

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Koome, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, SCJJ)

PETITION NO. 22 of 2017

BETWEEN

THE COUNTY ASSEMBLIES FORUM.....PETITIONER

AND

HON ATTORNEY GENERAL1ST RESPONDENT

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION..... 2ND RESPONDENT

ANDREW KIPLIMO SANG MUGE.....3RD RESPONDENT

RICHARD OUMA OGINDA.....4TH RESPONDENT

PARLIAMENTARY SERVICE
COMMISSION..... INTERESTED PARTY

(Being an appeal from the Judgment of the Court of Appeal of Kenya sitting in Nairobi (Waki, Nambuye & Ouko, JJ. A) dated the 10th November 2017 in Nairobi Civil Appeal No. 147 of 2017)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before the Court is a Petition of Appeal dated 22nd December 2017 and filed on even date by the Appellant, the County Assemblies Forum. The appeal challenges the entire judgment and decree of the Court of Appeal dated 10th November 2017, made in *Nairobi Civil Appeal No. 147 of 2017, The Hon. Attorney General and Another vs Andrew Kiplimo Sang Muge, The County Assembly Forum and Another* (Waki Nambuye & Ouko, JJ.A).

B. LITIGATION HISTORY

(i) High Court.

[2] The Appellant filed High Court **Petition No 118 of 2016**, which was consolidated with **Nairobi High Court Petition No 576 of 2016** filed by Andrew Kiplimo Sang Muge and **Homabay Petition No 148 of 2016** filed by Richard Ouma Oginda. The three were challenging the date of the second General Elections under the Constitution, 2010 which was scheduled by IEBC on 8th August, 2017. It is instructive to note that the first General Elections after the promulgation of the Constitution was held on 4th March, 2013. As such, they claimed that holding the General Elections on the aforementioned date would unconstitutionally reduce the Members of the County Assemblies (hereinafter referred to as “MCAs”) term in office by a period of eight (8) months, taking into account that their term, as fixed by Article 177(4) of the Constitution, is five (5) years. They argued that in accordance with Article 255, the tenure of MCAs could only be altered by an amendment to the Constitution through a referendum. In essence, they contended that there was an apparent conflict between Articles 177 (1) (a) and Article 177 (4) of the Constitution.

[3] Consequently, they sought various reliefs, but the Appellant in particular sought the following declarations that; the term of office of the then existing MCAs was to end on 5th March 2018, being five (5) years from the date of the General Elections held on 4th March 2013 in accordance with Article 177(4) of the Constitution; holding of elections on 8th August 2017 would be unconstitutional in light of Article 177 (4) and would also constitute deprivation of their right to property with regard to their accrued terms of service without compensation in violation of Article 40 of the Constitution. The Appellant also sought to compel Independent and Electoral Boundaries Commission (hereinafter referred to as “IEBC”) in discharge of its mandate to set and provide a date for the next election for MCAs after the expiry of the five year term of the then County Assemblies; and in the alternative, an award of damages for loss

and injury arising from the premature end of the term of the then existing MCAs if the elections were to be held on 8th August 2017 as declared by IEBC.

[4] In the Judgment delivered on 27th April, 2017, the Learned Judge, *Muriithi, J.* partly allowed the Petitions. He found that the tenure of office for Members of Parliament (hereinafter referred to as “MPs”) and MCAs was different. On the MPs tenure, he held that, unlike the repealed Constitution that provided for MPs tenure as a fixed term of five years, the Constitution provides for their tenure by making reference to a date, that is, the second Tuesday in August, in every fifth year. He added that MPs have no tenure after that date unless Parliament, in times of war, extends the life of Parliament for up to twelve (12) months in accordance with Article 102 (3).

[5] He found that for MCAs their position was muddled by Article 177 (4) which provides for a fixed term of five years. He found that this was in conflict with Article 177 (1)(a) which provides that MCAs are elected “*on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.*” The learned Judge found that it was not possible to give effect to both provisions at the same time. He observed that if effect was given to Article 177 (4) requiring five-year tenure of the County Assembly, it would mean that the elections of MCAs would always be held separately and after the elections of the MPs, because the second Tuesday of August would always come before the expiry of the five-year term. He equally found that it would be impossible to give effect to Article 177(4) and maintain the election “*on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;*” as required by Article 177 (1) (a) of the Constitution.

[6] Guided by *SDV Transami Kenya Limited and 19 Others vs The Attorney General & 2 Others HC Petition No 76 of 2012 and South Dakota vs North Carolina 192 U.S. 268 (1904)*, the learned Judge held that an aspect of purposive construction of the Constitution was the rule of harmonious interpretation of constitutional provisions. He found that this

meant that where two or more provisions of the Constitution are in conflict, the court must adopt a construction that achieves a harmonizing balance to reconcile the conflicting provisions.

[7] Consequently, it was his finding that the term of office for MCAs is plainly set out in the unambiguous constitutional text of Articles 177 (4) and 194(f) so that “*a county assembly is elected for a term of five years*” expiring at “*at the end of the term of the assembly*”.

[8] As to the correct day for the 2017 General Elections, he found that in accordance with the mischief rule, the provisions of the Constitution on the election date are geared towards certainty of the election date, to avoid uncertainty being used, as in the past, as a secret weapon by the ruling political party against other parties to the election. He found that all provisions for elections under the Constitution appoint the second Tuesday of August of the fifth year as the election date for all elective positions in both the national and county levels. To this end, he pointed out Articles 101(1), 136 (2), 148 (3), 180 (1), 177 (1), relating to the positions of MPs, President, Deputy President, County Governor and MCAs, respectively. He held that any other interpretation would lead to constitutional chaos. Therefore, for harmony and consistency in constitutional provisions, it was his finding that the election date for all the elective posts of the General Elections under the Constitution should be held as stipulated on the same day as a General Elections of MPs, being the second Tuesday in August, in every fifth year. Thereby, upholding the election date of 8th August 2017.

[9] On whether the MCAs suffered loss due to reduction of their tenure, relying on *Attorney General for The Gambia v Jobe (1985) LRC*, the learned Judge found that the right to hold office was a right to property in the widest sense. He added that this included salaries and emoluments earned by virtue of holding such office. As such, an aggrieved party is entitled to claim for damages for loss of property. He also found that loss in this particular case was remediable by compensation for loss of income for the uncompleted period of

the MCAs tenure of office. Consequently, he awarded the MCAs their salaries for the eight (8) months uncompleted period. He added a condition by directing that the award be payable as monthly dues in arrears, that is, in the same manner as it would have been paid in the course of the MCAs tenure had their term not been reduced by the General Elections. He however, found that the petitioners were not entitled to any order affecting the constitutionally ordained election date of the second Tuesday of August in every fifth year or the elections that were set to take place on 8th August 2017. There was no order as to costs.

(ii) Court of Appeal

[10] Aggrieved by the decision, the 1st and 2nd Respondents filed Civil Appeal 147 of 2017 proffering 13 grounds of Appeal which the Court compressed into one broad issue, “*that the Learned Judge failed to harmoniously interpret Article 177(1)(a) and 177(4) and the rest of the Constitution as a whole*”.

[11] The 3rd Respondent herein, Andrew Kiplimo Sang Muge, filed a cross appeal whose main contention was that it would be impossible to hold the next General Elections on 8th August 2017 without limiting the term of County Assemblies. He urged that fixing the election date based on the literal reading of the text ‘*second Tuesday, in every fifth year*’ would result in an absurdity including a four-year presidential and parliamentary term for all subsequent elections.

[12] In its Judgement delivered on 10th November 2017, the Court of Appeal found that, pursuant to Articles 2 and 259, the Constitution being the supreme law, the validity or legality of any its provisions could not be questioned by any court. The Court relied on the decisions in the ***Matter of The Principle of Gender Representation in the National Assembly and the Senate***, Advisory Opinion No. 2 of 2012 [2012] eKLR and ***Speaker of the Senate & another vs. Attorney-General & 4 others***, Advisory Opinion Reference No. 2 of 2013 [2014] eKLR to find that it has been consistently emphasized that the Constitution cannot subvert itself; no constitutional provision was superior

or inferior to another, rather they are complementary and must be read as an integrated whole. Ultimately finding that there was no contradiction in the terms or application of Article 177(1) and 177(4) of the Constitution. They further held that any other construction would produce an absurd result or have the tendency of one provision destroying the other instead of sustaining each other. It was their finding that the construction by the trial Court destroyed Articles 101, 136, 177(1) and 180(1) at the altar of Article 177(4); was averse to public interest; and ignored our constitution making history.

[13] The learned Judges of Appeal took into account the historical context as well the circumstances of the first General Elections after promulgation of the Constitution as litigated over and determined in the case of *John Harun Mwau & 3 others vs Attorney General & 2 others [2012] eKLR* and confirmed by the Court of Appeal in *Centre for Human Rights Education and Awareness & 2 Other. vs John Harun Mwau [2012] eKLR (the Mwau Case)*. The Courts therein determined that the date of the first elections as envisaged under the Sixth Schedule of the Constitution were distinct with regard to the date of the general elections provided for under Articles 101, 102, 138, 177 and 180. As such, the Court of Appeal in the present case held that trial court failed to consider that the Articles 177(1) and 177(4) were dealing with different occasions. One with the transition from one constitutional order to another and the other concerned the future elections after the transition.

[14] They reiterated that a series of events occasioned the reduction of the term of MCAs by approximately eight (8) months. Those events included the post - election violence that ensued immediately after the 2007 elections. They noted that this was resolved by the formation of the Grand Coalition Government on 28th February, 2008, in accordance with the Schedule to the National Accord and Reconciliation Act, No. 4 of 2008. Secondly, there was some delay in dissolving Parliament in 2012 to pave way for the first General Elections under the Constitution, 2010. The Sixth Schedule of the Constitution anticipated that, within sixty days of the dissolution of Parliament, the first General Elections

would be held at the same time for all political elective positions. It was the Court's finding that by complying with the formula "*the second Tuesday, in August of every fifth year*" and holding the second elections on 8th August, 2017, the five-year election cycle for all political elective positions had once more been restored. The Court concluded that those peculiar circumstances notwithstanding, Articles 177(1)(a) and 177(4) could not, as the learned trial Judge had erroneously held, be construed to be in conflict or to contradict each other.

[15] The Court of Appeal found that the award of damages for the unexpired term of MCAs was based on a misapplication of the law. They held that the office of an MCA is a public office, which under Section 9 of the County Governments Act, 2012 is vested with enormous public service roles. The Court held that pursuant to Article 194 of the Constitution, an MCA may vacate office *inter alia*, at the end of the term of the county assembly; if he dies; is removed from office; if he resigns; or becomes disqualified for election on grounds specified in Article 193(2). The Court held that if they could leave office before the expiration of the term of office, it could not be said that they were entitled to compensation should their term be interfered with. They relied on the decision in ***Justice Philip K. Tunoi & Another vs Judicial Service Commission & Another, Civil Appeal No. 6 of 2016***, which cited with approval the decision from Philippines in ***The Provincial Government of Camarines Norte vs Beatriz O. Gonzales, G.R. No. 185740*** and stressed that a public office holder or an elected political official has no property right in his office. In line with decisions from Supreme Court of Pennsylvania in ***Sweeney vs Tuckers 473 Pa 493, 375 A2d 698 (1977)***, the Supreme Court of Appeal of South Africa in ***South African Veterinary Council vs Szymanski 2003, ZASCA 11***, and ***Justice Kaplan H. Rawal vs Judicial Service Commission & 3 Others, Civil Appeal No 3 of 2016***, they found that there is no legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office holder.

[16] They observed that the making and implementation of a new Constitution must result in many transitional challenges and sacrifices. In that regard, the Constitution of Kenya was no exception. In closing, the Court of Appeal allowed the appeal and set aside the judgment of the High Court of 27th April, 2017 and substituted it with an order dismissing High Court Petition No. 576 of 2015 as consolidated with Petitions No. 118 of 2016 and No. 148 of 2016. The Cross-Appeal was found to be lacking in merit and was dismissed. Noting that it was a public interest nature appeal, the Court made no order as to costs.

C. PETITION BEFORE THE SUPREME COURT.

[17] The Appellant aggrieved by the decision of the Court of Appeal sought redress in this Court by a Petition of Appeal supported by the Affidavit of Johnson Osoi, the then Chairman of the County Assemblies Forum, sworn and filed on 22nd December, 2017. The Petition is premised on seven (7) grounds of appeal which are summarized as follows:

- i. *The Court of Appeal erred in finding that Articles 177(1)(a) and 177(4) of the Constitution must truly mean ex facie that members of the County Assemblies (MCAs) are to be elected on the same day as Members of Parliament at a general election.*
- ii. *The Court of Appeal erred in finding that the Petition filed in the High Court by the Petitioner was a challenge to the constitutionality of Article 177(1)(a).*
- iii. *The Court of Appeal erred in finding that there was no contradiction in terms or application of Articles 177(1)(a) and 177(4) with regard to the term of MCAs elected in the first general election under the 2010 Constitution*
- iv. *The Court of Appeal erred in finding that the High Court in its decision that gave effect and upheld the Provisions of Article 177(4) produced an absurd result being that MCAs are vested with a Constitutional right*

and legitimate expectation to hold office for a five-year term, which finding contravenes the provisions of Article 38(3)(c).

- v. The Court of Appeal erred in finding that the provisions of Article 177(1) (a) and 177(4) were transitional provisions and ought to have been construed and applied as such.*
- vi. The Court of Appeal erred in finding that the fact that there was a delay in holding of the first elections under the Constitution of Kenya 2010, then consequently the provisions of Article 177(4) were incapable of effect with regard to the term of MCAs.*
- vii. The Court of Appeal erred in construction and application of Article 259 (5) of the Constitution and in the computation of the time for the purposes of Article 177(1)(a) and 177(4) of the Constitution where it found that the 'fifth year' would mean that the election begins in August whereas time ought to have been computed with reference to 3rd March 2013 when the first elections under the 2010 Constitution were held.*

[18] The Appellant seeks the following reliefs:

- a. A declaration that the Court of Appeal in its decision made on the 10th of November 2017, violated the constitutional rights of the Petitioner and the Members of the County Assemblies elected in the first general election under the Constitution of Kenya, 2010 as provided under Articles 10(1) and (2), Articles 38(3) (c) and 177 (4) of the Constitution of Kenya.*
- b. An order setting aside the entire judgment and decree of the Court of Appeal made in **Nairobi Civil Appeal No. 147 of 2017, The Hon. Attorney General and Another vs Andrew Kiplimo Sang Muge, the County Assembly Forum and Another.***
- c. An order reinstating the judgement and decree of the High Court of Kenya in **Nairobi High Court Consolidated Petition No 576 of***

2015 Andrew Kiplimo Sang Muge and Others vs The IEBC and Another.

D. THE PARTIES RESPECTIVE CASES

[19] The matter came up before us for hearing where learned counsel **Charles Njenga** appeared for the Appellant, **Thande Kuria** appeared for the 1st Respondent, **Edwin Mukele** appeared for the 2nd Respondent, **Andrew Muge** appeared on his own behalf, **Bosire Gichana** appeared for the 4th Respondent and **Ms. Thanji** holding brief for **Mr. Awath**, appeared for the Interested Party.

(i) The Appellant

[20] The Appellant relies on its submissions dated 4th April 2018 and filed on 9th April 2018. It is submitted that Article 177(4) of the Constitution is a valid edict that warrants enforcement and application in the same rank and profile as any other Constitutional provision. It is further argued that application and interpretation of Article 177(4) should be effected within the principle of supremacy of the Constitution articulated in Article 2(1). Citing Article 2 of the Constitution, the Appellant reiterates that not only is the entire body and text of the Constitution the supreme law of the land but also that none of its provisions is subject to challenge in any court of law. In that regard, reference is made to **Judges and Magistrates Vetting Board & 2 others vs. The Centre for Human Rights & Democracy**, SC Petition No. 13A as consolidated with Petitions 14 & 15 of 2013; [2014] eKLR.

[21] Consequently, the Appellant submits that Article 177(4) expressly stipulates the term of MCAs as five years; and any interpretation and application of the said provision must give effect to the prescribed term. In its opinion, the Court of Appeal purported to interpret Article 177 (4) by ignoring and rendering redundant the express provision outlining the term of office of Members of County Assemblies; thus, arrived at an erroneous and absurd result

which is not contemplated by the Constitution; and abrogated the rights of MCAs which had accrued upon their election to office. To buttress that line of argument, the Appellant referred to *In the Matter of Kenya National Commission of Human Rights* [2014] eKLR and added that judicial ingenuity however novel, cannot be used to oust an express and unambiguous provision of the Constitution.

[22] Elaborating further, the Appellant contends that it is not in dispute that the MCAs in question were elected on 4th March, 2013 following the first General Elections under the Constitution. Therefore, the pertinent question is when their term ought to have ended in law? Referring to Articles 177(4) and 259(5)(c) of the Constitution, the Appellant maintains that the MCAs term ought to have expired on 4th March, 2018. Nevertheless, the Appellant argues, whilst the Court of Appeal agreed with the High Court that holding the second General Elections under the Constitution on 8th August, 2017, as declared by 2nd Respondent, reduced the MCAs term by eight (8) months, it went ahead to raise several irrelevant justifications which in its view rendered the reduction of the term non-justiciable and incapable of remedy. In other words, the Court of Appeal failed to interpret and give effect to Article 177(4) on account of what the Appellant termed as ‘escapist jurisprudence’ informed by misplaced exegesis of the history of the constitution making process and the transitional provisions in the Constitution.

[23] In any event, the Appellant asserts that the transitional and consequential provisions of the Sixth Schedule to the Constitution did not suspend the application of Articles 177(4) and 38(3) of the Constitution, hence upon promulgation of the Constitution they were available and enforceable. Further, the Appellant faults the Court of Appeal for relying on the *Mwau case* to avoid giving effect to Article 177(4). The Appellant contends that the said case was distinguishable to the circumstances of the instant case; for starters, the case neither considered the extent of the term of an MCA under Article 177 (4) nor dealt with the application of Articles 177 (1)(a), 194, 259 (5) and 38(3)(c) of the

Constitution; and as a result, has no application with regard to resolution of the matters raised in the High Court or Court of Appeal. The Appellant takes the position that the Court of Appeal in the said case could not have suspended the application of Article 177(4) as far as it provides for the term of MCAs.

[24] Consequently, the Appellant calls upon this Court, as the custodian of the Constitution, to uphold and re-affirm the interpretation and application which was adopted by the High Court. In its view, the said interpretation embodied a harmonious and purposive interpretation of the constitutional provisions in issue; in that, it was a delicate balance which upheld Article 177(1) to the extent that the High Court directed the second General Elections be held as scheduled on 8th August, 2017 whilst giving effect to Article 177(4) by awarding compensation for loss of the unexpired period of their term of eight (8) months. In other words, none of the provisions were segregated, rather the High Court observed the principles of constitutional interpretation.

[25] The Appellant is of the view that the Court of Appeal was motivated to set aside the High Court's decision based on the cost or financial burden and popularity of giving effect to Article 177(4). However, on its part, adherence and enforcement of the Constitution must not be compromised on the basis of costs. It is submitted that by dint of the preamble of the Constitution, the Kenyan people must through the entity of the state be prepared to pay the cost of implementing the Constitution to the fullest extent possible. In that regard, this Court's majority decision in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another*** SC Presidential Election Petition 2 & 4 of 2017 [2017] eKLR ("***Raila 2017***") was cited. What is more, relying on ***S vs. Makwanyane & Another*** (CCT 3/94) [1995] ZACC3, the Appellant submits that public opinion is not a sufficient ground to divest a party of its constitutional right.

[26] On compensation for the lost period, it is contended that the Court of Appeal misdirected itself in failing to appreciate that Article 38(3)(c) of the

Constitution does not create a right to a public office but rather a security that attaches upon election into such office guaranteeing the person the right to hold that office for the duration of its term and derive benefits therefrom. It is argued that if, for any reason the term is interfered with, save for as anticipated under Article 24, then there is legitimate claim that accrues in form of compensation for reduced or lost term.

[27] It is on the above submissions that the Appellant urges this Court to allow the Appeal with costs.

(ii) 1st Respondent (Attorney General)

[28] The 1st Respondent relies on his submissions dated 14th May 2018 and filed on 17th May 2018 as well as supplementary submissions dated and filed 13th June 2018. The 1st Respondent also endorses the harmonious interpretation of the Constitution. It is asserted that after promulgation of the Constitution on 27th August, 2010, it was obvious that there would be transition in the management and governance, hence the Constitution provided for Transitional and Consequential Provisions in its Sixth Schedule.

[29] The 1st Respondent argues that once the first General Elections was held on 4th March, 2013 under the transitional provisions, the general elections reverted to the date stipulated in Articles 101 (1), 102 (1), 136 (2) (a), 177 (1) (a) and 180 (1), which cumulatively state that elections for Members of National Assembly and the Senate, the President, MCAs and Governors shall be held on the second Tuesday in August in every fifth year. It followed therefore that the first term would be shorter. It is submitted that the date of the first election under the Constitution of Kenya was challenged in the High Court in ***John Harun Mwau vs Attorney General [2012] eKLR*** where the Court stated that the term of “... *the next President, Member of Parliament, Governor and Members of County Assemblies may be shorter than five years as a consequence of the transitional provisions*”. It is further urged that this position

was affirmed by a five–judge bench of the Court of Appeal in ***Centre for Human Rights Educational and Awareness & 2 Others vs John Harun Mwau & 6 Others [2012] eKLR***, that upheld 4th March 2013 as the date set by IEBC.

[30] As to the contention by the Appellant that the rights of MCAs to hold office amounts to a right to property under Article 40 of the Constitution, it is contended that the Court of Appeal already conclusively decided that there was no right to property in holding a public office in the decision in ***Justice Kaplana H Rawal vs JSC & 2 Others Civil Appeal No 1 of 2016***.

[31] It is asserted that the Appellant cannot sustain a claim for discrimination as the General Elections held in 2017 were for all elective positions with no exception. The 1st Respondent urges that granting the Appellant’s prayers would perpetuate discrimination against office holders such as Members of National Assembly, whose terms were also shortened due to transition. It is contended that legitimate expectation to serve a term of five years cannot be sustained since it is contrary to the Constitution.

[32] It is urged that pursuant to Article 259, the Constitution should be construed in a manner that promotes its values and principles as well as contributes to good governance. Further, that the Court should avoid interpreting the Constitution in a manner that produces an absurd result or in any way adverse to public interest, economic, social, political or otherwise. It was further submitted that the government spending should take into account principles of equity, fairness, productivity and fiscal sustainability of the public wage as outlined in the Constitution.

[33] Finally, the 1st Respondent asks the Court to dismiss the Petition.

(iii) 2nd Respondent (IEBC)

[34] The 2nd Respondent relies on its written submissions dated and filed 13th June 2018 as well as supplementary submissions dated and filed on 22nd November, 2021. It is submitted that the jurisprudence of interpretation espoused by Article 259 of the Constitution has been reaffirmed in ***Speaker of the Senate and Another vs The Attorney General and Other Advisory Opinion reference No 2 of 2013; Esposito Franco vs IEBS and another 2013 eKLR***; and the ***Centre for Human Rights Educational and Awareness & 2 Others vs John Harun Mwau & 6 Others [2012] eKLR***. The 2nd Respondent contends that under the harmonization principle, provisions of the Constitution are to be interpreted so as to augment each other and give proper effect to the intent of the people. Further, that the principle allows courts to preserve the integrity and sanctity of the will of the people in the majoritarian expression. It is asserted that where the Constitution contains several provisions relating to an issue the said provisions must be construed as an integral whole. The 2nd Respondent submits that Articles 177(1)(a) and 177(4) are to be interpreted and/ or constructed to augment each other to give the proper effect to the intent of the people as espoused in the Constitution.

[35] It is contended that the appellate court properly applied itself to the law in its judgment by embracing an interpretation of the Constitution that removes absurdity, allowed development of the law and voided difficulties of literal legalism advanced by the Appellant and the 3rd Respondent. The 2nd Respondent asserts that pursuant to Article 2(3) of the Constitution, no court of law is ordained with jurisdiction to entertain a petition that explicitly or implicitly challenges the validity of a constitutional provision. To support this assertion, the case of ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR*** is cited.

[36] As regards the right to property under Article 40 of the Constitution, the 2nd Respondent urges that the right is extinguished upon the holding of a General Election on the fifth Tuesday of every fifth year pursuant to Article 177

(1)(a). It is further urged that Article 194 provides for ways in which an MCA's office becomes vacant. Therefore, it follows that the Appellant cannot advance a claim of loss of income or legitimate expectation where the vacancy has been occasioned by the Constitution. The 2nd Respondent cites ***Justice Philip K Tunoi and Another vs Judiciary Service Commission and Another*** Civil Appeal No 6 of 2016, where the Court of Appeal held that security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by the law. Further, it is urged that the Appellate court properly applied the law by determining that there is no legitimate expectation to hold office to its end, since public office is not the property of the office holder.

[37] It is the 2nd Respondent's submission that though the Appellant has alleged violation of their constitutional right, it has failed to crystalize with a reasonable degree of precision the alleged violation and the manner in which it has been infringed.

[38] The 2nd Respondent submits that the dispute was between the Appellant and the respective county assemblies as an employment dispute, which jurisdiction is vested exclusively with the Employment and Labour Relations Court pursuant to Article 162 (2)(a) and Section 12 of the Employment and Labour Relations Court Act No. 20 of 2011.

[39] It is also contended that issues raised on compensation for loss of income for the eight (8)-month period can only be considered by the Salaries Remuneration Commission (SRC) pursuant to its mandate under Article 230 and Section 11 of the Salaries and Remuneration Commission Act No. 10 of 2011. The 2nd Respondent further contends that the SRC should have been enjoined for two reasons, first that a determination that the term of MCAs extended beyond 8th August 2017 would in effect result in payment of salaries beyond the date of the General Elections. Secondly, in order to make a determination of the amount of remuneration the MCAs would be entitled to in the event that their terms were extended beyond the date of the General Elections. It is added that

the SRC is mandated to inquire and advice on the salaries and remuneration to be paid out of public funds. It is asserted that any determination of any payments of salaries without enjoining the SRC would be unconstitutional. The 2nd Respondent prays that the instant petition of appeal be dismissed with costs.

[40] On whether the 2nd Respondent acted in accordance with the law by declaring 8th August 2017 as the date of the second General Elections under the Constitution of Kenya, it is contended that it acted in accordance with the command prescribed under Articles 177 (1) (a), 101 (1), 136 (2) (a) and 180 (1) of the Constitution. In so doing, the 2nd Respondent contends that it did not violate the Appellant's rights. To support that assertion, the 2nd Respondent cites the case of ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR.***

[41] On whether there can be an unexpired term for MCAs after a General Elections is conducted, it is argued that to entertain that line of argument would only go to interfere and/or invalidate the right to vote, which right was exercised by the electorate on 8th August, 2017. Further, that to do so would elevate the property rights of the MCAs elected on 4th March, 2013 above the political rights of the people of Kenya guaranteed under Article 38(2) of the Constitution. Further, that it would also deny the people of Kenya the right to grant a fresh mandate to their leaders through free fair and regular elections. It is contended that the Constitution does not envisage a situation in which previous holders of the office of the MCA can purport to continue to be members of the County Assembly. Further, that neither does it envisage the existence of two MCAs in a single ward simultaneously nor a scenario where the terms of two MCAs run concurrently.

[42] On whether the issue before this Honorable Court is an election dispute as contemplated under Article 87 of the Constitution, it is argued that the dispute before the Court is envisaged under Article 87 of the Constitution and is of such character that its resolution would lead to the finding that the second General

Elections ought to have been held on 3rd March, 2018. Therefore, it is submitted that in so far as the appeal seeks to challenge the date of the General Elections, it ought to have commenced by way of an election petition as mandated by the provisions of Articles 87 and 88 (4) (e) of the Constitution as read with Section 75 of the Elections Act No 24 of 2011. The 2nd Respondent cites the case of **Moses Mwicigi & 14 Others vs Independent Electoral and boundaries Commission & 5 Others [2016] eKLR** where this Court found that a contest to an election in any manifestation ought to be by way of an Election Petition.

[43] The final issue on who should to bear the costs of the Petition, it is urged that as the crux of the Petition is compensation by way of damages for the unexpired term for MCAs, it seeks to serve the personal interest of the Appellant. It is argued therefore that the Petition should be dismissed with costs to the 2nd Respondent. The 2nd Respondent relies on **Brian Asin & 2 Others vs Wafula W. Chebukati & 9 Others [2017] eKLR** where it was found that a Court must be careful to see that a body of persons or a member of public who approaches the court is acting *bona fides* and not for personal gain and where they are, they ought to be thrown out by rejection at the threshold and in appropriate cases with exemplary costs.

(iv) 3rd Respondent (Andrew Muge)

[44] The 3rd Respondent relies on his cross appeal and written submissions both filed on 17th May 2018 wherein he aligns himself with the Appellant's case and submissions save where he submits otherwise. He contends that the term for County Assemblies is set in Article 177(4) of the Constitution, and the Court of Appeal erred when it purported to construe it as a transitional clause. Further, that the High Court's statement in **John Harun Mwau and 3 Others vs Attorney General and 2 Others [2012] eKLR** suggesting that the term of MCAs may be shorter than that of five (5) years as a consequence of transitional provision was both *obiter* and made *per incuriam*. The contention

being that the Learned judges made the statement in ignorance of the transitional provision is clause 2(3) of the Sixth Schedule of the Constitution.

[45] As to the conflict between Article 177 (1)(a) and 177(4) of the Constitution, it is his submission that they are equally valid, and none overrides the other occasioning a need for harmonization. To support that, he cites the Ugandan Case of ***Paul Ssemogerere v Attorney General, Constitutional Appeal No 1 of 2012***.

[46] The 3rd Respondent submits that the effect of the text '*second Tuesday in August, in every fifth year*' was not fully appreciated at the trial and appellate court. He argued that the literal interpretation of the Constitutional timeline gives the fifth year for the third General Elections under the 2010 Constitution as between 8th August 2021, to 7th August 2022, and cannot be varied. Further, he contended that the text is an absurdity if a strict and literal interpretation of it is taken, giving the example of the Court of Appeal where on its own calculation, arrived at 11th August 2022, a Thursday outside the fifth year, as the next election date. Therefore, he submits that the third General Elections must be conducted on Tuesday, 10th August 2021, four years after the August 2017 election cutting short the MCAs terms by a year. Consequently, that the trial court's decision correctly interpreted inconsistencies between Article 177 (4) and 177(1)(a) of the Constitution and therefore amendment of the text on election dates is paramount in resolution of the matter.

[47] He urges this court to take a purposive interpretation of the Constitution, giving effect to all election date provisions, and set aside the Court of Appeal decision of 10th November 2017.

E. ISSUES FOR DETERMINATION

[48] The following issues emerge for the Court's determination:

- i. *Whether this Court is clothed with the requisite jurisdiction to determine this appeal?*

- ii. *The interpretation of Article 177 (1) and 177(4) of the Constitution; and whether there is a conflict between the said provisions vis-à-vis the date of the second General Election of MCAs under the Constitution.*
- iii. *Whether there was a reduction of the term of office of MCAs elected in the first General Election under the Constitution by virtue of the second General Election being held on 8th August, 2017;*
- iv. *If so, whether the MCAs in question had proprietary rights and/or legitimate expectation of holding their offices to the end of the elective term; and what reliefs, if any, are they entitled to.*
- v. *Who should bear the costs of the appeal?*

F. ANALYSIS AND DETERMINATION

i. Whether this Court is clothed with the requisite jurisdiction to determine this appeal?

[49] This Court must address itself on whether it has jurisdiction before proceeding to determine a matter. More so, where the jurisdiction has been challenged. The 2nd Respondent asserts that first, pursuant to Article 2(3) of the Constitution, no court of law is ordained with jurisdiction to entertain a petition that explicitly or implicitly challenges the validity of a constitutional provision. Second, that the Appellant has failed to crystallize with reasonable degree of precision the alleged violation and the manner of infringement. Third, that the issue before the Court is an election dispute contemplated under Article 87 of the Constitution and as such should have been commenced by way of an Election Petition. The 2nd Respondent relies on this Court's decision in ***Moses Mwicigi & 14 Others vs Independent Electoral and boundaries Commission & 5 Others [2016] eKLR*** where this Court found that contest to an election in any manifestation ought to be by way of an Election Petition.

[50] Fourth, that the dispute between the Appellant and the respective county assemblies is an employment dispute, which jurisdiction is vested exclusively in the Employment and Labour Relations Courts pursuant to Article 162 (2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, No. 20 of 2011. It is also contended that the issue of compensation of income for the eight-month gap can only be considered by the Salaries and Remuneration Commission pursuant to Article 230 of the Constitution as it is the body mandated to inquire and advise on any salaries and remuneration to be paid out of public funds.

[51] The Court's appellate jurisdiction is set out in Article 163 (4) of the Constitution, in the following terms:

“Appeals shall lie from the Court of Appeal to the Supreme Court;

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)”

[52] So as to bring the appeal as of right pursuant to Article 163(4)(a) of the Constitution, it must be demonstrated that the issues of contestation revolved around the interpretation or application of the Constitution. It is the interpretation or application of the Constitution by the Court of Appeal that forms the basis of a challenge to this Court. So that, where the dispute has nothing or little to do with the interpretation or application of the Constitution, this Court under Article 163(4)(a) will have no jurisdiction to entertain an appeal brought under that provision.

[53] In the ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*** Sup Ct Petition No 3 of 2012; [2012] eKLR, we delineated this Court's jurisdiction under Article 163 (4)(a) of the Constitution as follows:

“...This Article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under Article 163 (4) (b) of the Constitution. Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

(28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4) (a).”

[54] We reiterated these principles in the cases ***Hassan Ali Joho & another Vs. Suleiman Said Shahbal & 2 Others***, SC Petition No 10 of 2013 [2014] eKLR and ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others***, SC App No. 5 of 2014 [2014] eKLR. It is against this background that we examine whether the Petition raises issues of Constitutional interpretation or application.

[55] We note that the Appellant in its Petition of Appeal invites the Court to interpret the provisions of Articles 177(1) and 177(4) of the Constitution of Kenya. More specifically, the Court is asked to find that there exists a conflict between the two constitutional provisions and if so, whether MCAs elected on 4th March 2013 were entitled to compensation for their term having been cut short by a period of eight (8) months, due to the subsequent elections being held

on 8th August 2017. We are of the view that it is evident that this was not a mere electoral dispute arising from or touching on an election as contended by the 2nd Respondent. Having perused the record we take cognizance of the fact that the foregoing are the central questions that were canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this Court by way of an appeal. That being so, we are inclined to agree with the trial court that joinder of the Salaries and Remuneration Commission was unnecessary as the issues before Court are not on the amount of compensation to be paid to the MCAs for services rendered. Rather, they include questions of interpretation of Articles 177(1) and 177(4) as well as whether MCAs are entitled to damages for the reduced term in office as a consequence of the election date in 2017.

[56] On the question of appropriate forum of the dispute, the trial Court found that the question of enforcement of rights and fundamental freedoms even touching on the employment and labour is within the competence of the High Court pursuant to Article 22. We are inclined to agree with the trial court and add that Articles 23 and 165 of the Constitution fortifies this position as they are the provisions that gives the High Court jurisdiction to hear and determine applications for redress of denial, violation or infringement of rights or fundamental freedoms in the Bill of Rights.

[57] Consequently, we come to the conclusion that the appeal falls squarely within the ambit of Article 163 (4)(a) and that we have jurisdiction to entertain this appeal.

ii. The interpretation of Articles 177 (1) and 177(4) of the Constitution; and whether there is a conflict between the said provisions vis-à-vis the date of the second General Elections of MCAs under the Constitution.

[58] Article 177 (1) and (4) of the Constitution provides as follows:

“Membership of county assembly

(1) *A county assembly consists of—*

(a) *members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, **being the second Tuesday in August, in every fifth year;***

.....

(4) *A county assembly is elected for **a term of five years.***
[Emphasis added]

[59] The first General Elections under the Constitution were held on 4th March, 2013 wherein the MCAs subject of this matter were elected. Thereafter, on 10th December, 2015 the 2nd Respondent declared that the second General Elections would be held on 8th August, 2017. It is this declaration that aggrieved the MCAs who believed that the date in question was contrary to the provisions of the Constitution; and more particularly Articles 177 (4) of the Constitution which stipulates the term of County Assemblies as five (5) years.

[60] The Appellant submits that pursuant to the principle of supremacy of the Constitution as well as harmonious interpretation, Article 177 (4) warrants enforcement and application like other constitutional provisions. They argue that, Article 177 (4) provides that the term of MCAs is five years therefore holding of the elections irregularly cut short the term in office of MCAs elected on 4th March 2013.

[61] The 1st Respondent agrees with the harmonious principle of interpretation but argues that after promulgation of the Constitution, there was to be transition which resulted in the first election being held on 4th March 2013. The 1st Respondent further asserts that it was due to the transition that the MCAs term in office ended up being shorter than the five years, taking into account that the second elections were held on 8th August 2017. It is however urged that after transition, the General Elections reverted to the date stipulated in Articles 101(1), 102(2), 136 (2)(a), 177(1) and 180 (1), being the second Tuesday in

August in every fifth year. It is for this reason that the 2nd Respondent contends that the Appellant is precluded from claiming for loss of income or legitimate expectation where the same has been occasioned by the Constitution.

[62] The 3rd Respondent on the other hand argues that this line of argument is flawed in light of the transitional provision is clause 2(3) of the Sixth Schedule of the Constitution

[63] Article 2(3) stipulates that the validity or legality of the Constitution is not subject to challenge by or before any court or other state organ. We also take cognizance of the fact that the Court of Appeal was not determining the constitutionality or otherwise of Articles 177 (1) and (4) of the Constitution, only on the interpretation and application as regards the context of the present case. We say this, because to purport to question the validity of a constitutional provision is to question the very foundation of authority of the courts is not only contra Article 2 (3) but also against the will of the people of Kenya.

[64] Article 259 of the Constitution then gives the approach to be adopted in construing it which is “*in a manner that—*

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2).....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking....”

[65] By this provision therefore, the Constitution calls for its holistic interpretation. This has been our consistent determination in the Court's various decisions. In the case of ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, SC Advisory Opinion No. 2 of 2012 [2012] eKLR we stated that the Court as “a custodian of the integrity of the Constitution as the country’s charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution.”

[66] We reiterated this in ***In the Matter of Kenya National Commission on Human Rights*** SC Reference 1 of 2012 [2014] eKLR where we found that holistic interpretation of the Constitution means “*interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.*” [Emphasis added]

[67] It is for this reason that we agree with the submissions that no constitutional provision is more superior to the other. They all rank equally and must be all be interpreted and applied together to give them their full tenor and meaning. We are further guided by Article 2 (1) and (3) of the Constitution which provide for the supremacy of the Constitution over other laws and thereby its validity and legality are not subject to challenge by or before any court or other State organ.

[68] We take cognizance of the fact that the Constitution is very consistent in the date of the General Elections in various Articles other than Article 177 (1).

The election date is predicated on the election of MPs which is provided for under Article 101 (1) as follows:

“101. Election of members of Parliament

*(1) A general election of members of Parliament shall be held on the **second Tuesday in August in every fifth year.**”*

On the elections for the position of the President and County Governors Articles 136 (2) (a) and 180 (1) of the Constitution provide as follows:

*“136 2(a) An election of the President shall be held— on the same day as a general election of Members of Parliament, **being the second Tuesday in August, in every fifth year;***

...

*180. (1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, **being the second Tuesday in August, in every fifth year.**”*

[69] We note that the designated date for General Elections is not a set date but rather *the second Tuesday in August, in every fifth year*. Further, the Constitution provides that all elections for the positions of President, Governor, Senator, MPs and MCA must be held on the day. This much is clear without much contest.

[70] The Country held its third General Elections in 2022 since promulgation of the Constitution on 27th August 2010. The 2017 General Elections were held on 8th August 2017. While the 2022 General Elections were held on 9th August 2022, thereby fulfilling the requirement of holding General Elections every five years. It is for this reason that from the outset, we are clear in our view, that there does not exist a conflict between Articles 177(4) and 177(1) of the Constitution, apparent or otherwise. If the two were to be put side by side, they

can both be given effect at the same time as demonstrated by the continued election cycle.

[71] Having found that there is no conflict in the Constitutional provision of Article 177 (1) and (4), we must turn to why the Appellant is now before the Court. More specifically, why the second General Elections are alleged to have failed to follow the constitutional command in Articles 177 (1) and (4) with regard to the MCA's term in office following the first General Elections of 2013.

[72] After promulgation of the Constitution on 27th August 2010, the first General Elections in the Country were held on 4th March 2013. This date was subject to litigation in *John Harun Mwau & 3 others V Attorney General & 2 others [2012] eKLR* and confirmed by the Court of Appeal in *Centre for Human Rights Education and Awareness & 2 Other. v. John Harun Mwau [2012] eKLR*.

[73] The first elections under the Constitution were significant in the history of the Country as we were shifting from the old constitutional order to the new one. In that period of transition, we were also shifting from the old way of carrying out Elections to the new method under the Constitution 2010. We were also, establishing a two-tier form of government, with the founding of the County Governments alongside County Assemblies. We are minded to reiterate the words of this Court in *Speaker of the Senate & another v. Attorney General & 4 others*, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR as follows:

"[160] The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and

supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens.

[161] The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order." [Emphasis added]

[74] Significant to the case before us was the fact that as a country, we were shifting from an unpredictable election date which was anchored in Section 59 of the repealed Constitution. The election date, though it had an outer limit of five years pursuant to Section 59(4), was pegged on the dissolution of Parliament by the President.

[75] It is this unpredictability that the Constitution of Kenya Review Commission (CKRC) in its Final Report of 2005 noted as one of the specific concerns by the people of Kenya. The Commission highlighted that the people did not want the President to have the power to determine the election dates. They wanted to see a more predictable, transparent and efficient system. It is for this reason that the Commission recommended that the General Elections should be held on the first Tuesday of the second full week of August after every five years. Just like the Court of Appeal, we have also not found debate, discussion or rationale that informed the choice of date other than to accommodate the various religious groups. However, what is clear is that the intention of the framers of the Constitution was to remove the control the President had over the election date.

[76] The framers of the Constitution achieved this predictability of the election date by entrenching in Articles 101(1), 136 (2), 177 (1) and 180 (1) that the General Elections would be held on the same date for all the elective positions. They went a step further and designated the date to be “*the second Tuesday in August, in every fifth year.*”

[77] The first General Elections following promulgation of the Constitution were held on 4th March 2013. This date was arrived at following the decision by the Court of Appeal in ***Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR*** when it held as follows;

“The result of the decision of the majority is that the order No. 2(b) of the High Court that the elections shall be held upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by legal notice No. 1 of 2008 as 15th January, 2008 and the term therefore expired on 14th January, 2013 and the election shall be held within sixty days of 15th January, 2013 is confirmed.”

[78] We agree with the Appellant’s submissions that this case is distinguishable from the present dispute as the main issue in contention therein was the first general election and not subsequent elections. We also agree that the Courts therein were not called upon to make a determination on harmonizing the terms of office of MCAs pursuant to Article 177 (1) and (4) contrasted with other elective posts.

[79] Turning back to the present case, we note that the date of the first elections, 4th March 2013, was informed by the transition clauses of the Constitution. More specifically, Section 9 (1) of the Sixth Schedule of the Constitution which provided that the first elections under the Constitution were to be held within sixty days after the dissolution of the National Assembly. Vide Legal Notice No. 1 of 2008, the term of the National Assembly commenced on 15th January 2008 and ended on 14th January 2013. Hence, sixty days later, was 4th March 2013,

achieving the first hurdle in transitioning the elections of the country from the old constitutional dispensation to the new.

[80] In the case of *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*, SC Petition Nos 13 A, 14 & 15; of 2013 [2014] eKLR this Court endorsed the depiction of the transitional concept by *Lady Justice Sichale* at the Court of Appeal in that appeal (*Civil Appeal No. 308 of 2012*), as follows:

“When a new Constitution is introduced, a range of provisions [is] needed to ensure that the move from the old order to the new order is smooth and, in particular, ...the changes expected by the new Constitution are ...effectively [implemented] [so as to sustain] [the] institutions that are retained under the new Constitution... [Such] transitional provisions...are usually not included in the body of the Constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the Constitution but, because it is appended at the end...its provisions will not interfere with the permanent provisions of the Constitution in the future.” [Emphasis added]

[81] The transitional provisions of Sixth Schedule were only for a limited period of time and once they served their purpose, the nation reverted to the permanent provisions of the Constitution. On General Elections, we reverted to the date stipulated in Articles 101 (1), 102 (1), 136 (2) (a), 177 (1) (a) and 180 (1). This was such that, after the first General Elections was held, IEBC then had a constitutional duty to apply these provisions of the Constitution with regard to the future elections.

[82] This was not a simple duty, as IEBC had to decide between holding the elections in August of 2018, five years after 2013 or alternatively in August of 2017. IEBC elected to hold the second General Elections on 8th August 2017. As has been evident throughout these proceedings, this date fell short of the five-

year mark by eight (8) months. This was not just for the MCAs but for all elective positions.

[83] Perhaps what informed IEBC’s decision regarding the said election date in 2017, was to ensure the terms in office for all elected officials would not fall outside the constitutionally stipulated five years. Holding the election in August 2018 would have meant that the term in elective office for all officials would have been over and above the five-year timeline by approximately five months. We can infer that IEBC was trying to avoid generating a gap whereby the holders of the various elective offices would either not be legally in office, or if they elected to go home, then the elective offices would be vacant for eight months. The ramifications of such scenarios were far greater than that the office of the MCAs, as it cut across all elective positions. One such office being that of the President of the Republic of Kenya. This would have had the resultant effect of placing the country in constitutional crisis. It is our considered opinion that such an effect would not have been the intention of the framers of the Constitution. It would certainly not have been a reflection of the will of the people. As this Court stated in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others**, SC Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) [2014] eKLR, [par 206];

“The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order.”

[84] Further, as the Committee of Experts noted in their Final Report, transitional provisions are not contained in the body of the Constitution because they are of a temporary lifespan. Such provisions are usually considered technical, though they may have significant policy implications. Some of the transitional provisions provide that existing obligations, laws and rights will remain in force, until other laws or amendments to laws are enacted; and others

provide that existing public offices will continue to function and operate, so as to prevent situations of gaps or vacuums in the discharge of the functions of these offices.

[85] In the case of ***Regina v Secretary of State for Social Security, Ex parte Britnell*** [1991] 1 WLR 198 at 202; [1991] 2 All ER 726 at 730, the House of Lords remarked as follows concerning transitional clauses:

*“One feature of a transitional provision is that its operation is expected to be temporary, **in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with**, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage. In the present instance [the transitional regulation concerned] must eventually become spent, although it may be envisaged that that could take a considerable period of time.” [Emphasis added]*

[86] Transitional and consequential provisions in the Constitution are supposed to be a bridge between two constitutional dispensations. These provisions provide for the orderly implementation of law helping to avoid the shock that can result from an abrupt change in the law.

[87] However, transitions are not always smooth and often times calls for compromise. The effects of the transition in the Kenyan context did not end with the holding of the first General Elections pursuant to the Sixth Schedule. One compromise that had to be made was the date of the second General Elections. We take note of what this Court stated in the case ***In Speaker of the Senate & another v. Attorney General & 4 others***, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR (paragraph 156):

“Constitution-making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create.”

[88] By choosing to hold the elections on 8th August 2017, IEBC were selecting the more rational and judicious option of having the terms in office for holders of elective posts, end a few months short of the five-year mark. Rather than ending five months over and above their term limits. A secondary consequence of this choice was ensuring a smooth transition from one government to another. The eight-month gap was a compromise that the Kenyan people and by extension, their elected leaders had to make in order to complete the transition from the old constitutional order to the new.

[89] As is evident from the third General Elections, falling on the fifth year being 9th August 2022 from 8th August 2017, that transition is now complete.

[90] This Court therefore finds that the decision by IEBC to hold the second General Elections under the Constitution of Kenya to 8th August 2017 was not unconstitutional. It is our considered view that IEBC was seeking to give effect to the will of the people as expressed in the provisions of the Constitution in a manner that resonated with a purposive interpretation of Articles 177 (1) and (4) as read with Article 259 the Constitution.

iii. Whether there was a reduction of the term of office of MCAs elected in the first General Elections under the Constitution by virtue of the second General Elections being held on 8th August, 2017

[91] On this issue, from the foregoing, we find this in the affirmative. We reiterate our finding that there was an eight-month gap created by holding the second General Elections on 8th August, 2017.

iv. Whether the MCAs in question had proprietary rights and/or legitimate expectation of holding their offices to the end of the elective term; and what reliefs, if any, were they entitled to

[92] What is left for the Court to determine is whether the MCAs in question had any proprietary rights or legitimate expectation to hold their offices to the end of the elective term. And, if so, what reliefs they are entitled to.

[93] The Appellant contends that Article 38 (3) does not create a right to a public office but rather a security that attaches upon election into such office guaranteeing the person the right to hold that office for duration of its term and derive benefits therefrom. It is added that if, for any reason the term is interfered with save for as anticipated under Article 24, then there is legitimate claim that accrues in form of compensation for reduced or lost term.

[94] The 2nd Respondent contends that legitimate expectation to serve a term of five years cannot be found contrary to the Constitution. It is for this reason that the Court is urged to take into account principles of equity, fairness, productivity and fiscal sustainability of the public wage as outlined in the Constitution.

[95] The 3rd Respondent asserts that the right to property as contended by the Appellant under Article 40 of the Constitution is extinguished upon the holding of a General Elections on the first Tuesday of every fifth year pursuant to Article 177 (1)(a). It is further argued that Article 194 provides for ways in which an MCAs office becomes vacant. Therefore, it follows that the Appellant cannot advance a claim on loss of income or legitimate expectation where the vacancy has been occasioned by the Constitution. We were urged to rely on the Court of Appeal decision in ***Justice Philip K Tunoi and Another vs Judiciary Service Commission and Another*** Civil Appeal No 6 of 2016 (2016) e KLR, where the Court held that security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by the law. Further, that there is no legitimate expectation to hold a public or an elective office to the end of its term since a public office is not the property of the office holder.

[96] Looking at Article 38(3) of the Constitution, it provides as follows:

“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 added]*

[97] The Appellant was correct in its assertion that pursuant to this provision, the MCAs had a right to hold office. However, they hold elective office subject to application and interpretation of the same Constitution. As we have found, the Constitution requires a holistic and purposive interpretation, which includes considering the provision of Article 24 on limitations of rights and freedoms. The implication of this is that, outside the non-derogable rights enshrined in Article 25 of the Constitution, the rest are not absolute hence subject to some forms of limitations provided that the limitation does not go against Article 24 of the Constitution.

[98] This Court in the case of ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) [2014] eKLR found that legitimate expectation is a doctrine well recognized within the realm of administrative law and well reflected in judicial practice in Kenya. The Court set out principles of application of legitimate expectation as follows:

“[269] *The emerging principles may be succinctly set out as follows:*

- a. there must be an express, clear and unambiguous promise given by a public authority;*
- b. the expectation itself must be reasonable;*

c. *the representation must be one which it was competent and lawful for the decision-maker to make; and*

d. *there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”*

[99] The Court of Appeal in the case of ***Justice Philip K. Tunoi & another vs Judicial Service Commission & another (Supra)*** is a significant decision in our history for several reasons. The Court of Appeal ultimately found that there is no property right to hold the office of Judge under the Constitution. In doing so, the Court of Appeal highlighted several decisions, demonstrating a consistent line of judicial thinking to the effect that the tenured office of a Judge is not to be regarded as an item of property in which a Judge has proprietary interest until retirement. It affirmed the decision by the High Court (*Lesiit, Wendoh, Emukule JJ.*) in ***Amraphael Mbogholi Msagha v. The Chief Justice & Others, HC Misc. App. No 1062 of 2004 (2006) e KLR*** where the Court found that public office is not the property of the office holder. It held as follows;

*“In modern day constitutional law, therefore, the office of judge is not regarded as a **“property”** in which we or any one judge has a proprietary interest in the sense of physical object like land, domesticated animals, or machines or other proprietary rights or even intellectual property. The office of judge is more of a calling, of the **“priestly caste”** (as Bishop C.J. said in the **Barnwell case**), a privilege which is held in high esteem by society and in which every holder of that office is beckoned and called upon to discharge the functions of that office in accordance with the highest and noblest ethics and standards be-fitting to the office.*

*We therefore find and hold that the office of judge is not a **“property”** in terms of section 75 (1) of the Constitution, which can be compulsorily*

acquired and be subjected to fair and prompt compensation in terms of the provisions of the Land Acquisition Act, Chapter 295 Laws of Kenya.”

[100] The Court of Appeal and the High Court relied on a several decisions which revealed that the general policy in United States is that a public office is not property and the officeholder has no vested property rights. These cases include ***Mial vs. Ellington, 134, N.C. 131 (1903)***, where the Supreme Court of North Carolina reiterated this position while in ***Gorman vs. City of New York (280 App. Div. 39(NY. App. Div. 1952)*** the Supreme Court of New York Appellate Division held that merely because a member’s benefits in a pension scheme may not be constitutionally impaired does not create a constitutional right to stay in public employment.

[101] Subsequently, in ***Townsend vs. County of Los Angeles (49 Cal.App.3d 263 [122 Cal.Rptr. 500]), 20th June 1975***, the Court of Appeal of California, Second District held that retirement age, if any, in effect when a public employee is hired, does not constitute vested right. Further, in ***Miller vs. State of California (413 U.S. 15, 23 (1973)***, the Supreme Court of California, on 4th January 1977 held that in an action challenging reduction of the mandatory age from 70 to 67 years, the plaintiff had no vested contractual right to remain in State employment until the age of 70 years.

[102] The Court of Appeal also relied on decisions from the Philippines. In the case of ***The Provincial Government of Camarines Norte Vs. Beatriz O. Gonzales G.R. No. 185740*** the Supreme Court found that security of tenure of office does not vest right to property for the holder of the office. It held as follows:

“Security of tenure in public office simply means that a public officer shall not be suspended or removed or dismissed except for cause as provided by law and after due process. It cannot be expanded to grant a right to public office. Security of tenure is only violated if an individual is removed

from position without sufficient cause and due process as provided by law.”

This position was affirmed by the Supreme Court in a later decision in ***Commission on Elections Vs. Conrado Cruz & Others, C.R. No. 186616.***

[103] In the Article *Constitutional Law – Officer’s Vested Rights- Right in Nomination to Public Office as Vested Property Right* 24 WASH. U. L. Q. 267 (1939) and Fitzgerald, Mark R. (1995) *Should Elected Officials Have a Property Interest in Their Positions?* University of Chicago Legal Forum: Vol. 1995, Article 13, several more cases from United States are highlighted. These include ***Butler vs. Pennsylvania, 51 U.S. 402, 10 How. 402, 13 L. Ed. 472 (1850)*** where the US Supreme Court rejected the argument that an official is entitled to pay for a period he expects to work, but has not in fact worked. The court expressed itself thus:

“...promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and of equity, but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures.”

[104] In ***Attorney General ex re; Rich Vs. Joachim (1894) 99 Mich. 358, 58 N. W. 611, 41*** the Supreme Court of Michigan held that since the right to hold office is not vested, the legislature may within limits of the constitution provide methods by which incumbents of the office may be removed before the expiration of their terms. That is not to say that the holder of the office may be

removed without due process. In ***Sweeney Vs. Tucker (supra)*** the Supreme Court of Pennsylvania held as follows:

“An elected office is a public trust, not the private domain of the office holder. A member of the Legislature....holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office. ...The public interest in the office far outweighs any private interest of the office holder.”
[Emphasis added]

[105] In ***Barnes Vs. Kline 759 F2d 21 50 (DC Cir 1984)*** by the Court of Appeals for the District of Columbia Circuit, Judge Bork in his dissent was of the view that those who run for office should do so in pursuit of the common good rather than in pursuit of personal interests in compensation. In ***Slawik Vs. State 480 A.2d 636***, the Delaware Supreme Court held that a public officer in the state takes his position under the aegis and for the benefit of the public, subject to suspension or removal by any constitutionally permissible means. The office is in the nature of a public trust created to serve the public interest and not the private advantage of the individual officer.

[106] This is a position that resonates well with the Constitution, 2010 which provides, under Article 1 of the Constitution, that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. It further provides that the people of Kenya may exercise their sovereign will either directly or indirectly through their democratically elected representatives. Sovereign power under the Constitution is delegated to Parliament and the legislative assemblies in the County governments, the national executive and the Judiciary and independent Tribunals.

[107] This is reiterated in Chapter Six of the Constitution, more specifically Article 73 which provides as follows:

“73. Responsibilities of leadership

- (1) *Authority assigned to a State officer—*
- (a) **is a public trust to be exercised in a manner that—**
- (i) *is consistent with the purposes and objects of this Constitution;*
 - (ii) *demonstrates respect for the people;*
 - (iii) *brings honour to the nation and dignity to the office; and*
 - (iv) *promotes public confidence in the integrity of the office; and*
- (b) **vests in the State officer the responsibility to serve the people, rather than the power to rule them.”** [Emphasis added]

[108] It is due to public trust that elections are considered to be *sui generis* affecting not just the contestants for public office but the people on whose behalf they vie. It was the basis for which this Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*** Application 5 of 2014 [2014] eKLR (***Munya 1***) added public interest as a third consideration in determining applications for stay of execution in election petitions. The Court held as follows:

“[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

*[89] This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. **While an election petition***

manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest. [Emphasis added]

[109] In ***Raila 2017*** the Court found the higher standard of proof in election petitions to be grounded on the nature of the public trust and the rights of the voters anchored in Article 38 of the Constitution. The Court held as follows:

“[150] The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. As the Tanzanian High Court stated in the old case of *Madundo v. Mweshemi & A-G Mwanza*[71]:

“An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons.”

[151] In Kenya, Githua, J. succinctly stated the rationale for this higher standard of proof in the case of ***Sarah Mwangudza Kai v. Mustafa Idd & 2 Others***[72]–

“[29]...it is important for this court to address its mind to the burden and standard of proof required in election petitions. This is because election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the

Constitution. This means that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned.”

[110] It is therefore our considered opinion that public office to which a portion of the sovereignty of the people, either legislative, executive or judicial, attaches for the time being and which is exercised for the benefit of the public, does not vest in the holder of the office the right to property of the office. The holders of elective office vie and hold office, not for their private benefit but for the benefit of their constituents on whose behalf they act. Be that as it may, the holders of such office still retain their rights to fair administrative actions, access to justice and fair hearing as enshrined in Articles 47, 48 and 50. They cannot be removed from office, other than by operation of the law. In the present suit, it was the interpretation and application of the constitutional requirement to hold elections on *the second Tuesday in August, in every fifth year*, that imposed the need to hold the second General Elections on 8th August, 2017 thereby occasioning the gap of eight (8) months.

[111] As we have stated hereinabove, the MCAs term in office ended by operation of the Constitution, thereby running afoul the principles of legitimate expectation. Further, election into public office is not anchored on a promise. It therefore follows that the Appellant’s claim for legitimate expectation lacks merit. The Appellant’s claim that the MCA’s had proprietary rights to the unexpired eight-month period also fails.

[112] For the reasons we have stated hereinabove, we find no merit and reject Petition of appeal in its entirety.

H. ORDERS

[113] Consequent upon our conclusion above, we finally order that;

- a) ***The Petition of Appeal dated 22nd December 2017 by the Appellant is hereby dismissed.***

b) Given the nature of this matter, being one of public interest, we order that each party shall bear their own costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th Day of October 2022.

.....
M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA