Case Number:	Petition 471 of 2017
Date Delivered:	11 Oct 2017
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	John Muting'a Mativo
Citation:	Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR
Advocates:	-
Case Summary:	**All presidential candidates who participated in the August 8, 2017 elections, concerning which the presidential election results were nullified, qualify to participate in the fresh presidential elections.** **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others** **Petition No 471 of 2017** **High Court at Nairobi** **Constitutional & Human Rights Division** **J M Mativo, J** **October 11, 2017** **Reported by Beryl A Ikamari**

***Constitutional Law**-interpretation of the provisions of the Constitution-principles applicable to the interpretation of the Constitution-the meaning of the term fresh elections as used in article 140(3) of the Constitution, in relation to elections held after the nullification of the results of a presidential election-Constitution of Kenya 2010, articles 140(3) & 163(3).*

***Jurisdiction**-jurisdiction of the Supreme Court-original jurisdiction of the Supreme Court-whether the Supreme Court had the jurisdiction to determine the meaning of the term fresh elections in article 140(3) of the Constitution-Constitution of Kenya 2010, articles 140(3) & 163(3).*

***Legal Precedent**-stare decisis -binding (ratio decidendi) and persuasive precedents (obiter dicta)-nature of observations in a judgment which were not an issue raised or pleaded by the parties to the dispute in question-whether the Court was bound by such observations-extent to which such observations would be of persuasive value.*

***Constitutional Law**-enforcement of fundamental rights and freedoms-political rights and rights to equality and freedom from discrimination-failure to allow the Petitioner, a candidate in a presidential election whose results were nullified, to participate in the fresh presidential elections-whether under the circumstances the Petitioner's political rights and rights to equality and freedom from discrimination were violated-Constitution of Kenya 2010, article 140(3), 38 & 27.*

Brief facts

The Petitioner was a presidential candidate for Thirdway Alliance Party in the August 8, 2017 general elections. The results of that election were successfully challenged by the NASA presidential candidate Hon. Raila Amolo Odinga and his running mate Hon. Stephen Kalonzo Musyoka, in Supreme Court Petition No 1 of 2017. In the Supreme Court petition, the presidential election and its results were declared a nullity and orders were issued for a fresh election to be conducted within 60 days from the date of the Supreme Court

judgment.

Through a Gazette notice dated September 5, 2017, the IEBC and its Chairman directed that only Jubilee Party and Orange Democratic Movement would participate in the fresh presidential elections. The Petitioner wrote to the IEBC on September 6, 2017 requesting to be included as a candidate in the fresh elections but he obtained no positive response to his letter.

The Petitioner then sought the Supreme Court's intervention but he was asked to file the matter before the High Court as the Supreme Court did not have the jurisdiction to hear and determine it. The Petitioner, at the High Court, stated that under articles 27, 38, and 140(3) of the Constitution, as a candidate that participated in the August 8, 2017 elections, he had a right to participate in the fresh presidential elections slated for October 26, 2017. He said that his rights to participate in that election were being violated.

The IEBC and its Chairman's response to the petition was that the Supreme Court ordered for fresh presidential elections without providing guidance on how they would be conducted. They also said that there was no settled practice on repeat presidential elections and there was a gap in the law with respect to how such elections were to be conducted. The IEBC and its Chairman said that they sought legal advice on the question of the conduct of fresh presidential elections and the outcome was that they only put Jubilee Party and Orange Democratic Movement as the participants in the presidential elections, in good faith. The advice included the findings of the Supreme Court in the *2013 Raila Case*, in which it was said that presidential candidates who did not challenge the outcome of the presidential election were deemed to have conceded defeat or acquiesced in the declared results and would not be participants in repeat presidential elections.

The 4th Respondents' grounds in support of the petition included the assertion that the exclusion of the Petitioner from the elections was discriminatory and that the determinations on fresh elections in the *2013 Raila case* were distinguishable from the instant case. On the other

hand, the Attorney General opposed the petition and stated that it was bad and incompetent in law, that the High Court lacked jurisdiction to hear it and that the issue as to what constituted fresh elections was already determined in the *2013 Raila Case*.

Issues

1. Whether the question, touching on which presidential candidates would participate in fresh presidential elections, was determined by the Supreme Court in the *2013 Raila case* and the High Court had no jurisdiction to determine it as it was a Court which was bound by the Supreme Court's decision, under article 163(7) of the Constitution.
2. Whether the Supreme Court interpreted article 140(3) of the Constitution, which provided for fresh elections after the invalidation of the results of a presidential election, in the *2013 Raila Case*.
3. Whether the failure to allow the Petitioner, a candidate in a presidential election whose results were nullified, to participate in the fresh presidential election was a violation of the Petitioner's right to equality and freedom from discrimination and political rights.
4. Whether the observations of the Supreme Court in the *2013 Raila Case*, which related to the import of article 140(3) of the Constitution, were *obiter dicta*.

Relevant provisions of the law

Constitution of Kenya 2010, articles 163(3), 140(3), 38 & 27;

Article 163(3);

(3) The Supreme Court shall have—

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the

office of President arising under Article 140; and

(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—

(i) the Court of Appeal; and

(ii) any other court or tribunal as prescribed by national legislation.

Article 140;

140. (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President elect to be invalid, a fresh election shall be held within sixty days after the determination.

Article 38;

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause...

Article 27;

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

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(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...

Held

1. Article 163(3) of the Constitution provided for the jurisdiction of the Supreme Court. It provided for the Supreme Court's original jurisdiction to entertain disputes related to elections to the office of the President under article 140 of the Constitution and the exercise of the Supreme Court's appellate jurisdiction. Article 140 of the Constitution concerned questions on the validity of presidential elections. The issue raised in the instant petition was not a question as to the validity of presidential elections but a question as to the interpretation of what would constitute a fresh election. The Supreme Court rightfully held that it had no jurisdiction to interpret the provision and that the necessary jurisdiction was possessed by the High Court. The Petitioner also raised questions relating to violations of his rights under article 38 and 27 of the Constitution and such questions fell within the High Court's constitutional mandate.
2. The observations by the Supreme Court in the *2013 Raila Case* were not an interpretation of article 140(3) of the Constitution. It was not possible for the Supreme Court to interpret that provision because it did not have jurisdiction to do so.
3. It was important to address the question as to whether the observations by the Supreme Court were *obiter dictum* or *ratio decidendi*. The doctrine of precedent decrees that only the *ratio decidendi* of a judgment, and not *obiter dicta*, have binding effect. If a determination was truly

obiter dicta, it would not be followed. However, *obiter dicta* would be of potent persuasive force and would only be departed from after due and careful consideration.

4. *Obiter dicta* are things said by the way or in passing by a Court. They are not pivotal to the determination of the issue or issues at hand and are not binding precedent.
5. The issue on who would participate in fresh presidential elections, in the *2013 Raila Case* was not raised by the Petitioners or the Respondent nor did it arise from the pleadings. It was not a pleaded issue. Paragraph 286 of the judgment in that case states, "The Hon. Attorney General, as *amicus curiae*, invited the court to give directions on a line of relief declared by the Constitution, depending on the finding on merits." The directions requested for were not part of the issues for determination or final orders of the Court. It could not be said that they constituted the *ratio decidendi*.
6. The *ratio decidendi* of a judgment has been defined as the reason of or for the decision, the decision being the order of Court. It has been suggested that the more accurate description is that it is the principle of the decision. Whatever the reasons for a decision were, it is the principle to be extracted from the case, the *ratio decidendi* which is binding and not necessarily the reasons given for it.
7. The observations of the Supreme Court in the *2013 Raila Case* were *obiter dicta* and not the *ratio decidendi* of the decision. In those observations, the Supreme Court used the word suppose not less than three times and it gave hypothetical situations to explain several scenarios and to support its opinion.
8. The Petitioner was an Interested Party in Supreme Court petition No 1 of 2017 which led to the nullification of presidential election results. It would be jurisprudentially wrong to say that an Interested Party who supported a petition ought not to benefit from the decision of the Court.

9. The Supreme Court had no jurisdiction to interpret article 140(3) of the Constitution. The statements it offered on the candidates to a fresh presidential election were *obiter dicta* and they were an opinion rendered at the request of the Honourable Attorney General.
10. In interpreting article 140(3) of the Constitution, it would have to be borne in mind, that the starting point was the language of the provision. In the absence of an expressed intention to the contrary, the language would be taken as conclusive especially where the words used were unambiguous.
11. Article 140 (3) stated that if the Supreme Court determined the election of the president-elect to be invalid, a fresh election would be held within sixty days after the determination. The Constitution and the Elections Act did not define the term fresh elections. The dictionary definition of a runoff is a further competition, election, race, etc., after a tie or inconclusive result. In Kenya, the runoff would be between two leading candidates in the presidential election. From the definitions, it was clear that the election contemplated under article 140(3) was not the runoff contemplated in article 138(3) of the Constitution.
12. Due regard was to be had to the fact that article 140(3) would come into play after the nullification of the results of a presidential election. Nullification is the act of making something void. Article 140(3) used the words fresh election and the word fresh is defined as recent, not stale, characterized by newness without any material interval not previously known or used; new or different. The question that would arise from that terminology was on whether a fresh election would also mean fresh nominations. In determining that, it was necessary to consider the fact that the fresh elections were to be held within 60 days of the judgment nullifying the presidential election results.
13. In light of the applicable principles of interpretation and the need to avoid an

interpretation that would lead to absurd results, the 60 days period would not be adequate for fresh nominations. The interpretation which would serve public interest was that those who participated in the invalidated election were qualified to contest in the fresh election.

14. The Petitioner participated in and supported the petition which nullified the presidential election results. Even an application of the Supreme Court's *obiter dicta* would not bar the Petitioner from contesting in the fresh elections.
15. Article 38 of the Constitution guaranteed political rights including the right to be a candidate for public office. The right to participate in an electoral process both by voting and standing for elective office were part of the basic structure of a democratic state. Restrictions placed on such participation could only be justified by very strong reasons and in a manner in which the core basic feature, democracy, was not damaged.
16. Political rights and the right to equality and freedom from discrimination were not absolute. They could be limited as provided by law and only to the extent that the limitation was reasonable and justifiable in an open democratic society. Any such limitation would be subjected to three tests which were to the effect that a limitation will only be acceptable;

    a. When prescribed by law,
    b. When it is necessary and proportionate, and,
    c. When it pursues a legitimate aim which includes the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

17. Any action that specifically barred the Petitioner, from participating in a democratic process, would be unconstitutional unless it was justified under the limitation clause. The right/freedom to vote, and the

	right/freedom to stand for office were conceptually inseparable, as they formed equally integral parts of the democratic process. 18. Article 27 of the Constitution guaranteed the right to equality and freedom from discrimination. Article 27(4) listed the grounds on which discrimination could occur and such discrimination would be presumed to be unfair. In assessing whether there was discrimination, it was necessary to determine; a. Whether the Gazette Notice complained of differentiated between different presidential candidates, b. Whether the differentiation amounted to discrimination, and c. Whether the discrimination was unfair. 19. The exclusion of the Petitioner from the ballot in the elections scheduled for October 26, 2017 was a violation of his rights to political participation. It was also unfair and therefore discriminatory. 20. Having contested in the presidential election as a candidate and also participated in the presidential election petition whose outcome was the nullification of the election results, as an Interested Party, the Petitioner would not be deemed to have conceded defeat. There was no legal basis for excluding the Petitioner from contesting in the fresh presidential elections. *Petition allowed.*
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition allowed.
History County:	-
Representation By Advocates:	-

Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 471 OF 2017

In the matter of alleged contravention of Articles 2 (4), 10, 19, 20, 21, 22, 23, 27, 38, 47, 48, 56, 81, 86, 88, 137, 138, 140, 159, 259 and 260 of the Constitution of Kenya 2010

In the matter of interpretation of Articles 138 (5) & (7) and 140 (3) of the Constitution of Kenya 2010

and

In the matter of Articles 165 (3) (d) of the constitution of Kenya

and

In the mater of the challenge of the validity of the Gazettement of fresh presidential election vide Gazette notice No. 8751 Vol. CXIX-No. 130 dated 5 September 2017

BETWEEN

DR. EKURU AUKOT.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....1ST RESPONDENT

WAFULA CHEBUKATI.....2ND RESPONDENT

JUBILEE PARTY.....3RD RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....4TH RESPONDENT

JUDGEMENT

Petitioners' case

1. The petitioner contested the presidency on 8th August 2017 general elections as a candidate for the **Thirdway Alliance Party**. However, the results were challenged in the Supreme court of Kenya in a Petition filed by the **Hon. Raila Amolo Odinga** the presidential candidate for NASA coalition and his running mate the **Hon. Stephen Kalonzo Musyoka** being Supreme Court Petition No. **1** of 2017.

2. By a majority decision of the Supreme Court rendered on **1st** September 2017 without reasons, the Supreme Court held that:- **(a)** the presidential election held on 8th August 2017 was not conducted in accordance with the constitution and the applicable law rendering the declared results invalid, null and void; **(b)** that the **Hon. Uhuru Muigai Kenyatta** was not validly declared as the president elect and that the declaration was invalid, null and void; **(c)** an order was issued directing the first Respondent herein to organize and conduct a fresh presidential election under article **140 (3)** of the constitution within **sixty days** from the date of the determination in strict conformity with the constitution and the applicable election laws. Detailed judgments giving the reasons by the majority and minority determinations were rendered on 20th September 2017.

3. By a Gazette notice dated **5th** September 2017, the first and second Respondents directed that the third and fourth Respondents shall be the only participants as presidential candidates in the fresh elections scheduled to take place on **26th** October 2017.

4. On the **5th** September 2017, the petitioner wrote a letter to the first Respondent through the second Respondent requesting that his name be included on the ballot paper as a presidential candidate but there has been no positive response to the said letter.

5. The petitioner sought the intervention of the Supreme court by way of a notice of motion dated **6th** September 2017 under certificate of urgency. On **7th** September 2017, the **Hon. Justice David Maraga**, the Chief Justice of the Republic of Kenya and President of the Supreme Court, certified the application as urgent and directed the petitioner to serve the application together with his written submissions on it on or before **11th** September 2017. He also directed the Respondents in the said case to file their responses together with their written submissions on or before **15th** September 2017. A mention date was fixed before the Registrar on **18th** September for compliance.

6. However, on **21st** September 2017, the Hon. The Chief Justice made orders couched in the following terms:-

*"Further to my Directions/Orders of 7th September, 2017 and having further considered this matter, I hereby vacate **suo motto** the Registrar's Order fixing this matter for hearing today and instead I now give further Directions/Orders under Section **24 (1)** of the Supreme Court Act as follows:-*

*i. I note that this application in substance seeks an interpretation of Article **140 (3)** of the Constitution as regards the meaning and effect of **"fresh elections."***

*ii. As this court has no jurisdiction to interpret the Constitution save as stated in Article **163 (3)** and **(6)** of the Constitution it cannot entertain this matter. The same should have been filed before the High Court under Article **165 (3) (d).***

iii. In the circumstances, I decline to admit it for hearing instead I hereby strike out the same with no orders as to costs.

7. The petitioner avers that by virtue of article **27, 38 (1), (b)** and **140 (3)** of the constitution and by virtue of the petitioner having duly participated in the said elections as aforesaid, the first and second Respondents is under a constitutional duty to gazette his name as a presidential candidate in the "fresh elections" scheduled for **26th** October 2017. As a consequence of the foregoing, the petitioner avers that the first and second Respondents have violated his rights under articles **27, 38** and **140 (3),** hence the reliefs sought in the petition.

First and Second Respondents Response to the petition

8. The first and second Respondents response is that:- **(a)** the Supreme Court nullified the presidential results for the elections held on 8th August 2017 and directed the first Respondent to organize and conduct a fresh presidential election in strict conformity with the constitution and the applicable election laws within **60** days of the determination under article **140 (3)** of the constitution; **(b)** the Supreme court did not provide any further guidance regarding the framework under which the fresh presidential election should be conducted; **(c)** the order in question is un-preceded, hence there is no settled practice on the handling of such elections; **(d)** part **XIV** of the Elections (General) Regulations, 2012 (as amended by L.N. 72/2017) (hereinafter referred to as the Regulations) only provide for elections pursuant to article **138 (5)** of the constitution, hence, there is a lacuna in law; **(e)** in absence of guiding law or regulations, the commission sought and obtained legal advice on how to proceed in discharging its duty to conduct the fresh presidential election and it received legal advice from its lawyers the crux of which was that the issue of candidates for purposes of an election following nullification under article **140 (3)** of the constitution "was dealt with by the Supreme Court in the case of *Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others*[1] (Hereinafter referred to as the **"2013 Raila Case"**) in which the Supreme Court gave directions on the issue at the request of the Hon. Attorney General under article **163 (6)** of the constitution; **(f)** acting upon the said directions, the first Respondent Gazetted the third and fourth Respondents as the only candidates in good faith, hence the alleged violation of articles **27, 38** and **140 (3)** of the constitution does not arise.

Fourth Respondents' grounds in support of the petition

9. The fourth Respondent supports the petition on grounds that:- **(a)** the Gazettement in question is discriminatory, unconstitutional and invalid to the extent it excludes the petitioner from the elections; **(b)** the "**2013 Raila Case"** is distinguishable from this case; **(c)** this court has inherent jurisdiction to determine this case.

Attorney Generals Grounds of opposition

10. The Hon. Attorney General who was enjoined in these proceedings as an interested party states that:- **(a)** this petition is incompetent and bad in law; **(b)** the issue of what amounts to a *fresh election* was determined in the "**2013 Raila Case";** **(c)** and that this court has no jurisdiction to hear and determine this matter.

Petitioners' supplementary affidavit

11. The petitioner filed a supplementary affidavit on 4th October 2017 stating that he retracted his public statement conceding defeat on grounds that it premised on misleading information he had received from his chief agent. Thus, he revoked the signatures that the agent had appended to the results, and denied conceding defeat or acquiescence.

Courts' directions

12. Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner.

13. This petition was accompanied by a notice of motion seeking conservatory orders but on 27th September 2017, I directed the hearing of the petition to proceed as opposed to the application.

Consequently, the application dated 22nd September 2017 was abandoned.

14. On 4th October 2017, counsels for the first to the third Respondents and the interested party sought to raise a preliminary objection citing Article **163 (7)** stating that this court lacks jurisdiction on grounds that the Supreme Court in the "**2013 Raila Case"** determined the issues raised in this petition. They urged the court to hear the objection first because it was dispositive and had the potential of determining the case at that point if upheld by the court.

15. The petitioner and fourth Respondents counsels' view was that this petition is premised on alleged violation of the petitioners rights to political participation, rights against discrimination and interpretation of article **140 (3)** all of which are within this courts mandate under article **165 (3) (d)** and argued that the said objection could be addressed in the course of the submissions.

16. I directed the parties to address the objection together with their submissions and that the question will be addressed in the judgment. I was conscious of the fact that in the event of disallowing the objection, then, the matter would still have to proceed for hearing on merits. This would mean more utilization of courts valuable time and a likelihood of not concluding the case before October 26th 2017.

17. In so directing, I considered that exercise of judicial authority is now entrenched in the constitution which commands this court to *inter alia* be guided by principles enumerated in article **159** among them "*justice shall not be delayed*" and Rule **5** of The Constitution of Kenya (Protection of Rights and Fundamental) Freedoms and Procedure, 2013 which provides for *inter alia* timely disposal of proceedings.

Petitioners Advocates submissions

18. On jurisdiction, the petitioner's counsel urged the court to determine this petition on merits, adding that the "**2013 Raila Case"** did not make a final determination on who is eligible to participate in a fresh election in the event of nullification by the court; and that the paragraph relied upon by the Respondents is an *orbiter dictum* and therefore has no precedential value. He cited **William M. Lile et al**[2] where the author observes that *"Strictly speaking an orbiter dictum is a remark made or opinion expressed by a judge in his decision upon cause 'by the way'- that is, incidentally or collaterally and not directly upon the question before the court; or it is a statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion…"*

19. He submitted that the question of who is eligible to participate in a fresh elections was not an issue for determination in the **"2013 Raila Case"** and that the comments in question were an opinion made at the request of the Hon. Attorney General, as *amicus curiae* who sought directions on the matter. It was not a pleaded issue, it was not deliberated nor was it decided on merits.

20. Counsel argued that the scenario contemplated in "**2013 Raila Case"** can be distinguished from the present case in that the petitioner actively participated in the petition that led to the nullification of the elections results as an interested party and that the position of an interested party was well captured by the Supreme Court in *Francis K. Muruatetu & Another vs Republic & 5 Others*[3] where the court observed that *"… interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"*

21. On the nature and effect of fresh elections envisaged under article **140 (3)** of the constitution,

counsel sought to distinguish the various scenarios envisaged in articles **138 (4) & (5)** of the constitution which are different from article **140 (3)** which stipulates a fresh election after the results are nullified by the court.

22. Counsel cited **Hon. Justice (Prof) Otieno-Odek** in his paper entitled Election Technology law and the Concept of *"Did the Irregularity affect the Result of the Elections'* where he observed that *"…once the machinery o election dispute resolution has been activated, the petition continues for the benefit of the whole voting constituency. It is for this reason that prima facie, a petition once filed cannot be withdrawn…"* Thus, the beneficiaries of an election petition are not just the parties in the petition, but the whole voting constituency and argued that there is no legal basis for restricting the fresh elections to only the third and fourth Respondents candidates.

23. Counsel also argued that upon nullification, the will of the people as expressed in the election ceased to have effect and must now be subjected to fresh test and urged the court to find that the proper interpretation of article **140 (3)** of the constitution means a new presidential election which includes the petitioner and that his exclusion is a violation of the petitioners rights under articles **38** and **27** of the constitution and also a violation of articles **1, 2 (4), 10, 47** and **140** of the constitution.

First Respondents' Advocates' submissions

24. Counsels for the first Respondent submitted that the first Respondent was guided by the Supreme Court decision in **"2013 Raila Case"** and argued that in the said case the court found that "fresh election" conducted pursuant to article **140 (3)** of the constitution would have the following features:-

i. Can only involve the persons who participated in the original invalidated election and there would therefore be no fresh nominations;

ii. If the petition invalidating the election is filed by a petitioner who was one of the candidates in the original election and who had taken the second position, the fresh election shall be confined to only the petitioner and the president-elect;

iii. If the petition invalidating the election is filed by a number of petitioners who were candidates in the original election, the fresh election shall be confined to those petitioners and the president-elect;

iv. Any candidate who participated in the original invalidated election and did not challenge the election of the president elect is presumed to have conceded defeat or acquiesced to the results.

25. Counsel submitted that since the petitioner herein did not participate in the petition as a petitioner but as an interested party, he cannot contest in the fresh elections as per the above decision and that constitutional provisions must be interpreted as a whole and that the petitioners rights under articles **27, 38** of the constitution must be read and appreciated in concert with the constitutional rights that guarantee a free, fair, credible and transparent elections under article **81** and **88 (4)** of the constitution.

26. Counsel also submitted that the interpretation of article **140 (3)** of the constitution by the Supreme Court is binding on this court by virtue of article **163 (7)** of the constitution[4] and argued that the said interpretation was based on a substantive prayer before the court, hence, it was not *orbiter dictum* and that under article **163 (7)** the binding nature of the Supreme Court decision is absolute regardless of whether or not the decision is either *orbiter dictum* or *ratio decidendi* and that article **163 (7)** is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[5] and that where the issues before the court were determined by the Supreme Court, it

will no longer be open to that court to examine the same with a view to arriving at a different decision.[6]

Second Respondents Advocates' submissions

27. Counsel submitted that:- **(a)** the applicable legal framework governing the conduct of fresh presidential elections is under article **140 (3)** of the constitution as read with part **111** of the Elections Act[7] and the Regulations; **(b)** the regulations do not make provision for holding fresh elections arising from nullification of a presidential election under article **140 (3); (c)** The issue was resolved in the **"2013 Raila Case"** upon request for directions by the Hon. Attorney General appearing as an *amicus curiae; (d)* in absence of express statutory provisions, the second Respondent cannot be faulted for relying in good faith on the Supreme Court's decision.

Third Respondents Advocates' submissions

28. Counsel relied on the **"2013 Raila Case"** and added that:- **(a)** the petitioner has no legitimate right to participate in the fresh elections since he was only an interested party in the petition; **(b)** the first respondent acted in conformity with the Supreme Court decision; **(c)**the petitioner conceded defeat; **(d)** He cited *Mwai Kibaki vs Daniel Toroitich Arap Moi*[8] and submitted that since the observations in **"2013 Raila Case"** were made after the court was invited to give directions in line with the reliefs declared by the constitution, the observations were not *orbita dictum.*

Fourth Respondents' Advocates Submissions in support of the petition

29. The fourth Respondents' counsel supported the petition on grounds that:- **(a)** the challenged Gazette notice offends the petitioners rights to equal protection under the law; **(b)** the fact that the petitioner was an interested party in the petition as opposed to a petitioner does not deprive him of the benefits of the judgment; **(c)** the Supreme court's decision of 1st September 2017 is a judgement *in rem* which binds all persons to the extent of their interests in the subject whether or not they were parties; **(d)** the Supreme court did not state that the election will only involve candidates who participated in the original election.

Interested Party's Counsels Submissions

30. Counsel for the interested party submitted that:- **(a)** the Gazette notice conforms to the constitution, the law and the **"2013 Raila Case**; **(b)** the issues were settled in the said decision; **(c)** this petition is incompetent, **(d)** and that this court lacks jurisdiction.[9]

Analysis of the Issues, Facts, Law, Submissions and determination

31. The first issue that falls for determination is whether the Supreme Court in **"2013 Raila Case"** interpreted article **140 (3)** of the constitution. If it did, then, by dint of article **163 (7)**, this court has no jurisdiction to delve into the matter and it must down its tools. Article **163 (7)** explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court.

32. I need not repeat that the Hon. the Chief Justice in the order referred to earlier correctly decreed that the Supreme Court has no original jurisdiction to interpret the constitution save as stated in Article **163 (3)** and **(6)** and added that the petitioner ought to have approached the high court under article **165 (3) (d).**

33. Article **163 (3)** of the Constitution provides that:-

The Supreme Court shall have-

*a. exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article **140**; and*

*b. subject to clause **(4)** and **(5),** appellate jurisdiction to hear to hear and determine appeals from-*

i. the Court of Appeal; and

ii. any other court or tribunal as prescribed by national legislation.

34. Sub-article **(6)** provides that the Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

35. Article **140** of the constitution deals with questions as to the validity of presidential elections which as the learned Chief Justice observed is a matter within the original jurisdiction of the Supreme Court. The issue presented in this petition is not a question as to the validity of presidential elections, but a question on the interpretation of what constitutes a *fresh election*. Thus, the Hon. the Chief Justice was right in holding that the Supreme Court has no original jurisdiction to interpret the said provision. The jurisdiction lies in this court by dint of article **163 (3) (d)**. Consequently, this matter is properly before this court.

36. Also raised in this petition is the question of alleged violation of Rights under articles **38** and **27** and other constitutional provisions which to me is within the constitutional mandate of this court. The jurisdiction of this court on the above issues is beyond doubt.

37. **I need not mention that Article 165(1)** establishes the High Court and vests in it vast powers *including the power to 'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' and the jurisdiction **'to hear any question respecting the interpretation of the Constitution**.' **Article 23(1)*** provides that:- *"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."* Article **165 (6)** provides that *"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.*

38. In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-[10]

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

39. In view of the clear provisions of articles **163 (3)**, **(6), 140** and guided by the order by the Hon. the Chief Justice reproduced above, and bearing in mind that the Hon. the Chief Justice was fully aware of the "**2013 Raila Case",** I am not persuaded that the observations by the Supreme Court in **"2013 Raila Case"** were an interpretation of article **140 (3)** because, the jurisdiction to interpret the said provision lies

in the High Court. Thus, on the face of such clear constitutional provisions, it was not possible for the Supreme Court to exercise a jurisdiction they do not possess.

40. It is important to address the question whether or not the observations by the Supreme Court were *orbita dictum* or *ratio decidendi*. The said observations and the clear provisions of Article **163 (7)** brings to the fore the important doctrine of precedent, a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. The doctrine is a means to an end.

41. The doctrine of precedent is widely recognized in developed legal systems. It has been described as a manifestation of the general human tendency to have respect for experience. Its importance is captured in the following passage:-

' In the legal system the calls of justice are paramount. The maintenance of certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rules in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.

It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.[11]

42. I can also borrow from the eloquence of Cameron JA:-

*"The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions."***[12]**

43. The doctrine of precedent decrees that only the *ratio decidendi***[13]** of a judgment, and not *obiter dicta*, have binding effect.[14] The fact that *obiter dicta* are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as *obiter* what is otherwise binding precedent.[15] Only that which is truly *obiter* may not be followed. But, depending on the source, even *obiter dicta* may be of potent persuasive force and only departed from after due and careful consideration.[16]

44. The controversy raised by the observation in the **"2013 Raila Case"** raises a few issues. The first is whether the said observation is *obiter*.[17] Even if it is, it is highly persuasive, coming – as it does – from the highest court in the hierarchy of our courts. But it is not binding.[18]

45. Literally, *obiter dicta* are things said by the way or in passing by a court.[19] They are not pivotal to the determination of the issue or issues at hand and are not binding precedent. They are to be

contrasted with the *ratio decidendi* of a judgment, which is binding. Regarding this concept Schreiner JA in *Levinson***[20]** said:-

*"It may be that the contrast between a reason and the ratio depends mainly on the meaning attached to those words in their context by the users. . . . [W]here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the ratio decidendi, originating or following a legal rule, provided **(a)** that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, **(b)** that they were not merely a course of reasoning on the facts . . . and **(c)** (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons."*

46. It is admitted that the Supreme Court was responding to a question raised by the Honourable the Attorney General who sought the courts guidance on what would happen should the court allow the petition bearing in mind that the petition was the first in the country. The Hon. Attorney General was an *amicus Curiae* in the case.

47. The issue was not raised by the petitioners or Respondent nor did it arise from the pleadings. It was not a pleaded issue. Paragraph **286** of the judgement clearly states that "The Hon. Attorney General, as *amicus curiae, invited the court to give directions on a line of relief declared by the constitution, depending on the finding on merits.* In my view, the invitation was for the court to give directions on a line of relief *"depending on finding on merits*" and it was not one of the issues for determination in the dispute before the court. The directions are not part of the final orders of the court. In my view, they cannot be said to be the *ratio decidendi* of the case.

48. The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court." [21]

49. The relevant passage in the **"2013 Raila Case"** reads:-

*[289] It is clear that a fresh election under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. **Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election**. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.*

[290] Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of Article 138(1) (b) would become applicable, with fresh nominations ensuing.

*[291] Barring the foregoing scenario, does the "fresh election" contemplated under Article 140(3) bear the same meaning as the one contemplated under Article 138(5) and (7)" The answer depends on the nature of the petition that invalidated the original election. If the petitioner was only **one** of the candidates, and who had taken the second position in vote-tally to the President-elect, then the "fresh election" will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates **who did not contest** the election of the President-elect, will be assumed to have either conceded defeat, or acquiesced in the results as declared by IEBC; and such candidates may not participate in the "fresh election."*

[292] Such, indeed, is the situation in the instant case. It follows that if this Court should invalidate the election of the 3rd and 4th Respondents, only the 1st Petitioner would participate as a contestant in the "fresh election" against the President-elect. And the candidate who receives the most votes in the fresh election would be declared elected as President.

[293] But suppose a successful petition challenging the President-elect were filed by more than one candidate who had participated in the original election. The only candidates in the fresh election, in such a case, in our opinion, would be the petitioners as well as the declared President-elect whose election had been annulled.

[294] Suppose further, that the election of a declared President-elect is annulled following the petition of a person who was ***not*** *a candidate in the original election. In such a case, in our opinion, each of the Presidential-election candidates in the original election would be entitled to participate in the "fresh election" – and no fresh nominations would be required.*

50. At its most fundamental level, the *ratio decidendi* of a judgment has been defined as *"the reason of or for the decision"*, the decision being the order of court.[22] It has been suggested that the more accurate description is the *"principle of the decision*."[23]

51. In *Halsbury Laws of England (Hailsham)* 4th ed vol 26 para 573 at 292 it is described as the general reasons given for the decision or the general grounds on which it is based, detached, or abstracted from the specific peculiarities of the particular case which gives rise to the decision. Whatever the reasons for a decision may be, it is the principle to be extracted from the case, the *ratio decidendi* which is binding and not necessarily the reasons given for it.[24]

52. As observed in paragraph **45** above, the reasons given in a judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided **(a)** that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, **(b)** that they were not merely a course of reasoning on the facts and **(c)** (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.[25]

53. In my view, in applying the above reasoning, the observation by the Supreme Court must be viewed as *obiter*, and not the *ratio decidendi* of the decision. The court's observation itself supports such a characterisation. The court used the word "suppose" not less than three times while giving "hypothetical" situations to explain several scenarios to support its opinion. This confirms it was a mere opinion, hence it was *orbier* hence not binding to this court.

54. The obiter of the highest court is ordinarily persuasive to this court. A close examination of paragraph **289** shows that it supports the position taken by the petitioner that having participated in the invalidated election, he is entitled to contest. It reads:-

[289] It is clear that a fresh election under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. ***Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election****. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.*

55. Clearly, if the first and second Respondents were guided by the Supreme Court's opinion, they

cannot choose the paragraphs that favour them and ignore paragraph **289** reproduced above.

56. The other issue is whether in line with the said opinion, the petitioner contested the invalidated election in court. It is not disputed that the petitioner was admitted as an interested party in petition no. **1** of 2017 that led to the nullification of the results. He supported the petition. The position of an interested party was well captured by the Supreme Court in *Francis K. Muruatetu & Another vs Republic & 5 Others*[26] cited earlier where the court observed that *"… interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"*

57. To construe the statement by the Supreme Court to mean an interested party supporting a petition should not benefit from the decision of the court would in my view be jurisprudentially wrong. To the extent that the interested party supported the petition, then in my view he contested the results of election.

58. The next issue is whether the Supreme court interpreted Article **140 (3)** of the constitution. *Firstly,* the answer is no. As explained above, the Supreme Court has no jurisdiction to interpret the provision. Its mandate is limited to the earlier cited provisions. *Secondly*, as pointed above, the text relied upon is an *orbita*. It was an opinion rendered as the request of the Honourable Attorney General. It was not a pleaded issue canvassed by the parties to the suit.

59. *Thirdly*, and most important disposition of issues relating to interpretation of the constitution and determining constitutional questions must be formidable in terms of some constitutional principles that transcend the case at hand and is applicable to all comparable cases. There is no way the Apex court in the land could have approached such a grave constitutional issue in such a manner using hypothetical situations and words such as "suppose" to illustrate their point. They were merely rendering an opinion. Period.

60. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand.[27]The privy council in the case of *Minister for Home Affairs and Another vs Fischer*[28] while interpreting the Constitution of Bermuda stated that:-

"a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation… It is important to give full recognition and effect to those fundamental rights and freedoms……."

61. **Lord Wilberforce**, while delivering the considered opinion of the court in the above case observed:-

".....Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms……"

62. On the correct interpretation of Article **140 (3)** it is important to bear in mind that the starting point of interpreting a provision is the language itself. In the absence of an expressed intention to the contrary,

the language must ordinarily be taken as conclusive. *Thus, when the words are unambiguous, then this first canon is also the last, judicial inquiry is complete*.

63. There are important principles which apply to the construction of statues such as:- **(a)** presumption against "*absurdity"* – *meaning that a court should avoid a construction that produces an absurd result;* **(b)** the presumption against unworkable or impracticable result - *meaning that a court should find against a construction which produces "unworkable or impracticable" result*; **(c)** presumption against anomalous or illogical result, - *meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result* and **(d)** the presumption against artificial result – *meaning that a court should find against a construction that produces "artificial" result* and, lastly**,(e)** the principle that the law should serve public interest –meaning *that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise*."

64. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting the constitution, the court should give life to the intention of the document instead of stifling it.

65. Article **140 (3)** reads that "*If the Supreme Court determines the election of the president-elect to be invalid, a fresh election shall be held within sixty days after the determination*."

66. The constitution does not define *"fresh elections"* nor is it defined in the Elections Act. By Dictionary, a *runoff* is defined as *"a further competition, election, race, etc., after a tie or inconclusive result."* In Kenya, the runoff is between two leading candidates in Presidential Election. From these definitions, it is clear the election contemplated under article **140 (3)** is *not a runoff* contemplated under article **138 (5)** of the constitution. *It is a fresh election as the article states.*

67. Article **140** that deals with validity of presidential election and the petition there from. It prescribe in sub-article three **(3)** that *"If the Supreme Court determines the election of the President-elect to be invalid, **a fresh election** shall be held within sixty days after the determination*." It is the use of the word *fresh* in Article **140 (3)** that warrants a close scrutiny. In my view, the constitution envisages *a completely fresh* election.

68. However, it is important to point out that Article **138** that deals with Procedure at presidential election also has used the words *"fresh election*" when referring to what has been defined as a *runoff.* Sub-article five **(5)** states that:-*"If no candidate is elected, a fresh election shall be held within thirty days after the previous election".* The *fresh election* referred to in this sub-article is indeed what we know as a *runoff*. Further, this *fresh election* allows only **(a)** "the candidate, or the candidates, who received the greatest number of votes; and" **(b)** "the candidate, or the candidates, who received the second greatest number of votes."

69. My understanding of the Supreme Court opinion is that they took the view that the definition of *"fresh election*" as contemplated in Article **138** sub-article **5** should be imposed on Article **140**. My humble view is that if the draftsman or woman of the constitution indented so, then the provision could have captured it in clear terms. To me, Article **140 (3)** clearly talks of a *fresh election*.

70. It should be remembered that the provisions comes into play after the results are nullified by the Court. Nullify is defined as *"to make void, to render invalid." Nullification is "the act of making something void."*[29]

71. Article 140 (3) uses the word "invalid" which is defined as *"not legally binding, without basis*"[30]To me, the use of the above words require no elaboration, hence the use of the word "fresh election" which to me is the logical and natural interpretation that flows from the use of the said words. Fresh is defined as *"recent, not stale, characterized by newness without any material interval*"[31]"*not previously known or used; new or different...."*[32]

72. I am persuaded that the election envisaged under the above provision is a "new" election. The question that should follow is whether this would mean fresh nominations. It should be remembered that the same provision gives a time frame of **60** days within which the *fresh elections* should be held.

73. Applying the principles of interpretation enumerated above, and to avoid an interpretation that may lead to absurd results, it is my view that the **60** day period may not be adequate for *fresh nominations*. Hence, the logical construction which to me would serve public interest is that those who participated in the invalidated election do qualify to contest in the fresh election.

74. The daunting task of court through judges and intricacies embedded in the discharge of judicial functions with a view to achieving justice is eloquently captured in the immortal pronouncement of per Tobi J.C.A.0- Nigeria (as he then was) in the case of *Emesin vs. Nwachukwu***[33]** when His Lordship held thus:

"In doing justice according to law in a situation where there is an enabling statute, a court of law should allow itself or pet itself to follow the course of a liberal interpretation of the statute to accommodate the tenets of justice, while at the same time not throwing overboard the intention of the draftsman. ……

The day a court of law, which is also a court of justice, in the course of exercising its interpretative jurisdiction, yields or kowtows to arid legalism and abandons its primary function of doing substantial justice, a crisis situation permeates the entire system of administration of justice or the enforcement of the judicial process. Democracy in its shapeless and amorphous content and its twin brother, the rule of law, will be threatened in such a situation which will definitely result in anarchy. That will be a very strange and most unhappy moment for the judiciary. I hope that day does not come."

75. It is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole.***[34]*** To me, the articles **138 (5), (8)** and **140 (3)** create separate scenarios and imposing the scenarios in **138 (5) & (8)** on **140 (3)** would be an improper interpretation because the situations are different., They are real situations and not hypothetical.

76. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[35] It follows that the definition of *"fresh election"* as contemplated in Article **138** sub-article **5** should not be imposed on Article **140 (3)** since different scenarios are contemplated.

77. Having participated and supported the petition that nullified the elections, and even applying the *orbita* by the Supreme Court, I still find nothing to bar the petitioner from contesting in the *"fresh elections*."

78. The next issue is whether the impugned decision violates the petitioners constitutional rights under articles **38** and **27** of the constitution.

79. Article **10 (2**) of the Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

80. The constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies[36] and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.[37]

81. It is also important to emphasize the rights and fundamental freedoms in the Bill of Rights[38]— **(*a*)** belong to each individual and are not granted by the State; **(*b*)** do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter;[39] and **(*c*)** are subject only to the limitations contemplated in the Constitution.

82. Article **38** of the Constitution guarantees political rights which include the right to be a candidate for public office. *Undoubtedly, the right created under Article **38** in favour of citizens of Kenya to participate in the election process is an integral part (for the sake of convenience, I call it an ELEMENT) of the basic feature of democracy.*

83. There are two important points to note. The first is that the right to participation in the electoral process (which would include both voting and standing for election), is part of the basic structure of a democratic state. This would mean that restrictions upon participation in the electoral process can only be justified through very strong reasons, and in a way that the *core* of the basic feature – democracy – is not damaged.

84. Secondly – and even more significantly – while the rights under articles **38** and **27** are not absolute rights, they cannot "be limited except by law, and then only to the extent that the limitation is reasonable, justifiable in an open democratic society.[40] Any limitation must be subject to a three part test:- **(a)** a limitation will only be acceptable when 'prescribed by law; **(b)** when it is necessary and proportionate; and **(c)** when the limitation pursues a legitimate aim' namely:- the interests of national security or public safety; the prevention of disorder or crime; the protection of health or morals; or the protection of the rights and freedoms of others.

85. *Article **27** of the constitution guarantees the right to equality and freedom from discrimination.* Equality of rights under the law for all persons, male or female, is so basic to democracy and commitment to Human Rights.

86. The right to equal treatment, and the right not to be discriminated against, is a right vested in individuals. The Constitutional freedom to vote (and run for office) as an aspect of Article **38** is an individual freedom. Any action that specifically bars the petitioner, from participating in the democratic process, is unconstitutional unless it can be justified under the limitation clause. The right/freedom to vote, and the right/freedom to stand for office are conceptually inseparable, as they form equally integral parts of the democratic process.

87. The core issue for determination is whether or not the petition discloses a case to demonstrate that the decision complained of and/or the reasons offered for excluding the petitioner from the presidential contest amount to discrimination within the meaning of article **27** of the constitution.

88. To me, the guiding principles in a case of this nature are clear. The first step is to establish whether the gazette notice complained of differentiates between different presidential candidates. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. This is where the answer lies. Period.

89. I must add that if the discrimination is based on any of the listed grounds in Article **27 (4)** of the Constitution, it is presumed to be unfair. It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in article **27 (4)** of the constitution is made and established, the burden lies on the Respondent to prove that such discrimination did not take place or that it is justified.

90. The Judiciary is an essential component of our constitutional democracy and judicial authority is vested in the courts by the Constitution.[41] Allegations of actual bias or a reasonable apprehension of bias or discrimination certainly raise a constitutional issue.

91. The Constitution forbids unfair discrimination regardless of the context in which it occurs and irrespective of whether the perpetrator is the state or a private person. Article **27** provides that a person shall not discriminate directly or indirectly against another person on any ground including the grounds specified or contemplated in clause **(4).**

92. The Right to equality and Freedom from discrimination is protected by International and legal frameworks that Kenya is a signatory. The Constitution provides that general rules of international law, treaties and conventions ratified by Kenya shall form part of law of Kenya.[42] Article **2** of the Universal Declaration of Human Rights that:-

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

93 This is echoed in Article **2** of the African Charter on Human and People's Rights which states:-

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

94. Equality is one of the philosophical foundations of human rights and it is intimately connected to the concept of justice. The concept is expansive, but at its core, it speaks the language of the Universal Declaration of Human Rights (UDHR) of 1948, which stipulates that:- "*All are equal before the law and are entitled without any discrimination to equal protection of the law."* Equality at its core, communicates the idea that people who are similarly situated in relevant ways should be treated similarly.

95. The European Court of Human Rights defined discrimination as treating differently, without any objective and reasonable justification, persons in similar situations.***[43]*** At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups or status. To this extent, the goal of the Constitution should not be forgotten or overlooked.

96. The Canadian Supreme Court analysing the subject of discrimination stated:-[44]

*"This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society...***[45]***More than any other right in the Charter,……. . . Equality, as that concept is enshrined as a fundamental human right… means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate….distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."***[46]**

97. The Constitution is the Supreme Law of the Republic and binds all persons.**[47]**The constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance.[48] This court is obliged to protect and promote the purposes and principles of the constitution.[49] The constitution should be given a purposive, liberal interpretation. The court is bound to adopt the interpretation that most favours the enforcement of the petitioners' right to equality and non-discrimination. Such an interpretation inevitably leads me to the irresistible conclusion that the exclusion of the petitioner from the ballot in the elections scheduled for October 26th 2016 is a violation of his rights to political participation and is also unfair, hence, discriminatory.

98. The next question is whether the petitioner conceded defeat. The Supreme Court stated *"..... If the petitioner was only* ***one*** *of the candidates, and who had taken the second position in vote-tally to the President-elect, then the "fresh election" will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates* ***who did not contest the election of the President-elect, will be assumed to have either conceded defeat or acquiesced in the results as declared by IEBC; and such candidates may not participate in the "fresh election."***

99. The petitioner participated in the petition No. 1 of 2017 as an interested party and supported the petition which led to the nullification of the results. Can he assumed as having conceded the defeat" I do not think so. Having contested the election in that he participated in the petition as an interested party and supported the petition, he cannot be deemed to have conceded defeat. His further affidavit which has not been rebutted also explains the circumstances under which he issued a statement conceding defeat and the reason why he retracted the statement.

On the whole, I find no legal basis to justify the first and second Respondent's decision to exclude the petitioner from contesting the fresh elections.

Disposition

100. In view of my conclusions herein above, I finding that this petition has merits. Consequently, I find that the petitioner is entitled to the reliefs sought. Accordingly I make the following orders/declarations:-

a. ***A declaration*** *be and is hereby issued that the petitioner's rights under Article* ***38, 27*** *and* ***140 (3)*** *of the constitution have been and continue to be infringed, violated and/or denied by the first and second Respondents failure to include him as a presidential candidate in the fresh elections slated for the* ***26th*** *October 2017.*

b. ***An order*** *be and is hereby issued compelling the first and second Respondents to immediately issue a fresh Gazette notice and or amend the Gazette notice dated* ***5th*** *September 2017 by way of a*

corrigendum to include the petitioner herein as a presidential candidate for the Thirdway Alliance Party in the fresh election scheduled for 26th October 2017.

c. No orders as to costs.

Orders accordingly.

Dated at Nairobi this **11th** day of **October,** 2017

John M. Mativo

Judge

_____

[1] Petitions Nos. 3, 4, and 5 of 2013 (consolidated), {2013}eKLR

[2] In Brief Making and the use of Law Books, 3 edition at page 304

[3] {2016}eKLR

[4] Counsel cited Woods Manufacturing Co. vs The King {1951} S.C.R. 504 at page 515 and Youngsam R (oN THE Application of) vs The Parole Board {2017}EWHC 729

[5] Counsel cited Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR

[6] Counsel cited Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another {1970} E.A. 195

[7] Act No. 24 of 2011

[8] {1999}eKLR

[9]Counsel cited Judges and Magistrates Vetting Board & 2 Others vs The Centre for Human Rights and Democracy & 11 Others Pet No. 13A OF 2013) Consolidated with Pet no. 14 of 2013 & 15 of 2013)

[10] 19 U.S. 264 (1821)

[11] *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Walters*) at para 57, quoting Hahlo and Khan *The South African Legal System and its Background* (Juta and Co Ltd, Cape Town 1968).

[12] *True Motives 84 (Pty) Ltd v Mahdi and Another* [2009] ZASCA 4; 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA) (*True Motives*) at para 35.

[13] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay Ratepayers*) at para 27.

[14] See *Jafta v Minister of Law and Order and Others* [1991] ZASCA 1; 1991 (2) SA 286 (A) (*Jafta*) at 292-3 and *R v Crause* 1959 (1) SA 272 (A) at 281C-D.

[15] Supra Note 19

[16] *Durban City Council v Kempton Park (Pty) Ltd* 1956 (1) SA 54 (N) (*Kempton Park*) at 59D-F and *Rood v Wallach* 1904 TS 187 (*Rood*) at 195-6.

[17] What is said *obiter* and *obiter dicta* in a judgment are dealt with more fully below

[18] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317 (*Levinson*). See also *Jafta* above n 93 at 292-3; *R v Kaukakani* 1947 (2) SA 807 (A) at 813; and *Petersen v Jajbhay* 1940 TPD 182 at 190.

[19] Hahlo and Kahn *The South African Legal System and its Background* 6 ed (Juta & Co Ltd, Cape Town 1991) at 260 and *De Kock NO and Others v Van Rooyen* [2004] ZASCA 136; 2006 (6) BCLR 714 (SCA) at para 17.

[20] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317 (*Levinson*). See also *Jafta* above n 93 at 292-3; *R v Kaukakani* 1947 (2) SA 807 (A) at 813; and *Petersen v Jajbhay* 1940 TPD 182 at 190.

[21] In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at para 5.

[22] Fellner v Minister of the Interior {1954} 4 All SA 304 (A) at 315.

[23] *Hahlo and Kahn The South African Legal System and its Background (1968) at page 260.*

[24] Collett v Priest **1931 AD 290** at **302** DE VILLIERS CJ

[25] In Pretoria City Council v Levinson 1949 (3) SA 305 (A) SCHREINER at 317

[26] {2016}eKLR

[27] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[28] {1979} 3 ALL ER 21

[29] Black's Law Dictionary, Ninth Edition

[30] Ibid

[31] Ibid

[32] Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press

[33] {1999} 6 NWLR (Pt. 605) p. 169 para B – E

[34] Paul Ssemogerere and Others vs. The Attorney General, Constitutional Appeal no. 1 of 2002) [2004] UGSC10)

[35] Smith Dakota vs. North Carolina, 192 US 268(1940)

[36] Article 19. (1)

[37] Article 19.(2)

[38] Article 19 (1)

[39] Chapter 4 of the Constitution

[40] Article 24, Kenya Constitution

[41] Article 159

[42] Article **2 (5)** and **(6)**

[43]In **Willis vs The United Kingdom, No. 36042/97, ECHR 2002 – IV**

[44] In *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5. L'Heureux-Dubé J

[45] Big M Drug Mart Ltd [(1985) 13 CRR 64] at p.97 . . . (per Dickson J. (as he then was)).

[46] (See also the judgment of McLachlin J in Miron v Trudel (1995) 29 CRR (2d) 189 at 205.)

[47] Article 2(1)

[48] Article **259**

[49] Article **159 (2) (e)**