rights and Freedoms including life liberty and security of the person. Their claim in the Superior court was struck down for lack of private or public interest standing.

82. On appeal, the British Columbia Court of Appeal described public interest as follows:

"Public interest standing is granted where a serious issue has been raised by a party with a direct or genuine interest and where there is no reasonable and effective alternative for the issues to come before the court.\'

The Court of Appeal noted that a generous approach to public interest standing is necessary in certain claims:

"Where, as here, the essence of the complaint is that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and excercebates their vulnerability, the law on standing does not require the challenge to be by a person with a private interest standing."

83. As earlier shown, the Applicants have come to court expressly, on behalf of a class of persons or group who are members of a body, known as the MRC, or as an association. They fit into the categories either under Article 22(2)(b) or (d), but most certainly as an association under Article 22(2)(d). This bears restating as evidenced in both the Affidavits in support of the Originating Motion and the Interlocutory Motion, and the Applicants Motions themselves. The interests they are expressed to espouse as stated in paragraph 2 of the Supporting Affidavit, are those of the people in the Coast Region, namely, the people in the six counties of Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta.

In the Originating Notice of Motion dated 31st January, 2012 at paragraph (q):

"The petitioners do bring the present originating motion in the capacity provided them under Section (sic; Article) (22) (2) (a) (b) and (c) of the Constitution of Kenya"

In the Supporting Affidavits at paragraph 2:

"... And it is in the interest of the residents and voters and stakeholders in all the Counties situated within the Coast Province that we, the Petitioners, do bring this Originating Motion as provided for under Section (sic; Article 22 (2)(b)(c) and (d)....Annexed hereto marked RNR 1(a) and (b), Respectively, please find a letter authorising the Petitioners to being this Petition on behalf of voters in the Coast Province constituencies..."

It is the attachments, "RNR 1(a)" and "RNR 1 (b)", that clarify that the Applicants act for or on the

authority of MRC which is an association.

And in the Interlocutory Motion:

"Paragraph XXII. The Petitioners herein do bring the present originating Motion in the capacity provided them under Section (sic, Article) 47 of the Constitution of Kenya, 2010."

Article 47 confers the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

84. In addition, in paragraph (2) of his first Affidavit deposed on 31st January, 2012 Randu Nzai Ruwa says he served as an official of the **"now defunct Mombasa Republican Council**". The word "**defunc**t" means,generally, **"no longer living or active, dead or extinct; no longer operative or valid."** It is thus evident that the MRC could not donate any authority if it was defunct. That statement in the Affidavit is, therefore, inconsistent. Further, in his Affidavit deposed on 12th April, 2012 in support of the Interlocutory Motion, Randu Nzai Ruwa states ***that at the time of being proscribed***:

"14 ….we had not yet registered the Mombasa Republican Council as a society and in an attempt to demonstrate our *bona fides****, we did lodge a formal application with the office of the Registrar of Societies with which we did complete the statutory forms and annex our proposed constitution, but our application was denied peremptorily. Annexed herewith marked RNR 5(a) (b) and (c) find respectively, our Application for Registration as a Society, Notification of Registered Office and Draft Constitution all dated 16th November, 2011."***

85. It was argued by the 1st and 2nd Respondents that the Applicants had not demonstrated that they had lodged their said application for registration, or that it had been denied.

We have perused the annexures in "RNR 5". Neither the Application for Registration Form A, nor the Notification of the Registered Office Form B, discloses any evidence of having been presented to the Registrar of Societies. Nor is there evidence of any record or payment showing the forms to have been submitted to the Registrar.

Under Rule 2 (d) of the Societies (Amendment) Rules, 2003, every application made for registration or exemption from registration is required **"to be sent to the Registrar together with the prescribed fee."** Under Rule 6, where the Registrar refuses to register a society **"he shall send to the society a notification of his refusal in form E in the schedule to these rules.**"

There was no evidence of either payment, or of refusal to register Form E, attached by the Applicants.

86. Annex "RNR 5(a)" Form A, aforesaid, discloses the following five (5) officials of MRC: 1) Chairman – Omar Khamis Mwamnwadzi, 2) Secretary-General - Randu Nzai Ruwa; 3)Treasurer - Abdallah Ali Sheikh, 4) Co-ordinator- Omar Yasin Bakari; 5) Organising Secretary – Salim Issa Goga. The application (Form A) is undated but Form B is dated 16th November, 2010. Of these five officials only Randu Nzai Ruwa is included in the letter of authority dated 31st January, 2012 to the three Applicants to act on behalf of members of the MRC ("RNR 1 (a)").

A close perusal of "RNR 1(a)" also discloses that amongst the twenty one persons listed in that letter of authority as having granted authority to the Applicants on behalf of members of the six counties in Coast Region, only Salim Issa Goga of Mombasa county, the Organising Secretary, is listed in the

Application for Registration Form A, as an official of MRC.

87. Accordingly, with the exception of Randu Nzai Ruwa, it is unclear under what authority the two other Applicants Robert Charo Tukwatukwa and Omar Babu Suleiman, are appointed as representing MRC. As regards Randu Nzai Ruwa, he is stated to be an official of MRC, but none of the other officials of MRC, except for Salim Issa Goga are included as his appointers.

88. The upshot of the above analysis, is that the appointment of the Applicants by, or for and on behalf of, MRC, is of doubtful veracity and generates ambiguity as to its authenticity as an appointment on behalf of that association or group.

89. But assuming the question of appointment is a non-issue, the more fundamental question is: whether the MRC is an association acting in the interest of one or more of its members in accordance with Article 22(2) (d). There is no doubt that the Applicants were or presented themselves to be acting on behalf of MRC. The Applicants admit that they are members of MRC. There is also no doubt that MRC is indicated to be a membership association. It behooves us, therefore, to identify and understand the organisation called MRC.

90. What is MRC and what does it stand for" As earlier indicated, the Applicants annexed the Constitution of MRC as “RNR 5(c).” Counsel for all Respondents made submissions to the effect that MRC was an unlawful body, that neither it nor its members could show any prejudice that they would suffer over and above the rest of the public; that the rights sought to be protected by the Applicants cannot be sought by the MRC as a group on a collective basis, being an unrecognised legal entity.

91. We have perused the draft MRC Constitution of 2010, and Forms A and B, which were intended for its registration. We take these documents as constituting the essence of MRC. Clauses 2(b) and (c) of the MRC Constitution provide that:

“b) The Council shall be non-political

c) The Council shall not support any political party”

Clauses 2(d) and (e) state that the Council shall provide civic education to its members concerning, inter *alia*, land problems, employment, democracy, drug abuse etc. These are positive, public-spirited and generalised objects. We however, highlight the following final clauses in the MRC Constitution:

“15 DISSOLUTION

The Council shall not be dissolved <u>until the Coast Region becomes an autonomous state.”</u>

and clause 16:

“16 GOALS OF THE COUNCIL

1. ***To repeal the 8th October, 1963 agreement Number cmnd 2161***

2. ***<u>The Kenya Government to remove their administration</u>***

3. ***<u>To grant our independence</u>.”*** (underlining ours)

92. In our view, the word **"political**" means pertaining or relating to the policy or the administration of a government, state or nation. If that is so, then clauses 15 and 16 of the MRC Constitution do clearly and unambiguously espouse political objects or goals, notwithstanding what is stated in clause 2 (b) therein.

93. There is also a "***Definitions***" clause at page 9 of the MRC Constitution. It provides for citizenship and defines a "**citizen**"as follows:

"DEFINITION

1. Citizens are all the people living in Coast

2. The Coastal natives are all the people who originated from long ago during the immigration age and are listed here below as follows*:*

1. ***Mijikendas***
2. ***Taita/Tavetas***
3. ***Pokomos***
4. ***Bajunis***
5. ***Arabs***
6. ***Indians and others"***

94. The provisions of Clauses 15 and 16 of the MRC Constitution and its definition of citizen, all bespeak the intrinsic nature of the association on whose behalf, or in whose name, the Applicants prosecute these proceedings. We highlight these as the underlying purpose and principles of MRC as stated in the recited provisions.

95. It is these essential characteristics of the MRC as fronted by the Applicants that the Respondents condemn as unconstitutional in so few words. In particular, the 1st and 2nd Respondents\' application for striking out is premised on, and seeks striking out the Applicants\' Motions, on *inter alia,* the following grounds which we restate here for clarity:

"***a) The Mombasa Republican Council is the alleged Society on behalf of whose members the petitioners purport to bring these proceedings.***

b) The petitioners lack the locus standi to bring these proceedings as they have done;

c) ***To hear and entertain the complaints of members of an illegal and unlawful society would be tantamount to offering legitimacy and recognition to such an entity."***

And the 4th-10th Respondents have urged that the Applicants cannot bring those proceedings on behalf of an entity that is legally non-existent.

96. In dealing with the rights of association of persons as earlier defined, we turn to Article 36 of the Constitution, 2010, which provides as follows:

"(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

....

(3) Any legislation that requires registration of an association <u>of any kind</u> shall provide that -

(a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before a registration is cancelled." (Underlining ours)

97. When people associate or get together in groups, they are expressing their right to freedom of association. That right includes the entitlement of freely forming, joining in or participating in the activities of an association pursuant to Article 36(1). It is to be noted that Article 36(3) provides that there may be legislation requiring registration of an association "**of any kind**." Such legislation must adhere to the basic constitutional minimums set out under that Article, as to reasonableness and natural justice before the withholding, withdrawal or cancellation of such registration can be effected.

98. The Constitution thus anticipates that the freedom of association cannot be exercised in a vacuum. There is the expectation that free persons wishing to associate or join in or participate in activities of whatever nature should not unreasonably be restrained or prevented from doing so and may be registered. This constitutional requirement or expectation for registration is not irrational, even in a free society. It enables a society or people to engage in an orderly manner in the vibrant market-place of interaction and ideas. It facilitates their protection from threats to their so associating, and secures them and others in society from insecurity by providing an enabling environment. It creates a platform upon which conflicts and disputes within the association and between different groups can be resolved. It eases identification of similarities and differences between all the different groupings, and facilitates those members of society who are like-minded to readily identify one another through looking at their objectives. Finally, but without being exhaustive, it provides for the means under which those associating can organise their leadership issues and other affairs both internally amongst themselves, and also externally vis-a-vis third parties.

99. We do have such legislation, and it is the Societies Act, Chapter 108. Under Section 2(1), thereof, a **"Society**" is defined as follows;

"\\\\\\\\\\\\\\\'Society\\\\\\\\\\\\\\\' includes any club, company partnership or association of ten or more persons, <u>whatever</u> its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not, except in paragraphs (i) and (ii) of Section 11 (2) (f) of this Act include..."

The bodies excluded from that definition are listed in sub clauses (a)-(f) of Section 2(1). They are corporate or un-incorporate bodies registered or formed pursuant to various statutes. They include companies; statutory corporations; trade unions; company, firm, association or partnerships of not more than twenty persons; co-operative societies; schools; building societies; banks; international organizations; and any other bodies declared to be such by the Minister.

Section 2(2) then provides:

"For the *avoidance of doubt, it is declared that for the purposes of this Act, where any body of*

persons, whether incorporated or unincorporated, is a member of an association, all members of that body are members of that association."

100. It is, clearly, pursuant to these provisions that the Applicants and MRC, recognising themselves as an **"association of ten or more persons"** having objects, sought or seek to be registered. They prepared a constitution and completed registration forms A and B under the Societies Act, (Annex RNR 5 (a), (b) & (c)) for registration. They have deposed as much.

101. Section 9 of the Societies Act requires every society to be registered. Section 4 then provides:

"Every society which is not a registered society or an exempted society is an unlawful society:

Provided that a society shall not be an unlawful society where, within twenty eight days of its formation it has applied for registration under Section 9, and it has not been notified of the determination of its application, unless -

(i) it is formed for an unlawful purpose; or

(ii) the minister has declared it, by order, to be a society dangerous to the good government of the Republic; or

(iii) The Registrar has notified the society (whether or not before the making of the application)that he intends to refuse registration or exemption from registration on one of the grounds specified in Section 11(1) (b) of this Act."

102. What little information has been placed before this court on this issue, is in the affidavit of Randu Nzai Ruwa where he says at Paragraph 14 of his affidavit in support of the Interlocutory Motion, earlier quoted, that they completed and filed the relevant forms **"but an application was denied peremptorily**"

As earlier stated, no evidence was placed before us on the alleged attempt to file, nor on the response or decision from the Registrar of Societies. The Registrar is under Section 4(2), required to communicate within one hundred and twenty days of receipt of the application

103. In the circumstances, we find that the MRC, not being registered, or not pursuing the process of registration or exemption from registration, lacks legal capacity. As such, it has brought the Motions before us prematurely and without the legal capacity to do so.

104. In addition, given all we have stated, this court has no alternative but to give life and meaning to the constitutional imperatives upon which its ultimate authority is derived under Article 159. That provision states at Article 159 (2) as follows:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(***a) Justice shall be done to all...***

(b) ….

(c) …..

(d) ….

(e the purpose and principles of the Constitution shall be protected and promoted." (underlining ours)

105. Applying these principles *for* the exercise of our judicial authority, it is clear to us that the jurisprudence that must emanate from the courts should:

- resonate with the principle of the sovereignty of the people of Kenya; that power emanates from them and can only be exercised in accordance with the Constitution (Article 1)

- underscore the supremacy of the Constitution as the supreme law of Kenya binding all persons and all state organs (Article 2)

- uphold the citizens\' obligation to respect, uphold and defend the Constitution, including defending against the promotion of a philosophy or ideology of establishing a government otherwise than in accordance with the Constitution (Article 3)

- enhance citizenship in accordance with the law and promote citizen rights

- resonate with and encourage an indigenous and patriotic adherence to the national values and principles including those of patriotism, national unity, the rule of law, democracy and participation of the people.

106. We pause briefly, to recall the Transition to Devolved Government Act, Number 1, of 2012, TDGA, which we had referred to earlier. That Act came into effect on 7th March, 2012, after the filing of the Originating Motion. According to the Applicants\' counsel it remedied some of the alleged infringements of the Applicants\' rights.

107. We have taken into account the overall complaints of the Applicants. We are not determining them at this stage. We, however, note and appreciate the anxiety the Applicants must feel on account of the numerous transitions occurring in the country prior to, since, and as a result of, the promulgation of the Constitution, 2010, particularly in regard to effectuation of the political and socio-economic rights at the grassroots of society.

108. We have also noted the enactment of the Intergovernmental Relations Act, Number 2, of 2012, (IRA), assented to on 27th February, 2012 but whose commencement will take effect upon announcement of all results of the first election under the Constitution 2010. Its object in the preamble is:

"To establish a framework for consultation between the national and country government and amongst county governments..."

Section 5 of that Act provides that the objects of intergovernmental structures include:

"(a) facilitating the realisation of the objects and principles of devolution provided for under Articles 174 and 175 of the Constitution...

….

(e) providing for mechanisms for transfer of power, functions and competencies to either level of government;"

That Act also establishes a National and County Government Co-ordinating Summit at Section 7.

109. Another statute which we have noted is the County Governments Act, Number 17, of 2012, (CGA), assented to on 24th July, 2012. It will commence with the announcement of the results of the first election under the Constitution 2010. Its object is:

"To give effect to the Chapter 11 of the Constitution to provide for County Governments\' powers, functions and responsibility to deliver services and for connected purposes."

All these statutes will no doubt have some interplay with the Applicants in respect of the numerous issues causing them concern.

110. Having taken all the circumstances of this case, the parties\' arguments and our reasoning aforesaid into consideration, the ultimate question we must dispose of in this matter is this: Are the Applicants, or is the MRC, or are the members comprising MRC, entitled to constitutional protections under the Constitution 2010, when such body or person evidently or admittedly is neither a legal entity or registered or recognised under any law of the land, and such body or person has, as its inherent fundamental essence, purpose, and object, the purveyance or promotion of an agenda that is expressly unconstitutional albeit clothed in the guise of socio-political, economic, or fundamental rights and freedoms" We think not.

111. The upshot of the foregoing is that we hold that neither the Applicants as individuals acting on behalf of MRC, nor the MRC as an unregistered, amorphous body espousing an unconstitutional agenda, has either the *locus standi* or the legal competency to bring the Originating Motion or the Interlocutory Motion, or to be entitled to pursue the reliefs sought.

112. Having found as aforesaid, we do consider it a moot matter to make any determination on the sixth issue, namely, whether the protection of constitutional rights is available only to individuals and not to groups on a collective basis.

Conclusion and disposition

113. In concluding, we wish to make an observation concerning this court\'s decision in **Misc App 468/10** under which the **"ban"** on MRC was lifted on 25th July, 2012. In paragraph 2 of the Applicants\' grounds of opposition there was the assertion that following the Court\'s judgment in that petition, the Respondents\' applications are overtaken by events as the question of illegality is no longer in issue. That is an erroneous impression.

114. The court there was dealing only with the question of *proscription* of the MRC, and not with the legality or otherwise of MRC. At page 1 paragraph 1 of the court\'s judgment in that petition, the issue was phrased as follows:

"The question raised by this petition is simply whether or not the action of the Government of Kenya in proscribing the group known as Mombasa Republican Council (MRC) vide Gazette notice Number 12585 is unconstitutional."

And at page 38 paragraph 77 the court concluded:

"On our assessment, we have reached the conclusion that the state has not satisfactorily demonstrated that the proscription was justifiable or proportionate."

Nowhere in its judgment did the court *legalise* the MRC. Indeed, the court there pointed out that MRC should legalise itself, and suggested the option of registering as a political party.

115. In the present case, this court has made a determination that the MRC, not being an entity known to law, and having evinced its intention to be a registered body, but having failed to do so, and having expressly been established to tread an unconstitutional journey evidenced in its intrinsic constitutional character, it has no *locus* or competency to bring this application for constitutional protection, which we hereby strike out.

116. On all the other grounds raised by the Respondents for striking down the Originating Motion and the Second Motion., the court has found that they were not established.

117. In light of the nature of the motions herein, the public law and public interest issues raised, and in exercise of our discretion, we determine that each party will bear its own costs.

Dated, signed and delivered this 20th day of December, 2012.

J.W. MWERA, JUDGE

E.M. MURIITHI, JUDGE

G.N. NZIOKA, JUDGE

F. TUIYOTT, JUDGE

R.M. MWONGO, JUDGE

Read in open court

In Presence of Parties/Representative as follows:

a) .....

b) .....

c) .....

d) .....