REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki Ndung'u and Lenaola, SCJJ)

PETITIONS NOs. 2 AND 4 OF 2017

(As consolidated on 14th November, 2017)

-BETWEEN-

JOHN HARUN MWAU…..1ST PETITIONER

NJONJO MUE…..2ND PETITIONER

KHELEF KHALIFA……..3RD PETITIONER

-AND-

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....…….....…….1ST RESPONDENT

CHAIRPERSON OF INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2nd RESPONDENT

H.E UHURU KENYATTA…….....3RD RESPONDENT

-AND-

EKURU AUKOT……..……1ST INTERESTED PARTY

ATTORNEY GENERAL…….....2ND INTERESTED PARTY

JUDGMENT OF THE COURT

A. TWO PRESIDENTIAL ELECTION PETITIONS: BACKGROUND

[1] On 8th August 2017, Kenya held its second general election under its 2010 Constitution, the Hon. Uhuru Muigai Kenyatta, the 3rd respondent, being declared the winner of the Presidential election. The Hon. Raila Amolo Odinga and the Hon. Stephen Kalonzo Musyoka, who had contested as Presidential and Deputy-Presidential candidates respectively, challenged the election, in ***Raila Amolo Odinga &***

Another v. The Independent Electoral and Boundaries Commission & 2 Others, Presidential Election Petition No. 1 of 2017, (hereinafter ***Raila 2017***). In a decision rendered on 1st September, 2017, with reasons reserved and delivered on 20th September, 2017, this Court, by a majority of four-to-two, nullified that election and, pursuant to Article 140(3) of the Constitution, directed the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh Presidential election within 60 days. IEBC conducted a fresh Presidential election on 26th October, 2017 and on 30th October, 2017 the Chairperson of IEBC declared the 3rd respondent as the winner, having garnered 7,483,895 out of the 7,616,217 valid votes cast.

[2] On 6th November, 2017, two petitions were filed challenging that election: *Petition No. 2 of 2017* by Mr. John Harun Mwau (hereinafter, 1st petitioner) and *Petition No. 4 of 2017* by Mr. Njonjo Mue together with Mr. Khelef Khalifa (hereinafter, 2nd and 3rd petitioners). These two petitions were on 14th November, 2017 consolidated, with petition 2 of 2017 being the lead file.

B. PARTIES

[3] The 1st petitioner describes himself as a patriotic Kenyan, a firm believer in the supremacy of the Constitution, the rule of law, justice, equality, equity, fairness, democracy and human rights. He describes himself as a stickler for the rule of law, who has never been involved, directly or indirectly, in any criminal activity.

[4] The 2nd and 3rd petitioners describe themselves as voters in Lang'ata and Nyali constituencies, respectively; and they filed their petition in that capacity.

[5] The 1st respondent, is an independent Constitutional Commission established under Article 88, as read with Articles 248 and 249 of the Constitution, and the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 [the IEBC Act]. It is the constitutional organ charged with responsibility for conducting and/or supervising national referenda, and elections for any elective body or office established by the Constitution, as well as other elections as prescribed by an Act of Parliament.

[6] The 2nd respondent is the Chairperson of the 1st respondent, and is the officer mandated under Article 138(10) of the Constitution to declare the result of a Presidential election, and thereafter deliver a written notification of the outcome to the Chief Justice and the incumbent President.

[7] The 3rd respondent was at all material times a Presidential election candidate on a Jubilee Party ticket, and was declared as the President-elect, in the fresh Presidential elections conducted on 26th October, 2017.

[8] The 1st interested party was at all material times a Presidential election candidate, on Thirdway Alliance Party ticket, and was enjoined as an interested party by a Ruling delivered by this Court on 14th November, 2017. The 2nd interested party is the Attorney-General of the Republic of Kenya, an office created under Article 156 of the Constitution, enjoined contemporaneously with the 1st interested party.

C. CAUSES

[9] Petition No. 2 of 2017 is based mainly on one legal issue: that the 1st and 2nd respondents failed to conduct fresh nominations for the election of 26th October, 2017, thus rendering the election null and void. Petition No. 4 of 2017 raises the following grounds:

"(i) The 2nd respondent did not conduct any nominations of presidential candidates in accordance with

the Constitution and the Law: the 3rd respondent was [thus] not validly, procedurally and/or lawfully nominated as a presidential candidate.

"(ii) The election conducted by the 1st and 2nd respondents on 26th October, 2017 failed to meet the general principles stipulated under Article 81(d) of the Constitution of Kenya: of universal suffrage based on the aspiration for fair representation and equality of vote.

"(iii) The election conducted by the 1st and 2nd respondents on 26th October, 2017 failed to meet the general principles stipulated under Article 81(e) of the Constitution of Kenya of a free and fair election, which is (sic):

(a) The election was not free from violence, intimidation, improper influence or corruption;

(b) The fresh election was not conducted by an independent body;

(c) The fresh election was not transparent; and

(d) The fresh election was not administered in an impartial, neutral, efficient, accurate and accountable manner.

"(iv) The fresh election was further marred by illegalities and irregularities; and

"(v) Given the prevailing conditions and circumstances, the 1st and 2nd respondents could not and should not have proceeded with the conduct of the fresh election on 26th October, 2017."

1. The Grievances

(a) The Issue of Nominations

[10] The 1st petitioner contends that upon the nullification of the presidential election held on 8th August, 2017, no process pertaining to that election had been saved, or carried forward: and consequently, all the documents, processes, including nominations of candidates, and issuance of nomination certificates became spent as at 5.00 pm on 8th August, 2017, and were no longer usable in any other Presidential election; and in the circumstances, and as nomination was a mandatory requirement for any election, the 1st and 2nd respondents were obliged to carry out fresh nomination under Article 137 of the Constitution as read with Sections 14 and 23 of the Elections Act as well as Regulations 11, 12, 18, 19 and 51 of the Elections (General) Regulations, 2012; and the nominated candidates were also required to pay the requisite nomination fee of Kshs. 200,000/- and be issued with new nomination certificates to contest in the fresh Presidential election.

[11] The 1st petitioner contends that, after omitting the nomination stage, the 1st and 2nd respondents, on 5th September, 2017 published *Special Gazette Notice* No. 8751, Vol. CXIX-NO. 130 stating, *inter alia*, that there shall be no nominations for candidates participating in the fresh presidential election and that, pursuant to the decision of the Supreme Court in ***Raila Odinga v. IEBC & Others,*** Petition No.5 of 2013 (hereinafter ***Raila 2013*****),** the fresh Presidential election to be held on 17th October, 2017 would be a contest between the Hon. Uhuru Kenyatta with his running mate, Hon. William Samoei Ruto, and the Hon. Raila Amolo Odinga with his running mate Hon. Stephen Kalonzo Musyoka. By another *Special Gazette Notice*, No. 9800 Vol. CXIX—No. 145 of 29th September, 2017, the 1st respondent changed the election date from 17th October, 2017 to 26th October, 2017, while also stating that the campaign period would run from 15th September, 2017 to 24th October, 2017.

[12] The 1st petitioner further avers that despite the disqualification of Mr. Cyrus Shakhalaga Khwa Jirongo under Articles 137 and 99(2)(f) of the Constitution, and the gazettement of that disqualification in *Special Gazette Notice* No. 10152 , Vol. CXIX—No. 153 of 13th of October, 2017, on 24th October, 2017, barely 24 hours to the election, and without according him any time to campaign, the 1st and 2nd respondents reinstated that candidate, by *Special Gazette Notice* No. 10562 Vol. CXIX-NO. 160, for the fresh election of 26th October, 2017.

[13] He contends that the 3rd respondent not having been validly nominated as required by Articles 137 and 138(1) and (2) of the Constitution, Sections 14 and 23 of the Elections Act, as well as Part IV, IX, and XII of the Elections (General) Regulations, was not qualified to participate in the fresh Presidential election, nor capable of being declared elected under Article 138(4) of the Constitution: and so, his election on 26th October, 2017 was unconstitutional, and should be nullified once again.

[14] In Petition No.4 of 2017, the 2nd and 3rd petitioners similarly contend that nomination under Section 14 of the Elections Act is a requirement for any election, including a Presidential election; and that a nomination certificate issued to a candidate under that Section is valid only for the election for which it is issued. Consequently, it is contended, the nomination certificates issued to the Presidential election candidates for the 8th August, 2017 election expired upon the nullification of that election. It follows, in their view, that the 1st respondent was obliged to conduct the nomination of candidates for the fresh election held on the 26th October, 2017, and to issue them with new certificates. The petitioners urged that there was no basis for the fresh election held on 26th October, 2017; and hence, the election of the 3rd respondent was invalid *ab initio,* is for annulment.

(b) Universal suffrage and fair elections

[15] The 2nd and 3rd petitioners urge the point that universal suffrage denotes the right of every adult citizen to vote, which the 1st respondent is required to ensure, under Article 81(d) of the Constitution. They contend that if two or more Presidential election candidates are nominated, Article 138(2) of the Constitution requires that an election shall be held in each and every constituency. Their standpoint is that there had been a violation of this requirement, as such full-scale voting was not realized on 26th October, 2017. They contend that, without any legal basis, and contrary to Article 47(1) and (2) of the Constitution, the 1st and 2nd respondents arbitrarily and unilaterally decided that no election would be conducted in certain constituencies: Alego-Usonga, Awendo, Bondo, Gem, Ugenya, HomaBay, Kabondo-Kasipul, Karachuonyo, Kasipul, Kisumu Central, Kisumu East, Kisumu West, Muhoroni, Ndhiwa, Nyakach, Nyando, Nyatike, Rangwe, Rarieda, Rongo, Seme, Suba North, Suba South, Suna East, Suna West, Ugunja, and Uriri. They impugn this action as having denied many voters their right to vote. Besides, as regards Turkana Central and Fafi Constituencies, they claim that the election was conducted on 28th October, 2017 while counting and tallying was already in progress in other constituencies, and that this degraded and undermined the quality of the vote in those two constituencies. Their specific argument is that Article 81(d) of the Constitution, as read with Article 138(2) thereof, was violated, and the election in question rendered a nullity.

(c) Free and fair election

[16] In addressing the above issue, the 2nd and 3rd petitioners raised a number of sub-issues which are enumerated below:

(i) Effect of violence, intimidation, improper influence, and corruption

[17] The 2nd and 3rd petitioners aver that, contrary to Article 38 of the Constitution which safeguards the

right to free, fair and regular elections, based on universal suffrage and Article 81(e)(ii) of the Constitution, the election of 26th October, 2017 proceeded amidst riots and violent demonstrations by people perceived as National Super Alliance (NASA) supporters in Western Kenya counties, Mombasa County and some areas of the Coast region, as well as in certain constituencies in Nairobi County: the effect being an extraordinarily low voter-turnout. In their perception, there were situations of threat and violence against IEBC's staff, which led to relocation of polling stations in Kibra in Nairobi, and the cancellation of elections in the said 27 constituencies.

[18] On behalf of the 2nd and 3rd petitioners, Mr. Njonjo Mue made depositions to the effect that the 3rd respondent had, on 2nd September, 2017, launched a "Jubilee Women Brigade" whose members appeared publicly in military and police attire, with their leaders administering oaths on new members in places such as West Pokot, Nakuru, Mombasa and Nairobi, even as their leaders addressed some of the 3rd respondent's campaign rallies. On this averment, it was contended that there had been a "militarization" of the fresh Presidential election, with the object of having an intimidating effect upon voters who were not supporting the Jubilee Party, associated with the 3rd respondent's campaigns.

[19] In her affidavit, of 5th November, 2017, in support of petition No. 4 of 2017, Ms. Perpetua Adar, citing reports of election observers such as the European Election Observation Mission; the Election Observation Group (ELOG); Kenya National Commission on Human Rights (KNCHR) and the Independent Medico-Legal Unit (IMLU) and others, deposed that the election of 26th October, 2017 was held in a tense and polarized political environment characterized by violence, which involved cases of deaths in Nairobi, Busia, Migori, Kisumu and Athi River areas, getting to a total of 37. She further deposed that as a result of the said violence and intimidation, only Jubilee Party election agents were present in most polling stations, posing a risk of vote-count error and manipulation.

[20] Another deponent, Ms. Nasanga Aki averred that, due to the heavy police presence and to clashes, involving menacing and rowdy youths, there had been no voting in most parts of Western Kenya. She averred that at Keveye Youth Polytechnic, and Waluka Primary School polling stations, youths had barricaded the entrances to the stations, barring voters from accessing them. She deponed that at Majengo Shopping Centre, youths forcefully examined the fingers of passers-by, to confirm if they had voted; and that this scared off many voters, leading to low voter turn-out in Vihiga County.

[21] The 2nd and 3rd petitioners contend that on election day, scenes of militia groups, increased administration, and taking of oaths, prayers, and practices previously associated with the secret Mungiki sect, had been witnessed. These petitioners attributed cases of violence, killings, rape and other atrocities in areas deemed NASA strongholds, to the police. The petitioners also alleged that police and persons dressed in police uniform had broken into houses in some parts of the country, beaten up and maimed men, and raped women, with the effect of provoking the voters in certain regions to resent voting in the fresh Presidential elections.

[22] The 1st and 2nd petitioners further alleged that the 3rd respondent, as a candidate and as the incumbent President, had uttered words calculated to intimidate the Judiciary, and this Court in particular. It was alleged that such threats had the consequences of keeping off voters, who believed that a Presidential election being a process ending with dispute resolution by the Supreme Court, would be destined to favour the 3rd respondent.

[23] The 2nd and 3rd petitioners also accuse the 3rd respondent and his Acting Cabinet Secretary for the Interior and Co-ordination of National Government, of abuse of their positions by declaring 25th October, 2017 a public holiday, with the intention of interfering with the constitutional mechanism for the determination of Presidential election disputes, and frustrating the hearing of cases filed to challenge the

fresh election. It was claimed that the declaration of public holiday had specifically frustrated the hearing of Supreme Court Petition No. 17 of 2017 ***Khelef Khalifa & Others v. Independent Electoral and Boundaries Commission & Others*** and Civil Appeal No. 359 of 2017, ***Orange Democratic Movement v. Ekuru Aukot & Others*** in the Court of Appeal.

[24] The 2nd and 3rd petitioners furthermore accuse the 1st respondent of failure to ensure compliance with Regulations 3, 6, and 7 of the Code of Conduct for Political Parties, which forbid engaging in and/or condoning violence, intimidation, or misuse of public resources. They contend that the election of 26th October, 2017 was marred by improper influence, and corruption. They accused the 3rd respondent of unlawful use of public resources, by directing Cabinet Secretaries, Mr. Mwangi Kiunjuri, Ms. Sicily Kariuki, Mr. Eugene Wamalwa, Dr. Fred Matiang'i and Mr. Najib Balala and other Senior State officers, to play a role in his campaigns. They also accuse the 3rd respondent of publishing advertisement of Jubilee Party Government achievements in the electronic media, and the Government delivery portal, as a scheme of improper influence upon voters to support his re-election bid, contrary to law.

[25] The 2nd and 3rd petitioners also aver that Members of Parliament of the Jubilee Party, with the concurrence of the 3rd respondent, passed the *Election Laws (Amendments) Act, 2017,* which amended certain provisions of the electoral laws and regulations which the Supreme Court had interpreted and relied upon in its 1st September, 2017 determination of ***Raila 2017***. They contend that the consequence has been a scale-down of the use of technology during presidential elections, such as would expose elections to manipulation; and that this is a signal to the voters that it would not be possible to successfully challenge the results of a fresh Presidential election, even where the process was unconstitutional, unlawful or irregular.

[26] In summary, it is the 2nd and 3rd petitioner's contention that the alleged acts of violence and undue influence had polluted the voting environment, and seriously undermined free voting in the fresh Presidential election in most parts of the country, so that the relevant election cannot be said to have been an election at all.

(ii) Independence and impartiality

[27] It is the 2nd and 3rd petitioners' case on this issue that although the 2nd respondent, and all IEBC commissioners, are State Officers, bound by Article 73 of the Constitution to demonstrate public confidence in their integrity and leadership, the 3rd respondent compromised their independence, right from the inception of the Commission. They claim that this is because, on 10th October, 2016, the 3rd respondent appointed Mr. Evans Monari, an Advocate who acted for him in the ***Raila 2017*** case, and who also acts for the Jubilee Party, as a member of the selection panel that appointed the 2nd respondent, and the 1st respondent's Commissioners. They urge, in that regard, that the 3rd respondent's action aforesaid eroded the 1st and 2nd respondents' integrity in the conduct of the fresh Presidential election. These petitioners also contend that, Mr. Monari acted for the 1st respondent in the High Court case, ***John Harun Mwau v. Independent Electoral and Boundaries Commission & Others,*** Petition No. 514 of 2017, and that this indicates his influence on the decision making processes of the 1st and 2nd respondents.

[28] The 2nd and 3rd petitioners further contend that, contrary to Article 81(e)(iii) and (v) of the Constitution, the administrative decisions of the 1st and 2nd respondents were taken under the influence of the 3rd respondent and/or his political party. In his supporting affidavit, the 2nd petitioner deponed that, at the behest of the Cabinet Secretary for Education who is also the Acting Cabinet Secretary for Interior and Co-ordination of National Government, the 1st and 2nd respondents had scheduled the fresh presidential election to be held on 17th October, 2017, purportedly so as not to interfere with the national

schools' examination calendar, though, following public outcry on the short period given for the election, and upon the realization that the KIEMS Kits could not be reconfigured in time for an election on 17th October, 2017, the election date was changed to 26th October, 2017. Such a fact, it was urged, indicated that the 1st and 2nd respondents were not in control of the election calendar, contrary to expectations.

[29] The 2nd and 3rd petitioners also claim that on 5th September, 2017, the 2nd respondent wrote a letter to the CEO/Secretary to the 1st respondent, Mr. Ezra Chiloba, demanding answers to 12 questions, a resolution to which was necessary to guarantee a free and fair fresh election. However, the 3rd respondent's running-mate, as well as the Jubilee Party, allegedly defended the CEO/Secretary, and directed that the letter be not responded to, or acted upon; and thereafter, on 7th September, 2017, five Commissioners of the 1st respondent issued a separate press statement alleging that the letter had not been sanctioned by the 1st respondent as a body; and so, to date, the issues raised in the letter have not been addressed.

[30] The petitioners stated that, on 5th September, 2017, the 2nd respondent had notified the public of the appointment of a seven member project team, excluding the CEO/Secretary and several other staff of the IEBC, to oversee the fresh election. This was followed, on 6th September, 2017 by the 3rd respondent's party writing to the 1st and 2nd respondents, advising against the exclusion of seven members of staff from the conduct of the election¾on grounds of partisanship. In response, the 1st and 2nd respondents allegedly assured the public that the 2nd respondent "shall not be subject to direction or control by any person or authority". The project team idea was thereafter abandoned and the CEO/Secretary proceeded to oversee the preparation of the fresh election; and it was urged that the 3rd respondent had substantial influence on the decision-making processes of the IEBC, despite public statements to the contrary.

(iii) Neutrality, efficiency, accuracy and accountability

[31] The 2nd and 3rd petitioners urge that IEBC's decisions have been unpredictable, capricious, and not based on or backed by law, or lawful authority. One of the instances they cite is that, in a press release on 8th September, 2017, the 1st and 2nd respondents had notified the public that they were ready to hold fresh election on 17th October, 2017, but later, this proved impracticable, and they switched to 26th October, 2017. Another instance is that, on 11th September, 2017, the 1st and 2nd respondents departed from the public announcement of 6th September, 2017 in respect of the project team which they had formed to conduct the election; and they now stated that it had "agreed to review and streamline the operationalization of the project team for purposes of efficient and effective delivery of the fresh election." The CEO/Secretary who had been relieved of certain tasks, would now lead the team, and would later respond to the 12-point letter from the Chairman.

[32] It is part of the 2nd and 3rd petitioners' case that, there being no fundamental changes to the operations of the 1st respondent, in line with the National Super Alliance (NASA) Coalition of parties' "irreducible minimum" demands, before the fresh election was held, the NASA presidential candidate, the Hon. Raila Odinga, on 10th October, 2017 notified the 2nd respondent in writing that he had elected to withdraw from the fresh Presidential election. The petitioners claim, in that regard, that the said withdrawal had the effect of triggering the vacation of the fresh Presidential election scheduled for 26th October, 2017, "by operation of law." They thus censure the 1st and 2nd respondents for going ahead and holding the election as scheduled, and moreover, with NASA's Presidential candidate's name included on the ballot paper, on the basis that the withdrawal was not made in Form 24A as required by law.

[33] The petitioners censure the repeat Presidential election on the ground that the IEBC state-of-

election preparedness address of 25th October, 2017 was questionable; as the respondent was still grappling with critical issues affecting the election: such as the validity of the appointment of Returning Officers. They also stated that it had emerged that the 2nd respondent had made a significant change to the mode of transmission of election results, and that whilst the KIEMS had been reconfigured to transmit both text and images in the results-management process, it had now been decided that only the scanned images of the relevant result forms, without accompanying text, would be transmitted and posted on the portal. The 2nd and 3rd petitioners gave such a resolution by IEBC as evidence of uncertainty and unpredictability, prior to, and in the conduct of the election.

[34] The 2nd and 3rd petitioners further censure the election process as abdicating Commissioner, one Ms. Roselyne Akombe, had flown out and made a speech in New York, on 17th October, 2017, expressing herself on the issues and challenges that had afflicted the 1st respondent in the conduct of the 26th October, 2017 election. It was alleged that Ms. Akombe's misgivings had been replicated in a press statement by the 2nd respondent ¾ and that this gave proof that he could not have conducted credible elections on 26th October, 2017.

[35] As regards Dr. Ekuru Aukot, who was one of the candidates in the election of 8th August, 2017 Presidential election, the 2nd and 3rd petitioners reprobated High Court Petition, No. 471 of 2017, ***Dr. Ekuru Aukot v. Independent Electoral and Boundaries Commission & Others,*** which allowed his petition, and ordered his inclusion in the fresh election, on 13th October, 2017. But, on the basis of that Court's Order, the 2nd respondent published a *corrigenda* to *Gazette Notice* No. 8751 of 2017, and included all the other candidates who had contested in the 8th August, 2017 election, with the exception of Mr. Jirongo who had been barred on legal grounds from doing so. Mr. Jirongo's name was, however, reinstated on 18th October, 2017¾a position also censured by the petitioners herein. The petitioners' stand is that the 2nd respondent, at all times, acted without direction, lacked partiality, was inefficient, and was not accountable to the people of Kenya, as required under the Constitution.

d. Illegalities and irregularities

[36] The 2nd and 3rd petitioners contend that, apart from the failure to conduct nominations, the 26th October, 2017 presidential election was fraught with illegalities and irregularities: these including several complaints that: (i) the High Court, in Judicial Review Application No. 628 of 2017***, Khelef Khalifa & Hassan Abdi v. Independent Electoral and Boundaries Commission*** had held that the appointment of ungazetted and undesignated returning and presiding officers was illegal, yet such officers still presided over the election; (ii) ballot papers had as candidates the names of the Hon. Raila Odinga, who had withdrawn from the election, and Mr. Jirongo, who had been constitutionally disqualified; (iii) there was arbitrary relocation of polling stations in Kibra, Kaloleni and Changamwe Constituencies; (iv) there was dishonest posting of results in polling stations, such as St Mary's Polling Station in Mombasa County, where there was no voting at all; and (v) there was tampering with the Voters Register.

[37] On the issue of the Voters' Register, the 2nd and 3rd petitioners averred that, contrary to representations made by the 2nd respondent that it would put in place a biometric Voters Register that was secure and accurate, the averments of Mr. Billy Atudo's notes unexplained changes in the total number of registered voters, between 30th June, 2017 (the date of gazettement of the Register, for purposes of the General Election) and 26th October, 2017. They contend that this is evidence that, contrary to Articles 10, 38, 86, 88 (4)(b) of the Constitution, and Sections 4, 5, 6, 6A, 7, 8 and 8A the Election Act, the 2nd respondent had revised the Voters' Register less than 60 days to the election date. He further deposed that at least 28% of the people who turned out to vote in the fresh election could not be identified biometrically. The petitioners contended that, whereas in the KPMG Voters Register Audit, only 5,000 voters had been classified as lacking biometric records, in the 26th October, 2017 fresh

presidential election, only 5,525,487 out of the 7,653,930 voters were identified on the KIEMS kits by their fingerprints, and 1.6 million voters were not biometrically identified, while a total of 78,124 voters could not be accounted for in the KIEMS kit at all. The petitioners, furthermore, aver that, in some areas, the 2nd respondent deliberately, or otherwise, failed to use the biometric system of voter identification, in order to misrepresent the voter turn-out. These, together with the discrepancies noted between voter turn-out as recorded in Forms 34A and as captured/recorded in OT-Morpho's KIEMS Kits records/logs, in their view, bring to question the credibility of the election.

[38] On the issue of alleged manipulation of election results, Mr. Billy Atudo deponed that an examination of Form 34A from Stream 1 polling station in Bura Ward of Fafi Constituency in Garissa County, as seen by Kura Yangu Sauti Yangu (KYSY) observers, recorded 115 votes for Mr. Uhuru Kenyatta, 2 votes for Mr. Abduba Dida, and 117 total valid votes while the one posted on the IEBC portal revealed that 415 votes were cast for Mr. Uhuru Kenyatta, and 2 for Mr. Abduba Dida; and the copy of that form had the KYSY agent's signature, while that posted on the IEBC portal did not have. The petitioners contend also that, due to violence and police presence, only 2 people voted in two polling centres in Kibra constituency (Sarangombe and KAG Olympic Educational Centre) with 3,158 and 3,588 registered voters respectively, and that with the relocation of those polling stations on voting day without notice, a total of 6,744 voters had been disenfranchised.

[39] The 2nd and 3rd petitioners also urge that there was lack of transparency in the conduct of the 26th October, 2017 election, and that contrary to its many public assurances, the 2nd respondent failed to disclose the final voter turnout by the close of polling.

[40] As examples of alleged obscurity on the part of the 2nd respondent, the 2nd and 3rd petitioners state that these include, gazettement of the names of only two presidential candidates at first, and then including other names later, changing the structure of electronic transmission of results; and announcing that elections in 25 constituencies had been postponed, and then cancelling them later.

e. Negative conditions and circumstances, during election

[41] It is the 2nd and 3rd petitioners' case that the totality of the foregoing grounds, evidence and factors show that, from the onset, the election of 26th October, 2017 was illegal, null and void *ab initio*. It is claimed that, the environment before, and on the date of the election, was so polluted, marred and tainted with violence, intimidation, partisan interests, and undue influence, and it was quite clear and foreseeable, that the 1st and 2nd respondents could not conduct a free and fair election.

[42] The foregoing perception rests on the fact that following the nullification of the 8th August 2017 Presidential election, the 2nd respondent had issued a press statement, calling on the Director of Public Prosecutions (DPP) to investigate and prosecute any member of the IEBC who may have been involved in election malpractices; and that the 1st respondent would make internal changes to its staff, ahead of fresh Presidential election. It also rests on the statement that the 1st respondent's CEO/Secretary had issued a memorandum on 1st September, 2017 to the 1st respondent's staff, contradicting the position taken in the said press statement.

[43] The petitioners contended that the 2nd respondent had publicly admitted, a few days to the election that as he had no control over the 1st respondent (the IEBC), he was not able to guarantee a free and fair election; and that the 2nd respondent had left no doubt whatsoever that the electoral process of 26th October, 2017 was a waste of time, money and resources.

[44] The 2nd and 3rd petitioners contend that the 1st and 2nd respondents did not make any diligent or

reasonable effort to conduct a free, fair and credible election, as required of them; and that the environment and the circumstances in which they held the fresh election had, produced an absurd outcome, given the voter turnout of 38%.

2. Quest for Reliefs

[45] On the basis of the foregoing averments and allegations, the 1st petitioner sought the following reliefs:

(a) a declaration that the acts of the 1st and 2nd respondents of failing to conduct the elections "strictly in accordance with the Constitution and electoral laws", as directed by the Supreme Court, amounted to disobedience of a Court Order;

(b) A declaration that the 1st and 2nd respondents' act of failing to publish the nomination day in the notice initiating the fresh Presidential election of 26th October, 2017 was unconstitutional, illegal, invalid, irregular, and in violation of Articles 88(4)(d)(f) & (K), (5), 82(1)(b), 137, 138(1)(2) and 8(a)of the Constitution, Sections 14 and 23 of the Elections Act and Regulation 11(1), and 12(1) of the Elections (General) Regulations, 2012;

(c) a declaration that the failure by the persons listed as candidates to deliver to the 1st and 2nd respondents, at least five days to the day fixed for nomination, the lists bearing the names, respective signatures, identity cards or passport numbers of at least two thousand voters registered in each of a majority of the counties, in standard A4 sheets of paper and in an electronic form for the fresh Presidential election of 26th October, 2017 was unconstitutional, unlawful and a violation of Articles 137, 138(1)(2) and (8), of the Constitution, Section 23 of the Elections Act, and Regulation 18 of and part IV of the Elections (General) Regulations, 2012;

(d) a declaration that the acts of the 1st and 2nd respondents of deliberately failing to collect the prerequisite mandatory Presidential candidates' nomination fees of Kshs. 200,000/- was unlawful, illegal, irresponsible, a dereliction of duty, and in breach of Articles 88(4)(d)(f) & (K), (5), 82(1)(b), 137, 138(1)(2) and 8(a)of the Constitution, Section 23 of the Elections Act, and Regulation 19 of part IV of the Elections (General) Regulations, 2012;

(e) a declaration that the failure of the persons listed as candidates to pay the nomination fees for the fresh Presidential elections held on 26th October 2017 of Kshs.200,000/-, while nonetheless proceeding to participate as candidates, was illegal and in violation of Articles 137, 138(1)(2) and 8(a) of the Constitution, Section 23 of the Elections Act, and Regulation 19 and part IV of the Elections (General) Regulations, 2012;

(f) a declaration that a person who has not been validly nominated under Articles 137 and 138 (1) and (2) of the Constitution, Section 23 of the Elections Act, and Regulation part IV, IX and XII of the Elections (General) Regulations, 2012 is precluded from being a presidential candidate;

(g) a declaration that the fresh Presidential elections held on 26th October 2017 were held in clear violation of Article 138(2) of the Constitution, as no two or more persons were nominated;

(h) a declaration that a person who is not validly nominated cannot have his or her name validly printed on the ballot paper as a candidate, and this is clearly, a violation of Regulation 68(4) (a) of the Elections (General) Regulations, 2012;

(i) a declaration that the ballot paper at the Presidential election of 26th October 2017 containing names of individuals not validly nominated as candidates for presidential elections, was illegal, and contrary to Articles 137 and 138 (1) and (2) of the Constitution, Section 23 of the Elections Act and Regulation 68(4)(a) and part IV, IX and XII of the Elections (General) Regulations, 2012;

(j) a declaration that the ballot paper containing the names of individuals who are not nominated as candidates, is unconstitutional, illegal and invalid.

(k) a declaration that the acts of the 1st and 2nd respondents of publishing waiver of nomination of candidates via *Special Gazette Notice* No. 8751 Vol. CXIX-No. 130 of 5th September, 2017 was *ultra vires* and their mandate authority and powers and was therefore invalid null and void;

(l) a declaration that the acts of the 1st and 2nd respondents, of granting two persons listed as Presidential candidates a campaign period of 48 days from the 6th of September to the 24th of October, 2017 was unconstitutional, as it was discriminative, unfair, not transparent, and contrary to Constitution and applicable laws;

(m) A declaration that the acts of the 1st and 2nd respondents, of listing five persons as candidates for Presidential election (*Gazette Notice* No. 10152, Vol. CXIX-NO 153 of 13th October, 2017), without going through a nomination process and collecting the prerequisite fee was in violation of Articles 137 and 138 (1) and (2) of the Constitution, Section 14 and 23 of the Elections Act, and Part IV,IX and XII of the Elections (General) Regulations, 2012; precluded from being a presidential candidate;

(n) A declaration that the acts of the 1st and 2nd respondents of listing five persons as candidates for Presidential election 13 days prior to the election of 26th October, 2017 *(Special Gazette Notice)* No. 10152, Vol. CXIX-NO 153 of 13th October, 2017 violates Section 14 of the Elections Act, 2011, is irregular, illegal, unconstitutional and null and void;

(o) a declaration that the acts of the 1st and 2nd respondents of naming Shakhalaga Khwa Jirongo as one who does not qualify as a candidate for the 26th October 2017 fresh Presidential election under Article 137 and 99 (2) (f) of the Constitution *(Special Gazette Notice)* No. 10152, Vol. CXIX-NO 153 of 13th October, 2017 without going through a nomination process was deceitful, discriminative, illegal and irregular, as having published a *Special Gazette Notice* that there shall be no nomination, purporting to have carried out nomination for one person was discriminatory;

(p) a declaration that the acts of the 1st and 2nd respondents, of having the name of Shakhalaga Khwa Jirongo printed on ballot papers while they had already declared *Special Gazette Notice* No. 10152, Vol. CXIX-NO 153 of 13th October, 2017 that he was not qualified was not transparent, not fair, not accurate contrary to Article 81(e) of the Constitution;

(q) a declaration that acts of the 1st and 2nd respondents denying Shakhalaga Khwa Jirongo the statutory and mandatory campaign period is not transparent and is a violation of Article 38, and was also unfair, opaque and inaccurate, and in violation of Article 81(e) of the Constitution;

(r) a declaration that the act of the 1st and 2nd respondents publishing that *Special Gazette Notice* No. 10562, Vol. CXIX-No 160 of 24th October, 2017 listing one person by the name of Shakhalaga Khwa Jirongo as a candidate on 24th October, 2017, was an act that on its face appears to have rescinded their earlier position, but does not disclose the day when the campaign period closed which was 48 hours before elections also unfair, was opaque, inaccurate, and in violation Article 81(e) of the Constitution.

(s) a declaration that the acts of the 1st and 2nd respondents in conducting the elections of 26th October, 2017 without any person being nominated as Presidential candidate, were unconstitutional, a breach of the electoral law, irregular and un-procedural, for failing to enforce Article 138 (8)(a) and (9) of the Constitution and Regulation 51(3A) of the Elections (General) Regulations, 2012.

(t) a declaration that as a result of all these violations of the Constitution, Elections Act, Elections (General) Regulations, and proceeding to conduct fresh Presidential elections without nominated candidates, nominations without fees, and without giving persons listed as candidates equal campaigning period, the respondents' acts directly affected the conduct and results of the fresh Presidential elections of 26th October 2017;

(u) a declaration that the deliberate violation of Articles 81, 88(4)(d)(f) & (k), (5), 82(1)(b), 137, 138(1)(2) and 8(a)of the Constitution, Sections 14 and 23 of the Elections Act and Regulation 11(1), 12(1), 68(3)(4)(a) and part IV, IX and XII of the Elections (General) Regulations, 2012 by the 1st and 2nd respondents and all the persons who participated in the elections of 26th October, 2017 affected the conduct and results of the said election;

(v) a declaration that the election of the President-elect in the fresh Presidential election held on 26th October, 2017 pursuant to Article 140 (3) of the Constitution is invalid;

(w) the petitioner be awarded costs of the petition, together with interests at Court rates.

[46] The 2nd and 3rd petitioners sought the following reliefs:

(a) immediately upon the filing of the petition, the 2nd respondent do avail all the election materials, including polling-day diaries, electronic documents, devices and equipment for the Presidential election, and the Forms 32A used in the complementary system within 48 hours;

(b) immediately upon the filing of the petition, the 2nd respondent do avail and deposit with the Court all the Secure Digital (SD) Cards from the KIEMS Kits that were used, unused or expected to be used in the fresh election, whether deployed or not;

(c) an Order that the 1st and 2nd respondents produce and give access to the petitioners to the full and un-redacted KPMG Audit Report on the Voter Register, including all sections of the Report that have not been made publicly available;

(d) a specific Order for scrutiny of all the Forms 32A and the polling day diaries prepared by the Returning Officers;

(e) an Order for scrutiny and audit of all the returns of the Presidential election including, but not limited to Forms 34A, 34B and 34C;

(f) a declaration that the non-compliance, irregularities and improprieties in the Presidential election were substantial and significant, and affected the result thereof;

(g) a declaration that the fresh election held on 26th October, 2017 was not conducted "in strict conformity with the Constitution and the applicable law" rendering the declared result invalid, null and void;

(h) a declaration that the 1st and 2nd respondents were obliged to carry out fresh nomination of

candidates in order to conduct a fresh election under Article 140(3);

(i) a declaration that the 3rd respondent was not validly declared as the President-elect, and that the declaration is invalid, null and void;

(j) a declaration that Section 83 of the Elections Act (as amended) is unconstitutional and invalid, to the extent of its inconsistency with the Constitution of Kenya;

(k) an Order directing the 2nd respondent to organize and conduct a fresh Presidential election "in strict conformity with the Constitution and the Elections Act", and to commence the process by conducting fresh nominations;

(n) following a declaration of invalidity and issuance of an Order for the conduct of a fresh Presidential election, and in light of the twice-impugned conduct of the 1st and 2nd respondents, this Court do issue just, fit and appropriate Orders as the circumstances warrant;

(m) in the interest of the public, each party to bear their own costs of the petition; and

(n) any other Orders that the Court may deem just and fit to grant.

(a) Nominations: Respondents' Case

[47] The 1st respondent filed a response to the petition dated 11th November, 2017, as well as a replying affidavit of even date, by Mr. Marjan Hussein Marjan, its acting Chief Executive Officer.

[48] The 2nd respondent filed a response to the petition on 12th November, 2017 and an affidavit, of even date. He adopted the 2nd respondent's response, in totality.

[49] The 2nd respondent further depones that he had declared the 3rd Respondent as President-elect on 8th August, 2017 in accordance with the returns made to the National Tallying Centre of the electoral process, but that this Court, in ***Raila 2017,*** on 1st September, 2017, invalidated his declaration, and ordered the 1st respondent to conduct a fresh Presidential election, "in strict conformity with the Constitution and the electoral laws."

[50] It is the averment of the 1st and 2nd respondents that there were only 60 days to conduct a fresh Presidential election, following the annulment of the first Presidential election by the Supreme Court. They contend that time was of the essence, as fresh ballot papers and election material had to be procured. It is their case further, that the repeat Presidential election was organized and conducted "in strict conformity with the Constitution", the ***Raila 2013*** decision, the ***Ekuru Aukot*** decision and the applicable election laws, within the prescribed time-frame of 60 days.

[51] The 2nd respondent, furthermore, states that no legislative framework has been put in place under Article 140 (3) of the Constitution, the Elections Act, and the Regulations thereunder, for the conduct of such a repeat election; and it thus became necessary for it to seek legal advice on which candidates should participate in the said election.

[52] The 2nd respondent adds that the legal advice received by himself and the 1st respondent was that the Supreme Court, in ***Raila Odinga 2013,*** had interpreted Article 140 (3) of the Constitution (at paragraphs 289-294 of the Judgment) and determined that, where a Presidential election was invalidated, there would be no need for fresh nominations, and candidates would be limited to the

President-elect, and those persons who had contested the first election.

[53] The 1st respondent states in the above context that it would have been impracticable to conduct fresh nominations, as the repeat election had to be conducted within 60 days – the relevant factors being the lack of time for: *(a) submission of nomination rolls by a political party to the Commission at least six months to the date of party primaries pursuant to Section 27 of the Elections Act; (b) submission of party membership lists by a political party to the Commission at least 120 days to the elections under Section 28 of the Elections Act, 2011; (c) resignation of a political party member from a political party who wishes to contest elections as an independent candidate at least 3 months from the date of the election under Article 85 of the Constitution and Section 33(1)(a) of the Elections Act; (d) submission of a symbol to the Commission by an independent candidate in the election at least 21 days before the nomination day; (e) party primaries, which include a political party nominating a candidate for elections at least 90 days to the date set for elections under Section 13 of the Elections Act, 2011; and (e) registration of candidates for elections, which has to be done at least 60 days to the date set for elections under Section 2 of the Elections Act, 2011.*

[54] It is further deponed that one candidate, Dr. Ekuru Aukot, had also sought interpretation of the provisions of Article 140 (3) of the Constitution in this Court, in Supreme Court Application No. 1 of 2017, but the Court struck it out on grounds of lack of jurisdiction; this compelled him to move the High Court, by Petition No. 471 of 2017, in which he successfully challenged *Gazette Notice* No. 8751 of 5th September, 2017 whereby only two candidates had been gazetted.

[55] It is deposed that, just before the High Court could give Judgment, one of the said two candidates, the Hon. Raila Odinga, issued a letter on 10th October, 2017 stating that he was withdrawing from the fresh Presidential election already scheduled for 26th October, 2017.

[56] It is the 1st respondent's case that before it could consider Hon. Odinga's said letter, the High Court rendered its Judgment, on *11th September 2017*, and directed the 1st respondent to include the name of Dr. Aukot as a candidate, by gazetting an *addendum* to *Gazette Notice* No. 8751 of 5th September, 2017, or issuing a *new notice*.

[57] The 1st respondent confirms that it took guidance from the High Court decision: that those who had contested in the invalidated election, duly qualified to participate in the fresh election. The 1st respondent, thus, issued an addendum to *Gazette Notice* No. 8751 of 5th September, 2017, and issued *Gazette Notice* No. 10152 of 13th October, 2017, setting out the names of the *five additional candidates* who qualified.

[58] The 1st respondent, in addition, deposes that it did not include the name of Mr. Jirongo in this *Gazette Notice* because as at that date, he was constitutionally ineligible to participate in the election, by dint of a Court Order in *Insolvency Cause No. 3 of 2017 of 4th October, 2017.*

[59] It is also the 1st respondent's case that, out of abundance of caution, and in the knowledge that Mr. Jirongo's advocates had applied for a stay of the bankruptcy Orders, it left his name on the Presidential election ballot papers, as it would have been easier, in view of the limited time, to remove it, than to include it. As such, when the Order of the Court in the insolvency cause was stayed, the Commission (by *Gazette Notice* No. 10562 of 24th October, 2017) issued an addendum, listing him as a candidate who would participate in the election of 26th October, 2017.

[60] In these circumstances, it is deponed that the *unequal campaign periods* accorded the candidates, arose by operation of the law, and would not pass as discrimination, or violation of the terms of Article 38

(2) of the Constitution.

[61] It is the 2nd respondent's further testimony that it did not conduct a new nomination exercise for all the eight Presidential-election candidates, as such nomination was not required, as confirmed by the High Court decision in the ***Ekuru Aukot Case,*** and in view of the limited time-frame.

[62] It is urged that, in the circumstances, the 2nd respondent was under no obligation to deliver *nomination papers* for the election of 26th October, 2017 nor was the 3rd respondent, or any other candidate, under an obligation to pay the nomination fees of Ksh. 200,000. It is deponed that the 1st and 2nd respondents were, therefore, under no obligation to issue *nomination certificates* to any of the candidates participating in the fresh election of 26th October, 2017.

[63] The 1st respondent furthermore avers that Section 2 of the Elections Act, which is enacted pursuant to Article 82 of the Constitution, defines 'Presidential election', but in a manner that excludes *fresh Presidential election under Article 140(3) of the Constitution.*

[64] It is thus the 1st respondent's stand, that Regulation 89 of the Elections (General) Regulations, 2012 accords it a discretion as to which rules to apply, in relation to *repeat Presidential election,* and with regard to such modifications or adaptations as may be proper.

[65] The 1st respondent deponed that, by *Gazette Notice* No. 9795 of 29th September, 2017, it had varied the election date from 17th October, 2017 to 26th October, 2017, on the basis of its service-provider advice, that more time was required for reconfiguring the KIEMS transmission system, to assure the settings for verifiability.

[66] The 1st respondent also urges that there was no need to seek an advisory opinion from the Supreme Court on nominations, as the High Court, in the ***Ekuru Aukot Case*** had already pronounced itself on the matter. Further, it is deponed that the 1st respondent had an obligation to abide by this Court's Order, to conduct the fresh election *within 60 days,* in accordance with the Constitution and the law – and it duly complied.

[67] On his part, the 3rd respondent filed a response and a replying affidavit by Mr. Davis Kimutai Chirchir (the 3rd respondent's Chief Agent), sworn on 12th November, 2017.

[68] The 3rd respondent avers that, after this Court determined that he was not validly declared as the President-elect, on the basis of the elections of 8th August, 2017, the 2nd respondent was ordered to conduct a fresh Presidential election, "in strict conformity with the Constitution and the applicable laws," within 60 days.

[69] t is the 3rd respondent's further testimony that the 1st and 2nd respondents published *Gazette Notice* No. 8751 on 5th September, 2017, listing the 3rd respondent and the Hon. Raila Odinga, and their running mates, as the candidates eligible to contest in the election then scheduled for 17th October, 2017, but later varied to 26th October, 2017.

[70] The 3rd respondent deposes that the said *Gazette Notice* was issued pursuant to the decision of the Supreme Court in ***Raila 2013,*** which had stated in part that *"There shall be no nominations for Candidates participating in the fresh elections."* It is urged in that regard, that the 1st respondent, in conformity with the said judicial authority, duly acquitted itself under the law, by notifying the public, that no new nominations would take place.

[71] It is also the 3rd respondent's case that the High Court, in the ***Ekuru Aukot Case***, had duly followed ***Raila 2013***, and had found that there was no need for fresh nominations, and that all Presidential election candidates who had participated in the 8th August, 2017 election were entitled to participate in the fresh Presidential election.

[72] It is the 3rd respondent's case that no one challenged the ***Aukot*** finding, save for the petitioner, who did so nine days to the fresh Presidential election – his petition being struck out by the High Court on the eve of the election.

[73] The 3rd respondent further urges that a nomination is not a condition-precedent, in a fresh Presidential election held under Article 140(3) of the Constitution; he contends that, the fact that nominations were not conducted afresh, prior to the fresh Presidential election, did not cause prejudice to any person who desired to be a candidate, as such person would probably have stood up and expressed a differing voice, through the Courts.

[74] For greater effect, the 3rd respondent urges that no gazetted Presidential election candidate did complain, or has complained, about the differential campaign timelines available to candidates.

[75] It is also the 3rd respondent's case that it would be highly prejudicial to him, to annul the election on the issue of nominations, as he was not at fault. It is urged on his behalf that a grave injustice would also be caused to the Kenyan taxpayer, at whose expense the repeat Presidential election had been conducted, at a cost of over 14 billion shillings.

[76] It is the 3rd respondent's further case that the High Court's ***Ekuru Aukot*** decision has been subjected to appeal in Civil Appeal No. 359 of 2017, and that the appeal is still pending in Court. It is, in the circumstances, urged that this Court should exercise restraint, in pronouncing itself on the issue of fresh nominations.

(b) Time-frame for Holding Nominations: Respondents' Case

[77] As regards the question as to whether it was necessary to conduct nominations, and the timing of the nominations, the 2nd respondent deponed that the timelines prescribed in Section 14 of the Elections Act are untenable, as Section 14(2) provides that a notice for holding a Presidential election shall specify the nomination day, which is defined in Section 2, as a day gazetted at least sixty days before an election.

[78] It is the 1st respondent's case that the election laws do not contemplate the withdrawal of a candidate, other than as provided under Regulation 52 of Elections (General) Regulations, 2012.

[79] The 2nd respondent further disputes the petitioners' claims that it fell into error by taking such advice as it did, and then proceeded to issue *Gazette Notice* No.8751 of 2017, dated 5th September, 2017, bearing notice of fresh election to be conducted on 17th October, 2017 with the names of two candidates.

[80] The 2nd respondent further urges that, contrary to the petitioners' averments, the elections held on 26th October, 2017 were in conformity with the Constitution and in particular, with Articles 3(1), 10 and 38(3)(c) thereof, as well as the relevant electoral laws, and the Supreme Court's express directions.

[81] It is also the 2nd respondent's case that the Presidential election conducted on 26th October, 2017 was an election *sui generis,* which required no fresh nominations. The 1st respondent further urges that it

would be incorrect to interpret the Constitution as requiring nominations in both the general election, and the repeat Presidential election.

[82] The 1st respondent places reliance on Rule 8 of the Supreme Court (Presidential Election Petition) Rules, 2017 which sets out distinct grounds upon which the outcome of a Presidential election may be contested. It contends that this rule presupposes that, unless the validity of nominations is specifically pleaded, and a determination made invalidating the nominations, the same must remain valid for the purposes of a fresh Presidential election, as ordered pursuant to Article 140(3) of the Constitution.

[83] The 1st respondent, in addition, states that after the High Court rendered its Judgment on 1st September, 2017, it had deliberated upon the letter it received, purporting to withdraw the candidature of Hon. Raila Amolo Odinga and Hon. Kalonzo Musyoka (as his running mate) from the fresh Presidential election; and it informed them of the proper withdrawal procedure, which was through the use of Form 24A. This, the Commission states, was not done; and hence, the attempted withdrawal from candidature had no legal effect.

[84] It is the 2nd respondent's case, in conclusion on this issue, that this Court decreed no particular nomination process, and thus, there was no basis for fresh nominations. The 2nd respondent, furthermore, disagrees with the petitioners' contention that nominations should have been conducted within 21 days of the fresh polls. The 1st respondent avers that, on the contrary, the law specifies different instances and timelines, within which such nomination may be conducted.

(c) Alleged Disobedience of Court Orders: Respondents' Case

[85] The 1st respondent filed a response to the petition dated 12th November, 2017, as well as a replying affidavit of even date, sworn by Mr. Marjan Hussein Marjan. The deponent averred that the fresh Presidential election held on the 26th of October, 2017 was conducted in accordance with the Constitution and the electoral laws, as well as the Judgment of this Court in ***Raila 2017***.

[86] It is deponed in that context, that the 1st respondent had undertaken appropriate measures to ensure conformity with the Constitution. For instance, the public and the stakeholders (Civil Society Organizations; Governors; Representatives from the Government of Kenya; Religious Groups; the Commission's own staff; international and domestic election observers; political parties; Presidential election candidates; youth groups; and members of the public) were informed of the proposed measures, and how the 1st respondent intended to implement these, with periodic updates thereafter. Annexed to the affidavit sworn by Mr. Marjan Hussein Marjan, is correspondence inviting the said stakeholders to various consultative engagements. Such engagements are listed as Development Partners' Engagement Forum on 28th and 29th September, 2017; National Observer Briefing on 13th and 14th October, 2017; IEBC-Youth engagement forum held on 16th October, 2017; IEBC National Stakeholders Town Hall Forum held on 17th and 18th October, 2017; and Women leaders engagement forum on 18th October, 2017.

[87] It is deponed in addition that, following such stakeholder deliberations, the 1st respondent developed a Legal-Compliance Matrix, setting out the observations made by the Supreme Court as against the measures to be taken. The Legal-Compliance Matrix was implemented as follows: *modification of the Results Transmission System ("RTS"), to enable transmission in compliance with the Court's decision; boosted network coverage, by availing Safaricom SIM cards on all KIEMS kits, to ensure maximum 3G network availability; putting in place a complementary system for results transmission; following Mr. Justice Mativo's decision (**Ekuro Aukot** case); modification of the KIEMS kits to include the other six candidates; and development and deployment of a scheme for tallying and display of verified results at*

the National Tallying Centre. A copy of the Legal-Compliance Matrix was annexed as evidence, to the replying affidavit sworn by Mr. Marjan Hussein Marjan.

[88] It is the 1st respondent's further case that it revised the Election-Results Path, to align it with Article 138(3)(c) of the Constitution, and duly gazetted the same: particularly, the submission of Forms 34A together with Forms 34B, by the Constituency Returning Officer to the National Tallying Centre; the Chairperson to verify the physically submitted Forms 34B against the physically-transmitted Forms 34A; generation of Forms 34C after verification from Forms 34B and 34A; and the chairperson upon verification, to record any errors noted on Forms 34B, and to publicize the same. This Election-Results Path, and the complementary mechanism for results transmission, was published in *Gazette Notice* No. 9978, and is annexed to the affidavit of Mr. Marjan Hussein Marjan, marked as "MHM-8."

[89] It is in addition averred that the 1st respondent revised its training manuals, especially those for instruction to all Constituency Returning Officers, to ensure that they fill the hand-over section of Forms 34B, and physically deliver these forms at the National Tallying Centre, where the Chairperson would sign the take-over section. The various revised training manuals are attached in the affidavit of Mr. Marjan Hussein Marjan.

[90] It is the 1st respondent's further case that it took steps to develop a complementary mechanism for results transmission, in case electronic transmission failed. It avers in that regard that, it also put in place a mechanism to ensure that the elections were carried out in a simple, accurate, verifiable, secure, accountable and transparent manner. It is deponed, on the 1st respondent's behalf, that it ensured all forms used in the election were standardized: in particular, Form 34C was redesigned, to indicate all polling stations.

[91] The 2nd respondent also testified that it had conducted the fresh Presidential election in strict conformity with this Court's detailed Judgment, and in full compliance with Regulation 87(3) of the Elections (General) Regulations, 2012.

[92] For the purpose of ensuring transparency, the 1st respondent avers, it had invited the office of the Director of Public Prosecutions, to investigate any possibility of illegalities having been committed within the Commission; and such investigations are still in progress, to-date.

[93] It was furthermore deposed, for the 1st respondent, that there was no guidance-reference on the listing of candidates for the repeat election, save for that found in the ***Raila Odinga 2013;*** hence the gazettement of the 3rd respondent and Hon. Raila Odinga as the only candidates. Subsequently, it was deponed, the decision to gazette 5 candidates (*Gazette Notice* 10152 on 13th October, 2017) was informed by the ***Ekuru Aukot*** decision, whereby the High Court directed that all candidates in the invalidated election be allowed to vie in the fresh election. The 1st respondent then proceeded also to include Mr. Jirongo's name on the ballot, through *Gazette Notice* No. 10562 of 24th October, 2017, on account of new judicial stay Orders on a declaration of bankruptcy against him. Consequently, it was deponed, the gazettement of all the Presidential-election candidates who had participated in the 8th August, 2017 General Election, was not on a whim.

[94] In response to the contention that the Presidential election candidates were accorded unequal campaign periods, the 2nd respondent testifies that, the time available unfolded strictly by operation of the law, and entailed no practice of discrimination against any of the six candidates, nor violated the provisions of Article 38(2)(a) of the Constitution. On the contrary, it is deposed that the *Gazette Notices* were meant to secure the candidates' rights under Article 38 of the Constitution.

[95] In response to Dr. Akombe's allegation on 17th October, 2017 that the 1st respondent was ill-prepared and unable to conduct credible, free and fair elections, it is the 2nd respondent's deposition that these were personal views, and did not represent the standpoint of the 1st respondent. In addition, it is averred that the 2nd respondent's decisions are taken by consensus, or by vote: and there is nothing to show that Dr. Akombe's statements relate to any of the decisions of the 2nd respondent.

[96] On allegations about illegal Returning Officers presiding over the October 26th election, it is the 2nd respondent's case that, contrary to the petitioners' allegations, the Judgement of *Odunga J.,* in JR No. 628 of 2017, ***Republic v. IEBC*** *ex parte* ***Khelef Khalifa and Another,*** did not invalidate the appointment of Constituency Returning Officers and Deputy Constituency Returning Officers, for the election.

[97] Nonetheless, it was averred, the Judgment in question had been stayed on 25th October, 2017 by the Court of Appeal, which ordered as follows: *"for avoidance of doubt, this Order means that the constitutional and statutory functions of the Returning Officers and their deputies relating to the Presidential elections slated for 26th October, 2017 are not invalid."*

(d) Withdrawal of Candidature by One Candidate: Respondents' Case

[98] In response to the issue of withdrawal of candidature, it is the 1st respondent's testimony that, save for withdrawal of a candidate within 3 days of nomination, the law carries no other provision for withdrawal; and the applicable law is that contemplated in Regulation 52 of the Elections (General) Regulations, 2012: and so, Hon. Raila Odinga's intention to withdraw had no legal effect, having not been made in the prescribed format and instrument.

[99] Further, it is deponed that the 1st respondent had communicated through a Press statement, on the need for any withdrawal to be in compliance with the law; though no notice of withdrawal came forth from any of the candidates in the fresh election.

[100] On this issue, the 3rd respondent states that such withdrawal, expressed through an ordinary letter, has no effect, as the election falls under Article 140(3) of the Constitution, and not under Article 138, and Section 14 of the Elections Act.

[101] Mr. Chirchir, on behalf of the 3rd respondent, deponed that the withdrawal of the NASA candidate from the Presidential election had no effect in law, as the withdrawal-window lapsed three days after the nomination, pursuant to Regulation 52 of the Elections (General) Regulations 2012. He deponed that such withdrawal would entail the withdrawal of nomination status, a process regulated by the Elections (General) Regulations 2012: yet there was a failure of compliance with those Regulations; and that, consequently, the name of the NASA candidate remained on the list of nominated candidates.

[102] The deponent further deposes that the withdrawal of candidature in the manner adopted by the NASA candidate, has no effect, as Article 138(8) of the Constitution envisages cancellation of an election only upon the death of a candidate, or where no candidate has been nominated; and no such circumstance applied in this instance.

(e) The Postponement of Election in Some Constituencies: Respondents' Case

[103] On the issue of postponement of election, and its effect on the validity of the process, the 2nd respondent avers that the decision to postpone election in 25 constituencies was necessitated by serious breaches of the peace in those constituencies. The postponement of elections in the said constituencies, from 26th October 2017 to 28th October, 2017 was thus made to enable the 1st respondent to reorganize

the election infrastructure, and allow the security agencies time to put in place adequate safety measures to guarantee a free and fair electoral process. It is averred that, due to unabated breach of the peace, it proved impossible for the 1st respondent to deploy staff, and provide the necessary infrastructure for the conduct of the polls in the affected areas.

[104] In response to the affidavit sworn by Mr. Nasanga Aki, the 1st respondent depones that it is aware there had been pockets of violence and intimidation in some other electoral areas, but, save for the 25 constituencies in which voting was postponed, voting took place in all other constituencies of the country.

[105] In response to the petitioner's affidavit of Ms. Perpetua Adar and Mr. Edwin Othira Aomo, it is deposed that the elections conducted all over the country, save for the said 25 constituencies, was in keeping with the principles of election, as provided for under Article 81 of the Constitution.

[106] It is averred furthermore, that the postponement of election in the said 25 constituencies, was done pursuant to Section 55B of the Elections Act, as read with Regulation 64A of the Election (General) Regulations, 2012 which allow for such a postponement, where there is reason to believe that a serious breach of the peace is likely to occur if the election is held on the appointed date, or that there has been an occurrence of electoral malpractice of such a nature as to make it impossible for an election to proceed.

[107] To affirm the assertion that elections were, in certain cases, postponed due to breach of the peace such as made it impossible to conduct the process, the 1st respondent relies on the affidavits of the Constituency Returning Officers within Kisumu County, one of the affected areas: *Dennis Obara Omare in Kisumu West Constituency; John Ngutai Munyekho of Kisumu Central Constituency; Yvonne Okeyo of Kisumu East Constituency; Alice Cherono Cheruiyot of Muhoroni Constituency; George Onyango Jobando of Nyakach Constituency; Carol Kangala Omoto of Nyando Constituency, and Evalyne Joyce Asiko of Seme Constituency.*

[108] In addition to Kisumu County, the 2nd respondent relies upon depositions from Returning Officers in Siaya, Migori and Homa Bay Counties, detailing the particulars of breaches of the peace hindering the conduct of election.

[109] It is the 1st respondent's case in addition, that Section 55B(3) of the Elections Act allows it to enter a return of the election, if satisfied that the results will not be affected by possible voting outcomes in areas where election has been postponed. It is deponed, consequently, that the declaration of results, notwithstanding the lack of voting in the said 25 constituencies, was well within the law.

[110] In response to the allegation that the 1st respondent had degraded voters in Turkana and Fafi Constituencies, by conducting elections in those areas while counting of votes elsewhere was already ongoing, it was deposed for the respondents, that the fresh election in these constituencies was conducted on 28th October, 2017, on account of heavy rains and flooding which had afflicted those areas two days earlier.

(f) Relocation of Some Polling Stations on Election Day: Respondents' Case

[111] As regards the relocation of polling stations in Kibra Constituency, it was averred, for the respondents, that Regulation 64(2) allows Presiding Officers to transfer polling from one facility to another, as necessitated by the exigencies of the occasion. It is averred further, that some stations were transferred because of instances of violence, such as barricading of roads leading to polling stations, or danger to voters.

[112] It was furthermore averred that, in all instances, notice of relocation of polling stations was displayed at conspicuous places outside the polling station, and on that account, the petitioners were well aware of the transfer. Ms. Beatrice Saki Muli, the Returning Officer for Kibra Constituency, in her affidavit, depones that the transfer was not arbitrary, but was done to ensure the safety of voters, the polling station being re-positioned next to the Deputy County Commissioner's office, where security had been enhanced.

[113] In the case of Kaloleni and Changamwe Constituencies, the 1st and 2nd respondents have attached the affidavit of Ms. Luciana Jumwa Sanzua, the Returning Officer for Changamwe Constituency, in which she depones that no polling station was set up in any ungazetted area, and that there was no relocation of polling station. Of relevance in this regard is the affidavit by Ms. Nuru Faraj Maftah, the Returning Officer for Jomvu Constituency, in relation to the occurrences at St. Mary's Primary School, Bangladesh.

[114] Ms. Nuru Faraj Maftah averred that there had been a barricading of the entrance to the polling station, occasioning an unconducive environment for the voting process. It was agreed with the Presiding Officers, in the circumstances, to open polling stations in an open field adjacent to the perimeter wall of St. Mary's Primary School, which was within the 400m radius of the previous polling stations, and was safe and practical.

[115] In response to Mr. Njonjo Mue's averments, Dr. Kibicho for the 3rd respondent, deponed that two polling stations in Kibra Constituency had been relocated by the 1st respondent on security considerations; and that the security agencies provided adequate security for the new sites as required, and voting proceeded uninterrupted thereafter.

(g) Impartiality, Neutrality, Efficiency, Accuracy and Accountability: Respondents' Case

[116] In response to the allegation that the 2nd respondent's electronic servers were not transparent, it was deponed for the respondents that, contrary to the petitioners' allegations, the said servers, as applied in the 26th October, 2017 Presidential elections, were, and are accessible to all stakeholders.

[117] As regards the technological set-up and the transmission of election results, the 1st respondent relies on the affidavit of Mr. Silas Njeru, its manager for ICT services, sworn on 12th November, 2017. This affidavit responds to the petitioners' supporting affidavits by Mr. Brian Otieno, Mr. Billy Atudo, and Ms. Adhiambo Opondo, on all depositions touching on the use of ICT during the repeat Presidential election. Mr. Njeru depones specifically that after the Court nullified the 8th August, 2017 elections, the Commission configured the KIEMS kits to transmit results for only two candidates; but after *Mativo J.* ordered the inclusion of Dr. Aukot on the ballot on 11th October, 2017, there was need to reconfigure the KIEMS kits, to accommodate all potential candidates. Such reconfiguration to include other persons, would have taken more than a month; hence the KIEMS was reconfigured to accommodate such a prospect.

[118] In response to the affidavit of Mr. Boniface Otieno, on the resolution and quality of the forms uploaded to the RTS results-portal, Mr. Njeru deposed that the resolution of an image is subject to various factors, including the amount of light in the environment; distance; position; positioning of camera lens from the image; and settings of the device, such as zoom, and even cleanliness. He averred that it was impossible that an image taken from a device other than a KIEMS kit, could find its way into the transmission system.

[119] Mr. Njeru further averred that some of the security parameters entailed in the KIEMS system were as follows: only authorized, pre-determined tablets (KIEMS) were so configured as to be able to transmit

and relay results into the Commission's servers, and in this regard, the KIEMS kits used in all polls were station-specific, and each could be traced from the source; the network was quite secure, with twin high-level firewalls¾and the only information that could enter was the permitted one, through these filters; there was pre-encryption of results before transmission; and then, transmission was done in a secure, virtual, private network (VPN) provided by all the three mobile telephone operators, through unique, specialized SIM cards.

[120] He further deponed that the transmission system only allowed access to authorized users, and not by use of biometrics; and also permitted users with distinct, but interdependent roles, at different levels, and a single person could not perform an end-to-end operation in the system, nor could such a person detect any SIM not in the system, and block it.

[121] Mr. Njeru, in addition, averred that such detailed security features were designed to ensure that there was no penetration of the system; and this ensured security through constant monitoring of alerts, upon unusual activity in the system; and any attempted intrusions would be filtered away by the firewalls, with all incidents of attempt, being recorded.

[122] Accordingly, the deponent averred, it was impossible for any prescribed image captured by any device other than the KIEMS kit, to be uploaded, or find its way into the result transmission system in KIEMS.

[123] On voter identification, Mr. Silas Njeru denied Mr. Billy Atudo's statement that voter turn-out had been misrepresented. He deponed that any variance in voter numbers had a credible explanation. He averred, in that context, that Section 10 of the Elections Act allowed *biometric identification* of a voter, and 5,525,487 voters were identified in this way, in the fresh Presidential election. There was also *alpha-numeric search, with reference to identification documents*, and finger-print reader – which process identified 348,839 voters. There was, as well, the use of *alpha-numeric search, with physical keying-in of biographic data*, using the voters' identification number. This identified 1,490,034 voters.

[124] Mr. Njeru, in addition, deposed that there were voters whose details would be retrieved, even though identification through fingerprints, and alpha-numeric search failed; *resort would then be to the Presiding Officer Authentication (i.e., the supervision mode)¾*with the presiding officer inviting the agents to bear witness, and then allowing the voter to vote under supervision; and 211,446 voters had been identified this way.

[125] He deponed further that there were instances when *complementary identification* was employed through search in the register of voters in the KIEMS, for the relevant polling station. He averred that 78,124 voters had been identified this way.

[126] Mr. Njeru furthermore, deponed that voter turn-out had been recorded as being 38.84% of the registered voters; and that the numbers given by the 1st respondent were the actual numbers of voters who turned out, in relation to various KIEMS kits which were actively transmitting results¾voters whose numbers were bound to vary at various times, depending on the number of KIEMS kits transmitting results at the time updates were given.

[127] Mr. Njeru denied the allegations in Mr. Billy Atudo's affidavit, that there was alteration in the Register of Voters. He averred, instead, that there had been proper liaison with the Registrar of Persons, in respect of dead voters whose names were expunged during clean-up of the register, before closing it. He also denied the claim that there had been a duplication of identity cards, and stuffing of ballot boxes, using the names of dead voters.

[128] The deponent denied tampering with the register, or changing it and also denied the alleged inconsistencies and errors in the Voters' Register. He deponed instead that the register had been certified and duly published in the *Kenya Gazette*, on 27th June, 2017, indicating the number of registered voters as 19,611,423.

[129] In response to the alleged suspect, supersonic speed on counting, tallying and transmission of results, Mr. Njeru deponed that, all the Forms 34A had been transmitted, totalling 37,187, and posted in the 1st respondent's portal. He averred that, this having been a *single election,* the process was faster, and took a shorter time to count and tally the votes, as compared to the earlier election¾especially in stations where the registered voters were few.

[130] As regards form-endorsement by agents, the deponent averred that only agents who were present were allowed to sign: and that there was no evidence of an agent in attendance, who failed, refused and/or was denied the opportunity to sign. He further averred that it was the duty of each party to deploy agents, to observe the election; and so the 1st respondent was not answerable for the high turn-out for agents of one party over the other, at the vote-counting centres.

[131] As regards the allegation that there were discrepancies, irregularities and illegalities on the statutory Forms, Mr. Njeru denied that there were 6 Forms 34B which did not have serial numbers, and deponed that all Forms 34B had serial numbers on all pages, and were duly signed by respective Constituency Returning Officers, as uploaded at the constituency level, and were properly handed over at the National Tallying Centre. He averred that none of the Forms 34A, B and C were forgeries, or bore mathematical errors, or were altered. He deposed also that no censurable form had been produced, to enable him to comment on it in specific terms.

[132] The 2nd respondent, on the issue at hand, filed a response to the petition dated 12th November, 2017 as well as a replying affidavit of even date. The responses are materially similar to those of the 1st respondent, save for the following additional elements: the 2nd respondent avers that while he had publicly cautioned against attempts at political influence upon the Commission, *he did not cast doubt on the 1st respondent's preparedness and ability to deliver a credible, fresh election.* He deponed that, as a National Returning Officer, with the obligation of ensuring transparency in the electoral process, he had made the statement of 18th October, 2017 outlining the 1st respondent's preparedness with regard to technical, operational and logistical arrangements, which the 1st respondent had put in place in preparation for the fresh election. He depones that, subsequent to his said statement, certain critical events assured his conviction as to the ability of the 1st respondent to conduct a free, fair and credible election. In his own words:

"On 19th October, 2017, the Commissioners approached me in my office and informed me of a resolution by certain secretariat staff to proceed on leave, thus allowing the identified project team for the fresh Presidential elections to carry on the preparations for the elections unhindered;

"Thereafter, I separately met the two leading Presidential candidates for the fresh elections. In the said meetings, the candidates assured me that they would do all that was possible to diffuse political tension in the country.

"Further, through correspondence with the Inspector General of Police, I received assurance that sufficient security will be provided across the country, as well as to each candidate, to superintend the holding of the fresh Presidential election."

[133] He deponed that, in the context of such assurances, in his statement of 25th October, 2017 he did

not doubt the preparedness of the 1st respondent and he was later vindicated, as he affirmed in his statement of 30th October, 2017, that the Commission had *"done everything that was required…to ensure that every Kenyan would have an opportunity to exercise their…rights under Article 38 of the Constitution, without interference, hindrance, threat or intimidation";* and that he was "*satisfied that we were able to meet conditions that have enabled the Commission to deliver free, fair credible presidential election."*

[134] Ms. Winnie Guchu for the 3rd respondent, also made depositions in response to Mr. Billy Atudo's averments, on several matters including the Register of Voters. She deponed that there was real consistency in the number of registered voters, totalling 19,611,423 as evidenced by Forms 34C, *as shown in the results of both elections.* She averred that names of dead voters had not been used to stuff the ballot boxes, and that the register had been duly cleaned up.

[135] Ms. Guchu deponed, as regards the allegation of low voter turn-out, that this was true only in respect of the NASA-dominated areas, where Hon. Raila Odinga is popular. She denied the allegation that voter-turnout was not representative of the Kenyan populace, averring that in Kenya, there was no mandatory voting requirement.

[136] On the issue of electronic transmission of election results, she states that the law had guided the 1st respondent, in all respects: counting and tallying was done in the presence of agents; 37,187 Forms 34A were uploaded in the public portal, and a copy of these forms posted at the entrance of each polling station. She denied the allegation that results for 266 constituencies from tallying centres differed from those transmitted pursuant to Section 39(1c) of the Elections Act. She deponed that, provisional results were transmitted electronically, as required by law. She further averred that the original Form 34A and 34B were delivered to the National Tallying Centre manually, and no credibility-complaint was received; and that copies of the said forms have been delivered to this Court in accordance with the law, together with Forms 34C. She furthermore stated that the petitioners were not justified in founding a complaint upon the enhanced pace at which the results were transmitted, as this is a clear improvement on the earlier position.

[137] With regard to Mr. Atudo's allegations of irregularities on Forms 34A, 34B and 34C, Ms. Guchu deponed that most Forms 34A were signed by the Jubilee Party agents, and that the Forms did not generally manifest any irregularities: she annexed in her affidavit copies of the forms complained of. She deposed further that it was not mandatory for party agents to be in attendance, as Regulation 79 provides for those instances in which agents are not in attendance; and so, absence of agents does not in and of itself, invalidate the results announced. She particularly deponed that no single Form 34B was without a serial number on any of its pages; that all Forms 34B were filled in, and/or completed; that all Forms 34A, 34B and 34C were standardized, verifiable, accurate and authentic.

[138] Ms. Guchu in addition, denied the allegation in Mr. Billy Atudo's affidavit, that 28% of the voters could not be identified by their finger-prints on the KIEMS kit, while 78,124 voters could not be accounted for during the fresh Presidential election; and she denied the allegation that there had been non-compliance with the electoral laws, by the 1st and 2nd respondents.

[139] Mr. Brian Gichanga Omwenga, a Technology Advisor of the Jubilee Party, made averments in reply to the affidavit of Ms. Opondo, in relation to the images taken by the KIEMS kits. He was concerned, firstly, with the qualification of Ms. Adhiambo Opondo, who allegedly extracted the KIEMS-kits images. He deponed that a KIEMS kit is capable of changing its resolution-settings as to photo-size and quality, and on this account, the allegations of single option for picture-size is not factual. He deponed that a resolution is the number of pixels, and the width and height of an image. He avers further that DPI (Dots-Per-Inch) is the same in all pictures, and not subject to change. On that basis, he avers

that the disputed Forms 34A are not fake, but only blurry, and invisible in the web-portal; and he annexes the same copies which are now visible. He avers furthermore that these Forms 34A are similar to carbon copies in possession of the 3rd respondent, and of other parties who participated in the election. In his depositions, he explains the causes of blurred images: smudge lens; poor focus; poor lighting; movements of a photographer when capturing image; and dirty lens. He finally deponed that 'blurs' can occur on any camera, and that images are also dependent on the skill of the photographer, and environment.

(h) Appointment of Vice Chairperson of IEBC as the Deputy Presidential Returning Officer: Respondents' Case

[140] In response to the allegation that his appointment of the vice-chair of the Commission as a deputy returning officer was unlawful, the 1st respondent disagreed, and explained that the appointment was informed by the dictates of good practice, and that the law had not limited the constitutional, regulatory mandate of the Chairperson.

(i) Petitioners'** locus standi **in Matter of Public Interest: Respondents' Case

[141] With regard to the issues of *locus standi*, the 3rd respondent filed a response dated 11th November 2017, denying the petitioners' assertion that they are advancing a public-interest agenda, in contesting the outcome of the 26th October, 2017 Presidential election. He perceives the petitioners as mere mouthpieces for the NASA candidate, and as anything but *bona fide* defenders of the *public interest.* He also views the petitioners as lacking *locus standi* under Article 140(3) of the Constitution, since they had not exercised their rights as provided for under Article 38 of the Constitution. The 3rd respondent further states that the NASA candidate, together with his supporters, had deliberately set out to ensure there would be no elections as scheduled for 26th October, 2017, by the express Orders of this Court.

(j) Free, Fair and Credible Elections: Respondents' Case

[142] In response to the statement made in New York by the former Commissioner, Dr. Akombe on 17th October, 2017, calling for postponement of the Presidential election, the 3rd respondent thus states: there had been a plurality of Court claims on the Presidential election, including those by the petitioners and their allies, seeking to stop the fresh Presidential election; Dr. Akombe had not shown any basis for contesting the legal advice rendered to the 2nd respondent; the petitioners were in possession of confidential, privileged information belonging to the 2nd respondent, and to which they are not entitled in law; the agitations that Dr. Akombe alluded to, in her misgivings about the fresh election, were, in truth, violent demonstrations, which were instigated and promoted by NASA, and the petitioners were among the protesters.

[143] The 3rd respondent remarks the point, from evidence, that Dr. Akombe's statement is in remarkable departure from her own reassuring comments to Kenyans earlier, on 13th and 14th October, 2017, on the 2nd respondent's decisive preparedness for a credible conduct of the elections.

[144] In further response to Dr. Akombe's statements, regarding the Commission's state of preparedness for the fresh Presidential election, Mr. Chirchir averred that the former Commissioner had spoken well outside the context of duty, and her opinion was purely personal. He deponed, in addition, that Dr. Akombe's resignation, departure and self-confinement abroad, were within her personal rights of choice, and she was at liberty to express her own opinion, save that such opinion was unrelated to the state of fact, as to the operations of the Commission in holding elections in Kenya. He added that the Commission takes decisions by way of majority stand-point and, in the absence of a unanimous

decision, differing opinions are contemplated. He averred that Dr. Akombe's statements made abroad, were contrary to the diverse public statements she had earlier made while in Kenya, to the effect that the Commission was ready to manage and supervise the fresh election.

[145] Mr. Chirchir deponed, in relation to the negative portrayal of the Commission's appointment of Returning Officers and Deputy Returning Officers, that the High Court Judgment endorsing such a view, had been put on hold by a Court of Appeal decreeing a stay thereof.

(k) Universal Suffrage, Fair Representation, Equality of the Vote: Respondents' Case

[146] The 3rd respondent states that the petition lacks merit, as it distorts and misrepresents the factual situations attending the fresh Presidential election; negatively portrays the 1st and 2nd respondent; and withholds and suppresses material facts readily found in the public domain, pertaining to the unlawful, disruptive and violent actions taken by NASA, to subvert the said election. The 3rd respondent denied the allegation that he had interfered with the independent operations of the 1st and 2nd respondents; and asserted that it was precisely NASA that had sought to interfere with the 1st and 2nd respondents' independence: by holding demonstrations against them; imposing "irreducible minimums"; attacking officials of the 2nd respondent who were preparing for the election; and barricading polling stations.

[147] In relation to the allegation that the Presidential election lacked a basis in universal suffrage, the 3rd respondent denies the claim of violation of Articles 38 and 81, which provide for the rights of voters, in relation to the 27 named constituencies. He asserts in that regard that the 1st and 2nd respondents had taken all practical, rational and judicious steps, to ensure that a fresh Presidential election was conducted in accordance with the Orders of this Court: but that these efforts were beleaguered by the NASA leaders and their supporters who had resolved not to vote. The 3rd respondent submits that a forcible election was thus not tenable, especially in view of the legal principle of not compelling one to do the impossible¾*lex non cogit ad impossibilia.* He urges that when an act is impossible of performance, the deed must be treated as dispensed with.

[148] The 3rd respondent submits, furthermore, that the 1st and 2nd respondents had given all the registered voters an opportunity to participate in the fresh Presidential election, by virtue of Section 55B of the Elections Act, as read with Regulation 64A of the Elections (General) Regulations, 2012; but the same was postponed in 25 constituencies, because of the security situation obtaining there. It is the 3rd respondent's case, therefore, that a prudent application of Article 138 involves taking into account Section 55B of the Elections Act, so as to safeguard the political rights of the majority of citizens under Article 38 of the Constitution: that failing this, a perverse incentive avails itself for some, to sabotage Presidential elections, by simply making it impossible to hold elections in just *one* constituency, even if the outcome therein would have no effect on the overall result.

[149] The 3rd respondent, however, acknowledges that there was a lower voter turn-out in the fresh election held on 26th October, 2017 than at the elections of 8th August, 2017, even as he observes that voter turn-out in Kenya, in general, averages 70% of the registered voters; and that voter turn-out in repeat-elections is generally lower than in first-round elections: though in this instance, there was intimidation and violence by NASA, which occasioned low voter turn-out. He deponed that the 3rd respondent's difference in votes in the 8th August 2017 election and the repeat Presidential election was a mere 719,395 votes.

[150] Ms. Guchu also responded to Mr. John Paul Obonyo's affidavit on violence at St. Mary's Primary School, Bangladesh in Mikindani Ward, Jomvu Constituency. She avers in that regard, that the deponent had not availed any evidence to show that he was performing the role of an accredited observer; and

that some of the matters raised by Mr. Obonyo were extensively reported by the media. She deposed that the accounts from accredited media observers stood in contradiction to the contents of Mr. Obonyo's affidavit, regarding the events of the day as reported in the dailies. She deponed that a presiding officer at St. Mary's Primary School, Bangladesh polling centre had made remarks in the comments section of Forms 34A: that some of the polling streams were closed early due to violence; in Stream 2, no votes were cast at all, and the returning officer made a nil return; in other streams, voter turn-out was low, averaging about 3 persons; and in some streams, voting was shifted to a temporary polling station; but that, notwithstanding such hiccups, voting still took place.

[151] In response to the claim that the Presidential election was marred by illegalities and irregularities, the 3rd respondent avers that the election was conducted by duly-appointed Returning and Presiding Officers; and that the 2nd respondent complied with his obligations under the Elections Act and the applicable Regulations: the 2nd respondent publicly and transparently provided all necessary information on matters relating to the electronic infrastructure used in the fresh election, including voter identification through the KIEMS kits, the complementary mechanism, the Voters Register, and voter turn-out numbers.

[152] Mr. Chirchir deponed that a Kenya National Commission for Human Rights report of 3rd November, 2017 confirms that, while the 3rd respondent had embarked on campaigning for the fresh Presidential election, NASA embarked on demonstrations, calling for reforms, as a pre-condition for elections to be held at all. The said report, Mr. Chirchir averred for the 3rd respondent was also not acknowledged by a statement from the civil society agency, the Independent Medico-Legal Unit (IMLU), which made unsubstantiated claims of injuries and fatalities to unnamed parties. He deponed further that, by the reports made on the fresh election, ELOG observers in Nyali, Kibra, Kilifi and Ruaraka (NASA's stronghold) were attacked by demonstrators, and had to withdraw. He concluded by stating that NASA supporters had engaged in violence even on polling day, and prevented genuine and willing voters from accessing the polling stations.

(l) Video Evidence Adduced by the Petitioners: Respondents' Case

[153] The deponent rebuts all the video evidence produced by Mr. Njonjo Mue, by way of the '*Bungoma Video':* the 3rd respondent avers that the narrative does not relate to him, but is directed at the Police. He deponed, however, that it confirms that the Bungoma youth had been rowdy on the occasion of the fresh Presidential election¾but were properly kept under control by the Police. He avers that the '*Kondele Video'* does not relate to the 3rd respondent, but to NASA's protestors clashing with the Police. These protestors were threatening IEBC officials, and chanting that there would be no election taking place.

[154] On the '*video of Kids Hospitalised After Police Teargas*,' Mr. Chirchir deponed for the 3rd respondent, that the incident was a consequence of Police engaging NASA supporters who were protesting against the 1st respondent, and that it does not relate to the 3rd respondent, and does not link him to violence.

[155] As regards the accusatory content of the '*Video of 8-Year-old shot in Mathare',* Mr. Chirchir avers that this relates to protests against the outcome of the 8th August, 2017 election, and was taken on the night of 11th August, 2017. He deponed that the video does not relate to the campaigns for the 26th October, 2017 election, and that it does not indict the 3rd respondent, as he was not the cause of the violence. Likewise, he deponed that the '*Video of Baby Pendo'* relates to protests against the outcome of the said August 8th elections, and the 3rd respondent had no role therein.

[156] As regards all the other videos proffered by the petitioners, Mr. Chirchir deponed that they do not relate to the 3rd respondent. He avers instead that some of the videos are not specific on areas where they were recorded, and thus, bear no objective signal against the 3rd respondent.

(m) Violence, Intimidation, Improper Influence and Corruption: Respondents' Case

[157] It is the 3rd respondent's case that the Governors for Kisumu, Siaya, Homa Bay and Migori Counties had conducted campaigns of violence and threat, against any member of the public daring to vote and/or participate in the fresh Presidential election, and that this was the direct cause of the failure of the electoral process in the constituencies of those Counties.

[158] As regards observance of peace and calm during the fresh Presidential election, the deponent for the 3rd respondent averred that, relative peace and calm had prevailed in the entire country, save for the said four counties: Kisumu, Homa Bay, Migori and Siaya.

[159] On the attribution of violence during election preparations, the 3rd respondent denies having caused violence, voter intimidation, voter influence, or corruption. He urges that, to the contrary, it was the NASA leader who instigated violence and intimidation, especially in parts of Kisumu, Siaya, Homa Bay and Migori Counties. He states that the allegation about the activities of the "Jubilee Women Brigade" operating at his behest, is misrepresented and misleading, and states that the said organization was a lawful and legitimate lobby, formed to encourage Kenyans to come out and vote in the repeat Presidential election. He denied any knowledge of oath-taking by this, or any other group, and averred that no evidence had been adduced showing otherwise. He also states that there was no violence, killings, rape or other atrocities, as alleged by the petitioners, attributable to him. He further states that the petitioners' allegations regarding remarks made by the acting Cabinet Secretary for the Interior and Co-ordination of National Government in Kisii, were misleading, and taken out of context. He asserts that, contrary to the petitioners' interpretation, the acting Cabinet Secretary had called on the Kisii community to co-exist harmoniously with other Kenyans, and to turn out in large numbers to vote.

[160] Dr. Karanja Kibicho, on his part, swore an affidavit denying allegations that the 3rd respondent had intimidated the Judiciary, in his address of 1st September, 2017. He deponed that the 3rd respondent's address was all conscientious, and given in the aftermath of a briefing from the National Security Council. He deposed in that regard, that the 3rd respondent's main message had accepted the Court's verdict, and had appealed to all Kenyans "to remain their brother's keeper"; the 3rd respondent had made a public tour of Nairobi, appealing for calm and restraint, in the wake of the unprecedented Judgment that had been issued.

[161] The 3rd respondent further denied the veracity of the allegation that the NASA Presidential candidate and his running mate had been denied State security; he averred that these candidates still enjoy their security detail, pursuant to the terms of the Retirement Benefits (Deputy President and designated State Officers) Act.

[162 Ms. Rachel Shebesh, on her part, made depositions in the capacity of co-convener of the "Jubilee Women Brigade", in response to Mr. Njonjo Mue's affidavit. She expressed agreement with Mr. Davis Chirchir's testimony, in relation to the women brigade. She denied that the brigade had been engaged in any oath-taking activities.

[163] Of the "Jubilee Women Brigade", Mr. Chirchir has deponed that it engaged in no violence, intimidation or threatening behaviour; members do not carry weapons, or use derogatory words or language; and no member of the brigade had been summoned, or prosecuted by the police for causing

violence, or intimidating voters. He averred that there was no evidence that the Women Brigade had ever attempted to take over functions of the Kenya Defence Forces; and that their attire was commonly found in clothing shops, and the designation 'brigade' was used widely by groups such as: boys and girls brigade of the Presbyterian Church of East Africa; Anglican Church Boys and Girls Brigade; Scouts movements, etc.

[164] Her deposition was supported by the averments of Dr. Karanja Kibicho, in his capacity as the Principal Secretary, State Department of Interior, in the Ministry of Interior & Co-ordination of National Government, who denied the allegation of oath-taking by members of the 'Jubilee Women Brigade', averring that their attire was quite distinct from the uniform ordinarily worn by Police or military. He denied the allegation of men supporting Jubilee Party in Nairobi, having been dressed in military and Police uniforms, and that there were such persons occasioning violence, killings or rape. He averred further, that the army was never deployed in the conduct of the electoral process; and he deponed that the deployment of the security agencies was a matter regulated by statutory law. As regards one motorist, Mr. George Gichimu Muriuki, who had run over two people with his motor vehicle, on 9th October, 2017 along Kenyatta Avenue, he deponed that this incident was reported and booked at the Central Police Station, and the file forwarded to the Director of Public Prosecutions for appropriate action.

[165] He also denied allegations of the 3rd respondent's supporters dressing in military fatigues, deponing that, to the contrary, it was NASA's principals and supporters who adorned military-type fatigue, and publicly declared the formation of a National Resistance Movement, and then engaged the Police in running battles.

[166] Mr. Davis Chirchir, in an affidavit sworn in his capacity as Chief Agent of the 3rd respondent on 5th November, 2017, had specific averments to make in relation to certain depositions made on behalf of the petitioners. On the issue of violence and intimidation at election time, he deponed that Ms. Aki, with regard to Vihiga County, had misrepresented facts, and relied on hearsay, as she failed to identify the persons she had interviewed. He averred that there was no documentary evidence of Ms. Aki being accredited as an observer, in any event.

[167] Mr. Chirchir further deponed that the alleged instances of violence and intimidation were attributable to the call for 'boycott of elections and resistance thereto', by NASA. He stated that Police presence before or during voting could not be typified as intimidation, as under Section 105 of the Elections Act, Police officers are deemed as election officers. He deposed that the averments by Ms. Aki, with allegations of Police destroying property, are scandalous and unsubstantiated, and devoid of veracity.

[168] Mr. Chirchir in addition, deponed that the actions taken by the Police did not amount to excessive force; and that the NASA supporters perpetrated violence in Migori, Siaya, Homa Bay and Kisumu Counties. He further averred that the 1st respondent's call for peace, to facilitate voting in the four counties on 27th October, 2017, was negated by the NASA Chief Executive Officer, Mr. Norman Magaya, with violence actually escalating.

[169] The deponent furthermore averred that the Cabinet Secretary for Interior and Co-ordination of National Government, Dr. Matiang'i, in barring public demonstrations in Nairobi, Kisumu and Mombasa, was only performing his mandate to protect people and property, in accordance with the Public Order Act; but he added that such functions were independent of the 3rd respondent's duties and functions. He deponed that the violence caused was directly attributable to NASA, even though Ms. Adar had preferred to assign blame to the Police responses. He thus deposed that NASA supporters were rowdy

and unruly, threatening breach of the peace; and the Police were forced to disperse them. In illustration, he produced video evidence marked “DKC3”, “DKC4” and “DKC6”.

[170] Mr. Chirchir responded to Ms. Perpetua Adar’s affidavit and stated that Ms. Adar was not a neutral human rights crusader, but a passionate supporter of NASA. He averred that Ms. Adar’s affidavit portrays an emerging trend whereby civil society groups treat transgressions by NASA and allied groups with kid-gloves, while demonising the Police, who restore order and protect life and property, including their own.

[171] In response to Ms. Adar’s allegations on missing agents at polling stations which she visited, Mr. Chirchir deposed that NASA had not appointed any agents for the 26th October election; hence allegations of missing agents at polling stations lacked a credible foundation.

[172] Mr. Boniface Onyango, a registered voter in Kisumu County, responded to Mr. Njonjo Mue’s averment on electoral violence, deposing that he was unable to vote due to intimidation by goons behaving raucously, who hindered the 1st respondent from delivering ballot papers.

[173] Mr. Joram Odhiambo Abayo, in his capacity as the Jubilee Party Presidential chief agent for Kisumu West Constituency, made depositions in response to those of Mr. Njonjo Mue on the same issue. He deposed that he had been attacked by goons, and subjected to death threats by NASA supporters, for his affiliation to the Jubilee Party.

[174] Mr. Daniel Ouma Jobel, a registered voter in Homa Bay County, deponed in response to Mr. Njonjo Mue’s affidavit on violence in that county, and stated that the NASA supporters had denied him his right to vote, on the ground that he was a known Jubilee supporter.

[175] Ms. Rose Atieno Kiserem, in response to Mr. Njonjo Mue’s averment on the same issue, deponed that, while she was going to check on her agents in Karachuonyo Constituency, she was accosted by goons, and sexually harassed, for being a Jubilee supporter. She depones that she was forced to flee her home, and seek safety in a different place.

[176] Ms. Rosemary Rumo deposed, in response to Mr. Njonjo Mue’s averments, that at her base in Homa Bay, she had successfully trained all agents at their respective polling stations, but was falsely accused of accommodating members of the “Mungiki Sect”, and subjected to prolonged intimidation, threats, mental and physical harassment.

[177] Ms. Caren Wambui Kiarie deposed, in response to Mr. Njonjo Mue’s averments, that she had been the Jubilee Party Presidential election chief agent for Nyando Constituency, in Kisumu County. Arrangements for the training of agents had been done outside the constituency, out of fear of violence, and due to constant threats and intimidation from leaders of the Orange Democratic Movement, a NASA member, within Kisumu County – the deponent averred. She further deponed that there had been a blockage of roads leading to all polling stations in the area, intended to prevent the delivery of voting materials. She was unable herself, she averred, to vote, on account of fear, threats and intimidation.

(n) Independence of the Electoral Agency: Respondents’ Case

[178] In response to the allegation that the 1st and 2nd respondents had acted unlawfully by allowing the Cabinet Secretary for Education to direct that the fresh election should be held on 17th October, 2017, the 3rd respondent stated that the 2nd respondent uses public schools as polling stations, and must of necessity, consult the Cabinet Secretary for Education, to ascertain the availability of such facilities for

elections. He stated that the Cabinet Secretary for Education did not participate in the decision-making process of the 2nd respondent and that consultations between the 2nd respondent, and the Cabinet Secretary for Education is a statutory requirement, pursuant to Regulation 8(1)(a) of the Elections (General) Regulations, 2012.

[179] Responding to the affidavit by Mr. Njonjo Mue, Mr. Chirchir denied allegations that the 3rd respondent had acted in concert with the 1st and 2nd respondents, in setting the date for the fresh Presidential election. He deponed that all the allegations made against an Advocate, Mr. Evans Monari, in that context, were false.

[180] In response to the allegation that the 3rd respondent had compromised the independence of the Judiciary, by declaring 25th October, 2017 a public holiday, the 3rd respondent stated that the declaration of a public holiday on 25th October, 2017 was guided by the object of facilitating travel for voters at the fresh Presidential election. The 3rd respondent also denied having had a hand in the management of the Supreme Court sitting of 25th October, 2017 which did not take place owing to lack of quorum. He also denied playing any role in the Court of Appeal sitting to hear Civil Appeal No. 359 of 2017, which also did not take place as originally scheduled.

[181] Mr. Chirchir further denied the allegation that the declaration of a public holiday on 24th October, 2017 by the Dr. Matiang'i was meant to frustrate the hearing of election-related cases by the Courts. He deposed that, in the past, public holidays have been declared as necessary, to commemorate special occasions, such as the election of Mr. Barrack Obama as President of the United States of America.

(o) State Resources and Election Campaigns: Respondents' Case

[182] With regard to the allegation of misuse of State resources to support his campaigns, the 3rd respondent averred that such was not the case, and the petitioners had wrongly perceived normal operations of government, as service delivery to the public was not suspended during the election period. It was stated that Government motor vehicles were only employed for the purpose of sustaining Police mobility, and facilitating quick response to emergencies and incidents.

[183] As regards the claim of abuse of State offices and resources, in connection with the election, the 3rd respondent denied having abused public resources in political campaigns and activities; he perceived the claims that Cabinet Secretaries and other public officers participated in campaigns, as imprecise, and short on particulars meriting response; he stated that Cabinet Secretaries have exercised, and continue to exercise their mandates as outlined in the Constitution, and in relevant legislation. Of the activities of Cabinet Secretaries, the 3rd respondent stated that Section 23 of the Leadership and Integrity Act exempts them from the requirement of political neutrality. He further denied that he had caused any advertisements of government achievements, so as to advance his cause in the fresh election. As regards allegations regarding the Government's Delivery Unit, the 3rd respondent stated that this had been set up by the government, to monitor, report and publicize the initiation, progress and attainments of government programmes and projects, by virtue of the terms of Article 35 of the Constitution, regarding the right to information.

[184] The deponent for the 3rd respondent further denied allegations that Cabinet Secretaries had made any promises regarding measures of development, in exchange for votes for the 3rd respondent. He averred that, following the High Court's Orders suspending public access to the Presidential Delivery Unit web-portal, in which advertisements were run on TVs and Radios, or shown in print and social media, there has been no further publication in that web-site.

(p) Amendment of Election Laws: Respondents' Case

[185] Mr. Adan Barre Duale, Member of Parliament representing Garissa Township, and Majority Leader in the National Assembly, responded to Mr. Njonjo Mue's deposition, on the issue of amendments to the Election laws. He averred that the amendments were meant to bring clarity to the enabling law and the regulations, and were made in accordance with Articles 10, 109 and 118 of the Constitution. He deponed in that regard, that the Bill was processed in accordance with the House's Standing Orders, and that public participation, indeed, took place; and consequently, the new law entered into force by operation of law, in accordance with Article 115(6), upon gazettement on the 2nd November, 2017.

[186] As regards the constitutionality of Section 83 of the Elections Act, the deponent averred that this is an issue pending determination before the High Court, and has to await determination by that forum. He nonetheless perceived that Section 83 as amended, is not unconstitutional.

[187] On his part, the 3rd respondent, as regards the charge of illegality attributed to the recent Election Laws (Amendment) Bill, avers that the amendments had been duly passed by Parliament, in accordance with the lawful procedure. He thus deponed that the legislative process had been preceded by public participation, even though NASA elected not to express any alternative view. He deponed further that the amendments had been necessitated by the striking down of several electoral-law provisions in Court.

[188] The 3rd respondent, lastly, avers that the constitutionality of Section 83 of the Elections Act, which is questioned by the petitioners, is an issue pending determination before the High Court, in High Court Petition No. 548 of 2017, ***The Katiba Institute and Another v. The Attorney-General and Another***, filed on 1st November 2017. He submits that, without prejudice to the foregoing, there exists a presumption of constitutionality of statute, which gives the starting point for any Court. He submits, therefore, that the pending matter arose when this statute was in force, and so, its state of continuance currently, represents the valid law.

(q) The Stand of the Interested Parties

(i) Nominations in fresh elections

[189] The 1st interested party filed a replying affidavit dated 15th November, 2017, sworn by Dr. Ekuru Aukot, in his capacity as party leader of the Thirdway Alliance Kenya.

[190] Dr. Aukot denied allegations that: the repeat Presidential election was not conducted in accordance with the Constitution and the law, or that the 3rd respondent was not validly, procedurally and/or lawfully nominated as a Presidential candidate.

[191] Dr. Aukot further contested allegations that nomination was a condition-precedent to the conduct of fresh election. He also contested the claim that the ***Raila Odinga 2013*** decision represents the true position in law: that where a candidate withdraws from the race, the elections are effectively annulled by operation of law.

[192] He testified that when this Court annulled the election of 8th August 2017, the 1st respondent, in reliance upon ***Raila Odinga 2013,*** only gazetted the 3rd respondent and the NASA Presidential election candidate, as persons eligible to participate in the fresh Presidential election, to the exclusion of the other candidates in the invalidated election.

[193] Dr. Aukot averred that he was aggrieved by the said exclusion, and sought redress in this Court.

The Court declined to hear the matter on the basis that it had no jurisdiction, directing the deponent to the High Court. In the High Court, *Mativo J.* rendered a decision in the ***Ekuru Aukot Case,*** the effect of which was to Order the inclusion of the deponent, as well as all the candidates who had participated in the 8th August, 2017 elections, if they had not formally withdrawn. He deponed that this decision was complied with by the 1st and 2nd respondents, and stands as final authority, unless and until it is successfully contested in the appropriate forum.

[194] It is in Dr. Aukot's averment that, in light of the High Court decision, he and the National Executive Committee members of the Thirdway Alliance, met with the 1st and 2nd respondents on 13th October, 2017, and discussed the weaknesses identified in the electoral system, as cited in the ***Raila 2017*** decision. This forum of deliberations considered the mitigation measures adopted to avert a repeat of the irregularities attributed to the 8th August, 2017 poll. He deponed that he and his fellow party members were issued with a report of the safety measures, and received assurance from Prof. Ghuliye, an IEBC Commissioner, that the Commission had engaged with Safaricom, as the main data transmission service-provider.

[195] Dr. Aukot deponed further, that these ameliorative measures were adopted during the fresh Presidential election, making the exercise more effective, and he witnessed their application first-hand. He states that, as a registered voter at Kapedo Constituency, he was unable to be identified by the KIEMS kit finger-print system, and had to go through an *alpha-numeric search*, which proved successful, and he was able to cast his vote.

[196] It is Dr. Aukot's evidence on nominations, that nomination of candidates was not mandatory in the repeat elections, due to impracticalities occasioned by constitutional time-frames; and he believed that the question of nomination of candidates in a repeat Presidential election had been settled by the ***Ekuru Aukot*** decision, and would not now be a subject for further litigation.

[197] Dr. Aukot, lastly, averred that there is a pending appeal on the ***Ekuru Aukot*** decision, before the Court of appeal at Nairobi (being Civil Appeal No. 359 of 2017); he perceived that the petitioners are acting in bad faith, by inviting this Court to adjudicate over an issue that is on appeal.

(ii) State resources, and State interference in elections

[198] On behalf of the 2nd interested party, Dr. Fred Matiang'i swore an affidavit, in his capacity as Cabinet Secretary, Minister of Interior & Co-ordination of National Government, dated 13th November, 2017. He responds to the issues raised in relation to alleged acts or omissions by State or Public Officers, in the run-up to the fresh Presidential election. It is his testimony that the 1st respondent had duly collaborated, through the multi-agency team, in election security-preparedness.

[199] He deponed that this team had been charged with the responsibility of mapping out violence hot-spots, all over the country, for the purpose of ascertaining deserving cases, in the deployment of security measures. The deponent denied the petitioners' averments that the defence agency was deployed in certain particular areas, so as to occasion demonstrations and disruptions, during the fresh Presidential election.

[200] The deponent further denied the allegation that Police officers had participated in the disruption of a NASA rally in Meru. He depones in addition, that the disruption was due to political rivalry between Jubilee and NASA supporters, manifested at a rally organized without prior notice to the Police.

[201] The deponent averred that, in the run-up to the fresh Presidential election, there had emerged

clear instances of threat and intimidation directed at officers of the 1st respondent, which merited effective security response, and in respect of which the Police officers did act, proportionately and professionally. He furthermore denied the particulars of fatalities portrayed in the Human Rights Commission report, "*Mirage at Dusk: A Human Rights Account of the 2017 General Election",* which reported 37 fatalities. He averred to the contrary, that the National Police Service Commission records depict 13 fatalities, in the commotions of the pre-election period.

[202] The deponent also averred that the Inspector General of the National Police Service had informed him that only eight Police officers had been injured in the line of duty, contrary to the allegation that the relevant figure is 13, coming from the petitioners.

[203] In response to the allegation of undue influence, in the declaration of 25th October, 2017 as a public holiday, the deponent stated that he invoked his mandate, under Section 4 of the Public Holidays Act, to declare public holidays. He averred that he had exercised this power reasonably and legitimately; and that the declaration was not intended to subvert the judicial process, insofar as this related to the fresh Presidential election.

[204] The deponent, in response to the allegation that he had banned anti-IEBC demonstrations, averred that on the 12th of October, 2017, following a resolution by the committee entrusted with security matters, he had issued a directive pursuant to the Public Order Act (Cap.56, of the Laws of Kenya), restricting public demonstrations within the Central Business District of Nairobi City County, Mombasa and Kisumu, to forestall the imminent threat of destruction of private property, and the potential impacts on the enjoyment of economic rights. This, he averred, did not amount to a ban on anti IEBC demonstrations.

(iii) Relocation of polling stations

[205] The 2nd interested party deposed that the relocation of polling stations in Kibra Constituency had been occasioned by insecurity and that, it is thanks to advantages flowing from such relocation, that essential security was provided which facilitated the process of voting. He denied the allegation that the Police had suppressed reporting on violence, and the gathering of evidence of human-rights violations, by destroying cameras and beating-up photographers.

(iv) The responses to petitions: overview

[206] The foregoing is a detailed account of the respondents' and interested parties' cases, and the evidentiary material which they proffer, to counteract the petitions lodged against them. From this account, we have taken note of the main factor in a contest which, essentially, stands or falls on the *evidence*. We are now in a position to undertake an analytical appraisal, such as will lead us to the ultimate verdict of this Court.

D. ISSUES FOR DETERMINATION

[207] An unusual feature in the petitioners' causes is, without a doubt, their boundless multiplicity of grievances: a condition that poses a clear challenge to the very design of judicial redress. It is hardly surprising, hence, that the parties failed to come to mutual agreement on issues that truly merit this Court's intercession. In the circumstances, each party was granted, at the pre-trial conference of 14th November, 2017 the liberty to file and make submissions on manifold issues, subject to the terrains of the pleadings on record. From the resulting maze, the Court has been able to extract the following as the main questions for determination:

*i. what is the **locus standi** of the petitioners" are their causes being pursued in the public interest"*

ii. did the 1st and 2nd respondents conduct the Presidential election held on 26th October, 2017 in conformity with the Constitution and the applicable laws"

iii. what is the legal effect of the withdrawal of a Presidential election candidate before election" did any of the candidates validly or properly withdraw from the Presidential election held on 26th October, 2017"

iv. did the election conducted on 26th October, 2017 meet the constitutional threshold of a free and fair election under Article 81 of the Constitution"

v. what are the legal consequences of not holding a Presidential election in each constituency under Article 138(2) of the Constitution"

vi. was the Presidential election held on 26th October, 2017 "marred with illegalities and irregularities"" if so, what are their effects on the validity of the election"

vii. what is the effect of the Election Laws (Amendment) Act, 2017 on the conduct of the Presidential election held on 26th October, 2017" is Section 83 of the Elections Act (as amended) unconstitutional"

(viii) was the election held on 26th October, 2017 and its results, legitimate and credible, both in fact and in law"

(ix) what Orders should the Court issue, including Orders on costs"

1. Petitioners'** locus standi **and Public Interest Litigation

(i) What is the locus standi of the petitioners" Are their causes being pursued in the public interest"

[208] This issue of *locus standi* was raised by the 3rd respondent (paragraph 4 of the response to Petition No. 4 of 2017). It was contended that, '*the petitioners are not entitled to file a petition under Article 140(3), as the persons contemplated in the said Article 140(3) are not persons who have exercised their rights under Article 38.*'

[209] Subsequently, the 3rd respondent's counsel submitted in Court that the petitioners had only demonstrated that they were registered voters, but failed to demonstrate that they had exercised the right to vote¾*hence they failed the test for filing* a petition under Article 140(1). They argued further that participation in an election gives a person *locus standi* under article 140(1) and that a person must have exercised the right under Article 38 to attain the *locus standi.* We now proceed to determine whether the petitioners herein have the requisite *locus standi* to prosecute their respective causes.

[210] This Court's jurisdiction to hear and determine a Presidential election petition is provided for under Article 140 (1), which provides *that "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."* Who is "a person" under Article 140(1)" Article 260 of the Constitution defines a person to include a "*company, association or other body of persons whether incorporated or unincorporated*."

[211] In that context, *locus standi* to file an election petition has been alluded to by this Court, in the Advisory Opinion in, ***In the Matter of the Principle of Gender Representation in the National***

Assembly and the Senate, Advisory Opinion No. 2 of 2012, with the Court thus stating [paragraph 69]:

"Article 140(1) of the Constitution provides:

*'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.'*

*It is clear that **the aggrieved, in such a case, may be a candidate in the election, or indeed, any other person."***

[212] Guided by the terms of Articles 140 and 260, as well as the above- cited pronouncement, it can be concluded that "a person" under Article 140 of the Constitution, includes both a natural and a juristic person. There is no requirement for participation in an election, under Article 140. The 3rd respondent did not, in our view, effectively affirm his submission to the effect that Article 140 (1) bestows *locus standi* only upon persons who *have exercised their rights to vote* under Article 38. Therefore, we hold that the petitioners have the legal standing under Article 140 (1), to file the Petition.

(ii) Are the petitioners' causes being pursued in the public interest"

[213] Closely related to the issue of *locus standi* is whether the petitions before us can be characterized as public interest litigation causes. Towards this end, the 2nd and 3rd petitioners (paragraph 2 of Petition No. 4 of 2017) stated that the petition was instituted in their own interest, and in the interest of the public pursuant to Article 258 as read with Article 22 of the Constitution. The 1st and 2nd respondents did not respond to the issue of public interest litigation; but the 3rd respondent in his response to this petition (paragraph 4), contends that far from advancing any public-interest agenda as alleged in the petition, the petitioners come as no more than surrogates, agents, and mouth-pieces of the 4th respondent and its leaders; masquerade as *bona fide* defenders of the public interest.

[214] The petitioners in response, contended that the petition was indeed filed in a personal capacity and in the interest of other aggrieved voters, without the intention of advancing any political interest. In addition, the petitioners submit that the matter is of great public interest and, any allegations to the contrary are misplaced. The petitioners assert their right to come to court as Kenyans, in their individual capacities, under the Constitution. They deny that they are a front for any political party.

[215] In urging the Court to dismiss the petition, counsel for the 3rd respondent submitted that this Court should put a stop to all abuses of the process of public interest litigation.

[216] Counsel called in aid the Supreme Court of India case, of ***Ashok Kumar Pandey v. State of West Bengal AIR 2004 SC 280*** in which caution was sounded, in relation to public interest litigation, on the basis that the true interest of litigants ought to unfold:

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking… As indicated above,[the] Court must be careful to see that a body of persons or [a] member of public, who approaches the court is acting** bona fide **and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations…The Petitioners of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

[217] Learned counsel urged the Court to partake of this opportunity, and issue clear guidelines for the pursuit of public interest litigation at the various levels of judicial forum.

[218] We note that, at the level of principle, this Court already has pronounced itself on the elements of public-interest-litigation, notably in Civil Application No. 29 of 2014, ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Other,*** [2014] eKLR, as follows:

"Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. ***This was the Constitution's aim in enlarging*** *locus standi* ***in human rights and constitutional litigation.*** *Locus standi* ***has a close nexus to the right of access to justice…"***

[219] We would have no doubt that the subject-matter of the petitions before us, does meet the criteria to be characterized as being in the category of public-interest litigation. Public-interest litigation is a "public right", enshrined in Articles 22 (1) (c) and 258 (2) (c) of the Constitution. It is a veritable vehicle for the vindication of public rights, such as extend beyond the constraints of the common law doctrine of *locus standi.* Since public interest litigation, as it sounds currently, has elicited considerable judicial insight from the High Court, this is not the time, in our view, for this Court to lay down hard and fast rules or guidelines, for the admittance of relevant cases, as we should not, inadvertently, constrain the creativity of other superior Courts.

[220] The general guiding principle in public interest litigation should always be that, the suit must be brought in the broad "public interest". It should not be a veil for private, commercial, partisan or other "non-public" interests. The detailed contours of the applicable law will continue to unfold, through the works of the superior Courts.

[221] We would regard the proliferation of issues raised in this matter as symbolic of parties aggrieved, and as presenting a real cause for judicial resolution.

2. Fresh Election: The Question of Compliance with the Constitution as Regards Nominations

(i) Did the election conducted on 26th October, 2017 meet the constitutional threshold of a free and fair election under Article 81 of the Constitution"

[222] This Court, on 1st September, 2017 ordered the 1st respondent to conduct a fresh election "in strict conformity with the Constitution and the applicable laws"; and the petitioners have now posited that, without adhering to the law regarding nomination of candidates prior to a fresh election, under Article 140(3) of the Constitution, that edict would not have been complied with. Were nominations, therefore, a necessary part of the fresh election"

[223] In answering the above question, we note that the very core of the 1st petitioner's case, is the question as to whether, the 1st respondent ought to have conducted fresh nominations following the annulment of the presidential election held on 8th August, 2017 and before the holding of the fresh election on 26th October, 2017. As the 2nd and 3rd petitioners share that view, the three petitioners are in unanimity that nominations of presidential candidates ought to have preceded the election of 26th October, 2017. According to the 1st petitioner, specifically, nomination is such a critical process in an electoral contest that, a lack of it vitiates any election thereafter conducted.

[224] According to the 1st petitioner, Articles 137 and 138 of the Constitution require that nominations do take place in every Presidential election. According to the 1st petitioner, all Presidential elections, other

than an election conducted pursuant to Article 138(5), must be preceded by the nomination of candidates. He further submitted that the only *sui generis* Presidential election is an election conducted pursuant to Article 138(5), as in such a case, the Constitution itself 'nominates' the two candidates who participate in that election¾ which is required to take place within 30 days.

[225] The 1st petitioner urged the Court to derive lessons from elections held after the nullification of County or Parliamentary elections, in respect of which nominations are a prerequisite for any fresh election. According to him, if nominations must be conducted afresh, upon the nullification of such elections, then the same measure should apply for a fresh Presidential election. Such is the position too, of the 2nd and 3rd petitioners. The three petitioners took the position that, since the 1st respondent did not conduct any nominations for the election held on 26th October, 2017, contrary to the Constitution and the governing laws, the declaration of the 3rd respondent as the winner of that election was null and void.

[226] The 1st respondent, however, takes the position that though lack of, or improper nomination of candidates is one of the grounds under Rule 8 of the Supreme Court (Presidential Election Petition) Rules, 2017, upon which a Presidential election may be vitiated, the petitioners in ***Raila 2017*** did not challenge the nomination process prior to the 8th August, 2017 election; and neither did the Supreme Court find any fault with the said process. Consequently, the 2nd respondent urges that all the processes leading to the conduct of the 8th August, 2017 election remain valid, and are not required to be repeated before a fresh Presidential election is held under Article 140(3) of the Constitution.

[227] The 1st respondent set out in detail some of the crucial processes, including preparation and certification of the register of voters and nominations, that occur before a General Election is held, and which processes according to him, need not be repeated if there is a fresh Presidential election under Article 140(3) of the Constitution¾especially where such processes had not been impugned. As the Supreme Court only nullified the election held on 8th August, 2017 for lack of, or improper result transmission, and left the nomination process intact, it was urged, a repeat of that process when holding a fresh election, pursuant to Article 140(3) of the Constitution, would have been superfluous, and an improper claim on time and public resources.

[228] This position is also adopted by the 3rd respondent, who urges the point that when the Supreme Court invalidated the Presidential election held on 8th August, 2017, it did not annul the nominations which had taken place on 28th and 29th May, 2017. Consequently, he contends that the IEBC acted in accordance with the law, in gazetting the identified candidates as duly nominated to participate in the election. At any rate, it was urged, prior to the 26th October, 2017 election, no political party, or candidate, or any other person, had complained about the publication of the special gazette notice, without the preliminary step of nominations of candidates. The 3rd respondent, thus, maintains that he was validly nominated as a Presidential candidate, and his inclusion on the ballot paper during the fresh election held on 26th October, 2017 was lawful, as was also the inclusion of all other candidates.

[229] The 1st and 3rd respondents' position was that ***Raila 2013*** decision was the applicable law, with regard to the conduct of nominations, in for a fresh Presidential election held following the nullification of such an election. Pursuant to that decision, they urged, it was not necessary to conduct nominations, as a repeat Presidential election would be between the candidates who had contested the election of the President-elect and the candidate whose election was nullified.

[230] Relevant issues on this question may be identified as follows:

(a) what is the purpose of nominations in a Presidential election"

(b) should the 1st and 2nd respondents have conducted nominations of candidates in preparation for the Presidential election held on 26th October, 2017" were the Presidential candidates who took part in the fresh election validly nominated"

(c) what is the place of the ***Raila 2013*** *decision, and the* ***Ekuru Aukot*** *Judgment, in the conduct of the fresh election held on 26th October, 2017"*

(a) Purpose of nomination in a Presidential election

(ii) Was the nomination process properly conducted, prior to the holding of the election of 26th October, 2017"

[231] The nomination process is deeply rooted in the Constitution, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions. Article 137 specifies the qualifications and disqualifications of a Presidential candidate, in the following terms:

"(1) A person qualifies for nomination as a presidential candidate if the person""

(a) is a citizen by birth;

(b) is qualified to stand for election as a member of Parliament;

(c) is nominated by a political party, or is an independent candidate; and

(d) is nominated by not fewer than two thousand voters from each of a majority of the counties.

"(2) A person is not qualified for nomination as a presidential candidate if the person""

(a) owes allegiance to a foreign state; or

(b) is a public officer, or is acting in any State or other public office.

"(3) Clause 2(b) shall not apply to""

(a) the President;

(b) the Deputy President; or

(c) a member of Parliament."

[232] Article 138(8)(a) also underscores the centrality of nomination, by decreeing that a Presidential election shall be cancelled if no person has been nominated as a candidate before the expiry of the period set for the delivery of nomination papers. Nomination, therefore, is not just a formality, or an exercise in futility, nor can it be dispensed with, save for lawful cause. Besides, not everyone qualifies to be nominated as a contestant, as this can be deduced from the phraseology of Article 137(1) and 137(2), which respectively, thus signal: '*a person qualifies for nomination…";* and *'a person is not qualified for nomination…'.* The Constitution thus provides the yardstick within which the nomination exercise is to be conducted, and it is only where a person meets the threshold set under Article 137, that such a person will have been duly nominated.

[233] Article 138 goes further to signal the process set in motion, upon the conclusion of a nomination exercise. Article 138(1) and (2) thus provides:

"(1) If only one candidate for President is nominated, that candidate shall be declared elected.

"(2) If two or more candidates for President are nominated, an election shall be held in each constituency."

[234] In summary, therefore, at a general level, nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election.

(iii) Presidential election of 26th October, 2017: was nomination required"

[235] The Constitution of Kenya, 2010 contemplates various instances in which a Presidential election may be held. These are as follows:

(i) at a General Election pursuant to Article 136(2)(a) of the Constitution;

(ii) whenever a vacancy occurs in the office of the President, as provided for under Article 146 of the Constitution;

(iii) an election conducted pursuant to Article 138(5) of the Constitution, where no Presidential candidate attains the constitutional threshold necessary before being declared elected to have been elected;

(iv) where a President-elect dies before assuming office as provided for under Article 139 of the Constitution;

(v) where the Supreme Court determines the election of the President-elect to be invalid, pursuant to Article 140(3) of the Constitution.

[236] All such elections are unique, and take place under different circumstances. As such, it is essential that they be appraised separately, and perceived in their distinctive contexts. We note, in this context, that we have been referred to Section 14 of the Elections Act, as a foundation for holding a nomination before all Presidential contests, and particularly in the case of an election conducted pursuant to Article 140(3). In that regard, indeed, Section 14 provides the manner in which a Presidential election is initiated, in the following terms:

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

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

(b) in the case of an election under Article 138(5) of the Constitution, at least twenty-one days before the date of the election;

(c) in any other case, upon the office of the President becoming vacant.

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

(a) the nomination day for the presidential election; and

(b) the day or days on which the poll shall be taken for the presidential election, which shall not be less than twenty-one days after the day specified for nomination."

[237]Though the use of the phrase, '*whenever a presidential election is to be held'* signals a wide scope of application, the substantive provision, nonetheless, confines the application of Section 14 to just three kinds of Presidential election, these being: a general election; an election conducted under Article 138(5); and, whenever a vacancy occurs. In all those instances, the nomination process is identified as an imperative step, before the conduct of any such election. The only Presidential election not specifically mentioned therein, is *a fresh election conducted pursuant to Article 140(3) of the Constitution.* It is apparent to us that, the failure to recognize the need for nomination in an election under Article 140(3), was not out of oversight, or inattention, on the part of the drafters of the Constitution, but arose from a proper appreciation of the law.

[238] We would note in that context, that though Section 14 requires nominations to be conducted for an election under Article 138(5), the Constitution itself restricts the candidates who may participate in such an election, to only the candidate, or candidates with the greatest number of votes, and the candidate, or candidates, with the second greatest number of votes. Consequently, *nominations would be pointless, as the Constitution itself establishes with specificity who the participating candidates should be.*

[239] It is clear that an election held under Article 138(5) is not a stand-alone election, but rather, one anchored on an 'initial' election that had been conducted and where no candidate met the constitutional threshold, for being declared elected. Similarly, a fresh election conducted pursuant to Article 140(3) is anchored upon the nullification of a Presidential election, which could have been part of a general election; an election upon a vacancy occurring in the office of the President; or an election held under Article 138(5) of the Constitution. It is therefore not a stand-alone election, devoid of a historical foundation.

[240] On the basis of the foregoing reasoning, the election held on 26th October, 2017 was the outlaw of the nullification of the Presidential election held on 8th August, 2017. The election of 8th August, 2017 was itself a General Election, which is held every second Tuesday in August of every fifth year. It was also the second national election held under Constitution of 2010. It is our perception that, an objective appreciation of the fresh Presidential election held on 26th October, 2017 can only be achieved if it is seen in context, rather than in isolation from the General Election of 8th August, 2017 and the processes leading to that earlier election.

[241] It is of relevance that Article 140 confers upon the Supreme Court jurisdiction to determine the validity of a Presidential election, upon a contest hinged on any of the grounds provided for under Rule 8 of the Supreme Court (Presidential Election Petition) Rules, 2017 as follows:

(i) the validity of the conduct of a presidential election;

(ii) the validity of the qualification of a President-elect;

(iii) the commission of an election offence as provided under the Election Offences Act (No. 37 of 2016);

(iv) the validity of the nomination of a Presidential candidate or

(v) any other ground that the Court deems sufficient, provided such ground shall not be frivolous,

vexatious or scandalous.

[242] A clear view of the election petition in ***Raila 2017*** would show that it revolved around the question of results transmission, irregularities, and illegalities touching on the conduct of the election held on 8th August, 2017. Thus, in the majority decision, the following passage occurs [paragraph 303]:

"[W]e find that the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, inter alia, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to Section 83 of the Elections Act, we have no choice but to nullify it."

[243] Upon making that finding, the Court directed the IEBC to conduct a fresh election "in strict conformity with the Constitution and the applicable election laws." It has not been disputed in the present petition that the nullification of the election held on 8th August, 2017 was occasioned by the acts or omissions of the IEBC during the conduct of that election. The nomination exercise that had taken place prior to the election, was not the subject of any contest, and so it remained, and remains valid¾and therefore, was a proper basis for the conduct of the fresh Presidential election of 26th October, 2017. It emerges from this analysis that, a fresh election under Article 140(3) is not a disjointed phenomenon, but one lodged within the motions of the previous electoral contest. The fresh election held on 26th October, 2017 only happened because the August 8th 2017 election, in view of the ***Raila 2017*** decision, did not culminate in its logical conclusion, that of determining who the winner was. The purpose of the 26th October, 2017 election, therefore, was to concluded a 5-year electoral cycle, which would have ordinarily ended on 8th August, 2017, and to initiate another electoral cycle of 5 years, ending on the second Tuesday in August, of the next fifth year. From this timing scenario, it would not, in our view, be logical that a person who was not a Presidential candidate for the election held on 8th August, 2017 be a contestant in a repeat election, and subject candidates to a fresh nomination¾when the issue arose neither in the petition challenging that election, nor in the final Orders of this Court.

[244] The above position may be perceived alongside the possible scenario of an election held pursuant to Article 139 (in case of death of a President-elect, before assuming office), or one under Article 146 (where a vacancy arises in the office of the President, and the Deputy-President's office is vacant, or the Deputy-President is unable to assume office). In these two scenarios, a nomination process is but a logical contemplation, of the law, as there would be no other way of identifying a candidate.

[245] In our appraisal of the law relating to the nomination of candidates for Presidential election, we would prefer the purposive standpoint, predicated on the Constitution's intent of assuring unbroken governance process. This leads us to hold that the nominations for Presidential-election candidates which took place on 28th and 29th May, 2017, remained valid and no other nomination was required for the purposes of the fresh Presidential election held on 26th October, 2017. We affirm, therefore, that all the Presidential candidates in the election held on 26th October, 2017, were validly nominated, and it was proper for the 2nd respondent to include them in the ballot papers as Presidential candidates.

[246] What of the inclusion of Mr. Jirongo in the ballot" We find no fault in the IEBC decision to do so, because the initial decision to exclude him was based on the fact that the High Court had on 4th October, 2017, in ***H.C. Insolvency Cause No.3 of 2017,*** adjudged him to be bankrupt, thus automatically disqualifying him, by dint of Article 137 of the Constitution as read with Article 99 thereof, from being a Presidential candidate.

[247] However, although the said decision should have settled the matter, on 16th October, 2017, Mr. Jirongo made an application to the High Court seeking a stay of the Order which had adjudged him

bankrupt. By a Ruling dated 23rd October, 2017, the High Court stayed the Bankruptcy Order, pending the hearing and determination of that application. By virtue of that stay Order, Mr. Jirongo became effectively qualified to contest in a Presidential election, and hence the IEBC decision to include him in the ballot, through *Gazette Notice* No. 10562 Vol. CXIX No. 160 dated 24th October, 2017. We are unable to understand why the petitioners did not appreciate such a development of definite legal consequence.

(b) The Raila Odinga 2013 & Ekuru Aukot 2017 decisions: what standing on fresh Presidential elections"

[248] An issue was raised, regarding the application of ***Raila 2013,*** in terms of the identification of candidates for fresh election conducted pursuant to Article 140(3) of the Constitution. Of relevance in that decision are paragraphs 291 and 292, which read as follows""

"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 elections'.

"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."

[249] The 1st respondent urges that it fully relied on the above decision, in deciding to have only two Presidential candidates in the fresh election, being the successful petitioner and the President-elect in the invalidated election. It is clear that the decision in ***Raila 2013*** had limited the number of candidates who would participate in a fresh Presidential election, in the context in which the issue was raised in that petition. We have already in this decision, however, stated our position, with the object of clarifying the law.

[250] We do take note of the context in which the Judgment in ***Ekuru Aukot*** was given, directing the IEBC to include the name of Dr. Ekuru Aukot as a Presidential candidate for the fresh election held on 26th October, 2017. While being in agreement with the petitioners, that the High Court had directed the inclusion of Dr. Aukot as an additional Presidential candidate, but without mentioning the status of the other potential candidates, it is clear to us that the Court's reasoning (paragraph 73) had contemplated the availability of an opportunity for every other person who had been a Presidential candidate in the elections of 8th August, 2017, to participate in the fresh election. This is manifestly from the passage in that Judgment, that¾

"…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 [f]resh election."*** [emphasis added].

[251] In all the circumstances, we find no fault with the 1st and 2nd respondents' decision not to conduct fresh nominations; it was a decision fully in keeping with ***Raila 2013,*** and later, the ***Ekuru Aukot*** decision: this position, as correctly argued by counsel for the 3rd petitioner, binding on them at the time.

[252] In conclusion, therefore, it is our finding that the 1st and 2nd respondents, and indeed the 3rd respondent as well as all the other presidential election candidates, bear no fault as regards nominations, and the inclusion of all the August 8th candidates on the ballot paper.

3. Voluntary Withdrawal of Candidate, Before Election

(i) What is the legal effect of the withdrawal of a Presidential election candidate before election" Did any of the candidates validly or properly withdraw from the Presidential election held on 26th October, 2017"

[253] The attribution of illegality to IEBC's retention of the Hon. Raila Odinga's name on the ballot, after he wrote a letter withdrawing his candidature, was a subject of submissions by all the petitioners.

[254] In response, the 1st and 2nd respondents relied on *Regulation 52* of the *Elections (General) Regulations, 2012,* submitting that, save for a withdrawal by a candidate in any election three days after nominations, the election laws do not contemplate withdrawal. And consequently, the Hon. Raila Odinga's letter of withdrawal as a Presidential election candidate, amounted to just a mere intention to withdraw, with no legal effect, as it had not been communicated on the prescribed form.

[255] The 1st respondent, besides, stated that he had issued a press statement after the letter by Hon. Odinga was received, emphasizing the need to file Form 24A, in compliance with the law; but he did not receive any such notice of withdrawal from Mr. Odinga. Supporting that view, the 3rd respondent submitted that the NASA Presidential candidate had abandoned the electoral contest outside the framework of the law, and so should not be regarded as having withdrawn his candidature; and his name had properly remained on the ballot.

[256] The 2nd interested party, on his part, submitted that the applicable law has since changed from the position in ***Raila 2013,*** by virtue of the subsequent introduction of Regulation 52 of the Elections (General) Regulations, which requires a candidate seeking to withdraw from an election, to do so within three days of the nomination, by filling in a Form 24A.

[257] The question calls for an answer: what is the effect of the alleged withdrawal by the NASA Presidential candidate, on the elections" This entails interpretation of the Constitution, and the applicable laws as well as the effect of ***Raila 2013,*** in that context.

[258] The NASA Presidential candidate had written a letter addressed to the 1st respondent, dated 10th October, 2017 (annexure NM6 to the affidavit of Njonjo Mue), bearing the following content:

"RE: WITHDRAWAL OF CANDIDATURE IN THE FRESH PRESIDENTIAL ELECTIONS

"The above matter refers.

"Following the nullification of the presidential election held on 8th August, 2017 and the subsequent gazettement by the Commission of the undersigned as presidential candidate and running mate for a fresh election that you have scheduled for 26th October, 2017, we hereby withdraw our candidature with immediate effect."

[259] Subsequently, on 11th October, 2017 the 1st respondent in response to the said letter of withdrawal, issued a press statement in which he cited the legal requirement of Form 24A being filled by a candidate, as proof of withdrawal. The transcribed press statement, in part, thus reads:

"The Commission cannot compel a candidate to participate in an election. ***The law allows a candidate to withdraw his/her candidature by delivering to the Commission a duly filled Form 24A. This Form is provided by the Elections (General) Regulations.***

We note that the Rt. Honourable Raila Odinga and his running mate sent a letter dated 10th October, 2017 indicating that they had decided to withdraw from the fresh presidential election. ***They however have not submitted the statutory Form 24A. Once the Commission receives the requisite Notice from any of the candidates it will process the same in accordance with the requisite provision of Law"*** [emphasis supplied].

[260] We note that, neither the Constitution nor the Elections Act makes provision for the withdrawal of a candidate from an election. The procedure for withdrawal of candidature is, instead, provided for under Regulation 52 of the Elections (General) Regulations, 2017 which provides that:

"(1) A candidate who has been nominated may withdraw his or her candidature by delivering to the respective returning officer a notice to that effect in Form 24A not later than three days after nomination.

"(2) Where there are only two nominated candidates and one candidate withdraws, the remaining candidate shall be declared duly elected in accordance with regulation 53."

[261] It is thus, under the law, plain that a Presidential candidate who intends to withdraw can only do so within three days of the nominations by filling Form 24A, and submitting the same to the Returning Officer ¾ in this case the 2nd respondent.

[262] It was the petitioners' standpoint, however, that Regulation 52 is not applicable to fresh election, because no nominations had been conducted prior to that election. They urged the Court to rely upon ***Raila 2013,*** for guidance on the issue. In that decision, this Court, (paragraph 290), held that if a candidate who took part in an original Presidential election abandons the fresh election, scheduled under Article 140 of the Constitution, *"…the provisions of Article 138(8) (b) would become applicable, with fresh nominations ensuing."*

[263] The petitioners in petition No. 4 of 2014 submitted, besides, that the withdrawal from and/or abandonment of candidature by the NASA presidential candidate, ought to have occasioned the vacation of the fresh Presidential election date of 26th October, 2017, by operation of law.

[264] The respondents, for their part, contended that there was no effective withdrawal from the fresh election by the NASA Presidential candidate, such as would lead to cancellation of the fresh election. They submitted that a candidate could only withdraw pursuant to the provisions of Regulation 52, and failure to do so would render a withdrawal ineffective, and of no legal effect.

[265] In determining the legal effect of withdrawal by a candidate before an election, what guidance is to be drawn from the pronouncements of this Court in ***Raila 2013"*** The operative paragraphs are 289- 290 where the Court thus stated:

"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(8) (b) would become applicable, with fresh nominations ensuing."

[266] These two paragraphs have assumed judicial prominence since the nullification of the Presidential election of 8th August, 2017 by this Court. Not only have they been subject to contradictory interpretations by parties to the petitions before us, they have also elicited varying "expert" comment from many quarters.

[267] In the High Court, before *Mativo J.* in the ***Ekuru Aukot Case,*** the question arose as to whether the Supreme Court's pronouncements constituted *ratio decidendi,* and were therefore binding on him, or whether they were *obiter dicta.*

[268] The situation is more complex, as the ***Ekuru Aukot case*** is now on appeal pending determination before the Court of Appeal. This is significant, in view of this Court's general policy of staying its hand in a matter that is pending before another superior Court.

[269] The relevance of such questions in this instance, calls for a consideration of the point whether the above paragraphs in the ***Raila 2013 case,*** are of binding authority. The second question is whether this Court should, notwithstanding the fact that the matter is pending on appeal, proceed to determine this issue. The third question is whether it is necessary for the Court to make a clarification of the meaning of the said paragraphs, in view of the contradictory interpretations attendant upon them.

[270] To the first question, it is not in doubt that in making some of the pronouncements it made, the Supreme Court was responding to hypothetical questions that had been expressed before it by the Attorney- General, in his capacity as *amicus curiae.* The questions were not essential for the determination of the two petitions before the Court; and the answers to them could not, therefore, constitute the *ratio decidendi* of ***Raila 2013.***

[271] To that extent, therefore, the pronouncements in those and other related paragraphs, were *orbiter dicta,* and thus, not binding on other Courts. *Mr. Justice Mativo,* in his carefully thought-out Judgment in ***Ekuru Aukot,*** is not, therefore, to be faulted for having characterized the said statements as such.

[272] As to whether this Court should determine this matter while it is pending on appeal, it is apparent to us that this is no ordinary matter, resolution to which can await the appellate process. The petitions now before us could stand or fall, on the basis of how we determine the twin issues of withdrawal of candidature, and nominations. As the Supreme Court, in this instance, is exercising its original and exclusive jurisdiction under Article 140 of the Constitution, an abnegation of its task is not tenable; and the responsibility devolves to it to resolve the relevant questions, without reservation. The Court's task is to determine the Presidential election petition.

[273] To the third question, in ordinary circumstances, having declared paragraphs 286-290 of the ***Raila 2013*** decision *obiter dicta,* there would be no need to clarify their meaning, since they are of no binding effect. They are of no precedential value. However, though *obiter,* these pronouncements hold special stature, emanating as they do from the apex Court.

[274] It is proper, in the circumstances, to consider the content of paragraphs 289 and 290, as the "suppositions", today, have a live face before us.

Paragraph 289 thus reads:

"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."

[275] Thus far, it is clear to us that the foregoing statement represents the correct legal position. But the paragraph also reads:

"***In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest."***

[276] The foregoing statement is only correct to the extent that it refers to the nullification of an election of the President-elect, where the issue of "nomination of candidates" was not the basis for the nullification of the election. In the petitions before us, the nomination of candidates was not the basis for the nullification of the election of 8th August 2017. But if an election is nullified *on the basis of flawed nominations,* it is clear that the ensuing fresh election cannot be conducted on the basis of the same flawed nominations. Fresh nominations would, in the circumstances, have to be conducted.

Paragraph 290, which appeared more conjectural in its cast, thus reads:

"***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 (8) (b) would become applicable, with fresh nominations ensuing."***

[277] It is clear to us, with the benefit of hind sight, that, had the foregoing pronouncement not been made *obiter;* had it been *a* r*atio,* it would have been made *per incuriam,* since Article 138 (8) (b) of the Constitution only contemplates three scenarios of a cancellation of an election, namely: where no person has been nominated as a candidate before the expiry of the period set for the delivery of nominations; where a candidate for election as President, or Deputy-President, dies on or before the scheduled election date; or a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President. Withdrawal of a candidate from the electoral contest is clearly not one of the scenarios contemplated by the Constitution, as a basis for the cancellation of an election. In the circumstances, this Court would have to depart from the decision in question.

[278] Our immediate question is: did the Presidential candidate for NASA withdraw from the 26th October, 2017 electoral contest" It has been submitted by the respondents that, because he did not effect his withdrawal by the prescribed statutory Form 24, the Hon. Raila Odinga's "purported" withdrawal was of no legal effect. On the other hand, the petitioners urge that the withdrawal was effective, as it was notified through a letter, and as Regulation 52 was inapplicable to this particular case.

[279] It is clear, in the above context, that Regulation 52 provides for withdrawal of a candidate within three days of the nominations. The said Regulation is, thus, not applicable to the situation herein. The nominations had long been conducted before the scheduled fresh election. Does this mean that after the expiry of the three-day period, no candidate can withdraw from an election" We don't think so, as one cannot be forced to participate in an election, in which he or she has lost interest. The NASA candidate not only made a public announcement of his decision to withdraw from the elections, but addressed a formal letter to that effect, to the 1st respondent. Such actions, in our perception, constituted a substantive, and legally-effective withdrawal from the elections.

[280] What legal effect did the withdrawal of the NASA candidate have on the elections of 26th October, if any" It was submitted by the petitioners that the withdrawal should have led to the cancellation of the elections. In view of our observations in the foregoing paragraphs, it emerges clearly that, the withdrawal of the NASA Presidential candidate from the 26th October, 2017 fresh Presidential election *could not, in law, have occasioned the cancellation of the elections.* Did the retention of the name of the withdrawn candidate on the ballot, vitiate the election" The answer is in the negative, given that a candidate has the liberty to withdraw from the electoral contest even one or two days before the elections, when it would be quite impossible to remove his or her name from the ballot.

4. Was this Free and Fair Election, as Required under Article 81 of the Constitution"

[281] On the basis of the pleadings in Petition No. 4 of 2017, this issue, in our view, does not stand on its own, but is inextricably intertwined with other issues and questions requiring resolution, these being:

(i) was every adult citizen afforded the right to vote, without unreasonable restrictions" if so, what is the effect on the entire electoral process"

(ii) was the election free from intimidation, improper influence or corruption" did the 3rd respondent and his supporters, or any political party, instigate or encourage violence during the election period" were any electoral offences committed by the 3rd respondent"

(iii) did the 3rd respondent use public resources as campaign tools" did Cabinet Secretaries and State/Public officers engage in political campaigns and activities" what is the implication of such actions on the validity of the election"

(iv) did the 3rd respondent advertise Government achievements during campaign time"

(v) was the election conducted by an independent and impartial body, and was it administered in an impartial, neutral, efficient, accurate and accountable manner"

(i) Voting without unreasonable restrictions

[282] It is the 2nd and 3rd petitioners case that the 1st and 2nd respondents violated the constitutional right to universal suffrage by failing to provide an opportunity for every person to vote in the fresh Presidential election held on 26th October, 2017. They urge in that regard that due to violence and intimidation, the 1st respondent chose not to conduct the election in 27 constituencies, thereby disenfranchising a significant part of the electorate.

[283] On its part, the 1st respondent submitted that it provided the requisite infrastructure in all the polling stations across the country, and every effort was made to train the electoral officials in all the 290 constituencies, for the conduct of the 26th October 2017 election: save that it was prevented from taking electoral materials to certain polling stations, a matter beyond its control; and so, it was unable to hold elections in 27 constituencies, on the election date.

[284] Like the 1st respondent, the 3rd respondent and the 2nd interested party submitted that every opportunity had been given to voters in the affected regions to exercise their right to vote. However, the insecurity witnessed on the voting day, prevented some voters from exercising their right.

[285] Article 38 of the Constitution carries various dimensions of political rights, such as: (i) the right to political choice (Art.38(1)); (ii) the right to free, fair and regular elections based on universal suffrage and

the free expression of the will of the electors (Art.38(2)); and (iii) the right to be registered as a voter, to vote by secret ballot and to be a candidate for public or political office, without unreasonable restrictions (Art. 38(3)). For purposes of the issue at hand, the relevant parts of that Article are Clauses (2) and (3) thereof which guarantee the right to vote in the following terms:

"(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free….

"(3) Every adult citizen has the right, without unreasonable restrictions:

(a) ……

(b) to vote by secret ballot in any election or referendum….."

[286] The dimensions of this right, and the corresponding obligations to effectuate it, have been extensively set out locally and in other comparative jurisdictions. In the case of ***Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others,*** Supreme Court Petition No. 12 of 2014, [2015] eKLR this Court held [at para 112] that:

"The overriding objective of the Elections Act is to functionalize and promote the right to vote. This requires a broad and liberal interpretation of the Act, so as to provide citizens with every opportunity to vote, and to resolve any disputes emanating from the electioneering process….."

[287] The Constitutional Court of South Africa echoed a dimension of this right in ***New National Party v. Government of the Republic of South Africa and Others*** **(CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999),** in the following terms:

"[11] The Constitution effectively confers the right to vote for legislative bodies at all levels of government …. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.

"[12] …This means that the regulation of the exercise of the right to vote is necessary so that … deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.

"[13] The Constitution recognises [the necessity] to regulate the exercise of the right to vote so as to give substantive content to the right…."

[288] As to who should guarantee the right to vote, Article 21(1) of the Constitution requires the State and State Organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The Constitution and statute law charge the IEBC, a State Organ established under Article 88 of the Constitution, with the responsibility of safeguarding and guaranteeing the enjoyment of the political rights of the Kenyan people.

[289] This is the position in other jurisdictions as well. In the case of ***Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*** **(CCT 03/04) [2004] ZACC,** the Constitutional Court of South Africa thus observed:

"*The right to vote by its very nature imposes positive obligations upon the legislature and the executive… this right which is fundamental to democracy requires proper arrangements to be*

***made for its effective exercise. This is the task of the legislature and the executive which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections*.**"

[290] It is not left to the State and State organs to guarantee the right to vote. The obligation equally binds the voters themselves. Thus in the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others,*** S.C. Petition No. 2B of 2014; [2014] eKLR **[Munya 2B],** in a concurring opinion at paragraphs 247, 248, and 249, Mutunga CJ & P (as he then was), expressed this view in the following terms:

"Constitutional provisions are by themselves not enough. *The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote…. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved:* ***that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections.*** *The election belongs to everybody, and it is, therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it*" [emphasis supplied].

[291] The Supreme Court of Ghana, in ***Nana Akufo-Addo & 2 Others v. John Dramani Mahama & 2 Others***, **Writ No. J1/6/2013** held that: *"beyond the individual's right to vote is the collective interest of the constituency and indeed of the entire country in protecting the franchise."*

[292] On the same line of principle, the Inter American Court on Human Rights stated in the case of ***Velasquez Rodriguez v. Honduras,*** **Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988)**, that "*the Court's task is to determine whether the [alleged] violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights…."* Thus, the question in the instant case is whether the State, IEBC and other State Organs, failed to take necessary action to ensure that the electorate, in the affected areas, were accorded an opportunity to vote.

[293] From the affidavit evidence presented by the 2nd respondent, it is clear that between 21st and 27th October 2017, the 1st respondent and the Police exchanged correspondence on the security of not only the IEBC staff, but also that of the voters, in several parts of the country. The 1st respondent in particular sought urgent Police intervention to protect its staff from attacks of goons wielding *pangas, rungus,* stones and other crude weapons, who were disrupting training sessions for poll officials in Migori, HomaBay, Kisumu, Vihiga and Siaya Counties. Following meetings of the National Security Advisory Committee, the County Commanders were directed to liaise with the IEBC County Co-ordinators, and ensure that elections took place in the affected Counties. In particular, they were directed to ensure adequate security was provided for: election officials, escort for materials to and from the polling stations, and safe passage for voters as well as IEBC Officials to polling stations, and escort for all election materials. Other such measures included: rapid response from the police, in case of threat to the safety of voters or officials; additional security personnel deployed to reinforce existing deployment; emergency evacuation procedures in case of threats to safety or natural disaster; and in high security areas, Joint Operation Centres had been activated, to allow quick coordination on emergencies.

[294] On voting day, Police were called to restore order at St. Mary's Polling Station in Mikindani Ward Jomvu Constituency, and Kasikeu CAW in Kilome Constituency. In Kibra Constituency, under Police supervision, polling had to be relocated from the original Polling Centres to others.

[295] On the basis of the evidence adduced, it is clear to us that violent demonstrations, actively orchestrated by certain political actors, prevented the conduct of the fresh Presidential election, threatened the lives of election officials, voters, electoral infrastructure and private property in certain

parts of the country. Contrary to the petitioners' assertions, it is our further finding that neither the State nor IEBC or any other State Organ failed to fulfil its duty to respect and guarantee the right to vote. To the contrary, the evidence adduced indicates that the State (particularly the Police and the Ministry of Interior and Co-ordination of National Government) took preventative action to safeguard the safety of election officials, voters, election material and infrastructure. It is also evident that there was also active correspondence between the security agencies and the 1st respondent, on securing the country for the conduct of the fresh Presidential election. The police, furthermore, made arrests, and charged suspects of various crimes during the demonstrations.

[296] Who, then, bears responsibility for the denial of the right to vote in the affected areas" We may find insight from the Constitutional Court of South Africa, in the case of ***South African Transport and Allied Workers Union and Another v. Garvas and Others*** (**CCT 112/11) [2012] ZACC 13**; [paragraphs 67 and 68] in which the Court thus observed:

"The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised….For this reason, the decision to exercise the right to assemble [and/or to picket] is one that…[t]he organizers must … always reflect on and reconcile themselves with the risk of a violation of the rights of …[others]."

[297] In a nutshell, it is our finding that neither the State nor the IEBC bears responsibility for failure of voting in certain regions of the country. Such failure ought to be attributed to unidentified private citizens and political actors, who actively caused the offending situations, directly or indirectly. The validity of the fresh election, however, cannot be successfully challenged on that ground alone.

(ii) Impediments: violence, intimidation, improper influence, corruption

[298] It is the 2nd and 3rd petitioners' position that following the delivery of the Supreme Court decision on 1st September, 2017, the 3rd respondent addressed a public rally in Nairobi, in which he threatened *'to deal with'* and *'sort'* the Judiciary. These petitioners also contend that on 2nd September, 2017, the 3rd respondent had a meeting with Jubilee members of Parliament, and allegedly repeated his threat to Supreme Court Judges. They allege that such 'threats' were intended to send a message to the voters that the 3rd respondent would not allow the Court to freely determine disputes arising from a fresh Presidential petition, should a petition be filed again.

[299] While being alive to the fact that the 3rd respondent has on various occasions expressed his dissatisfaction with the Judgment delivered by this Court on 1st September, 2017, we note, contrary to the 2nd and 3rd petitioners' position, that there is no evidence of any Judge of the Supreme Court being intimidated by the choice of words by the 3rd respondent, or of any voter being discouraged from voting on that account. In our view, it is not enough to reproduce the 3rd respondent's political statements, attribute an effect-upon- Judges to them, and invoke the scenario of unidentified voters, then reach the conclusion that such statements had an intimidating effect. As stated in both in the ***Raila 2013*** and ***2017*** decisions, the burden of proof, at all times, lies on a petitioner: and generalised claims, without evidence that meets clear threshold, are of no value. Consequently, we find no basis for the petitioners' claim in this regard, and we dismiss the same.

[300] The 1st and 2nd petitioners attributed acts of intimidation to the decision of Cabinet Secretary Dr. Matiang'i, to bar anti-IEBC demonstrations from the Central Business Districts (CBDs) of Nairobi, Mombasa and Kisumu. We are unable to see how the said actions of the Cabinet Secretary could have had any bearing on the validity of the Presidential election. The 2nd and 3rd petitioners have not shown the nexus, if any, between the actions of the Cabinet Secretary and the low voter-turnout. In the

circumstances, we dismiss the allegation.

[301] The 2nd and 3rd petitioners also submitted that sometime in October, 2017, during the campaigns, the State, headed by the 3rd respondent, withdrew police security personnel attached to the NASA Presidential candidate, his running mate and other principals in that coalition, thus rendering his participation in campaigns in the Presidential election risky, leading to his withdrawal from the election altogether. This allegation has also not been proved. Neither the Hon. Raila Odinga, nor his running mate, has sworn any affidavit to confirm the allegation, and even if it were true, there is no evidence that it had any impact on the Presidential election. That claim therefore fails.

[302] The 2nd and 3rd petitioners claimed that on 2nd October, 2017, the 3rd respondent met 10,000 women supporters at State House, Nairobi, and officially launched a group known as the *'Jubilee Women Brigade;* and adorned in Police and military uniforms, that group later went on to recruit and administer oaths to new members in areas such as West Pokot, Nakuru, Mombasa and Nairobi. According to the petitioners, the act of dressing in military regalia was meant to, and did intimidate voters who were not supporting the Jubilee Party. Such allegations, as we find, are made without any proof at all. We have no choice but to dismiss them. It is not enough to plead such a grave matter, without tangible evidence of its bearing upon the electoral process.

(iii) Public resources: to what extent did these feature in the conduct of election"

[303] The 2nd and 3rd petitioners alleged that the 3rd respondent unlawfully used public resources, by involving Cabinet Secretaries and other senior State Officers in his political campaigns. They accuse the 3rd respondent of using and abusing State resources, including State House facilities such as vehicles and other public resources, in his political campaigns and activities. However, they cited names of Cabinet Secretaries who allegedly participated in the election campaigns, but without particulars showing the mode of the abuses, or the particulars which have had impacts on the elections.

[304] We have noted that the role of Cabinet Secretaries is the subject of regulation under Section 23 of the Leadership and Integrity Act, and, even if the 2nd and 3rd petitioners had sufficient evidence, the alleged actions of the named Cabinet Secretaries cannot be challenged without first examining the governing law¾ a matter which was not brought before us. The complaint in that regard is without merit, and must fail.

(iv) Advertisement of Government achievements: what role in the electoral process"

[305] The 2nd and 3rd petitioners contend that following the nullification of the Presidential election results for the election held on 8th August, 2017, and throughout the campaign period, the 3rd respondent caused to be published by way of advertisement, the achievements of the Government, in the electronic media and in the Government delivery portal. According to them, the said advertisement was meant to exert improper influence upon voters to support the 3rd respondent's re-election bid, contrary to law.

[306] We note that the same issue arose during the hearing of ***Raila 2017,*** and we observed that the issue of advertising by Government during campaign time was then under litigation in the High Court. Consequently, we restrained ourselves from delving into the merits of that issue, to allow the High Court, to proceed and determine it. Subsequently, on 19th October, 2017, the High Court made a determination of the issue, in the case of ***Apollo Mboya v. Attorney General & 15 Others*****,** Petition No. 162 of 2017; [2017] eKLR. The High Court thus determined the matter:

"(a) A declaration is hereby issued that the Kenya Government Delivery

Portal/website www.delivery.go.ke to advertise the achievements by the National Government on various programmes and project undertaken across the country in the last four (4) years is unlawful as it was made in violation of Section 14(2) of the Election Offences Act, No. 37 of 2016 and against Articles 10 and 81(e) of the Constitution and therefore is null and void.

"(b)….

"(c) An order of permanent injunction is hereby issued restraining the national Government whether by itself, agents, servants proxies and/or any other person acting under its or their authority or direction from advertising achievements by the national government of any programmes and or projects undertaken across the country in the last four (4) years in the Kenya government, delivery portal or in any other print media electronic media or by way of banners or hoardings in public places during the election period."

[307] We note that, the High Court gave a clear determination on the said issue, and forbade the Government (not the 3rd respondent in any capacity) from advertising its achievements using State resources during campaign time. This decision was delivered on 19th October, 2017 just a week before the repeat Presidential election was held on 26th October, 2017, and it specifically related to events and actions prior to the election of the 8th August, 2017. The 2nd and 3rd petitioners do not indicate whether the 3rd respondent was in violation of the High Court Orders prior to the 26th October, 2017 election, or was specifically held liable for any advertisements by the Government prior to 8th August, 2017. They have also not indicated any specific instances where the Government, through the print and electronic media, advertised its achievements, during the campaign period for the election held on 26th October, 2017.

[308] Consequently we find that there is insufficient evidence placed before us, on whether the 3rd respondent had, in any way, used government advertisements during the 60 days leading up to the election, as a campaign tool; and we have no option but to dismiss the petitioners' claims, in that regard.

(v) Impartiality and Independence: to what extent were these observed, during the election"

[309] The 2nd and 3rd petitioners contended that the fresh election was not conducted by an independent and competent body, and that the record of this petition is replete with evidence that the 1st respondent, some of its commissioners, and its Secretariat were not independent of political influence, and neither were they impartial, fair or neutral. From that contention, they proceed to make the inference that 1st respondent was not competent in the conduct of the election and, that, consequently, the election was rendered a sham.

[310] Such is a bare contention, which, besides, implicitly denigrates the very constitutional and legal process which has entrusted the conduct of election to but one, duly appointed agency – the IEBC. The contention, in effect, argues against the very concept of legality under the constitutional process, thus negating the essential democratic values of constitutionalism and legal process. Such a stand is negative, retrogressive, and invites disapproval by this Court. Accordingly we hold the contention in question to be devoid of merit.

5. Postponement of Election in some Constituencies: What effect"

[311] Apart from the pleadings and submissions before Court, we take judicial notice of the fact that, there was violence experienced in some parts of the country, on 26th October, 2017. The violence was more pronounced in the 25 constituencies where it was not possible to conduct an election. These 25

constituencies are considered and/or perceived as the strongholds of NASA, whose candidates had opted to not only withdraw from the elections, but also promoted the slogan, “NO REFORMS, NO ELECTIONS”, rallying their supporters to boycott the election. We take judicial notice of the fact that, in those constituencies, as well as parts of Nairobi, officials of the 2nd respondent were physically prevented from accessing the polling stations to which they had been assigned for the purpose of conducting the election.

[312] In response to our question as to the cause of the said violence, Ms. Julie Soweto, counsel for the 2nd and 3rd petitioners, submitted that “it did not matter who caused the violence.” In counsel’s view, the fact that violence occurred in certain parts of the Country was enough to vitiate an election.

[313] It was not, in our view, a meritorious response by learned counsel. Violence in any form, by any person or agency (private or State), against any person, community, institution or establishment, constitutes a travesty of justice and of the rule of law. Violence undermines the democratic process and makes a mockery of the pacific resolution of disputes which is one of the hallmarks of our progressive Constitution. Unchecked and unbridled episodes of violence, are a sure recipe for the disintegration of a nation, and the destruction of the constitutional order. This Court stands not for lending legitimacy to any acts of violence, as a device for settling disagreements.

[314] Were any State agencies, such as the police who are allowed to resort to a limited measure of force to prevent crime, protect lives and property, and quell violent insurrection, to deploy excessive force resulting in injury, destruction of property or death, they certainly would be undermining the authority of the Constitution. By the same token, where civilians, for whatever reason, resort to acts of violence and intimidation, with the object of preventing others from exercising their democratic right to vote, or impeding election officials from executing their constitutional responsibilities, such civilians will engage themselves in the atavistic path of undermining the authority of the Constitution. Article 3(1) of this vital charter categorically declares that “*every person has an obligation to respect, uphold and defend this Constitution.”*

[315] The terms of Article 81(e) (ii) of the Constitution, read in proper context, must be understood to mean that no person, candidate, political party, party agent or supporter, or State agency is to resort to acts of violence, intimidation, improper influence or corruption, to defeat the will of the people exercising their democratic rights to vote. The said provision cannot be read as sanctioning or lending legitimacy to acts of violence and intimidation, to achieve the invalidation of an election. If we were to hold otherwise, the authority of the Constitution would be surrendered to cynical acts of violence: all that one would need to do, is to instigate violence in any corner of the Republic during a Presidential election, and thereafter petition this Court to nullify the election. Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election.

[316] The right to vote is enshrined in Article 38 of the Constitution, which provides that:

“(1)…

“(2) …

“(3)** Every adult citizen has the right, without unreasonable restrictions**””

a) to be registered as a voter;

b) to vote by secret ballot in any election or referendum; and,

c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office" [emphasis supplied].

[317] The operationalising statute, the Elections Act, thus provides in Section 3:

"(1) An adult citizen shall exercise the right to vote specified in Article 38(3) of the Constitution in accordance with this Act.

"(2) A citizen shall exercise the right to vote if the citizen is registered in the Register of Voters."

[318] We have already established that the Presidential election could not be held in certain constituencies because of the threat of insecurity caused by violent demonstrations. In that regard, the IEBC invoked Section 55B of the Elections Act, postponing the conduct of the repeat election to 28th October, 2017. The IEBC is empowered by the Elections Act to postpone an election in a Constituency, County or Ward, in circumstances specified by the Act. However, there is a *non-obstante* [a 'none-the-less' qualification] proviso to that provision; the Commission *may,* if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made. Section 55B of the Elections Act spells out that mandate in the following terms:

"(1) The Commission may, where a date has been appointed for holding an election, *postpone* ***the election in a constituency, county or ward for such period as it*** *may consider necessary* ***where""***

(a) there is reason to believe that a *serious breach of peace is likely to occur if the election is held on that date;*

(b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,

(c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

"(2) Where an election is postponed under subsection (1), the *election shall* ***be held at the earliest practicable time.***

"(3) *Notwithstanding* ***the provisions of this section, the Commission may,*** *if satisfied* ***that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed,*** *direct that a return of the elections be made"* [emphasis supplied].

[319] Inherent in the foregoing statutory provisions are certain vital points:

(a) the Commission is a constitutional body established under Article 88 of the Constitution to conduct elections. In particular, Article 88(5) mandates the Commission to "exercise its powers and perform its functions in accordance with the Constitution and national legislation;

(b) Article 82(1)(d) of the Constitution empowers Parliament to enact legislation to provide for the conduct of elections;

(i) the long title to the Elections Act describes it as *"an Act of Parliament to provide for the conduct of elections to the office of the President, National Assembly, Senate, County Governor and County Assembly….";*

(ii) Section 55B of the Elections Act confers upon the Commission a discretion to consider the circumstances necessitating postponement of an election in an electoral unit, such as: the likelihood that a serious breach of the peace is likely to occur if the election is held on that date. There is a low threshold placed upon the Commission, in exercising its discretion to postpone an election for one reason or the other. Mere apprehension of breach of the peace may trigger the exercise of this power. In the instant case, there was *actual,* not imagined, threat of violence in the affected areas. Therefore, the Commission's actions were not outside the contemplation of this provision;

(iii) it follows, that Section 55B of the Elections Act is a *normative constitutional derivative*, annexed to Article 82 of the Constitution: to aid the conduct of elections, in line with the principles of the electoral system, and the prerequisites of voting pursuant to Articles 81 and 86 of the Constitution, and the right to vote.

[320] Section 55B bears a *non obstante* clause that allowing the Commission to direct that a return of the election be made, if satisfied that the result of the election will not be affected by voting in the area in which voting remains outstanding. In terms of a Presidential election, this discretion is extended by Regulation 87 of the Elections (General) Regulations, 2012 in the following terms:

"(3) Upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall""

(a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre;

(b) tally and complete Form 34C;

(c) announce the results for each of the presidential candidates for each County;

(d) sign and date the forms and make available a copy to any candidate or the national chief agent present;

(e) publicly declare the results of the election of the president in a accordance with Articles 138(4) and 138(10) of the Constitution;

(f) issue a certificate to the person elected president in Form 34D set out in the Schedule; and

(g) deliver a written notification of the results to the Chief Justice and the incumbent president within seven days of the declaration;

Provided that the Chairperson of the Commission *may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of* ***Article 138(4)(a) (b) of the Constitution…"*** [emphasis supplied].

[321] In the present case, voters from 25 constituencies did not vote, due to politically-instigated violence. There were also individuals who opted to boycott the election. The IEBC then designated a different day for the elections to be conducted in the 25 Constituencies that had not voted. However, even on this specially-designated election day, elections could not be held in the said areas, due to violence; and the 1st respondent called off the repeat elections. Consequently, upon the tallying and verification of results being complete, the Commission declared the winning candidate as the President-

elect, despite the electorate in the 25 Constituencies not having voted.

[322] It is clear that the Commission made its declaration pursuant to Article 138 of the Constitution, Section 55B of the Elections Act, 2011 and Regulation 87 of the Elections (General) Regulations, 2012. On that basis, even though voters in 25 constituencies had not voted, the declaration of results by the Commission was in perfect accord with the terms of the Constitution.

6. Illegalities and Irregularities: to what extent were these a factor in the electoral process"

[323] One of the grounds upon which Petition No. 4 of 2017 is anchored is that *the fresh Election was "marred by illegalities and irregularities."* The petitioners cite several items under that head: *failure to conduct nominations*; *ungazetted and undesignated returning and presiding officers and/or illegally appointed returning and presiding officers*; *ballot papers with candidates whose names should not have appeared; arbitrary relocation of polling stations on election day without notice; failure to conduct a legitimate, credible and transparent process; and lack of transparency.* To support these allegations the petitioners rely upon the supporting affidavits of Mr. Njonjo Mue and Mr. Billy Atudo, sworn on 5th November, 2017.

[324] We have already considered some of the alleged illegalities and irregularities in detail; in particular, the issue of nominations for the fresh Presidential election, and the appearance of certain candidate-names on the ballot paper. Our position on such issues is now quite clear.

[325] The 2nd and 3rd petitioners contended that the conduct of election lacked transparency, for failing to disclose the total number of voters who had turned out to vote on 26th October, 2017. To support this, they argued that, on the 26th October, 2017, the 2nd respondent had intimated that the final voter turnout would be known by close of voting, at 17oo hours, but that the 2nd respondent failed to disclose the total extent of voter turn-out on 26th October, 2017; and that thereafter, the proportions kept changing, from 48% to 34%, and thereafter to 38%. In our view, the issue of changing percentages in terms of voter turn out did not in any way call into question the final tally announced by the 1st Respondent at the time he declared the results of the presidential election. It is this final tally that ought to have attracted the attention of the Petitioners

i. Returning Officers and Presiding Officers

[326] The 2nd and 3rd petitioners contended that a number of Returning Officers and Presiding Officers in the election, did not turn up on the date of the election; and that the election was presided over by officials who had been illegally appointed, and that any returns prepared by such officials contravened the Constitution. To support this argument, the petitioners invoked the High Court decision in ***Khelef Khalifa & Hassan Abdi v. Independent Electoral and Boundaries Commission,*** Judicial Review Application No. 628 of 2017 [2017] eKLR wherein the High Court had held that the appointment of Returning Officers and their deputies was illegal.

[327] In response to this argument, all the respondents together with the interested parties, by contrast, submitted that the appointment of the Constituency Returning Officers and their deputies was legal and proper. The attention of this Court was drawn to the fact that the issue is subject of a pending appeal before the Court of Appeal. It was the respondents' further contention that, contrary to the petitioners' allegation, the Judgment by *Odunga J* in ***Republic v. IEBC*** *exparte* ***Khelef Khalifa & Another*** JR No. 628 of 2017, [2017] eKLR, did not invalidate the appointment of the Constituency Returning Officers or their deputies. At any rate, they submitted that the said Judgment of the High Court had been stayed on the 25th October, 2017 by the Court of Appeal in ***Independent Electoral and Boundaries Commission***

v. Khelef Khalifa & Another, Civil Application No. 246 of 2017. The respondents urged this Court to exercise restraint, bearing in mind the hierarchy of the Courts.

[328] From the submission of the parties, it is clear that this issue was canvassed in ***Republic v. Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Another,*** Judicial Review Misc. Application No. 628 of 2017 (formerly Mombasa JR 58 of 2017 [2017] eKLR), and the Court held [paragraph 114] that:

"Having considered the issues raised herein and pursuant to Section 11 of the Fair Administrative Action Act, 2015, these are my findings:

(1) The Respondent was under a constitutional and statutory obligation pursuant to Regulation 3(2) of the Elections (General) Regulations, 2012 to provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

(2) The Respondent did not provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

(3) In so doing the Respondent violated Regulation 3(2) of the said Regulations as read with Articles 38 and 81 of the Constitution.

(4) Since there is no prayer seeking either the cancellation of the fresh elections due for 26th October, 2017 or their postponement, it would not be efficacious to grant the orders herein in the manner sought.

115. Therefore without sanitizing the said process, I decline to issue the reliefs sought herein in the exercise of my discretion not based on lack of merit, but on public interest."

[329] Upon the delivery of the said Judgment, the IEBC filed an application at the Court of Appeal, Civil Appeal No 246 of 2017 seeking a stay of execution of the decision of the High Court, pending the lodging, hearing and determination of the intended appeal. Upon the hearing of the application, the Court of Appeal (*Githinji E. M, Koome M. K, Sichale F JJA*) made the following *exparte* interim Orders;

"…….[7] The Impugned decision of the High Court has the potential of rendering the Presidential Elections slated for 26th October, 2017, irregular even before the elections are held thus precipitating another election outside the stipulated sixty days and in contravention of the provisions of Article 140 (3).

"[8] In deference of the sovereignty of the people and the supremacy of the Constitution, we order that the declaration by the High Court that the appointment of the Returning and Deputy Returning Officers was in violation of Regulation 3 (2) aforesaid as read with Articles 38 and 81 of the Constitution and the implementation thereof is hereby suspended and/or put in abeyance pending the hearing of the application inter parties.

"[9] For the avoidance of doubt, this order means that the Constitutional and Statutory functions of the Returning Officers and their Deputies relating to the Presidential Elections slated for 26th October, 2017 are not invalid."

[330] In the above context, the petitioners' claim rests squarely upon a single case, ***Khelef Khalifa,*** which is now the subject of a pending appeal. By the High Court's decision, the said appointment of Returning Officers and their deputies, had been tainted with illegality: and so, all such returns as emanated from such officials, were in contravention of the Constitution, and consequently, the election result in question should be annulled – by the petitioners' cause.

[331] Such a contention is contested by both the respondents and the interested parties. They maintain that the appointment of the constituency Returning Officers and their deputies, was in due compliance with the law in every respect. They urge further, that the issue is *sub judice*, as it is the subject of future determination by the Court of Appeal, which has already ordered (in ***Independent Electoral and Boundaries Commission v. Khelef Khalifa & Another,*** Civil Appl. No. 246 of 2017) that the matter rests in abeyance, and is to occasion no prejudice for the moment, in relation to the exercise of the mandate of the said electoral officials. The respondents, in advancing their standpoint, have observed that *Mr. Justice Odunga*, in the ***Khelef Khalifa Case,*** had not taken any action to invalidate the appointment of the said polling officials.

[332] Whereas the respondents' position represents a valid *status quo*, and the legal status of the Returning Officers thus cannot be denied, this Court has an obligation to set the matter to rest. The Court is considering an electoral matter in which it takes the first instance, and the ultimate instance. Its singular jurisdiction in the electoral matter is to be secured by holding that the current legal status of the said electoral officials, carries validity for now, and for *the future*: irrespective of such determination as may later be made by any other Court on the matter. Guided by exigency, and by judicial notice which must be taken of the reality of discharge of the assigned mandate of the electoral agency, we now hold that the officers in question lawfully held their positions, and duly discharged the constitutional mandate devolving to them. This is also because on the election date, the stay Orders granted by the Court of Appeal were firmly in place, and to state otherwise would be to negate the value of the validity of Court decisions, unless and until they are overturned. The decision of the High Court, to that extent, cannot be the basis for invalidating the 26th October election.

[333] Accordingly, we find no validity in the petitioners' claim that the said Returning Officers and their deputies, lacked authority.

(ii) Was there arbitrary relocation of polling stations contrary to the law"

[334] The 2nd and 3rd petitioners submitted that on the 26th October, 2017, without notice, or further direction to the voters, the 2nd respondent arbitrarily relocated the following polling stations, Kibra (1390) Sarangombe (Ward 023) KAG Olympic Educational Center with 3789 registered voters; and Kibra (1390) Sarangombe (Ward 024) Kibera PAG Church School with 2957 voters, and that this resulted in about 6,746 voters being disenfranchised, as only 2 voters managed to vote.

[335] The petitioners contended that the 2nd respondent dishonestly claimed that an election had taken place in areas such as St Mary's Polling Station within Mombasa County, when the voters did not have a real opportunity to vote; and that this showed dishonesty, especially by representing that an election took place, when the majority of voters were disenfranchised. They urged that there was no fair election.

[336] In response, the 1st and 2nd respondents stated that by moving the polling station, they acted within the powers provided for under *Regulation 64(2) of the Elections (General) Regulations 2012,* which allows Presiding Officers to transfer polling to another polling station or public entity. In addition, it was their submission that the notices of transfer were displayed conspicuously at the polling stations, and anybody who visited the polling station would have seen them. It was there submission that the move

was necessitated by the fact that the polling station had been barricaded and replaced with bonfires, and this, coupled with escalating violence, made it impossible to vote at these stations. Thus, the Returning Officer for Kibra advised the presiding officers to move to Olympic Primary School, which was secure; and they placed notices at the entrance of the centre, informing voters of the new stations. This was corroborated by the 3rd respondent, who emphasized that the 1st respondent's official acted within the law, and that the transfer was necessitated by violence that had erupted in Kibra Constituency.

[337] With regard to Changamwe, the 1st and 2nd respondents relied upon the affidavit of the Returning Officer for Changamwe, Ms. Luciana Jumwa Sanzua, dated 12th November, 2017, who averred that no polling station was set up in any ungazetted area, as there was no occurrence of events such as to warrant such an action, and voting went on normally.

[338] We note that the allegations as regards Kibra Constituency, have not been substantiated with any evidence showing that only 2 people voted at the polling station. No one has come up to say that he or she could not trace or find the polling station after it was moved. It is also admitted that the polling stations were moved as a result of violence that erupted, and that the 2nd respondent exercised the powers which are conferred on it under *Regulation 64(2) of the Elections (General) Regulations 2012.*

[339] In this regard, the allegations by the petitioners are in generality, and are not supported by any evidence; and they have been rebutted by the various returning officers.

(iii) Voter identification, and transmission of results

[340] The 2nd and 3rd petitioners submitted that at least 28% of the people who turned out to vote in the fresh election could not be identified biometrically, contrary to representations made by the 2nd respondent that they would put in place a Biometric Register that is secure and accurate. This, they submitted, raises doubt concerning the actual number of people who turned out to vote in the fresh election. It was submitted that the people who were identified by the KIEMS kit were only 5.5 million voters, and that there were about 78,000 voters who were not identified but still voted.

[341] The 2nd and 3rd petitioners contended that, there were discrepancies between voter turnout as recorded in Forms 34A, and as captured/recorded in OT-Morpho's KIEMS Kits records/logs in a sample of about 100 polling stations in Garissa and Muranga. It was contended that, in some polling stations the turn-out gap between Form 34A and in the KIEMS Kit is more than half of the total number of registered voters in that station.

[342] On behalf of the 1st respondent, it was submitted that for the authenticity of the transmission logs from the KIEMS kits that were provided to Court, the affidavit of Silas Njeru provided the requisite explanation. It was submitted that the KIEMS kits have different resolutions and it all depends on how the Returning officer sets it, as regards the pictures produced. The KIEMS kit is a stand-alone gadget and no image can be transmitted in the system unless it originates from the KIEMS kit.

[343] On the failure to transmit both the text results and the image of the Form 34A, it was submitted by Mr. Mahat, counsel for the 2nd respondent, that first there was no evidence that anyone was prejudiced by the omission to transmit the text results. Secondly, upon the High Court Order to include Mr. Aukot and other candidates, the company reconfiguring the KIEMS kits was categorical, that having already reconfigured the kits with two candidates, it would need more time to incorporate all the candidates. However, this was not possible since the Supreme Court Order for a fresh election under Article 140(3) of the Constitution, was time bond. He urged that where there is a conflict between a regulation and the Constitution, it must be the Constitution that takes precedence.

[344] The 3rd respondent went through the process of KIEMS Kits identification through Biometrics, and the complementary manual identification through the alpha-numeric setting, and document search using the surname, or other names. This was corroborated by the 1st interested party, who confirmed to Court that the complementary identification system was working.

[345] The 3rd respondent urged the Court to find that the 2nd respondent acted in a transparent manner, by opening up its servers without being prompted immediately after the 1st respondent declared the 3rd respondent as the President-elect, on the 30th day of October, 2017, to enable candidates and observers to have access to information in its servers.

[346] The 2nd and 3rd petitioners contend that through Kura Yangu Sauti Yangu (KYSY), they received and analysed about 1167 forms 34A from its observers. Out of the total 1,167 forms, 55 were not signed by agents while 1,112 had agents. Out of this number 1,106 forms were signed by the Jubilee Party Agents only; out of the 266 Forms 34B obtained and analysed by KYSY from the 2nd respondent's portal, 250 were signed only by Jubilee Party Agents and only 12 were signed by Jubilee agents as well as other party agents. Only 1 form was signed by a non-Jubilee agent. Only 3 forms were not signed by any agent; out of the 266 forms 34B obtained by KYSY from the 2nd respondent's portal, 260 forms have serial numbers on every page while 6 don't have serial numbers on every page; from the 266 forms 34B obtained and analysed by KYSY from the 2nd respondent's portal, "handover" sections were fully completed in only 13 forms, handover sections were partially completed in 55 forms and handover sections were blank in 198 forms. There were no Forms 34B that contained fully completed "takeover" sections.

[347] Following this, the petitioners submitted that despite the Supreme Court's decision that the Forms 34A, B and C need to be standardized, verifiable, accurate and authentic, there is evidence as outlined above, that some of the forms transmitted by the 2nd Respondent are either forgeries, had mathematical errors or were altered.

[348] In response, the 3rd respondent, on his part submitted that the 1st respondent conducted elections that are free, fair, secure, and transparent, devoid of discrimination, with full participation of the public and other stakeholders and in a manner that is simple, verifiable and accountable.

[349] The difficulty with the 2nd and 3rd petitioners' submission on this issue is that, not being candidates or agents, may not really be privy to the nitty gritty of the operations of the electoral process. It is undisputed that the 2nd respondent developed a compliance and a legal matrix to guide it in the transmission process. The petitioners, however, make general allegations, but without specifying in which manner transparency was not achieved, and in what aspect.

[350] It is worth noting that most polling stations had agents mainly from the 3rd respondent's party. However, save for the bare allegations made by the petitioners, we were unable to detect such serious anomalies as to demand that the election should be invalidated.

(iv) Voters Register

[351] The 2nd and 3rd petitioners urge that the 2nd respondent did not put in place a Biometric Voter Register (BVR) that was secure and accurate making it prone to electoral fraud. They submitted that according to the evidence on record, at least 28% of the people who turned out to vote in the fresh election could not be identified biometrically, raising doubt as to the actual number of people who voted.

[352] It was urged that failure to use the electronic system of voter identification (Electronic Voter

Identification Device-EVID) to identify voters was meant to misrepresent the voter turnout. In addition, that there were unexplained changes in the total number of registered voters between 30th June, 2017 (the date when the Register was gazetted for purposes of the General Election) and 26th October, 2017, (the date of the fresh presidential election).

[353] It was submitted that in an audit conducted by KPMG on the Voters' Register, only about 5000 voters were classified as having been registered without biometric records, yet, the 2nd respondent claimed that there were about 1.6 million voters identified without biometrics. In the 2nd and 3rd petitioners' view, this was indicative of electoral fraud and breached their legitimate expectation that the ICT systems would work with a seamless complementary mechanism in cases where the KIEMS kit experienced systems failure. They referred to the Court of Appeal's decision in the case of ***National Super Alliance Coalition (NASA) v. Independent Electoral and Boundaries and Boundaries Commission***, Civil Appeal No. 258 of 2017 (***The NASA case***) to elaborate on the meaning of the term 'complementary mechanism' under Section 44A of the Elections Act.

[354] It is our perception that, the issue of a Voters' Register when raised in any election proceedings, is a primary issue for determination. Registration of voters is also a constitutional imperative, by Article 83 of the Constitution which outlines the prerequisites of voter registration, in the following terms:

"(1) A person qualifies for registration as a voter at elections or referenda if the person –

(a) is an adult citizen;

(b) is not declared to be of unsound mind; and

(c) has not been convicted of an election offence during the preceding five years.

"(2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

"(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election."

[355] Registration facilitates the effectuation of the right to vote. **Article 38(3)(a)** decrees that every adult citizen has a right, without unreasonable restrictions, to be registered as a voter. As such, the right to vote cannot be fully enjoyed if the registration of voters is not properly conducted. The 2nd and 3rd petitioners thus contend that:

(i) the Voters' Register was not simple, accurate and verifiable;

(ii) there were more than one Voter's Register between the General Elections held on 8th August, 2017 and the fresh election conducted on 26th October, 2017;

(iii) the KPMG Audit Report noted numerous anomalies in the Register, that were not addressed before the fresh Presidential election; and

(iv) the Register facilitated multiple voting.

[356] These concerns have been rebutted in the responses filed by the 1st, 2nd and 3rd respondents in

their various depositions. Certain factual concessions were, however, made. The allegation that the Register kept mutating was withdrawn in the last paragraph of Mr. Billy Atudo's affidavit, as noted by counsel for the 3rd respondent, Mr. Tom Macharia. It was further noted that the varying figures were as a result of the inclusion of prisoners in the County totals. A pertinent issue of factual verification, however, is whether the total numbers of registered voters declared by the 1st respondent in Forms 34C, during the 8th August and 26th October elections, and those published in the *Gazette* in terms of Section 4 of the Elections Act and Regulation 12(4) of the General (Registration of Voters) Regulations, 2012 tallied.

[357] Exhibit **'WC-2'** annexed to the Affidavit of Ms Winnie Guchu is a *Gazette Notice* No. 6250 dated 27th June, 2017 certifying that the revision of the Register of voters had been completed for purposes of the General Election held on 8th August, 2017. The total number of registered voters in all the Counties, according to this *Gazette Notice* totaled **19,601, 502**. In addition to this number, a total of **5, 528** persons were registered in the prisons, and a total of **4,393** registered in the diaspora, making a grand total of ***19,611,423***. Exhibit **WC-3**, *Gazette Notice* No. 8751 annexed in the Affidavit of Ms. Guchu suspended the registration of voters and revision of the voters' roll, until 8th November, 2017. The import of this suspension is that the total number of registered voters contained in the Register used for the 8th August General Election was still in operation during the 26th October, 2017 fresh Presidential election. *Did the numbers match"* Evidence was pointed to the Form 34C, generated during the 8th August General election and the fresh Presidential election. According to the evidence provided by the 1st respondent, the total number of registered voters, according to Form 34C was 19,611,423 registered voters, which tallies with the number recorded in the *Gazette Notice* No. 6250.

[358] The 2nd and 3rd petitioners did not lead further evidence to prove the alleged changes in the number of Registered Voters, or that indeed, this affected the outcome of the fresh Presidential election. In any event, the existence of these differences is attributed to the inclusion of prisoners from the total numbers by Kura Yangu Sauti Yangu. The evidence adduced by the respondents, therefore, sufficiently discharges the petitioners' allegations of an inconsistent Voters Register.

[359] On the issue of the KPMG Audit Report, it was alleged that the 1st respondent did not comply with the recommendations of the KPMG Audit Report to, *inter alia*, deal with the presence of dead voters in the Register. *What was the genesis of this audit"*

[360] Part II of the Elections Act comprehensively covers *"Registration of Voters and Determination of Questions Concerning Registration."* Section 8A (3) of the Elections Act places a mandatory obligation on the Commission to engage a reputable firm to conduct an audit of the Register of Voters, for purposes of, *inter alia,* verifying the accuracy of the Register and updating the Register. That Section reads:

" Audit of the register of votes

"(1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of –

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

"(2) ….

"(3) *For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of* **–**

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

"(4) The firm engaged under subsection (3) *shall* ***conduct the audit and report to the Commission within a period of thirty days from the date of engagement.***

"(5) The Commission *shall,* ***within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.***

"(6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate" [emphasis supplied].

[361] From the materials on record, we noted that in April, 2017, the 2nd respondent formally engaged KPMG to conduct an Audit on the Voters' Register with the following objectives: (i) to verify the accuracy of the register; to (ii) recommend mechanisms for enhancing accuracy of the register and updating the register. According to a press release issued on 9th June, 2017 by the IEBC, after completion of the exercise, the scope of the audit was to:

(i) review the legal framework relating to voter registration;

(ii) review the voter registration process, voter transfer process and voter updates processes;

(iii) review the Biometric Voter Registration System and database that hosts the Register of Voters;

(iv) review the process of identifying and removing deceased voters from the Register of Voters;

(v) assess the accuracy of the Register of Voters in terms of completeness of the details of voters' data and matching of voters details (Biometrics) to the voter;

(vi) assess inclusiveness of the Register of Voters in relation to eligible voting population based on gender, age and geographic distribution;

(vii) review and recommend improvements on existing mechanism for continuous update of the Register of Voters;

(viii) analyze the security of the registration of voters' data and infrastructure it sits on; and

(ix) make recommendations for enhancing the accuracy and inclusiveness of the Register of Voters.

[362] The 2nd respondent, in addition, has submitted a copy of the Audit Report to Parliament, in line with the law. The recommendations in the report covered eight broad areas as follows:

(i) stakeholder engagement and feedback;

(ii) legal and institutional issues;

(iii) inaccuracies in the Register of Voters;

(iv) irregularities in the Register of Voters;

(v) deceased persons in the Register of Voters;

(vi) inclusiveness in the Register of Voters;

(vii) database security and infrastructure controls; and

(viii) action plan for implementing recommendations.

[363] The 2nd respondent further issued a commitment to continue with stakeholder engagements, to promote transparency in the Register of Voters. The report also noted that, in order to address emerging data issues, it was imperative for the 2nd respondent to assert its independence, as well as cooperate with other reinforcing external agencies such as those concerned with immigration and registrations of births and deaths. This, the report noted, was outside the internal ambits of the 2nd respondent, and included institutional co-ordination and collaboration. The Report also noted that at least 5,427 records lacked biometric fingerprint images in the Register. A total of 2,900,089 records had a number of inconsistencies such as: mismatched gender and date of birth; mismatched date of birth; inconsistencies in gender, names and particulars. IEBC noted furthermore that where the details in the Register were confirmed to be invalid, they would be expunged from the Register. The 2nd respondent in that regard indicated that it would reconcile audit findings, and address gaps within 5 days of the press statement, which process had commenced during verification; and that other issues would be addressed through the new infrastructure and database security software which had been acquired.

[364] The 2nd respondent has also pointed out that the Register used by KPMG for the audit was provisional in nature. Consequently, it thereafter undertook a verification exercise, which cleaned up the Register including, removing names of dead voters. Although allegations of Voters' Register permutations and inaccuracies were raised, particularly with respect to the aspects addressed in the Audit Report, clear, specific, and direct allegations regarding the Voters' Register, and its effect on the conduct of the fresh Presidential election, were not made. Indeed, the respondents rebutted these allegations systematically, and while the audit report was a statutory requirement by Parliament to improve transparency and enhance the accuracy of the Register, the implementation of the recommendations by KPMG required actions on the part of IEBC, as well as cross-institutional collaboration, to facilitate implementation.

[365] The more essential concern for the purposes of these proceedings is, *whether the allegations made in the petition concerning the Voters' Register affected the outcome of the fresh Presidential election*. The Voters' Roll is the centerpiece of an electoral process. At the heart of the right to vote is the obligation of the State to ensure that the registration of voters is undertaken and discharged properly. The Constitution addresses voter registration in four separate Articles, namely: (Arts. 38(3)(a); 82(1)(c); 83; and 88(4)(f)). Kenya's history of elections features voter registration as one of the aspects that required intensive reform. When this Court determined the ***Raila 2013*** case, the conclusion was that the Register was a product of several components. To consolidate these components into one central location, the KIEMS was introduced, which is a one-stop gadget, with three functionalities, these being:

voter registration; voter identification; result transmission. Each of these components is independent, yet they all reinforce the electoral process.

[366] Voter identification addresses some of the fundamental issues that arose in earlier elections. According to the 2nd respondent, it is an elaborate system of identification, structured in a way that does not negate any persons' right to vote. The composite of the voter identification designs are: *Biometric identification; alphanumeric search with reference to identification documents; alphanumeric search with reference to physical keying in of the biographic data; Presiding Officer Authentication (Supervision mode); and complementary identification*. With the checks guaranteed by these elaborate modes of identification, most of which were witnessed by voters, and visible in the eviRTSlogs provided by the 2nd respondent, the 2nd and 3rd petitioners have not met the dictates of proof to show that: *dead persons participated in the election; unqualified persons voted; persons with special needs were denied the chance to vote or that the total number of registered voters was in doubt at the time of the election*.

[367] We further note that Section 2 of the Elections Act, 2011 defines a "Register of Voters" to mean a current register of persons entitled to vote at an election, prepared in accordance with Section 3, and *includes a register that is compiled electronically*. As such, a print-out of the electronic register for purposes of the election was not in violation of the law. Indeed, as submitted by counsel for the 3rd respondent, Mr. Tom Macharia, Regulation 61 (4) of the Elections (General) Regulations, 2012, requires the *"Returning Officer to provide each polling station with both electronic and hard copy of the Register of Voters or such part thereof as contains the biometric data and alpha numeric details of the voters entitled to vote at a polling station."*

[368] In addition to the above, we note that the Voters' Roll is subject to periodic inspection as decreed by Section 6 of the Elections Act, 2011. The discretion to determine when a Register is closed to inspection rests with the Commission. This is necessitated by the administrative needs that attach to electoral management and preparation. This continuous exercise, therefore, shows that the Commission was not under immediate obligation to act on the recommendations of KPMG.

[369] The Voters' Roll is a living document; with the addition of eligible persons entitled to vote, and the exit of others, its character also changes, necessitating regular updating. In this regard, *Section 8* of the Elections Act, 2011 is very instructive:

"(1) The Commission shall maintain an updated Register of Voters.

"(2) For purposes of maintaining an updated register of voters, the Commission shall"

(a) regularly revise the Register of Voters;

(b) update the Register of Voters by deleting the names of deceased voters and rectifying the particulars therein;

(c) conduct a fresh voter registration, if necessary, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the Constitution;

(d) review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and

(e) revise the Register of Voters whenever county boundaries are altered in accordance with

Article 94(3) of the Constitution."

[370] The Supreme Court of India reaffirmed the living nature of the Voters' Roll in the case of ***Lakshmi Charansen and Others v. A.K.M Hassan Uzzaman and Others***, **1985 SCC (4) 689 SCALE 384,** in terms that commend themselves to this Court, as follows:

"It is true as submitted on behalf of the Election Commission, *a perfect electoral roll is not possible****. But at the same time, it must be remembered that the name of any eligible voter should not be omitted from, nor the name of any disqualified person included in the electoral roll, in violation of any constitutional or statutory provisions. The error,*** *when pointed out, has to be removed"* [emphasis supplied].

[371] The processes outlined by the law relating to registration, verification, inspection, audit, transfer of registration, and updating the Voters' Register, are all time-bound. In this case, the 3rd petitioner question processes that occurred before the conduct of the General Election on 8th August, 2017. As was rightly pointed out, the question of the Register was addressed by the Court (paragraph 301 of the Majority decision) in ***Raila 2017***, and we have been satisfied that the 1st respondent did not alter the Register as alleged by the 2nd and 3rd petitioners. All evidence adduced and analysed leads to a contrary position. As such, the answer to the question: *what was the effect of alleged neglect by the 1st respondent to address issues raised in the KPMG audit"* must lie in a finding of *"no effect."*

[372] In view of all the evidence presented, and the submissions, the 2nd and 3rd petitioners' grounds on the Voters' Register, must fail.

[373] This Court has already pronounced itself in unequivocal terms, on the effect of irregularities upon an election. The legal position remains as stated in the majority decision of the Court in ***Raila 2017***. Our view is informed by the conclusion which we have made, as to the applicable law in relation to the 26th October, 2017 election. This may be simply restated: not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the actual result, or the integrity of an election, for a Court of law to nullify the same.

[374] We have painstakingly considered the petitioners' case, as stated in the petition and accompanying affidavits. We have, in equal measure, considered the respondents' replies, and the accompanying affidavits. We have read, and listened with undivided attention to the submissions of all counsel, regarding the issue of illegalities and irregularities. We have taken note of the fact that while the petition makes far-reaching allegations of irregularities, the same have been effectively rebutted, or explained away in replying affidavits, and submissions of counsel.

[375] Our examination of sample materials submitted to the Court by the 1st and 2nd respondents (Forms 34A 34B and Form 34 C), as against the ones attached to the petitioners' pleadings, lends credence to the explanations given to the Court by the respondents. It was not lost on us that, while the 2nd and 3rd petitioners made serious allegations of widespread malpractices having characterized the election, various counsel for the petitioners spent most of their allocated time addressing us on collateral issues, instead of laying evidence, and discharging the burden of proof, by addressing the respondents' written submissions.

[376] This finding leads us to the unavoidable conclusion that the petitioners have not discharged the *burden of proof* to the standard established by this Court. At no time, in our view, did the burden shift to the 1st and 2nd respondents. By the same token, the Court has not been persuaded that the respondents violated the applicable electoral law, in the management of the 26th October, 2017 election.

7. Election Laws (Amendment) Act, 2017

[377] The 2nd and 3rd petitioners plead in paragraphs 74 and 75 of their petition, *inter alia*, that the Elections Laws (Amendments) Bill, 2017 was intended to diminish the role of technology in elections, open election results to manipulation, and signal to voters that it would not be possible to successfully challenge the results of the fresh Presidential election, even if the same were to be unconstitutional, unlawful or irregular. They state that the said Bill has since become law, with the overt approval of the 3rd respondent, and has been gazetted as Election Laws (Amendments) Act, Number 34 of 2017. Consequent upon that pleading, the petitioners raise, for determination by this Court (at paragraph 140 of the Petition), the issue that, in light of the amendment of Section 83 of the Elections Act by the Election Laws (Amendment) Act, 2017 after the conduct of the fresh Election, the question: which law is applicable for purposes of determining the present dispute" and, whether Section 83 of the Elections Act as amended is unconstitutional and invalid.

[378] The petitioners then seek various reliefs, the one relevant to the above pleading being, that a declaration be made that Section 83 of the Elections Act (as amended) is unconstitutional and invalid, to the extent of its inconsistency with the Constitution.

[379] As regards the issue of the applicable law in respect of the 26th October, 2017 election, our view is that, as at the time the cause of action arose, to wit, the 26th October, 2017, the law then applying was the Elections Act, 2011. The amended laws did not become effective until the 2nd November, 2017. In that context, the common practice is *that legislation should be effected prospectively and not retrospectively;* that is, laws should be forward-looking and should not apply backwards in time. Prospective application of legislation is based on ancient Roman and English common law – see ***Fray v. Omaha World Herald Co***., 960 F.2d 1370, 1374 (8th Cir. 1992). “Prospectivity” is also consistent with elemental notions of fairness; as stated in the U.S. Supreme Court concurring opinion in ***Kaiser Aluminium & Chem. Corp. v. Bonjorno****,* 494 U.S. 827, 855 (1990) of Mr. Justice Scalia:

“The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.”

[380] It is a conventional rule of construction that, legislation must be addressed to the future, and a statute should not be given retrospective operation, interfering with antecedent rights. We are inclined to the standpoint that, legislation should bear only prospective effect, in the absence of special legislative signal to the contrary. Where a legislative body thus wishes to change the law regarding a past event/action, its intent is to be clear enough. By this principle, where legislation is ambiguous, or silent as to its effective date, it should be presumed to be prospective.

[381] In the present instance, when Parliament passed the amendment to Section 83, it did not state that the law shall apply retroactively. The United States Supreme Court, in ***Landgraf v. USI Film Prods*.** 511 U.S. 244, 265-73 (1994), limited this presumption to statutes altering substantive rights. That Court presumed prospectivity to avoid construing a new law that otherwise might have attached new [post-enactment] legal consequences “*to events completed*” before the law’s enactment. Although the ***Landgraf*** case dealt with private actions, the reasoning is in our view, germane to the instant matter.

[382]This Court has, furthermore, already pronounced itself on the retrospectivity of laws, in the case of ***Samuel Kamau Macharia v. Kenya Commercial Bank Ltd*** [2012] eKLR (at paragraph 61), to the effect that a retroactive law is not unconstitutional unless it:

(i) is in the nature of a bill of attainder;

(ii) impairs the obligation under contracts;

(iii) divests vested rights; or

(iv) is constitutionally forbidden.

[383] The issue in this petition, however, is that the amended law was not made retroactive by Parliament, and should, therefore, be read prospectively. It is noteworthy that, in addressing the same issue in ***Moses Masika Wetangula v. Musikari Nazi Kombo*** [2014] eKLR, the Court of Appeal adopted the dicta in ***Morgan v. Simpson*** [1974] 3 All ER 722, and took the position that an election must be guided by the law as it was on the date of the election. The Court thus stated the rationale:

"This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election."

(See also Lon L Fuller "Eight Ways to Fail to Make Law" in Feinberg and Coleman (eds) *Philosophy of Law* **(Thompson Learning, 2000) 91-94.)**

[384] From the foregoing, we find that the applicable election law, in respect of the conduct of the 26th October, 2017 election was the Elections Act, 2011, the Elections Laws (Amendments) Act, 2017 (Act No. 34 of 2017) not having come into effect as at the time of that election, and the same not having had retrospective application.

[385] The second issue is this: the 2nd and 3rd petitioners seek a declaration that Section 83 of the amended law is unconstitutional and invalid. Having taken into account all the submissions on the matter, and being aware, as we are, that the amended law is the subject of various pending causes before the High Court, such as in Nairobi High Court Petition no. 548 of 2017 – ***The Katiba Institute & Africa Centre For Open Governance v. Hon. Attorney General & The Government Printer,*** we restate our stand in similar circumstances, as in ***Re the Matter of the Interim Independent Electoral Commission*** where this Court stated [paragraph 47]:

"*The application is still more inappropriate in the light of the several petitions pending before the High Court: Constitutional Petition No. 65 of "2011 –* ***Milton M. Imanyara & Others v. Attorney General & Others;*** *Constitutional Petition No. 123 of 2011 –* ***John Harun Mwau –vs- Attorney General****. The two cases seek the interpretation of the Constitution, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a Court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which this Court must protect the jurisdiction entrusted to the High Court."*

[386] However, the above position can be distinguished, as we have stated elsewhere in this Judgment, from a matter arising in the course of a Presidential election in regard to which the Supreme Court has unqualified jurisdiction, and where the issue essentially relates to a petition before the Court. The Supreme Court, in its advisory opinion in, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** [2012] eKLR Advisory Opinion No. 2 of 2012**,** thus stated its jurisdiction to adjudicate over *any dispute touching on the presidential petition,* whilst acknowledging the

mandate of the High Court on determining the constitutionality of a statute (paragraph 76):

"For the Court to have jurisdiction, the Reference must fall within the four corners elucidated …It was, however, argued on behalf of CREAW that since appeals of this issue of two-third gender principle are now before the Court of Appeal a decision on this Reference could render them nugatory. It is true that this Court's decision binds the Court of Appeal, but it is for the Court of Appeal to make such a decision. I have no evidence that the pending appeals are on all issues raised in this Reference. In any event this Court has held that it will decide matters that come to us on a case-by-case basis. We have also held we should not subvert the jurisdiction of the courts below. The Court of Appeal will take its golden chance to enrich the jurisprudence in this area."

[387] The overlapping jurisdiction between the High Court and the Supreme Court only arises when interpreting or applying the provision in so far as it relates to the Presidential petition. Where however, the challenge to a statutory provision is directed as a ground in the context of a Presidential petition, the Supreme Court should not find any difficulty in addressing the same in the context of a Presidential petition. This does not exclude the power to refer the matter to the High Court, for its proper disposal, depending on the circumstances.

[388] We find no reason, therefore, to disturb our already settled principle of not taking away the jurisdiction of other Superior Courts, and determining issues pending thereat. We thus would restate our position in ***Raila 2017,*** [paragraph 313]:

"Having that in mind and fortified by our observation that the interpretation of Section 14 of the Election Offences Act is a live matter at the High Court, we are unable to address our minds to any allegation that touches on this section. That is the end of the matter."

[389] Similarly, we leave the issue of the unconstitutionality or invalidity, or otherwise, of Section 83 of the amended law to the determination of the High Court, where the matter is currently under consideration. In stating so, we see no prospect of the High Court making a finding that would affect our determination of the present Presidential election petition.

8. Legitimacy and Credibility of the Presidential Election

(i) Was the election held on 26th October, 2017 and its results, legitimate and credible, both in fact and in law"

[390] The only substantive question that is left unanswered is whether the election conducted on 26th October, 2017 lacks *legitimacy* and *credibility*" The 2nd and 3rd petitioners, in that regard, argue that the election was not conducted in a conducive environment; that many voters were disenfranchised; and that the low voter turn-out was a manifestation of a seemingly low quality election, that was defective on all fronts. In analyzing this issue, we will begin by examining the meaning and applicability of the term 'legitimacy' and 'credibility', in the general context of a Presidential election, and finally apply the concepts to the facts of the case.

(ii) Legitimacy

[391] The relevant definition of "legitimacy", in this context, is set out in the ***Concise Oxford English Dictionary,*** 12th ed. (Angus Stevenson & Maurice Waite) (Oxford: Oxford University Press, 2011), p.814: "…*able to be defended with logic or justification."* From this meaning, it is clear that "legitimacy" is a

broad yardstick, essentially concerned with *propriety*, or lack of it.

[392] In that context, two scholars, Professors Patrick McAuslan and John F. McEldowney in their work**, *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's Law of the Constitution*** (London: Sweet & Maxwell, 1985)**,** p.2n have perceived that *"a claim to political power is legitimate only when the claimant can invoke some source of authority beyond… himself."* And, equally relevant is the perception of Professor Maurice Duverger in his book, ***Political Parties: Their Organization and Activity in the Modern State*** (London: Methuen & Co. Ltd., 1964), p.26: *"an institution is legitimate when it corresponds to the dominant doctrines of a period, to the most widely held beliefs on the nature and form of power."*

[393] From such a background of scholarly theory, it is clear that Kenyan elections have to be evaluated, in their general outlook, in the context of *recognized legal practice;* of the *operative law and governance institutions*; and of the *profile of stable socio-political order* and of *economic dynamics that have sustained, and continue to sustain the community.*

(iii) "Credibility"

[394] The term "credibility" is still more subjective**, *Black's Law Dictionary,*** 8th ed. (Bryan A. Garner) (St. Paul, MN: West Group, 2004), p. 396 defining it as *"the quality that makes something worthy of belief."* Credibility in whose terms" We take the view that the term must be measured in the eyes of the general population for whom *dependability and sustainability are all-important*, on a day-to-day basis. Indeed, the rationale of the electoral process is that it should facilitate *dependability of governance for the voting public*. Though the test is largely subjective, the Court's task is to rest its findings on its classical yardsticks of *legality, rationality and objectivity,* being guided by its true, professional understanding of the *public interest.*

[395] Thus in addressing credibility in the context of the impugned election among other things, the Court must adhere to *verifiable criteria*, such as: *was there valid preparation for the election" did the election take place" was the conduct of the election guided by prescribed law" what scope of discretion existed within the law" was this duly exercised" was a candidate duly declared elected" in general picture, was the constitutional task accomplished"*

[396] As already stated, the 2nd and 3rd petitioners contest the credibility of the 26th October 2017 election on the basis of claims of *"restrictions of right to vote"* in some constituencies and of claims that the *State* occasioned such restrictions; of claims of *violence* occurring in such constituencies; of *fear of bodily injury* in such constituencies; of acts of *intimidation* in such constituencies. It is also alleged that some *citizens, in such constituencies directly, prevented voting*, by other citizens and that *blockages to polling activities* did occur. How do such factors feature in the credibility-profile of the elections, *in the nation at large"*

[397] We note in that regard that the 2nd and 3rd petitioners contend that the election conducted by the 1st and 2nd respondents on 26th October, 2017 fell *outside the principles* stipulated under Article 81(e) of the Constitution which is concerned with *free and fair election*. They thus contend that the election was not free from *violence, intimidation, improper influence* or *corruption.*

[398] The 2nd petitioner specifically swears in his affidavit in support of the petition that the 3rd respondent had addressed a public rally on 1st September, 2017 issuing *threats to the Judiciary*: and he avers that the said threat had kept off voters from the polls, during the repeat election of 26th October, 2017. He also averred that the launch of the "Jubilee Women Bregade" had *intimidated voters* who,

consequently, failed to turn up for the repeat election.

[399] The 2nd petitioner also invoked a statement emanating from the 1st respondent on 18th October, 2017, that *he had encountered political interference, threats* and *pressure* emanating from fellow Commissioners thus creating doubts as to the legitimacy of the election he was to preside over.

[400] The 2nd petitioner further claims that the election process had been affected by *rioters* and *security officers* in two polling centres in Kibra, and in the counties of Siaya, Homa Bay, Kisumu and Migori. He also relied on a *statement in a report* by the Election Observation Group (ELOG), of 1st November, 2017, that the election had taken place in a *tense political environment* occasioned by lack of trust in IEBC. The deponent attributed to such lack of trust, *ELOG's inability to send its observers* to certain parts of the country viz. Busia, Bungoma, Vihiga, Kakamega, Kisumu, Migori, Homa Bay, Siaya, Nyamira and Kisii.

[401] The 2nd and 3rd petitioners relied too on the affidavit of one accredited observer, Mr. John Paul Obonyo, who deponed that a number of people had *the practice of burning tyres on the road* in affected areas and had prevented the IEBC from accessing a polling station at an informal settlement known as Bangladesh.

[402] In the class of such statements for the proposition that the election was conducted in a condition of violence, the petitioners have come with *other allegations that are not in sworn statements* as we have already demonstrated earlier parts of this judgment. For example, it is claimed that men in military and police uniforms were seen in Nairobi; that there was militia-group activity and that there was the taking of oaths, prayers, and practices which had in the past been associated with the *Mungiki* sect. It was further claimed that the Police, and persons dressed in police uniform, forcefully broke into houses in areas deemed to be NASA stronghold, beating up and maiming men, and raping women: it was alleged that such use of force was *intended to provoke, and had the effect of provoking* the voters in such areas to abstain from going to polling stations.

[403] Such *general allegations* include the attribution of scare-mongering to the Cabinet Secretary for Internal Security, Dr. Matiang'i – against any inclination to vote for *any other candidate a matter we have already addressed.*

[404] There are similar allegations to the effect that there had been a withdrawal of police security personnel attached to the NASA presidential candidate and his running mate, and other co-principals; and that the police openly superintended and aided the disruption of a NASA rally in Meru.

[405] The 2nd and 3rd petitioners thus contend that *the voting environment, on the whole, was not conducive to the proper conduct of fresh election* in most parts of the country. Yet, as the petitioners contend, the 1st and 2nd respondents still proceeded and purported to conduct fresh Presidential election. They allege that such incidents, taken singly or cumulatively, had compromised the outcome of the fresh election – rendering it a nullity. So, they contend, what transpired on the 26th of October, 2017 was by no means an *election* – and so should be annulled as the whole process lacked legitimacy.

[406] From the proper meaning of *legitimacy,* it is not tenable to attribute lack of this to Presidential elections duly conducted by the terms of the Constitution and the relevant statutes and regulations, *and by the constitutionally-designated authority, strictly in compliance with the valid Orders of the Supreme Court* – election essential to the sustenance of the national governance process as constantly recognized by the national population. *Only the failure of the conduct of such election would constitute lack of legitimacy – as it would occasion such uncertainty and appearance of crisis as would afflict the whole population in its social, economic and political engagement.*

[407] Was the election credible" From the controlling factor of legitimacy, the election would be perceived as credible, *in the absence of clear evidence that the bulk of it simply failed;* that *due procedure* was not followed in the conduct of election; that *someone other than IEBC conducted the election*; that the *procedures of vote counting* were not followed; that false results were announced, in place of the true outcome; that the *voters were turned away* from polling stations by IEBC, or by State agencies of power; that the *motions of verification* and announcement of vote-outcome were not complied with. We have stated elsewhere in this judgment that none of these factors were at play or at play in any significant manner.

[408] If it emerges that, in accordance with Article 81(e) of the Constitution of Kenya, the repeat election was conducted by *secret ballot*; that it was *free from violence* (more particularly, such violence being initiated and prosecuted by the electoral body, or by State agencies); that the voters were *not influenced by intimidation or corruption;* that the management process was *in the hand of IEBC;* that *voting was transparently done*; that such voting proceeded *transparently, efficiently, accountably, with precision and clear expression of voter-preference* – then such election has to be judged to have been *credible* for the purposes of the *Constitution*, the *law,* and the *national expectation.*

[409] It is our considered view, therefore, that the *burden falls on the 2nd and 3rd petitioners*, not just to allege, but *to show by objective evidence* the legal foundations of their claim; and thereafter to lay before this Court *weighty evidence* to sustain each and all of their claims. As already demonstrated, some of their claims are of such *a generic order* as to lend only feeble grounds for the Court to depart from *prima facie* perceptions of *legitimacy* and *credibility.* Examples in this category are:

(i) that the 1st and 2nd respondents acted outside the law, and demonstrated lack of independence and neutrality;

(ii) that the 1st respondent publicly admitted that he could not guarantee free, fair and credible elections;

(iii) that on 24th October, 2017 the IEBC, without any legal basis, appointed Consolata N.B. Maina as a Deputy National Returning Officer, a position unknown to law;

(iv) that in a public address, the 1st respondent, hours to the elections, publicly acknowledged that everyone was still questioning whether there was going to be an election, thus showing unpredictability and uncertainty as to the prospect of the said election;

(v) that the environment was not conducive to the conduct of a free, fair and credible election;

(vi) that the election failed to meet the general principles stipulated under Article 81(e) of the Constitution of Kenya, of free and fair elections;

(vii) that the IEBC was not independent, and its decisions have been unpredictable and capricious, and not based on law: for instance, that the 1st respondent promised to investigate the offences arising out of the decision of the Supreme Court, but failed to do so; that he promised to carry out internal changes at the secretariat, but failed to do so; that he notified the public that there had been no scuffles at the Commission, but later wrote an accusing memorandum to its CEO/Secretary;

(viii) that on 17th October, 2017, in her resignation statement, one Dr. Roselyn Akombe stated that the fresh election could not meet the basic expectation of a credible election, as the Commission was saddled with endless cases which it was losing, on account of legal advice skewed to suit partisan political interests;

(ix) that the IEBC was not transparent: for instance, it could not clearly tell the public whether the voter turnout in respect of voters registered with biometrics exceeded that for those without;

(x) that the IEBC failed to take every diligent and reasonable effort to ensure free, fair and credible election.

[410] In a nutshell, it is our finding that the 26th October 2017 elections met the threshold of credibility and legitimacy under the Constitution, certain anomalies highlighted in other parts of this Judgment notwithstanding.

(iv) The question of Voter turn-out

[411] The claim by the 2nd and 3rd petitioners is that the voter turn-out represented only 38.8% of the registered voters, and that the 1st respondent also failed to properly use the biometric voter identification system, so as to misrepresent the voter turn-out. It was contended that the 2nd respondent failed to fulfil his promise of ensuring that the public was informed of the voter turn-out by 1700 hours (close of polling) on 26th October, 2017. It was contended that the 1st respondent had kept revising the percentage of voter turn-out from 48% to 34% and finally to 38%. It is also claimed that the environment and circumstances in which the election was conducted, led to the low voter turn-out, and more specifically, such turn-out was attributed to the violent demonstrations that engulfed the country on the day of polling.

[412] The petitioners contended that the voter turn-out in the fresh Presidential election of 26th October, 2017, was the lowest in the history of multiparty democracy in Kenya. As compared to the voter turn-out of 77.5% during the 8th August, 2017 General Election, the petitioners urged, the current 38.8% represented a 39.2% drop, which is appalling, and gravely discredits the recent election.

[413] The 2nd and 3rd petitioners, to buttress their claims, rely on a 'voter analysis report' by Kura Yangu Sauti Yangu (KYSY), which indicates that the counties with the highest level of turn-out were those perceived to be predominantly supportive of the Jubilee Presidential candidate. The turnout in those counties was as follows: Murang'a 85.2%, Kirinyaga 84.4%, Nyeri 84.2%, Nyandarua 83.8% and Kiambu 78.8%, whereas the counties with the lowest voter turnout were those whose voters were predominantly supportive of the NASA Presidential candidate. The turn-out was as follows: Kisumu 0.7%, Vihiga 4.0%, Makueni 4.6%, Kakamega 6% and Busia 6.8%.

[414] It is the petitioners' further contention, in the foregoing context, that there were differences in turn-out recorded in Forms 34A and in the records attributed to the KIEMS Kit outlined in the OT MORPHO Report. This, they submitted, was demonstrated in the analysis of the Forms 34A and the KIEMS Logs, raising questions about the credibility of the identification of those claimed to have voted *vis-a-vis* the credibility of the Register.

[415] On its part, the 2nd respondent affirmed his neutrality in electoral processes, and asserted that the Commission bears no responsibility for either a high or low voter turn-out.

[416] The 3rd respondent, on the other hand, attributed the low voter turn-out to intimidation and violence engineered and co-ordinated by members of the NASA coalition. He argued further that, despite every effort being made by the 1st and 2nd respondents to conduct the election, the continued violent demonstrations impeded a full-scale exercise of the right to vote.

[417] The 3rd respondent, in addition, urged that there is no compulsory voting mechanism in Kenya, and voting was no more than the exercise of one's freedom of choice. It was his stand point, that voter turn-

out in a repeat election is generally low, as compared to an initial election. Through his counsel, the 3rd respondent pointed to evidence of low voter turn-out in past by-elections in Kenya. For instance in the 2013 General Election, Makueni recorded a voter turn-out of 84% while in the by-election conducted on 22nd July, 2013 to fill a vacancy in the office of the Governor the voter turnout was 24%. Similarly voter turn-out for the by-election held on Kajiado County, Malindi Constituency and Kibwezi Cest Constituency was 12%, 16% and 21% respectively.

[418] It is quite clear to us that the petitioners' concern with voter turn-out is that it should be an expression of the legitimacy of the recent election. They constructed this point around the right of every citizen to vote, and the effect of violence and non-voting, in certain constituencies, and its effect on the outcome of the election.

[419] We begin to consider this issue from the position that, whereas the right to vote is guaranteed, the Constitution does not impose a mandatory obligation on a citizen to vote in an election. The ultimate yardstick for determining the winner in a Presidential contest is provided for under Article 138 (4) of the Constitution, in the following terms:

"A candidate shall be declared elected as President if the Candidate receives –

(a) more than half of all the votes cast in the election; and

(b) at least twenty-five per cent of the votes cast in each of more than half of the counties."

[420] This Article spells out the minimum threshold required of a candidate, before being declared elected. The quantifying element is the outcome in the votes cast in an election and, consequently, if the safeguards of the right to vote are guaranteed, and the optimum environment adhered to within the confines of Articles 81 and 86 of the Constitution, and of all the imperatives of a free, fair and credible election, the matter resolves to the question of 'votes cast', and the 'county threshold.' A candidate only needs to attract a modicum of voter support, to earn a positive declaration. Therefore, if the foregoing attributes for declaration are not affected by the voter turn-out, the validity of the declaration stands uncompromised.

[421] The 3rd respondent, therefore, correctly argued that low voter turn-out, without more, is insufficient as a basis for invalidation. More so because, where the threshold for declaration has been met, to set aside an election because of low voter turn-out would be to deprive citizens who voted, of the benefit of their franchise. The Constitutional Court of South Africa, in the case of ***Kham and Others v. Electoral Commission and Another*** (CCT64/15) [2015] ZACC 37, thus pronounced itself on this question:

"It is notorious that ***voter turnout in by-elections is usually low and voters who know that they will in any event be called on to vote again relatively soon, will be disinclined to make a great effort to vote in the by-election as well.*** *This points against an order setting aside the by-elections****. But again it cannot be decisive. The voters in these wards were deprived of the free and fair election to which they were entitled. The candidates were deprived of the right to participate in a free and fair election. Saying to them that in any event they will have an opportunity in May to elect fresh representatives and stand for election will not redress that. That is a right they already have. To merge it with the need to hold fresh by-elections is effectively to deprive the voters of their initial right to a free and fair election."***

[422] In the instant case, it is clear that there were various factors leading to the low voter turn-out. Furthermore, the 3rd respondent urged that in addition to the non-mandatory aspect of Kenya's voting

systems, voter turn-out, as a matter of fact, in repeat elections, is usually remarkably low. Indeed, the US Supreme Court, in the case of ***Burson v. Freeman*** [1992] USSC 61, recognised that re-running an election would generally have a negative impact on voter turnout.

[423] There is a proper basis, therefore, for us to find that voter turn-out has no direct connection to the validity of the declaration of a President-elect, even though, subject to Article 138(4) of the Constitution, it remains, important for as many people as possible to participate in a Presidential election.

[424] The 2nd and 3rd petitioners urged persistently, that violence and intimidation were the factors that led to the low voter turn-out, and therefore compromised the credibility of the declared result. It is clear to us, however, that such low voter turn-out was due to an amalgam of factors – including in particular, the active call for boycott, and the violent demonstrations, as well as voter-fatigue.

[425] On boycotts, we take judicial notice that, throughout the world, a call to boycott elections has the impact of lowering voter turn-out. For instance, in Mauritania, prior to the 2014 election, the opposition called for an election boycott, following the breakdown of negotiations between the National Forum for Democracy and Unity, and the Mauritanian executive, which had aimed at building consensus in the preparation for Presidential elections. Consequently, elections were boycotted by almost the whole opposition, who considered the election to be a sheer masquerade. Nonetheless, according to an opinion document titled *"Mauritania: Presidential Elections 2014 – Legitimacy, Promises and Boycott,"* published by the Spanish Institute for Strategic Studies, 2014, the voter turn-out in the Mauritanian Presidential election was 56.5%, which was low, taking into account that the turn-out in the municipal and parliamentary elections of 2013 was 75.53% in the first round, and a turn-out of 72% in the second round. It is to be noted that notwithstanding the low voter turn-out resulting from the call for boycott by the opposition, the international community signalled their acknowledgment of the election of Mr. Abdel Aziz as President. The opinion document thus records, in respect of the boycott and the effect:

"The observers of the African Union and the Arab League highlighted the normality of the polling day, even if the opposition that supported the boycott has denounced a massive electoral fraud once more. The European Union, in its communiqué of June 25th, stressed again the importance of an inclusive electoral process where the different political factions assure a credible and democratic result, while congratulating the elected President Abdel Aziz."

[426] Regarding voter-fatigue, it is commonplace that voter turn-out is low, when voters are required to participate in elections which run one after another, with only a short break in-between, or if the number of elections in one year are numerous. Dr. Sebastian Garmann, the Chairperson of Public Economics at the University of Dortmund in Germany conducted an empirical study of the patterns of voter turn-out in elections, and proceeded to formulate a paper on his findings, titled *"Voter fatigue and turnout".* He thus observes:

"My main finding is that the closer in time an election is to the most recent one, the lower its turnout will be. This effect is highly significant and extremely robust. It is visible in the raw data, does not change quantitatively or qualitatively when common control variables are included, and persists (even at larger magnitudes) when only the time period with exogenous Bürgermeister and Landrat elections is considered. Quantitatively, my results suggest that one additional day between two elections increases turnout at the later election by approximately 0.0016 percentage points—that is to say, if there were a temporal distance of one year between two elections, this would increase turnout at the later election by 0.584 percentage points, ceteris paribus."

He further observes in respect of voter fatigues:

"… it fades approximately six months after an election. Because voter fatigue might explain why countries with high political decentralization and frequent contests—such as the United States and Switzerland—have typically low voter turnout, the present study contributes to the very scarce literature on how election timing causally influences turnout (e.g., Anzia, 2012; Garmann, 2015). This paucity of research on election timing is surprising, as elections constitute probably one of the most studied institutions in economics and political science (Berry and Gersen, 2011). Moreover, the current study can be categorized as part of an emerging body of literature termed "behavioral political economy" (see Schnellenbach and Schubert [2015] for a recent survey), as it shows that contextual variables (i.e., days since the most recent election, and the number of elections in the recent past [used in robustness checks]) can influence turnout decisions."

[427] It is a scenario of common occurrence. In France, the voter turn-out in the elections of 23rd April, 2017 was estimated to be *78.69%,* while in the second round the voter turn-out was estimated to be about *38%.* It is evident, therefore, that in repeat elections, and in by-elections, the voter turn-out is ordinarily lower than the turn-out in general elections. For example, on 28th October, 2014, Zambian President Michael Sata died after a period of illness. The Electoral Commission of Zambia conducted a by-election within 90 days, as prescribed by the Zambian Constitution. According to the Open Society Initiative for Southern Africa and ECF – SADC, in their Report titled, *"Election Management Bodies in South Africa"* (2016), voter turn-out in the Presidential by-election held in 2015 was very low. At the time of the by-election the number of registered voters was *5,166,084* but of these, only *1,671,662* cast their ballots in the by-election, resulting in a low voter turn-out of *32.4%.* Nonetheless, both local and foreign observers of the by-election commended the electoral body, for high levels of professionalism and impartiality, in organizing an election that broadly reflected the will of the Zambian electorate.

[428] That such a pattern of voter turn-out in repeat-elections is the constant norm, is clearer still from the scholarly study by Anthony George Fowler, in his dissertation for the degree of Doctor of Philosophy in Political Science, at Harvard University, 2013, titled *"Five Studies on the Causes and Consequences of Voter Turnout."* He thus records:

"[L]ow and unequal voter turnout is a serious problem, and it is very difficult to fix! Studies 1 and 2 show that low and unequal participation has significant partisan and policy consequences. Election results and public policies in advanced democracies with voluntary turnout are significantly different from the counterfactual world where everyone turns out to vote. Exogenous factors that influence the composition of the electorate like compulsory voting laws, election-day weather, or the coincidence of lower level elections with a presidential race can significantly change electoral and policy outcomes. Even modest electoral reforms that minimally expand or contract the electorate could have significant consequences because the preferences of marginal voters – those on the cusp of voting or abstaining – are often dramatically different from those of regular voters – those who are sure to turn out. Low and unequal turnout is a serious problem for democracy because election results fail to reflect the preferences of the citizenry."

[429] We also note that in the U.S. State of Louisiana, voter turn-out has often been low, a situation attributed to the many elections held in the State – sometimes up to seventy elections per year. The State-wide election statistical report available on Louisiana Secretary of State's website recorded voter turnout for an election held on 14th October, 2017, as remarkably low, within the range of 12% and 25%. This did not taint the credibility of the election. However, it has formed the basis for the Secretary of State, Mr. Tom Schedle, to seek a change in the law, *to reduce the number of elections held in that State in any given year.* Mr. Tom Schedle has often complained that Louisiana holds too many unnecessary elections, making it difficult to draw the interest of voters, who are weary of repeatedly

going to the polls. Going by these statistics, it can be deduced that low voter turn-out is not an unassailable indicator of the *want of credibility of an election.*

[430] It has then to be appreciated, quite objectively, that voter turn-out in a repeat election is generally low. Although there were a myriad of factors in the present case, that led to the low voter turn-out, an election cannot be tainted solely on the ground of voter turn-out. The factors that led to low voter turn-out, although politically tainted, and inviting political solutions, are not sufficient in this instance, as a basis for impugning the electoral process.

[431] From the emerging portrait of the issues in this case, it is clear that their primary focus on the broad-textured concepts of "legitimacy" and "credibility" has led the petitioners on a course of prolixity. This stands in contrast to the object of conscientious invocation of the judicial process – which brings before us only a limited set of meritorious issues. This latter category has been duly answered, bringing the Court to the clear conclusion that the petitioners' case lacks merit.

9. Costs

[432] In both ***Raila 2013*** and ***2017***, this Court took the view that, noting the substantial public interest accompanying Presidential election petitions, it would not be in the interest of justice to penalise a losing party, with the burden of costs. This reasoning may also apply to this case, especially as the petitioners have approached this Court as registered voters (whether or not they voted in the recent election), with complaints that the processes leading to, and the conduct of the 26th October, 2017 election did not meet constitutional or statutory thresholds, and that a further election ought to be held. Although we have not agreed with them, the interests of justice would disincline us to make an adverse Order on costs.

[433] By no means does this rule out the possibility that, in a proper case, this Court may dispense the penalty of costs upon a party, where such party brings forth a frivolous or vexatious case, or a case that distinctly aims at settling political scores. We see in particular, the domains of *locus standi,* or public interest litigation, as those which in a proper case, would attract penalty in costs. The order that commends itself to us in this case is that the parties shall bear their own respective costs.

E. THE CONCURRING OPINION OF NJOKI NDUNGU, SCJ

[434] This Concurring Opinion is limited to two issues which is (1) the applicability and (2) constitutionality of Section 9 of the Election Laws (Amendment) Act amending Section 83 of the Elections Act. I have applied a different path of reasoning and finding from that of the majority on the issue of applicability of Section 83 (as amended). I have also addressed and made findings on the submissions and arguments on the constitutionality of the same clause; the Majority having declined to do so at Paragraph 389.

[435] At paragraph 43 of the Petition (in Petition No. 4 of 2017, it was pleaded that: *"Section 83 of the Elections Act contemplates that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even so, although the Petitioners aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners position is that the non-compliance with the Constitution, the written laws and the Rule of Law is sufficient to invalidate the Presidential Election."*

[436] At paragraph 74, the Petitioners averred that: *"In September, 2017 Members of Parliament of the Jubilee Party led by the 3rd Respondent, caused to be published the Election Laws (Amendment) Bill 2017 vide which they sought not only to undertake "Parliamentary Review" of the Supreme Court*

decision in Raila Odinga 2017 but also proposed to repeal or amend all provisions of the Electoral laws and Regulations the Supreme Court interpreted and relied upon to render its determination. The impact of this legislative proposal was to diminish the role of technology in the elections, open election results to manipulation and to signal to the voters that it would not be possible to successfully challenge the results of the fresh presidential elections even if the same were to be unconstitutional, unlawful or irregular as previously found in Raila Odinga 2017. This was intended to and has the effect of making voters keep off the process."

[437] At paragraph 140(ix), one of the questions posed for determination was: *"whether Section 83 of the Elections Act as amended is unconstitutional and invalid""* The Petition also sought, "*a declaration that Section 83 of the Elections Act (as amended) is unconstitutional and invalid to the extent of its inconsistency with the Constitution of Kenya."*

Submissions

[438] The 2nd and 3rd Petitioners urged that the Election Laws (Amendment) Act which amended Section 83 of the Elections Act came into effect after the election had taken place. According to the Petitioners, the amendment was intended to circumvent the authority of this Court and was therefore unconstitutional for infringing on the independence of the Judiciary, violates the constitutional right to public participation, violates the right to universal suffrage, and undermines the core constitutional and statutory duties of the Commission to conduct free and fair elections.

[439] In addition, the Petitioners urged that the Election Laws (Amendment) Act came into effect after the 26th October, 2017 election took place and therefore could not be applied retroactively. The law came into effect on 2nd November, 2017. The Petitioners asked the Court to read the amended Section 83 disjunctively because to read it otherwise would violate Articles 81 and 86 of the Constitution. The Petitioners referred to the Court's interpretation of this section in ***Raila Odinga & Another vs. Independent Electoral Boundaries Commission & Others,*** Sup. Ct. Petition No. 1 of 2017; [2017] eKLR. (***Raila Odinga 2017)*** Judgement and urged that a conjunctive application would be contrary to Articles 81 and 86 of the Constitution.

[440] In terms of applicability of the law, it was the Petitioners' assertion that the declaration of the 3rd Respondent as the President-elect took place on 30th October, 2017. The Amendment Laws came into effect on 2nd November, 2017. The Petition was filed on 6th November, 2017. As such, the law was not in place when the cause of action, leading to the Petition occurred i.e. on 30th October, 2017. They urged that legislation should be effected prospectively and not retrospectively; that is, laws should be forward looking and should not apply backwards. They also urged that legislation should be presumed prospective in effect in absence of legislative guidance to the contrary. In this case, Parliament did not state that the amendment to Section 83 ought to apply retrospectively. The Petitioners' argument was that the Court ought to presume the legislation prospective to avoid construing a new law that otherwise might have attached new (post-enactment) legal consequences to events completed before the law's enactment.

[441] It was also the Petitioners' assertion that the Amendment Law was purposefully enacted to tie the hands of the Court and make it difficult for it to interrogate the validity of the fresh election in exercise of the Court's judicial authority and independence. The Petitioners urged the Court to find that the amended Section 83 was unconstitutional for reason of its conjunctive language. They were also of the view that any burden to prove the constitutionality of the amended Section fell upon the Respondents.

The Responses

[442] The 1st and 2nd Respondents joined the Petitioners in urging that the impugned amended Section 83 was inapplicable to the matter at hand since it had come into effect after the fresh election was conducted. It was urged that this issue was not one that could be determined at this juncture as it was still a live issue before the High Court, which bore the jurisdiction to determine it under Article 165(3)(d)(i) of the Constitution. Counsel referred to the case of ***Erad Suppliers & General Suppliers Contactors Limited vs. National Cereals and Produce Board*** [2012] eKLR [the ***Erad*** case] to urge that the issue of constitutionality of Section 83 was a live and integral matter before the High Court, which was the proper forum for a determination on the said question ought to be done.

[443] The 3rd Respondent was of the view that indeed, Parliament had amended Section 83 of the Elections Act requiring the two step process in making a determination of validity. He urged that the Petitioners had not made any attempt to show that the result of the election had been substantially affected as a result of any non-compliance. This was further reinforced in the Affidavit of Winnie Guchu (Paragraphs 105 to 108) who was of the view that: [T]he Amendment Laws were passed by Parliament in accordance with the laid down legislative procedures; the challenge to the constitutionality of these laws is the subject of a Petition in the High Court; extensive public participation was conducted by both house of Parliament before the laws took effect; and that the provisions of Articles 110 and 116 of the Constitution were followed. She urged that this Court was the inappropriate forum for the Petitioners to attempt to supplant the role of Parliament in enacting laws.

[444] The 1st Interested Party's view was also that the determination of the issue on constitutionality of Section 83 of the Election Laws (Amendment) Act was a preserve of the High Court and this Court lacked jurisdiction to determine the same. The Attorney General submitted that the challenge to the constitutionality or otherwise of Section 83 of the Election Laws (Amendment) Act was the preserve of the High Court in the first instance in the pending case of ***Katiba Institute & 3 Others vs. The Hon. Attorney General & Another,*** High Court Petition No. 548 of 2017. He referred to the directions of the Chief Justice in the case of ***Ekuru Aukot vs. IEBC & Others*** (referred to the High Court as H.C Petition No. 471 of 2017) to buttress this argument. In that case, the Chief Justice's directions were, in part:

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 Court under Article 165 (3)(d) of the Constitution.

[445] His opinion was that deferring that determination to the High Court would maintain order and efficacy in the administration of Justice. He relied on the Court's determination in ***Re The Matter of the Interim Independent Electoral Commission*** [2011] eKLR:

"In principle, the Supreme Court commits itself to order and efficacy in the administration of justice and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict: and each case will be carefully considered on its merits."

[446] The Attorney General however made a concession that Section 83 (as amended) was applicable to the instant Petition on the basis of the principle of presumption of constitutionality. Citing the case of ***Ndyanabo vs. Attorney General*** [2001] EA 495, he urged that the duty lay with the Petitioners to rebut that presumption. Although his primary submission was that this Court ought not to determine the question of constitutionality of this Section, consideration of purpose and objects of the Act ought to be considered should this Court assume that jurisdiction. He relied on the case of ***Murang'a Bar Operators and Another vs. Minister of State for Provincial Administration and Internal Security***

and Others, Petition No. 3 of 2011. He added that the purpose and object of the amendment was to bring clarity, certainty, and consistence with the jurisprudence in other common law countries on electoral dispute resolution. Overall, he urged that tying an irregularity to the number of votes cast was meant to safeguard the integrity of the election, sanctity of the vote and the centrality of the will of the voter. Further, that this conjunctive approach is a legitimate object in election legislations in open and democratic societies.

[447] The Attorney General also urged that by dint of Article 115(1) as read with 116 of the Constitution, the Election Laws (Amendment) Act came into force 14 days from the date the Bill was transmitted to the President for assent. As a result, the same was in operation at the time of institution of the instant Petition. As a result, reference ought to be made to its text and context. He relied on the Supreme Court of India's decision in ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd*** [1987] 1 SC 424.

He urged that the intent of the Legislature was clear in the statute and the Court's further judicial inquiry, therefore unnecessary.

Analysis

[448] Although the Parties referred to numerous decisions of this Court on the matters deserving the exercise of this Court's jurisdiction, none linked their arguments to the role of this Court on questions touching on the interpretation and application of the Constitution from the perspective of this Court's exercise of Exclusive Original Jurisdiction. More specifically, whether an issue touching on the constitutionality of any law, integral to the determination of a cause before us, although pending before another Court falls to this Court's determination.

[449] Section 83 of the Elections Act, 2011 was an integral part of this Court's consideration of the validity of the 8th August, 2017 Presidential election. The decision of the Majority turned on the disjunctive interpretation and application of this Section to the conduct of the election. At paragraph 171, the Court, in a majority, noted that Section 83 was indeed, the fulcrum of the Petition. Paragraph 187 of the Majority Opinion set the stage for the interpretation of this Section and at Paragraph 211, the Court laid out the application of Section 83 by Courts determining the validity, or otherwise of an election. The Majority held:

"[211] *In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances,* ***a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election"*** [emphasis supplied].

[450] While the cases cited by counsel revolved around this Court's appellate mandate, the Supreme Court's jurisdiction as an election Court and the interplay of the Constitution and the law to the issues at hand can be surmised from the reasoning in the case of ***Lamanken Aramat vs. Harun Meitamei Lempaka & 2 Others***, Supreme Petition No.5 of 2014, [2014] eKLR, (the ***Aramat case***) at paragraphs 88, 101 and 102:

[88] The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the Constitution of Kenya, 2010 (Article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established. The exclusive, dedicated role of the Supreme Court under the Constitution takes several forms: for example, it has "original jurisdiction to hear and determine disputes relating to the elections to the office of President" [Article 163(3)(a)];

[101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the Constitution with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carries the overall responsibility [The Constitution of Kenya, 2010, Article 163(7)] for providing guidance on matters of law for the State's judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.

[102] *The Supreme Court's jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior Courts.* ***We note in this regard that while the Court of Appeal's jurisdiction is based on Section 85A of the Elections Act, with its prescribed timelines, that of the Supreme Court is broader and is founded on the generic empowerment of Article 163 of the Constitution, which*** *confers an unlimited competence for the interpretation and application of the Constitution****; and this, read alongside the Supreme Court Act, 2011 (Act No. 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character*** *[emphasis supplied].*

[451] This interpretation, and the language of the Elections Act and the Election Laws (Amendment) Act, places Section 83 at the centre of any determination by an election Court. After the hearing and analysis of the case from the submissions and evaluation of the evidence, the application of Section 83 serves as the Judge's determinate vector. Therefore, although the Parties seemed to be in agreement that the constitutionality of that Section was removed from this Court's Exclusive Original Jurisdiction and was the preserve of the High Court on the basis of a pending suit, my opinion is that this Court's determination of that issue is necessary to complete the mandate bestowed under Article 163(3)(a).

[452] As rightly urged, this Court has time and again held that issues pending before another Court will not be subject to determination before the Supreme Court but rather this Court shall allow that other Court having the jurisdiction to determine the matter in the first instance. In ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** Sup. Ct. Petition No. 2 of 2012; [2012] eKLR, this Court enunciated this concept in the following terms [paragraph 29 & 30]:

"We draw analogies with the plurality of autonomous structures created by the Constitution of Kenya, 2010, which represents a progressive new trend of governance. The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.

In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the

technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, ***will deserve the further input of the Supreme Court."***

[453] In ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 other,*** Sup. Ct. Civil Appl. No. 35 of 2014; [2014] eKLR, the Court observed: at [paragraph 65]

"…Subject to the obligation on the part of all Courts to ensure efficiency and dispatch in proceedings before them, as required under the Constitution, it is an important principle guiding the judicial function, that the Courts are independent, and are committed to the judicious and conscientious discharge of their mandate. Upon this premise, this Court will in general, keep faith in the other Courts, in the absence of any plain situation to the contrary, that merits judicial notice…."

[454] In ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011; [2011] eKLR, ***(Re IIEC)*** this Court when called upon to make a determination in respect of the exercise of its jurisdiction to interpret the Constitution, which in that case overlapped with that of the High Court, citing the Court of Appeal decision in ***Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited,*** [1989] KLR 1, held that:

"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in ***Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited*** *[1989] KLR 1…*

[30] The ***Lillian 'S'*** *case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."*

[455] In ***Re IIEC***, this Court also took cognizance that the High Court, the Court of Appeal and the Supreme Court are all empowered to interpret the Constitution and that in ordinary circumstances, litigation on issues of constitutional interpretation will in the first instance fall for determination by the High Court. In that regard it held [paragraph 43]:

"Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. *This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction;* ***for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court. … Indeed, interpretation of the Constitution stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs… Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages."***

[456] However, it is important to distinguish those judicial pronouncements from the matter now before us, because in ***all*** of those instances this Court had in mind ordinary causes coming before it by dint of Article 163(4)(a) or (b) of the Constitution; i.e. appeals from the Court of Appeal; and, issues of constitutional interpretation or application which must have formed an integral part of the issues raised in the superior Courts and been the subject matter of determination. It follows therefore, that this Court will

exercise deference to another superior Court below it in hierarchy, in instances in which the Court of original jurisdiction in respect of the matter before it, is that superior Court. A question however arises as to whether the Supreme Court in hearing a matter in which it has Exclusive Original Jurisdiction will determine an issue of interpretation and application of the Constitution or whether it will defer to the Superior Courts below it.

[457] My considered opinion is that in a matter in which this Court is exercising Exclusive Original Jurisdiction, – as an election Court – it is imperative for this Court to answer, in the first instance, such questions relating to interpretation and application of the Constitution that are so integrally linked to the determination of the validity or otherwise of the declared result.

[458] Since the determination of a Petition challenging the declaration of a Presidential election falls to the Exclusive Original Jurisdiction of this Court, the legal implication of leaving main issues unresolved is the creation of a lacuna in the application of the law. Losing the chance to clarify it until such time as the jurisdiction of the Supreme Court will be invoked in another like matter or such time as the Legislature illuminates the penumbras occasioned therein. The grave occasion of this Court's acceptance of the submissions of counsel to skip the central determination revolving around the constitutionality of Section 83 (as amended) leaves a matter properly before the Court unresolved. The Constitution does not countenance a situation whereby this Court makes a partial determination on any matter, especially in an election cause. Former DCJ & VP Justice Kalpana Rawal captured this constitutional obligation succinctly in her concurring opinion in ***Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and Two Others,*** Sup. Ct. Petition No. 9 of 2014; [2014] eKLR, (the ***Lisamula*** Case) where she pondered on the issue *whether the jurisdiction of the Supreme Court under Article 163(4)(a) of the Constitution is intertwined with that of the High Court and the Court of Appeal under* ***Articles 87(1) and (2)*** *and* ***105*** *of the Constitution, and* ***Section 85A*** *of the Elections Act, 2011*: at [paragraph 133]

"….[T]he special nature of the Supreme Court under Article 163(4)(a) of the Constitution ordains that its mandate to settle legal issues of constitutional controversy, remains alive. The modalities of this charge, which is exercised in final form by this Court, are guided by Article 259(1) of the Constitution, which directs that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles [Art. 159(1)(a)]; advances the rule of law, and the human rights and fundamental freedoms in the bill of rights [Art. 159(1)(b)]; and permits the development of the law [Art. 159(1)(c)]. Therefore, to curtail the authority of the Supreme Court to address itself to legal issues of constitutional relevance, would be to negate the very essence of its establishment as a final Court. We note, however, and as has already been held, that this Court's special mandate is to be discharged judiciously."

The distinguished Judge continued at paragraph 135:

"…Therefore, the peculiar nature of the Constitution of Kenya, 2010 informs the peculiarity of the Judiciary in the new dispensation, and more so, that of the Supreme Court. The Constitution progressively broadens the arena of litigation in this country, and the Supreme Court must remain steadfast in its duty to address itself to issues that may properly come before it. The jurisprudence to be developed by the Supreme Court of Kenya may bear differences from that of other jurisdictions in the world, because of the special terms of this country's charter, which expresses the people's will, and embodies their mutual agreement. While most jurisdictions would command a Court to relieve itself of duty by making a prompt finding on jurisdiction, Kenya's Constitution directs the Supreme Court to take no rest, until all unsettled issues of its interpretation and application are resolved."

[459] In that case (***Lisamula***), my brother Justice J.B Ojwang', SCJ interrogated the modern day

application of the jurisdictional principle in the case of ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd*** [1989] KLR 1 **(Lillian S) with respect to the jurisdiction of the Supreme Court.** His conclusion then mirrors my conclusion now, that in Kenya's current Constitutional scheme, the jurisdiction of the Supreme Court is not as rigid as would have been in 1989 when the Court of Appeal rendered its opinion in the ***Lillian S*** case. Indeed, as Ojwang, SCJ determined in the ***Lisamula*** case: [at paragraphs 149 and 150]

"The Constitution, thus, reposes special trust in this Supreme Court, to apply its internal procedures, and its modalities of reasoning, to evaluate essentially political questions of public governance, and to render a legitimate opinion that guides the operations of the State, and its plurality of agencies.

It is my perception that this Supreme Court has a larger profile than that which had been attributed to Courts of the past, by the Court of Appeal's decision in "Lillian S"."

[460] There are rare instances, when the jurisdiction of the Supreme Court will engage the interpretation of an issue pending before a Superior Court. While Rawal, DCJ & VP (as she then was) and Ojwang, SCJ addressed their minds to this Court's appellate jurisdiction, the present issue makes it clear that where an issue is so integrally linked to the cause before the Court in exercise of its duty under Article 163(3)(a) of the Constitution, this Court will address itself to that issue notwithstanding its status before a lower Court. It is clear to my mind, that the foregoing remarks relating to the mandate of the Supreme Court are not only applicable in exercise of its Appellate Jurisdiction but also in respect of its Exclusive Original Jurisdiction.

[461] Moreover, this Court has on various occasions pronounced that it shall utilize every opportunity that presents itself in the course of determination of matters before it to interpret the Constitution. The concurring opinion of *Mutunga CJ-P* (as he then was), in ***Jasbir Singh Rai & three Others v. Tarlochan Singh Rai and Four Others,*** Sup. Ct. Petition No. 4 of 2012; [2012] eKLR, is instructive on this. At paragraph 81, he makes the following remarks:

"… I suggest that going forward it will be good practice for this Court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it."

[462] In view of the requirement in Section 3 of the Supreme Court Act, 2011 for this Court to: assert the supremacy of the Constitution and the sovereignty of the people of Kenya; provide authoritative and impartial interpretation of the Constitution; and, develop rich jurisprudence, among others, this Court cannot shy away from determining conclusively all the issues relating to constitutional interpretation and application that arise within a presidential election so long as such issue are central to the determination of the question of validity of the declaration of the President-elect.

[463] The resolution of a Presidential Election Petition falls to this Court for determination in exercise of its exclusive original jurisdiction pursuant to Article 140 of the Constitution. Failure, by this Court, to determine an issue that is integral to the Petition would have the effect of leaving part of the dispute between the parties unresolved. In terms of Section 83, it would have the effect of leaving undetermined, the fulcrum of the election cause itself. Consequently, the resultant decision would be one falling short of the explicit commands of Article 140 and those of Article 159(2) that justice shall not be delayed and the purposes and principles of the Constitution shall be protected and promoted. Such an incomplete decision would also be contrary to the distinct objects of the Court set out in Section 3 of the Supreme Court Act and the entire fabric of the Constitution.

[464] In context, the Petitioners invited this Court to determine the following issues, *inter alia*:

"In light of the amendment of Section 83 of the Elections Act the by Election Laws (Amendment) Act 2017 after the conduct of the fresh Election, which law is applicable for purposes of determining the present dispute" and whether Section 83 of the Elections Act as amended is unconstitutional and invalid""

In consequence, the Petitioners sought a *"declaration that Section 83 of the Elections Act (as amended) is unconstitutional and invalid to the extent of its inconsistency with the Constitution of Kenya."* In response the 1st and 2nd respondents urged that Section 83 of the Elections Act, 2011 was amended after the election, the subject of the Petition herein had been conducted. Consequently, they urged, Section 83 (as amended) is not law that is applicable to the determination of the election petition herein.

[465] Counsel for the 1st Respondent, Mr. Waweru Gatonye re-emphasised that standpoint by submitting that the amended Section 83 would not inform or affect the determination of the Petition; not an issue related to or whose determination is necessary for the determination of matters in the Petition; and, was not an issue which could be subsumed in the matters in the Petition or deemed to require a determination so as to determine the matter at hand on its merits. Counsel urged that the law applicable to the Petition was Section 83 of the Elections Act, 2011 as it was, before the amendment. However, he was categorical that the fresh presidential election of 26th October, 2017 was not tainted by any illegalities or irregularities and if any, they did not get to the threshold required under Section 83.

[466] The 3rd Respondent also contended that the Election Laws (Amendment) Act, 2017 came into force upon publication in the Kenya Gazette on 2nd November, 2017. It was counsel's submission that the provision sets out the considerations that a Court should apply when determining an electoral dispute and the dispute before the Court has arisen after the operationalisation of this Section. Therefore, forming the basis upon which the Court ought to determine the dispute before it. In his submission, the 'old' Section 83 stood repealed.

[467] I am of the considered opinion that in order for this Court to determine, *with finality,* the question of validity of the declaration of the president-elect after the election held on 26th October, 2017, it must inevitably, determine all the issues that crystallise for determination and the applicable electoral law in that respect. This Court is charged to signal the law that it has relied on in arriving at its determination in any matter, more importantly, in determining the validity of a declaration in a Presidential election and for good reason. **Firstly,** it attracts enormous public interest. **Secondly**, other Courts look up to this Court to offer the guiding compass on interpretation and application of the Constitution and its interplay with other applicable laws and **Thirdly,** for certainty and predictability of Kenya's electoral jurisprudence.

[468] I emphasized on the right-centric nature of election petitions and the pivotal nature of the precedent – setting decisions of this Court, in ***Raila Odinga, 2017***, where I observed: [at paragraph 14]:

"It is proper to emphasize that the Supreme Court in discharging its mandate as an election Court, remains the precedent-setting forum in the country and its decisions must be carefully analysed to ensure that a jurisprudential crisis or confusion does not ensue. Were that to happen, the Court would have failed the Constitution and the people…"

[469] I agree with the submissions made by Mr. Ogetto for the 3rd Respondent, to the extent that the doctrine of presumption of constitutionality would be applicable in respect of Section 83 of the Election Laws (Amendment) Act as long as that provision has not been adjudged unconstitutional by any Court. However, as explicated earlier, the constitutionality of Section 83 falls for this Court's determination in

the present Petition. The observations of this Court in ***Moses Masika Wetangula vs. Musikari Nazi Kombo & 2 Others,*** Supreme Court Petition No. 12 of 2014; [2014] eKLR, in respect of the mandate of an election Court are instructive. This Court observed [paragraph 112]:

"The primary duty of the election Court is to give effect to the will of the electorate; and consequently, the Court is to investigate the nature and extent of any election offence alleged in an election petition. ***Accordingly, the happenings that touch on the due conduct of the election process, come as proper items of agenda in the tasks of an election Court"*** [emphasis supplied].

Therefore, the pressing need for this Court to conclusively determine the present Petition together with all the issues intricately intertwined with it, cannot be overstated. It is therefore evident that the questions as to ***whether Section 83 (as amended) is the law applicable in determining the present Petition*** and ***whether the same is inconsistent with the provisions of the Constitution***, are critical issues to be addressed. Having said that, I now proceed to evaluate both.

i. Whether Section 83 of the Election Laws (Amendment) Act is the applicable law in determining the present Petition.

[470] The Election Laws (Amendment) Act 2017 was passed by Parliament on 12th October, 2017 and submitted to the President for assent on 13th October 2017. Article 115(1) of the Constitution provides that the President must assent to a Bill or return it to Parliament within 14 days of receiving it. Article 115(6) provides that if the President does not assent to a Bill or return it to Parliament within that period, the Bill is deemed to have been assented to at the end of that period. Under Article 116(1), the law must be published in the Gazette within 7 days of its assent whether express or implied. Article 116(2) provides that an Act of Parliament comes into force 14 days after publication in the Gazette unless the law provides for an alternative date.

[471] The President did not assent to the subject Bill by 27th October, 2017 (the 14th day) and by operation of law it was deemed assented to on that date. It was then published in the Gazette on 2nd November, 2017. Since the Act provides that the law would come into force on publication in the Gazette, it came into force on 2nd November, 2017.

[472] Reliance was placed by the Petitioner, on the case of ***Fray vs. Omaha World Herald Co.*** F.2d 1370, 1374 (8th Cir. 1992) where it was held that statutes should be forward looking and should not apply backwards, and that statutes should not be given retrospective operation interfering with antecedent rights. The Petitioners' relied on the Supreme Court of the United States (SCOTUS) decision in the case of ***Landgraf vs. USI film Film Prods.*** 511, U.S, 244, 265-73 (1994). SCOTUS in this case limited the presumption to statutes altering substantive rights, where it presumed prospectively to avoid construing a new law that otherwise might have attached new post-enactment consequences to events completed before the law was enacted. They also relied on the concurring opinion of Justice Scalia in the case of ***Kaiser Aluminium & Chem. Corp vs Bonjo*** *494 U.S 827, 855 (1990),* where he observed:

"T*he principle that legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."*

It was thus urged that a statute should not be given retrospective interpretation unless there is legislation guiding to the contrary, which provision was stated to be lacking in the new Amendment Laws. It was thus urged that the petition should be heard and determined as per the Constitution and the Election law that existed before the Amendments. It was the submission of counsel for the Petitioners, 1st and 2nd Respondents, the Hon. Attorney General and counsel for the 1st Interested Party that the Amendment

Law was inapplicable to the present Petition. ***However, counsels did not consider the import of Section 83 in isolation from the other Sections in the Election Laws (Amendment) Act or distinguish its application from those Sections.***

[473] Section 83 of the Elections Act appears in Part VII of the Act-Election Disputes Resolution, under the heading, 'Election Petitions.' More specifically, it addresses the conduct of the Court after an election Petition has been filed before it. In this instance, the determining cause triggering the application of the law is the cause presented for the Court's determination. Section 83 contains the test to be applied by a Court while determining an electoral cause before it. ***Therefore, it does not follow an electoral event i.e. the election, it follows the declaration by a Judicial Officer, of an election cause.*** Section 83 (as amended) is therefore, the applicable law not just in this Petition, but in other election Petitions and appeals before other Courts.

ii. Whether Section 83 of the Elections Act as amended is unconstitutional and invalid.

[474] Section 83 (as amended) provides:

83. (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that –

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and

(b) the non-compliance did not substantially affect the result of the election.

(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

[475] The Petitioners urged that the amendment was intended to circumvent the authority of this Court and was therefore unconstitutional for infringing on the independence of the Judiciary. They also urged that it violated the constitutional right to public participation, the right to universal suffrage, and undermined the core constitutional and statutory duties of the Commission to conduct free and fair elections. Mr. Waikwa, counsel for the 2nd and 3rd petitioners contended that despite the Respondents' arguments that there were cases pending in the High Court on the issue, it would be unjust for the Court to apply an unconstitutional provision of the law which was central to the determination of the matter without pronouncing itself.

[476] The Petitioners imputed the constitutionality of the amended Section 83 of the Elections Act against Articles 81 and 86 of the Constitution. Their argument was that its disjunctive application would violate the principles under these two provisions. In addition, they generalised their claim of unconstitutionality to four constitutional imperatives (i) independence of the judiciary (ii) the right to public participation (iii) the right to universal suffrage and (iv) the constitutional and statutory duties of the Commission. The challenge by the Petitioner therefore goes to *'the legislative intent in enacting the legislation'* and *'textual violation of certain rights and obligations mandated under the Constitution and principles of the electoral system.'* These aspects provide sufficient grounds, because the issue of unconstitutionality was pleaded and canvassed, to sustain a claim for determination before this Court.

[477] Any challenge of constitutionality or otherwise of any law, act or omission ought to be brought on the basis of inconsistency with the Constitution as directed under Article 2(4). This Article provides as

follows:

"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid" **[emphasis added].**

[478] The role of a Judge is to compare the impugned law or action with the provisions of the Constitution to determine consistency or otherwise. There must be more than an implied or incomplete argument touching on constitutionality to exhaustively determine a claim of inconsistency with the Constitution. Inconsistency on the basis of statute and on the basis of conduct are distinguishable and ought to be comprehensively pleaded. As distinguished by the Constitutional Court of South Africa in ***Doctors for Life International vs. Speaker of the National Assembly and Others*** (CCT12/05) [2006] ZACC 11

"There is an inter-relationship between the invalidity of conduct and the invalidity of law. Conduct that is inconsistent with the Constitution and invalid can result in an invalid law. That would happen where for example the Constitution requires certain conduct in order to pass a law validly. ***If the conduct of Parliament falls short of what is required by the Constitution, the conduct and the resultant law would be invalid****. Here too the court has no choice but to declare the conduct invalid for lack of consistency with the Constitution.*

An important issue connected with the relationship between the invalidity of conduct and the invalidity of law is whether conduct that is inconsistent with the Constitution may be so grave and ***may be connected to the fulfilment of an obligation of such importance*** *that a court has the power to declare invalid the consequent law even though the conduct by which the law was adopted cannot be said to be invalid…."*

[479] The Petitioners challenged the Amendment Laws on the basis of invalidity of the law and the legislative conduct of Parliament. The argument was that the purpose and effect of the law was at variance with Articles 81 and 86 of the Constitution and that the conduct by Parliament in enacting the Amendment Laws stifled or overlooked the voices of critical actors in Kenya compromising national consensus.

[480] The issue was pleaded at paragraphs 74 and 75 of the Petition where the Petitioners pleaded that the Election Laws (Amendment) Bill 2017 sought, through Parliament, to review this Court's decision in the ***Raila Odinga 2017 case***, repeal or amend all provisions of the electoral laws and regulations interpreted and relied upon by this Court to render its determination. It was also the Petitioners' case that the amendments were meant to diminish the role of technology in the conduct of elections, open election results to manipulation and signal to voters the impossibility of successfully challenging the results of the fresh presidential elections even if the same were to be at variance with the Constitution, unlawful or irregular as determined in ***Raila Odinga 2017***.

[481] At paragraph 59 of the Affidavit of Njonjo Mue, it was averred that the Elections Offences (Amendment) Bill, 2017 and the Election Laws (Amendment) Bill 2017, published in the Kenya Gazette Supplement No. 147 and 148 as Bills No. 38 and 39 were a form of counter and response to the opposition's demands for reforms prior to the fresh presidential elections.

[482] On the legislative process, it was averred at paragraph 61 that on 28/9/2017 Parliament resolved to reduce the publication time for the two Bills from 14 days to 1 day and the Bills were read for the first time and committed to the joint Committee of Parliament to facilitate public participation which was held

between 3rd to 5th October, 2017. At paragraph 62 it was averred that Parliament enacted the laws on 12/10/2017 and transmitted the same to the President for assent. It was further urged that in his acceptance speech delivered at the National Tallying Centre on 30/10/2017, the 3rd Respondent admitted to not having signed the Bills into law due to the need for national consensus. In addition, that the various entities such as civil society, faith based groups, dissenting political actors and election observer missions were disregarding in the haste through which the legislative process was conducted.

[483] On behalf of the 3rd Respondent, the leader of the Majority in the National Assembly Mr. Aden Duale swore an Affidavit in response to these allegations to the effect that:

(i) The provisions in the Amendment Laws do not take away any rights or freedoms;

(ii) The Amendments clarify the electoral procedure in line with the Constitution and the Electoral law;

(iii) The Amendment Laws were enacted by a legally constituted Parliament in spite of withdrawal of opposition members during the debate;

(iv) The Constitution does not demand the passing of the law through bipartisan arrangements;

(v) The Election Laws (Amendment) Bill was not one of the Bills requiring a two thirds majority for purposes of enactment but rather a simple majority;

(vi) It is not illegal that Parliament was predominantly constituted of Jubilee Party Members. This is a manifestation of the people's will and the endorsement of the popular party agenda.

[484] It is not enough to plead inconsistency of a law with the Constitution as a tangential issue in a case. Claims of inconsistency must be well pleaded and argued by the Parties and where the Court determines that such a crucial question was given peripheral treatment, it may exercise its discretionary powers to ask the parties delve deeper into it. The consideration of any law or conduct against the Constitution is central to any legal proceedings.

[485] In the present case, the general position by the parties, faulty in my opinion, was that the issue of 'constitutionality of Section 83 (as amended)' was removed from this Court's Jurisdiction on occasion of a pending suit before the High Court. A perusal of the matter pending before the High Court revealed the claim made with respect to Section 83 (as amended). At paragraph 51 of the Petition before the High Court:

Section 9 of the Election Laws Amendment Act (ELAA) amending Section 83(1) is unconstitutional because it creates a statutory threshold of invalidation of an election that is more onerous than what is contemplated in Articles 81 and 86 of the Constitution. It is a backdoor amendment to Articles 81 and 86 and an unjustifiable variation to the jurisprudence of the Supreme Court on Section 83 in Raila Odinga vs. IEBC Election Petition No. 1 of 2017. It also seeks to validate minority over the majority holding over the issue.

[486] As elucidated in the foregoing paragraphs, the resolution of the question of Section 83, as urged in this case, is very central to the matter before us. Section 83 of the Elections Act (as amended) is a product of the mandate bestowed on Parliament vide Article 82 of the Constitution. Parliament has the legislative authority to enact laws, including, legislation on elections. Having determined that the section, as amended is the applicable law in determining this Petition and having noted that it is the determinate vector while making a judicial determination in any election Petition, interpretation of this Section is

therefore a vital component of this Court's final determination. The Opinion of Murray CJ in ***A vs. The Governor of Arbour Hill Prison*** [2006] IESC 45, is persuasive in this case:

"A primary judicial function is to interpret the law that is to say the Constitution, legislation and the common law. As I observed in *Crilly –v- Farrington "…First, there is the law; then there is interpretation. Then interpretation is the law. This simplified reference to the judicial process emphasises that when Courts apply a statute the interpretation which they give it has ultimate authority*".

….

"It is also important to bear in mind, as in the present application, that the **Courts cannot and do not choose the legal issues, of interpretation or otherwise, which they have to decide. They can only decide such issues when they are raised in the context of judicial proceedings brought before them"** [emphasis added].

[487] Even where constitutional questions have not been presented concisely and clearly, the Court is not to overlook a determination of that issue. The test set by the Constitutional Court of South Africa in ***Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*** (CCT 36/08) [2009] ZACC 8; is, in this regard, agreeable: At paragraphs 38, 39 and 42

"In our adversarial system, courts are required to be impartial and ordinarily only decide issues that the parties have properly raised and are properly before the court in terms of its factual underpinnings. ***This principle is subject to an exception. A court is not always confined to issues of law explicitly raised by the parties****.* ***If a litigant overlooks a question of law which arises on the facts, a court is not bound to ignore the question of law overlooked****. Another equally relevant principle in this regard is that of the separation of powers. Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature. Ordinarily, therefore, they should raise and consider the constitutionality of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them.*

The High Court correctly identified the circumstances in which a court may, of its own accord, raise and decide a constitutional issue. There are two situations in which a court may, of its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done….

It must be stressed that the constitutional issue sought to be raised must arise on the facts of the case before the court. In addition, the parties must be afforded an adequate opportunity to deal with the issue. ***A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised****. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and* ***(b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so****"* [emphasis added].

In a proper case, this Court ought not to defer the determination of a Constitutional issue central to the cause before it to another forum.

i. This Section is presumed to be consistent with the Constitution until the converse is

established.

[488] A principle developed in deference to the separation of powers and more specifically, in light of the role of Parliament under Article 94 of the Constitution is *'presumption of constitutionality.'* Any legislative action by Parliament is presumed Constitutional and the burden is on the person challenging the legislative act to show in what manner it breaches the Constitution. This principle has been resounded in numerous decisions by the High Court. In ***Mugambi Imanyara & Another vs. Attorney General & 5 others [2017]*** *eKLR,* Mativo J held that:

"There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional)."

"In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment." [citing, with approval, ***Hamdarddawa Khana vs Union of India and Others*** 1960 AIR 554]

"It is a sound principle of constitutional construction that, if possible, ***a legislation should receive such a construction as will make it operative and not inoperative."*** [Emphasis] [Citing, with approval, **Ndyanabo vs. Attorney General,** (Civil Appeal No. 64 of 2001) [2002] TZCA 2, the Court of Appeal of Tanzania]

[489] It is not apparent, either from the case by the Petitioners by way of rebuttal of the *presumption of constitutionality* or following the application of the law, that the same violates the Constitution and more specifically, fundamental rights and freedoms. As such the constitutional qualification against this presumption, in the strict terms of Article 24 (2)(4) of the Constitution, does not arise. I must however add that the finality of the Supreme Court as a judicial agency, and its role as the custodian of the Constitution militates, save for rare instances dictated by the circumstances of each case, against the blanket presumption of constitutionality without delving into a holistic interpretation of the constitutional *vis-a-vis*, the impugned law or conduct. The Judiciary in general and the Supreme Court in particular retains control over interpretation of the Constitution. In likeness to Justice Sach's (concurring) observation in ***S vs Mhlungu and Others*** (CCT25/94) [1995] ZACC 4: At paragraph 127

"We are a new court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African ***(read Kenyan)*** *way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights."*

[490] The Petitioners claim that the Amendment compromises the independence of the Judiciary and was an attempt to review this Court's determination in ***Raila Odinga, 2017***. The legislative authority of the Republic is vested in Parliament (Art. 94). Parliament is the only body with powers to make provision having the force of law unless otherwise provided by the Constitution or legislation. Therefore, at the outset, by enacting the Election Laws (Amendment) Act, Parliament was well within its Constitutional Mandate.

[491] It was also urged that the legislative process was hasty, devoid of public participation and ignorant of the views of other important stakeholders. Article 118 (1)(b) of the Constitution requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees. It is admitted that on the 2nd to 5th October, 2017 the Joint Select Committee of the National Assembly and Senate committees on Election Laws (Amendments) Bill 2017 put in place avenues for public participation from the different stakeholders through the submission of proposals. This fulfilled the requirements of public participation as obliged under Article 118 (1)(b).

[492] Was the amendment to Section 83 of the Elections Act meant to undermine the independence of the Judiciary" The purpose of the Elections Act (Amendment) Laws was elaborated by Hon. Cheptumo while moving that the Election Laws (Amendment) Bill, be read a second time in the National Assembly. The purpose according to the following excerpts from the Hansard of the 12th Parliament on 10th October, 2017 was to harmonise the laws by clearing any ambiguities flowing from interpretation.

Excerpts of the Hansard:

Hon. Cheptumo: Thank you, Hon. Speaker. I beg to move that the Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017) be read a Second Time.

On 1st September 2017, the Supreme Court, with a majority decision of four Judges, nullified the election of President Uhuru Kenyatta. The court further directed that the Independent Electoral and Boundaries Commission (IEBC) conduct elections within 60 days from that date.

Hon. Speaker, the issues raised by the Supreme Court still remain disturbing, especially as we head to the fresh presidential election. As a patriot, a Kenyan, a leader and an elected Member of the great people of Baringo North, I could not sit and contemplate the possibility of deficiencies highlighted by the court as well as other challenges that arose from the election process.

Hon. Speaker, as you may recall, there were also several cases filed in the High Court by a number of Kenyans prior to the elections on 8th August 2017. Allow me to quote three cases that were filed before the elections of 8th August 2017. The first case is ***Peter Solomon Gichira versus the Independent Electoral and Boundaries Commission (IEBC) and another****. That is Petition No. 234 of 2017 where the Court held that Section 29 of the Elections Act contravened the letter and spirit of the Constitution in Article 38 on political rights; as read together with Article 137 (1)(d). The second case is that of* ***Kenneth Otieno versus Attorney-General.*** *That is Petition No.127 of 2017, where again the court held that Section 44 (8) offends the Constitution. Finally, referring to those two cases is the* ***IEBC versus Maina Kiai and five others****. Equally, another issue was addressed here and it was held that the presidential election results declared by the constituency returning officer are final in respect of the constituency and can only be questioned by an election court.*

Hon. Speaker, you can see from what I have said so far that in those three cases, issues of concern touching on the election process in the country arose. I said there are well over eight cases of that nature raising various constitutional and legal issues that I could not sit and wait as a responsible patriot, citizen and as a leader of this country. ***The Bill I have sponsored also seeks to align the Elections Act with three decisions I have referred to and, in effect, align the Act with the relevant provisions of the Constitution****. That is the foundation and basis, among others, that I felt it was important for me to come forth before this august House and take the challenge and raise these concerns.*

Close reading of election-related laws also reveals that ***where there are gaps in the law, indeed, there can be many and variant interpretations depending on the number of lawyers interpreting them****.*

This is a highly litigant country where every Kenyan lawyer will have different interpretations of various situations and laws. ***Therefore, the Bill proposes specific amendments to fill existing gaps in our scheme of laws and may lead to a legal and constitutional crisis if not addressed prior to the conduct of the fresh elections.***

Before highlighting the contents of the Bill and the thinking behind it, I am under obligation to note that upon the Bill being read the first time, this House approved a Motion setting an ad-hoc committee which was under my chairmanship. That Committee was mandated to look into these laws and undertake public participation, which I would like to report to this House that indeed for close to a week we had time to listen to the members of the public.

Hon. Speaker, allow me at this point in time to very sincerely thank the Kenyan people and institutions – both private and government – which had time to come before us...

I want to inform the nation that we received views from across all sectors of our society and I am proud that Kenyans took advantage of that public participation process to come forward and give their input. When they go through the Report that we have tabled today, my colleagues will realise that the comments were overwhelming because we captured every Kenyan in the HANSARD from the memoranda and so on…

Hon. Speaker, allow me to move to the specific clauses of the Bill. ***Clause 9 of the Bill seeks to amend Section 83 of the Elections Act, 2011. This section was the focus of the presidential election.*** *The Supreme Court was of the view that the petitioner had the burden of proving that the election was not conducted in accordance with the principles laid out in the Constitution and the electoral laws or that the non-compliance with the principles laid out in the Constitution and election laws affected the results of the elections. I do not need to read that. What we are saying here is that Section 83 has two aspects: one, in an election petition, it is the business of the petitioner to establish one aspect of that section. If you can prove that the elections were not done in accordance with the Constitution, then an election has to be nullified. The same argument applies to the second part of the particular section. What we would like to propose is that it will be the business of the petitioner to ensure that you prove to the Supreme Court that the election was not conducted in compliance with the Constitution.*

The second aspect under Section 83 is about showing that non-compliance with the Constitution and the laws, indeed, substantially affected the results. ***The problem with ambiguous laws is that they are subject to interpretation by different people. We want the law to be clear.*** *We are going for the repeat presidential election on 26th August 2017 and we have a chance to amend the laws to realign them so that if this issue arises in the future, we will not be accused of watching and waiting until too late.*

In our region, the same provision as proposed in this Amendment Bill is in use in Nigeria, Ghana, Zambia, Tanzania and Uganda. *I cannot explain how we did not provide for our laws to be realigned in that manner. What is relevant now is for this House to make a decision and amend our laws* [Emphasis added].

[493] The Constitution organises the functioning of the State in three distinct arms of Government; the Legislature, Executive and the Judiciary. Each of these entities has powers meant to protect the Constitution and sovereignty of the Kenyan people. It does not however follow that when one arm exercises its authority, that authority automatically undermines the functioning of the other. In this case, Parliament made reference to this Court's interpretation of Section 83 in ***Raila Odinga 2017*** (in the majority and dissenting opinions) and sought to clarify the law, by way of legislation. I am persuaded by

the determination of the Canadian Supreme Court in ***Republic vs. Big M Drug Mart Ltd*** [1985] 1 SCR 295 that:

"Both purpose and effect are relevant in determining constitutionality; ***either an unconstitutional purpose*** *or an* ***unconstitutional effect can invalidate legislation****. All legislation is animated by an object the legislature intends to achieve.* ***This object is realized through impact produced by the operation and application of the legislation****. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."* [Emphasis added]

[494] The above-provided Hansard excerpts guide my consideration of the purpose and effect of the legislation. I am persuaded that Parliament was in no way invasive into the judicial realm in amending the impugned section. The purpose of the Legislature was to clarify the law and bring it into conformity with international best practice. I must hasten to add that a law does not become unconstitutional simply because it goes against the precedents of this Court or other Courts. This legislative mandate affords an opportunity for the Courts to reconsider precedent and nurtures the development of constitutional law.

[495] ***Does the disjunctive approach of the amended section 83 violate the principles in Articles 81 and 86 of the Constitution"*** Article 81 outlines the principles of the electoral system. Article 86 on the other hand provides the imperatives of voting: voting method, counting, tallying, announcement, and post-election safeguards. These principles are therefore cross-cutting. A stricter dichotomy, of which I am in favour, would separate these two principled provisions as bearing on process and outcome. These two critical elements of an election are crucial in the determination of its validity. The process gives rise to the outcome. Therefore, deviation from the process must be considered against its effect to the declared outcome.

[496] As determined by this Court in the case of ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & Others***, Sup Ct. Application No. 5 of 2014 Elections Act, and the Regulations thereunder, are **normative derivatives** of the principles embodied in Articles 81 and 86 of the Constitution and that in interpreting them, a Court of law cannot disengage from the Constitution***.***

Section 83 (as amended) provides a formula for evaluating the conduct of an election against the process and the outcome and is the product of Article 82 of the Constitution. It also does not take away the powers of an election Court to determine compliance of an election with the purpose and principles of the Constitution. As such, I find no persuasion in the claim that it is inconsistent with the Constitution.

Conclusion

[497] The following conclusions therefore emerge from the foregoing analysis:

1. Section 83 as amended by Section 9 of the Election Laws (Amendment) Act, 2017 is the law applicable in the judicial determination of this Presidential Election Petition.

2. Section 83 provides the determining formula to any election Court adjudicating an election cause. As such, it also ought to be the applicable law in other election causes before lower Courts.

3. The question of consistency of Section 83 with the Constitution is distinctive to that of other provisions in the same Amendment Laws. Section 83 does not follow the electoral event as does the substratum of the other provisions. Section 83 follows the declaration by a Judicial Officer, of an election cause. It is an

electoral cause's determining vector.

4. I find no persuasion that the impugned provision, its purpose and effect or the conduct of the Legislature in enacting the Amendment Law contravene the Constitution. This issue therefore ought not to be retried by the High Court.

[498] In light of the foregoing, I concur with the decision of the Court on all other limbs except those analysed in this Concurring Opinion, to the extent that the reasoning differs. I also concur with the resulting final Orders.

F. CONCLUSION AND FINAL ORDERS

[499] In this Judgment, in arriving at which this Court is both a trial Court and an ultimate appellate Court, we found it judicious to lodge our decision within the stable setting of the material evidence. We have carefully considered the evidence set in original depositions, and a balancing of the pertinent averments has set our minds in a clear course of conviction. Against this background, we have entertained the substantial arguments of learned counsel, constructed around the prescriptions of the Constitution, the statutes, and the pertinent regulations. We have also taken note of the pertinent case law and the relevant scholarly writings. In that context, we have taken an unobscured view of vital issues of public policy and public interest: and it all brings us to a number of conclusions, as we have recorded. On that basis, we now make the final Orders, as follows:

(a) Petition No.2 of 2017, *Hon. John Harun Mwau v. Independent Electoral and Boundaries Commission & 2 Others),* ***as consolidated, is hereby dismissed.***

(b) Petition No.4 of 2017, *Njonjo Mue and Anor v. the Chairperson of the Independent Electoral and Boundaries Commission & 3 Others****, as consolidated, is hereby dismissed.***

(c) As a consequence, the Presidential election of 26th October, 2017 is hereby upheld, as is the election of the 3rd respondent.

(d) The parties shall bear their respective individual costs.

DATED and **DELIVERED** at **NAIROBI** this **11th day of December, 2017**

…….. **……..**

D. K. MARAGA **P. M. MWILU**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE & VICE**

OF THE SUPREME COURT **PRESIDENT OF THE SUPREME COURT**

…… **……**

J. B. OJWANG **S. C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…… ……...

N. S. NDUNG'U **I. LENAOLA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a

true copy of the original

REGISTRAR

SUPREME COURT OF KENYA