REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

REFERENCE NO. E001 OF 2022

IN THE MATTER OF: AN APPLICATION FOR AN ADVISORY OPINION BY THE HON. ATTORNEY GENERAL ON BEHALF OF THE NATIONAL GOVERNMENT UNDER ARTICLE 163 (6) OF THE CONSTITUTION OF KENYA

–AND–

IN THE MATTER OF: ARTICLES 1(1), (3), 2(1), (2), (4), (5), (6), 4, 88, (4) (5), 94 (1), (2), 136 (1), 140 (1), (2), 159 (1), 160 (1), 161 (1), 163(3) (a) AND 163 (7)

–AND–

IN THE MATTER OF: THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY- ARTICLES 27, 30, 33 (1) (2) OF THE TREATY

–AND–

THE HON. ATTORNEY GENERAL (ON BEHALF OF THE NATIONAL GOVERNMENT) .....APPLICANT

–AND–

HON. MARTHA KARUA, SC.....INTERVENER

Representation:

Mr. Somane for the Applicant
(Garane & Somane Advocates)

Mr. Ochiel J. Dudley, Advocate for the Intervener

ADVISORY OPINION

A. INTRODUCTION

[1] The Attorney General (AG), on behalf of the national government, by a Reference dated 9th December 2022, has sought this Court's advisory opinion pursuant to Article 163 (6) of the Constitution, Section 13 of the Supreme Court Act, 2011, and Rule 50 of the Supreme Court Rules, 2020. The Reference was supported by an affidavit sworn by ***Kennedy Ogeto***, the then Solicitor General of the Republic of Kenya, on 9th December 2023.

[2] The Reference seeks the Court's Advisory Opinion on the following questions:

i. *Whether the decisions by the Supreme Court on Kenyan law may be subject to a merit review by the East African Court of Justice and what would be the legal consequences upon the Government of Kenya and the sovereignty of the people of Kenya, of orders of the East African Court of Justice premised on a differing interpretation of the Kenyan Law from that held by the Supreme Court; and*

ii. *The legal effect of a finding by the East African Court of Justice that a national court, including the Supreme Court, did not adhere to legal principles, including natural justice and the rule of law, in a case heard and determined by a national court including the Supreme Court.*

[3] Hon. Martha Karua, SC (Hon. Karua), who was enjoined by the Court *suo motu* as an Intervener, raised a Preliminary Objection dated 6th October 2023 on the grounds that; the Court lacks jurisdiction to hear and determine the Reference because it does not concern county government under Article 163 (6) of the Constitution; that the issues raised in the Reference are either concluded or pending litigation before the East African Court of Justice (EACJ) and are thus either resolved or unripe for the delivery of an advisory opinion; the Reference invites the Court to usurp a role reserved by the Treaty for the Establishment of the East African Community (EAC Treaty) to the East African Court of Justice contrary to the principle of separation of powers; and that, Article 27 of the Vienna Convention forbids a state party, like Kenya, from invoking provisions of its internal law as justification for failure to perform its obligations under a treaty to which it is a signatory.

B. BACKGROUND

[4] The genesis of the Reference can be traced to the gubernatorial elections for Kirinyaga County held on 8th August 2017 where Hon. Karua was a contestant. Aggrieved by the declared election result, Hon. Karua filed ***Election Petition No.2 of 2017*** at Kerugoya High Court on 5th September 2017. The High Court however struck out the petition on 15th November, 2017 resulting in an appeal to the Court of Appeal. Vide a judgment delivered on 2nd March 2018, the appellate court set aside the High Court judgment and remitted the case back to the High Court to be heard on merits.

[5] The High Court heard the petition on merits as directed and proceeded to dismiss it. Hon. Karua appealed to the Court of Appeal at Nyeri in ***Election Appeal No. 12 of 2018.*** A cross-appeal was filed in the matter by Hon. Anne Waiguru, the winner of the electoral contest. The Court of Appeal found no merit in the appeal including the claim of violation of Hon. Karua's *right to fair trial* by

the High Court but, of importance, is that it upheld the cross-appeal, and set aside the part of the High Court judgment which was to the effect that the High Court had jurisdiction to hear and determine the election petition outside the statutorily prescribed time limits. On appeal to the Supreme Court, the Court agreed with the Court of Appeal and held that the determination at the High Court was a nullity having been undertaken outside the statutorily prescribed limits. It declined to consider any other issue on account of want of jurisdiction and dismissed the appeal.

[6] Having exhausted the domestic remedies available in Kenya, Hon. Karua filed at the EACJ, Reference No. 20 of 2019*;* ***Hon. Martha Wangari Karua vs The Attorney General of the Republic of Kenya***, faulting the decision of the Supreme Court. EACJ's First Instance Division agreed with her and found that the Supreme Court's interpretation of the Constitution was wrong and that the Republic of Kenya had violated Hon. Karua's *right to access to justice* through its judicial organ's (the Supreme Court's) acts and/or omissions and further held that Kenya violated its commitment to the fundamental and operational principles of the EAC Treaty, specifically the *principle of the rule of law* guaranteed under Articles 6(d) and 7(2) of the Treaty by not properly interpreting and giving effect to the Constitution of Kenya. It consequently awarded Hon. Karua compensation in general damages of USD 25,000 with simple interest of 6% per annum from the date of judgment until payment in full, including costs. Aggrieved, the AG appealed to the Appellate Division of the EACJ. The Appellate Division dismissed the appeal and upheld the decision of the First Instance Division of that court.

[7] Subsequently, two similar cases have been instituted at the EACJ by Hon. Karua and one, Male H. Mabirizi, arising from the Presidential Election held in Kenya on 9th August 2022 but unrelated to the Kirinyaga gubernatorial dispute aforesaid. The two References were however filed following the precedent set by

the latter decision. The AG in that context challenges the jurisdiction of the EACJ to review the merits of decisions rendered by apex courts of Partner States. That if this trend continues, the AG is apprehensive that the purported exercise of an appellate jurisdiction by the EACJ over decisions by national courts may pose a conflict with Kenya's commitment to the rule of law by creating an absurd situation where differing holdings on similar questions based on the same facts are made by national courts on one hand and the EACJ on other hand thereby exposing the Government and the people of Kenya to a legal dilemma on whether it should comply with contradictory yet binding decisions from the two courts.

C. PARTIES' CASES

i. The applicant's case

[8] In the Reference, the AG urged that Article 2(1) of the Constitution of Kenya provides for its supremacy, while Article 2(4) stipulates that, any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

[9] Furthermore, the AG contended that the principles and framework for the exercise of judicial authority and the hierarchy of the court system in Kenya are set out in Chapter 10 of the Constitution, with the Supreme Court being the apex Court. In addition, Article 163 (3) of the Constitution grants the Supreme Court exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and subject to clauses (4) and (5), appellate jurisdiction to hear and determine appeals from the Court of Appeal including election disputes arising from a gubernatorial election; and appeals from any other court or tribunal as prescribed by national legislation. All its decisions thereby are final and are not subject to further appeal.

[10] The AG further averred that, in the exercise of the sovereign power donated under the Preamble and Article 1(3) of the Constitution, the Government of Kenya became a signatory to the EAC Treaty on 30th November 1999, which Treaty came into force on 7th July 2000. Moreover, according to Article 2(6) of the Constitution, any treaty or convention ratified by Kenya shall form part of the law of Kenya.

[11] As regards the EACJ, it was the AG's case that its jurisdiction is encapsulated in Article 27 (1) of the EAC Treaty which provides that the Court shall initially have jurisdiction over the *interpretation and application of the EAC Treaty*: provided that the Court's jurisdiction to interpret under that paragraph *shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.*

[12] The AG argued in that regard that, whereas Article 33(2) of the EAC Treaty provides that decisions of the EACJ in the application of the Treaty shall have precedence over decisions of national courts on a similar matter, there is no express provision of the EAC Treaty conferring jurisdiction upon the EACJ to interpret the Constitutions of Partner States to reach a different decision on the substance of municipal law from what has been declared by the apex courts of such States.

[13] It is added by the AG that, the EACJ has nevertheless in a number of its decisions including Reference No.20 of 2019***; Hon. Martha Wangari Karua vs The Attorney General of the Republic of Kenya***, interpreted its jurisdiction to include merit review of the interpretation of Partner States' apex courts on the substance of their Constitutions and laws. And that, with two similar cases instituted by Hon. Karua and Male H. Mabirizi at the EACJ arising from the Presidential Election held on 9th August 2022, he is apprehensive that the purported exercise of jurisdiction by the EACJ over decisions of national courts

may pose serious conflict to Kenya's commitment to its Treaty obligations. This, the AG argued, will have a debilitating consequence on the observance of the rule of law and weaken governance and accountability systems locally and internationally.

[14] As a result, the AG has urged that, he being the Government's principal legal advisor, it is imperative that he should seek clarification vide this advisory opinion on which of the two differing interpretations and resultant orders by national courts, and the EACJ is to be given effect. Furthermore, legal uncertainty impairs various organs of the State from exercising their constitutional authority, and therefore, the issuance of this Court's advisory opinion will resolve a major governance issue. This uncertainty it is further urged, is not one premised on a normal dispute to be resolved through ordinary litigation and there are no facts in dispute, as the questions are purely on interpretation and application of the Constitution and the law.

[15] In addition to the above, the AG also filed submissions dated 9th November 2023 in opposition to Hon. Karua's preliminary objection reiterating the averments contained in the Reference. On the *question of the Court's jurisdiction to render the advisory opinion,* he submitted that, the Court's jurisdiction to issue an advisory opinion is anchored in Article 163 (6) of the Constitution. Moreover, the Court set the criteria for determining its jurisdiction to issue such an opinion under Article 163 (6) in the ***Matter of The Interim Independent Electoral Commission*** SC Application No. 2 of 2011 [2011] eKLR ***(Re IIEC)***. It was his submission in that regard that, the Court has jurisdiction to entertain the Reference as the AG is the principal legal advisor to the Government of Kenya and so his request satisfies the conditions to approach the Court.

[16] On whether *the matter concerns a county government*, the AG relied on this Court's decision in the ***Matter of the Speaker of the Senate & another,*** Advisory Opinion Reference No. 2 of 2013; [2013] eKLR ***(Re Speaker of the Senate)*** and urged that EACJ ***Reference No. 20 of 2019*** was triggered by proceedings arising from the 2017 election for the position of Governor, Kirinyaga County. For this reason, he submitted that the request for an advisory opinion regarding the twin decisions made by the EACJ and earlier by the Supreme Court falls within the ambit of Article 163(6) of the Constitution as it concerns a county government and the finality of its electoral processes and any resultant dispute resolution mechanism arising from such an election.

[17] The AG also relied on the decision in the ***Matter of the Principle of Gender Representation in the National Assembly and the Senate*** Advisory Opinion Reference No. 2 of 2012 [2012] eKLR (***Re Gender Representation)***, urging that the issues raised are novel, and cannot be settled through ordinary litigation. He further urged that an advisory opinion is an important avenue for settling matters of great public importance that may not be suitable for conventional judicial mechanisms. Thus, the AG urged the Court to exercise its discretion to give an advisory opinion noting the looming constitutional crisis regarding conflicting decisions of the Supreme Court and the EACJ.

[18] The AG furthermore submitted that, Article 9(4) of the EAC Treaty provides that the organs and institutions of the Community shall *only* perform the functions, and act within the limits of powers conferred upon them by the Treaty. To buttress this point, he relied on the EACJ decision in ***East African Civil Society Organisation Forum vs The Attorney General of the Republic of Burundi & 2 others*** EACJ First Instance Division Reference No. 2 of 2015 where it was held that the EACJ has no jurisdiction to interpret the provisions of the Burundi Constitution or Arusha Peace Agreement for purposes of determining

the correctness of the Burundi Constitutional Court's decision and that the said Court can only properly execute its mandate by interpreting and applying the EAC Treaty.

[19] On the question *of the finality of the Supreme Court's decisions in Presidential Election petitions under Article 140*, the AG posed further questions for this court to consider as follows: can such a decision, termed as final, then be the subject of litigation or challenge before any other court?; what would be the outcome should the other court(s) deem the decision of the Supreme Court as incorrect or should such a court not agree with the Supreme Court entirely?; and what would be the effect of such a decision on all the courts below the Supreme Court and state organs should the court differ with the Supreme Court, and would the said differences be binding to Kenyan courts? Finally, what is the effect of the provisions of Article 163(7) of the Constitution which provides that; *"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."*

[20] In conclusion, the AG reiterated his position that, there is an urgent need for clarification on which of the two differing interpretations are to be given effect so as to facilitate compliance with the constitutional requirements and that, unless the questions are answered, there will be major consequences on the observance of the principles of rule of law, governance, and accountability systems both locally and internationally. In his view, an advisory opinion by this court would therefore resolve the governance issue and settle the legal uncertainty that has impaired various organs of the State from exercising their constitutional authority. In addition, the AG urged that this is also an opportunity for the Supreme Court to make such an interpretation as would have the effect of upholding the meaning, intent, and integrity of the Constitution as a whole and uphold its authority.

ii. ***Intervener's Case***

[21] Hon. Karua was allowed as an Intervener in this matter as a party who is likely to be affected by the outcome of opinion. She filed written submissions in opposition to the Reference which are dated 22nd September 2023 and filed on 11th October 2023. She argued that this Court's jurisdiction under Article 163(6) should only be invoked sparingly and in compelling circumstances. Relying on the Court's decisions in ***Re IIEC (supra)***, in the ***Matter of the Speakers of the 47 County Assemblies*** Advisory Opinion Reference No. 3 of 2014 [2016] eKLR, and the ***Matter of Kenya National Commission on Human Rights*** Advisory Opinion Reference No.1 of 2012; [2014] eKLR, she urged that this Court has held that *"matters touching [on] a county government"* must incorporate any national-level process bearing a significant impact on the conduct of county government. In this context, she posited that none of the two questions framed by the AG concerns county governments in any way.

[22] In addition, she submitted that the Reference had been filed prematurely as there was no evidence to demonstrate that the National Government had sought, or the AG had issued a legal opinion on the issue before invoking the Court's jurisdiction, contrary to Rule 53(1)(c) of the Supreme Court Rules. She cited this Court's decision in ***Re Gender Representation (supra)*** and urged that the Court must be disinclined to take a position in discord with the core principles of the Constitution. Furthermore, since there were cases pending before, or determined by the EACJ, the Court ought not to render an advisory opinion in this matter as it will interfere with the due process of the law.

[23] In addition she submitted that a concise reading of Article 36 of the EAC Treaty, would point to the fact that the two framed questions fall squarely within EACJ's domain. For clarity, Article 36 of the Treaty provides that the EACJ may give an Advisory Opinion on a question of law arising from the Treaty which affects the Community. She added that the Reference is frivolous, vexatious, and

oppressive as Article 33(2) of the EAC Treaty answers the two questions without the need for further input by this Court. That Article provides that decisions of the EACJ on the interpretation and application of the EAC Treaty shall have precedence over national courts on a similar matter.

[24] She furthermore submitted that, although Kenya is not a signatory to the Vienna Convention on the Law of Treaties, 1969, aspects of the Treaty have gained the status of customary international law. She argued in that regard that, Article 26 of the Vienna Convention, which provides that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith"* is a restatement of a pillar of treaty law, the *pacta sunt servanda* rule. It was her other submission that since Kenya is a signatory to the EAC Treaty, it must perform its obligations therein in good faith, including enforcing EACJ decisions. In addition, she posited that Article 27 of the Vienna Convention forbids state parties, like Kenya, from invoking provisions of its internal law as justification for its failure to perform a treaty including the EAC Treaty. She added that pursuant to Article 18 of the Vienna Convention, Kenya is obliged to refrain from acts that would defeat the object and purpose of a treaty when it has signed the same.

[25] Moreover, she argued that this Court is the ultimate authority on the interpretation of the Constitution in Kenya. The EACJ on the other hand is the ultimate authority in interpreting the EAC Treaty to determine if any decision or action of a Partner State violates the Treaty. She contended that the Supreme Court of Kenya is a state organ of a partner state—just like other apex courts around the Community- and therefore, under Articles 27 and 30 of the EAC Treaty, the EACJ has jurisdiction to test the decisions of the Court for compliance with the EAC Treaty. She cited the International Court of Justice decision in ***Elettronica Sicula S.P.A. (ELSI),*** Judgment, I.C.J. Reports 1989, p. 15, at p. 51, para. 73 to support her assertions. In the said decision, the Court stated that; "*Compliance*

with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision." She therefore urged that there is no jurisdictional clash or conflict as urged by the AG.

[26] In conclusion, she submitted that the Reference by the AG was instituted with the intention of depriving her of the remedy given to her and affirmed on appeal by the EACJ, which Kenya has failed to comply with since 2019. She thus prayed that the Reference be dismissed.

D. ISSUES FOR DETERMINATION

[27] From the pleadings and the parties' submissions, the following issues crystallize for our determination:

i. *Whether this Court has jurisdiction to render the advisory opinion;*
ii. *Whether the advisory opinion is premature for lack of advice from the AG;*
iii. *Whether the decisions of the Supreme Court on the interpretation of Kenyan law can be subject to a merit review by the East African Court of Justice and if so, what is the effect of such decisions?*

E. ANALYSIS

i. *Whether this Court has jurisdiction to render the advisory opinion*

[28] The crux of Hon. Karua's preliminary objection was that this Court does not have jurisdiction to render an advisory opinion because none of the questions raised in the Reference concern a county government. The other limb of her objection is that all the issues framed for our advisory opinion fall squarely within the ambit of the EACJ and no input from this court is required to address them.

[29] In that regard, we note that this Court's jurisdiction to issue an advisory opinion is anchored in Article 163 (6) of the Constitution which stipulates that:

> *"The Supreme Court may issue an advisory opinion* ***at the request of the national government, any state organ, or any county government*** *with respect* ***to any matter concerning county government".*** [Emphasis added]

[30] This Court has in several decisions interrogated the question of its jurisdiction under Article 163 (6) of the Constitution. It set the guidelines for the exercise of its advisory-opinion jurisdiction in ***Re IIEC*** **(supra)** as follows:

> ***"... we are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.***
>
> ***(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.***
>
> ***(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.***
>
> ***(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in***

question have been instituted <u>after a request</u> has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.

(iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of <u>great public importance</u> and requiring <u>urgent resolution</u> through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would <u>not be</u> amenable to expeditious resolution through an adversarial Court process...

The foregoing guidelines coincide with our conviction that the plain terms of the Constitution should be read in the broader context of its spirit and philosophy; and on that basis, applications seeking Advisory Opinion shall be resolved as necessitated by the merits of each case. In view of the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint." [Emphasis added]

[31] Similarly, in ***Matter of the National Gender and Equality Commission*** Reference No. 1 of 2013 [2014] eKLR, we observed as follows:

"However, there are certain key considerations in applying these essentials. The <u>starting point will always be that the party must have locus standi</u>. The Court will always consider whether the party seeking to move it, falls within the categories of parties

decreed by the Constitution. The Court will then proceed to consider the subject-matter: whether it is one involving County Government. Once it rules in the affirmative, the other considerations come into play." [Emphasis added]

[32] Flowing from the above, does the Reference herein meet the above criteria to enable the Court to exercise its advisory opinion jurisdiction? We begin by noting that it is not in dispute that the AG has the *locus standi* to request an advisory opinion by dint of the provisions of Article 156 of the Constitution that creates his office and the powers bestowed to that office. However, Hon. Karua contests the Court's jurisdiction to render an advisory opinion in the matter on the ground that it does not concern a county government. From the record and the affidavit of Kennedy Ogeto, filed in support of the Reference, the genesis of this matter can be traced to the gubernatorial election in Kirinyaga County where Hon. Karua challenged the result that was declared against her. Even if the Court were to look at the matter through the narrow prism of the dispute that gave rise to the advisory opinion, as it will become more apparent in the analysis here below, it has a bearing on the county government of Kirinyaga.

[33] In the **Matter of the Speaker of the Senate & another SC Reference No. 2 of 2013 [2013] eKLR** this Court observed thus:

"It emerges that a matter qualifies to be regarded as one of county government only where: that is the case in the terms of the Constitution; it is the case in the terms of statute law; it is the case in the perception of the Court, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations, on the other." [Our Emphasis]

[34] Article 180 of the Constitution contemplates the election of a county governor who is to be directly elected by the voters in the county. In interrogating whether the matter is one concerning a county government, this Court is therefore invited to look into the obtaining facts alongside the provisions of the Constitution and statute law or perception of the Court. Our reading of Article 180 of the Constitution and the decisions of the Court cited above directly point to the fact that, the matter involves a county government.

[35] We say so because, Hon. Karua participated in the gubernatorial elections by dint of Article 180 of the Constitution which expressly provides for election of a county governor. Having lost the election, she approached the High Court challenging the election result as declared. The matter rose through the appropriate appellate mechanism to reach this Court where we pronounced ourselves accordingly. It is therefore this Court's judgment, arising out of that gubernatorial election, that Hon. Karua sought to challenge, and successfully so, at the EACJ in Reference No.20 of 2019***; Hon. Martha Wangari Karua vs The Attorney General of the Republic of Kenya***, which forms the substance of the Reference herein. It follows that the real substratum of the dispute remains the gubernatorial contest that was concluded at this Court and was then reopened at the EACJ albeit under that court's mandate and so, the real issue before us is whether the fact that the matter ended up at EACJ removes the county element from it.

[36] In that regard, we have perused the judgments of both the First Instance and Appellate Divisions of the EACJ and note that both comprehensively acknowledged that the genesis of the matter before them was the gubernatorial dispute-see Paras.37 and 38 of the Judgment of the First Instance Division and Paras.5-17 of the judgment of the Appellate Division. The judgment of this Court on the same subject was also the focus of both EACJ judgments. On the other hand,

the present Reference is also questioning the EACJ's mandate over a dispute arising from the Kirinyaga gubernatorial election and any other matter concluded by this Court but which has or may then be subjected to a merit review by the EACJ. To argue, as Hon. Karua has done, that the said Kirinyaga gubernatorial election dispute is not an issue before us in this Reference is not borne out by the facts in both the EACJ Reference and the one now before us. Her pleadings before the EACJ confirm that fact as well.

[37] As a consequence, it is our considered opinion that the Reference was triggered by the disputed gubernatorial election results of Kirinyaga County following the 2017 general election and the main question before us is whether such a dispute, once determined finally by this Court, can be subjected to a merit review by the EACJ. In answering that question, we shall not refer to the merit or otherwise of the EACJ decisions nor to the execution thereof but shall limit ourselves to the wider question of merit review triggered by the said dispute. The question before us remains: should all disputes arising from an election to a position in a county government trigger a merit review at the EACJ once determined by the apex court? The other issues raised by the AG are collateral but related in a wider context to that core question and which concerns a county government. It must be answered by this Court.

[38] In addition to the above, this Court has also been categorical that it will not exercise its discretion to render an advisory opinion where the matter in respect of which the reference has been sought is subject to proceedings in a lower court. We note that the questions raised for our determination by the AG have not been subjected to any litigation or are pending determination in any lower court within Kenya. The pending matters before the EACJ are not of concern to us even if arising from our final decisions. Furthermore, this Court exercises its mandate as provided for under the Constitution while EACJ exercises its mandate under the

EAC Treaty. The EACJ is not part of the hierarchy of courts in Kenya and therefore, the Court cannot fail to issue an advisory opinion regarding matters pending or concluded at the EACJ, because of the difference in jurisdiction and authority. Hon. Karua's argument that this Court should not proffer an advisory opinion on matters pending litigation or concluded litigation at the EACJ must therefore fail.

[39] We also note that the issues raised by the AG in the Reference constitute matters of great public importance as they concern the question whether the decisions of this Court can be subject to merit review by a regional or international court given the finality of the decisions of the Court as Kenya's apex court under the Constitution. The matters in question as demonstrated in the foregoing paragraphs cannot also be settled through ordinary litigation, and therefore, an advisory opinion represents an avenue for clarification of the issues raised by the AG.

[40] Given the above findings, it is our considered opinion that the Reference meets the guidelines for the Court to exercise its advisory opinion jurisdiction, and the Preliminary Objection by Hon. Karua is overruled.

ii. Whether the advisory opinion is premature for want of the Attorney General's prior advice

[41] It was Hon. Karua's contention that the application for an advisory opinion was premature without the AG's prior legal opinion and that there was no evidence that the national government sought or the AG did issue a legal opinion on the issue before invoking this Court's advisory jurisdiction.

[42] Article 156 (4) (a) of the Constitution provides that the AG is the principal legal advisor of the Government. This Court affirmed this position in ***Re IIEC, supra*** where we stated:

"...By Article 156(4) ... of the Constitution, the Attorney General is designated the principal [legal] advisor of the Government .... It can be said that the Attorney-General bears the mantle of the "chief lawperson" of Government in its diverse dimensions. <u>The various departments [and levels] of the Government have the liberty to seek the Attorney-General's opinion on any legal question of relevance to their day-to-day operations</u>." [Emphasis added]

[43] Furthermore, Article 156 (4) (b) of the Constitution states that the AG shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.

[44] Additionally, Rule 53 of the Supreme Court Rules, 2020 provides as follows:

(1) "The Court may, after giving the parties an opportunity to be heard, reject a reference in whole or in part, if –

...

(c) the matter in respect* of which the reference is made *can, in the opinion of the Court, <u>be resolved by the advice of the Attorney–General, and</u> such advice has not been sought". [Emphasis added]

[45] Taking the above provisions into consideration, it is our considered view that the AG filed this Reference pursuant to the authority granted to his office under Article 156 (4) (a) and (b) of the Constitution. In line with Rule 53 of the Supreme Court, Rules 2020, and our reasoning in ***Re IIEC* (supra)** it is absurd to require the office of the AG to seek a legal opinion from itself. If it had the capacity to resolve the matter on its own then it would have advised the national government expressly and not invoked this Court's advisory opinion jurisdiction.

[46] Furthermore, in the ***Matter of Speaker, County Assembly of Siaya County,*** Reference No. 4 of 2017 [2020] eKLR and ***Matter of the National Gender and Equality Commission,*** Reference No. 1 of 2013; [2014] eKLR, we stated that it is not a matter of law to seek the AG's opinion as follows:

> ***"Though there is no mandatory requirement to first seek the Attorney-General's opinion, this Court has held that, as a matter of good practice, such opinion should be sought...***
>
> ***Consequently, as a matter of due process, we would restate that the applicant, same as other government institutions and agents, should adopt the practice of resorting to the office of the Attorney-General first."*** [Our Emphasis]

[47] Also, in the ***Matter of the County Government of Nairobi vs Attorney General,*** (Reference 1 (E001) of 2021) [2023] KESC 65 (KLR) we held that:

> ***"[35] Flowing from the above, we see no reason to derogate from this Court's rules and set procedure, as well as settled legal standards. We, therefore, restate that, as a matter of good practice and anchored on Rule 53 aforesaid, such opinion should be sought. We further reaffirm that in line with Rule 53 (1) (c), we may, after allowing the parties a chance to be heard, reject a reference in whole or in part, if the matter in respect of which the reference is made, can in our opinion be resolved by the advice of the Attorney General if such advice has not been sought."*** [Our Emphasis]

[48] Based on the foregoing, we reaffirm that as a matter of good practice, the AG's opinion should be sought before a dissatisfied party can seek an advisory opinion from this Court. However, in this particular case, we reiterate that the office of the AG cannot be expected to seek an opinion from itself. In addition, as the principal government legal advisor, if the AG had the capacity, he would have advised the government without seeking an advisory opinion from the Court. Consequently, we find that the Reference is not premature for lack of the AG's report on what advice it should have given the national government.

[49] Having found that the questions raised in the Reference meet the guidelines for this Court to render an advisory opinion in line with the guidelines set in ***Re IIEC (supra)*** and that the Reference is not premature for failure to seek the AG's report, we hereby find that this court should exercise its jurisdiction and render an advisory opinion as requested. Hon. Karua's Preliminary Objection on that issue is similarly overruled.

iii. Whether the decisions of the Supreme Court on the interpretation of Kenyan law can be subject to a merit review by the East African Court of Justice and what is the effect of such a decision?

[50] The AG maintained that, while Article 33(2) of the EAC Treaty stipulates that the decisions of EACJ in the application of the Treaty will take precedence over decisions of national courts on similar matters, there is no explicit provision within the Treaty granting EACJ jurisdiction to interpret the substance of national laws of Partner States so as to reach divergent positions of law from what has been declared by the apex courts of Partner States. He further contended that the EACJ, in a number of decisions, has interpreted its jurisdiction to include merit review of the interpretation of Partner States' apex courts on the substance of their Constitutions.

[51] The above issue portends no difficulty for us at all and in that regard, we note that, under Article 2 (1) of the Constitution, the Constitution is the supreme law of Kenya and that under Article 163(7), Supreme Court decisions are binding on all courts in Kenya and there is no dispute that such decisions are final and are not subject to further appeal. However, in exercise of its mandate under the Constitution, the Court, like other organs of the State, is alive to the supremacy of the Constitution, and at all times exercises this mandate in accordance with among others, the principle of the *rule of law* which is a fundamental principle under the said Constitution.

[52] We also note that, Article 2 (5) of the Constitution provides that the general rules of international law shall form part of the law of Kenya while Article 2 (6) of the Constitution stipulates that any treaty or convention ratified by Kenya shall form **part of the law of Kenya under the Constitution**. The EAC Treaty therefore is part of the Kenyan laws that must be subservient to the Constitution and if there is any conflict regarding the hierarchy of the Kenyan courts and the courts created by the Treaty, the provisions of the Constitution take precedence over those of the Treaty.

[53] In addressing that issue, this Court in ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** (Petition 3 of 2018) [2021] KESC 34 (KLR) stated as follows:

> ***"Articles 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with,***

the Constitution, local statutes, or a final judicial pronouncement". [Emphasis added]

[54] Therefore, based on the provisions of Article 2 (6) and the reasoning adopted in ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (supra)** we emphasize that international law, including treaty law, applies in Kenya and by extension to the organs of the State as long as the same are not in conflict with the Constitution, local statutes, and final judicial pronouncements. This connotes that the Constitution embodies the primacy of domestic laws and the subsidiarity of international laws. The principle of subsidiarity respects national sovereignty by recognizing that each State retains the ultimate authority over matters occurring within its territory, because in the case of Kenya, Article 1 of the Constitution declares that "*All sovereign power belongs to the people of Kenya"* power to be exercised only in accordance with the Constitution.

[55] This was also the position adopted by the European Court of Human Rights in the case of **Handyside v United Kingdom**, Application No. 5493/72 where, in the context of human rights, it held as follows:

"The Court points out that the machinery of protection established by the Convention ***is subsidiary to the national systems*** *safeguarding human rights (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 35, para. 10 in fine)…*

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force." [Emphasis added]

[56] In appreciating the above position, we reiterate that the Constitution of Kenya is the supreme law of the land. International law reigns supreme on the international sphere. The same is to be said of municipal law within the domestic sphere. While we are cognizant of the time hallowed international law doctrine to the effect that a state party shall not invoke its domestic law to abdicate from its international obligations, we see nothing in the Treaty establishing the East African Community, that confers upon the EACJ, appellate jurisdiction over the member state apex courts' judgments. A state's electoral laws and procedures fall squarely within the municipal competency of its courts. It is juridically inconceivable that a regional tribunal, established by a regional Treaty, whose objectives are clearly decreed as in the EAC Treaty, can arrogate to itself an appellate jurisdiction, in matters involving the interpretation of a member state's Constitution by its own courts. Judicial supra-nationality in a regional or international community is a precept that must be categorically provided in a Treaty to which states have signified their consent.

[57] Moreover, the Constitution positions the Supreme Court as the apex Court and a court of final judicial authority under Article 163 (7). The role and standing of this Court as a court of final judicial authority is further elaborated under Section 3 of the Supreme Court Act, 2011 which provides that:

> ***"The object of this Act is to make further provision with respect to the operation of the Supreme Court <u>as a court of final judicial authority to, among other things –</u>***
>
> ***(a) <u>assert the supremacy of the Constitution and the sovereignty of the people of Kenya;</u>***
>
> ***(b) provide authoritative and impartial interpretation of the Constitution."*** [Our Emphasis]

[58] This Court in ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 others,*** SC Petition No. 6 of 2015 [2017] eKLR similarly asserted:

> ***"The Supreme Court is the final Court in the land. But most importantly, it is a final Court of Justice."*** [Emphasis added]

[59] Accordingly, we restate the binding and firm principle that, the Constitution places the Supreme Court as the apex court and a court of final judicial authority with the mandate to assert the supremacy of the Constitution and the sovereignty of the people of Kenya.

[60] Further, as alluded to above, the Constitution also envisions a situation where international law (treaty and customary law) to which Kenya is a party is subject to the Constitution within the domestic sphere. Therefore, if any provision of a treaty conflicts with the Constitution, the provision of the Constitution prevails because the Constitution is the supreme law of the Republic of Kenya and binds all persons and all State organs and;

> **"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".** [Our Emphasis]

[61] In that context and relevant to this Reference, Kenya ratified the EAC Treaty on 30th November 1999 and the Treaty came into force on 7th July 2000. Therefore, by dint of Article 2(6), it became part of the laws of Kenya ***subject to the Constitution***.

[62] The EAC Treaty establishes its judicial enforcement mechanism, the EACJ, at Article 9. The role of EACJ is elaborated in Article 23 of the EAC Treaty as the judicial organ to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.

[63] The jurisdiction of EACJ is further elucidated at Article 27 of the Treaty. In particular, Article 27 (1) provides that:

> ***"The Court shall initially have jurisdiction over the interpretation and application of this Treaty.***
>
> ***Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States".***

[64] As evidenced by the above provision, EACJ is specifically mandated to interpret and apply the provisions of the EAC Treaty and is expressly prohibited from interpreting national laws of Partners States outside the purview of the Treaty because national laws are beyond its jurisdiction. This is because national courts are mandated by national laws to adjudicate claims according to national law, culture, and customs. National courts are in the same vein not vested with jurisdiction to deal with the interpretation or application of the EAC Treaty.

[65] The question whether international Courts should embrace a non-intrusive standard of review has been the subject of judicial pronouncements in other realms. Grappling with this question, the European Court of Human Rights developed the margin of appreciation doctrine to aid it in determining the standard of review in disputes against States. The margin of appreciation means that a member state or its organs are permitted a degree of discretion, subject to the

court's supervision when it takes legislative, administrative, or judicial action in the area of a European Convention of Human Rights.

[66] The margin of appreciation doctrine also permits that court to take into account the fact that, the Convention might be interpreted differently in member states given the differing legal and cultural traditions. It is also premised on the idea that so long as a State's action does not violate a certain minimum threshold of protection, the court will respect the State's determination that the action complies with the European Convention on Human Rights even if **the court might have come to a different conclusion itself, faced with the issue *de novo***.

[67] The margin of appreciation doctrine is furthermore predicated on the notion that the European Convention on Human Rights' protection is secondary or subsidiary to the protection provided by the contracting State. In appreciating the margin of appreciation granted to domestic courts in interpreting the domestic laws and *vis-a-vis* the Convention, the European Court of Human Rights in ***Goodwin v UK*** (2002) 35 EHRR 447 therefore observed as follows:

> ***"In accordance with the principle of subsidiarity,*** *it is indeed* ***primarily for the Contracting States to decide on the measures necessary to secure Convention rights*** *within their jurisdiction and,* ***in resolving within their domestic legal systems the practical problems*** *created by the legal recognition of post-operative gender status,* ***the Contracting States must enjoy a wide margin of appreciation.****"* [Emphasis added]

[68] The Inter-American Court of Human Rights has also exercised restraint and deference on the issue of the standard of review of domestic court's decisions. In the case of ***Genie Lacayo v. Nicaragua,*** 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, 94 (Jan. 29, 1997) for example, it expressed itself as follows:

> ***"...in accordance with general international law, the Inter-American Court does not act as an appellate court or a court for judicial review of rulings handed down by the domestic courts. All it is empowered to do in this case is call attention to the procedural violations of the rights enshrined in the Convention which have injured Mr. Raymond GeniePeñalba, the interested party in the matter; however, it lacks jurisdiction to remedy those violations in the domestic arena, a task, as has been pointed out before, that falls to the Supreme Court of Justice of Nicaragua when it disposes of the application for judicial review which is yet to be resolved."*** [Emphasis added]

[69] Similarly, the ECOWAS Court in ***Moussa Leo Keita v Republic of Mali*** ECW/CCJ/APP/03/07, held that:

> ***"Unlike other international courts of justice, such as the European Court of Human Rights, ECOWAS, does not possess, among others, the competence to revise decisions made by the domestic courts of Member States; it is neither a court of appeal nor a court of cassation (cour de cassation) vis-a-vis the national courts".*** [Our Emphasis]

[70] As regards the right to a *fair hearing* resulting from an election dispute, the ECOWAS Court in ***Jerry Ugokwe v. Nigeria,*** ECW/CCJ/JUD/03/05 held as follows:

"Appealing against the decision of the National Court of Member States does not form part of the powers of the Court; the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And, if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, <u>the kind of relationship existing between the Community Court and these national courts of Member States</u> are not of a vertical nature between the Community and the <u>Member States</u> but demands an integrated Community legal order. The ECOWAS Court of Justice is not a Court of Appeal or a Court of Cassation." [Our Emphasis]

[71] This position was also adopted by EACJ itself in several of its decisions. In ***Dr. Mpozayo Christophe vs. The Attorney General of the Republic of Rwanda Reference 10 of 2014*** for example, it cited with approval the case of ***Ida Robinson Smith Putnam (USA) V United Mexican States*,1927, UNRIAA, vol. IV, p, 151 at 153** where it was held as follows:

> ***"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. A question which has been passed on in courts of different jurisdiction by the local judges,*** *subject to protective proceedings, must be presumed to have been fairly determined."*

[72] Furthermore, in ***Honourable Sitenda Sebalu vs. The Secretary General of the EAC & 3 Others*** Reference No. 1 of 2010 the EACJ itself expressed as follows:

> ***"In the circumstances, it is this Court's finding that Article 27 of the Treaty does not confer appellate jurisdiction on the EACJ***

over the decision of the Supreme Court of Uganda in Election Petition appeal No.6 of 2009, Hon. Sitaenda Sebalu V Hon. Sam K. Njuba & Electoral Commission of Uganda."

[73] The EACJ as a regional court is no different from the European Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights and the ECOWAS Court and the elucidation of the law as restated above is most persuasive to us as we address the matter at hand. And as evidenced above, regional courts across the world have exercised restraint and deference giving Partner States a wide margin of appreciation when reviewing decisions of the latter more so of apex courts like this one. The jurisprudence emerging from the above decisions is also that, the hierarchical relationship between regional/international courts and national courts is not of a vertical nature. This means that EACJ cannot exercise appellate jurisdiction over decisions of national courts of member States, a fact acknowledged by the EACJ in ***Honourable Sitenda Sebalu vs. The Secretary General of the EAC & 3 Others*** **(supra).** This was also the position of this Court, in ***Peter Odiwuor Ngoge T/A O.P Ngoge & Associates vs Josephine Akoth Onyango & 5 Others***, SC Petition No. 18 of 2015 where we observed that:

> ***"...the jurisdiction of the East African Court of Justice is found in Article 27 of the Treaty for the Establishment of the East Africa Community. <u>That jurisdiction does not confer on that court any appellate mandate as regards decisions of this court</u>".*** [Our Emphasis]

[74] Furthermore, it is obvious to us that, what international/regional courts are empowered to do, is to conduct procedural reviews on decisions of the national courts and call attention to violations only but in line with the mandate conferred by their parent Treaty or Convention and not national laws. Therefore, in

accordance with the EAC Treaty, EACJ's mandate is the interpretation and application of the EAC Treaty only and, we hold and find that the EACJ does not have appellate jurisdiction or merit review jurisdiction over decisions of the Supreme Court of Kenya in matters concerning the interpretation and application of the Constitution of Kenya or any other matter arising from the latter's decisions. The Constitution envisages the Supreme Court as the final judicial authority in asserting the supremacy of the Constitution and the sovereignty of the people of Kenya would be undermined if the converse situation were to apply. It should however be noted that mere disagreement with the interpretation that domestic courts have made of pertinent legal provisions does not constitute violations of the EAC Treaty. Interpretation of the Constitution or national laws, and weighing of evidence is the mandate of domestic courts, which cannot be replaced by the EACJ in that regard.

[75] In addition, it should be noted that regional and international courts such as the EACJ are, by Treaty or Convention, granted the mandate to examine how State organs satisfy regional or international obligations of the State to interpret and apply national laws save in the manner expressed above. Such courts should only act as agencies and tools for strengthening of local conditions, including democracy and the rule of law but not as substitutes of State organs.

[76] On the effect of a decision amounting to a merit review by the EACJ of a decision by a final national court such as this one, such a decision would be of no legal consequence. EAC Treaty has acknowledged this position in Article 9(4) which provides that the organs of the EAC shall act only and perform such functions as are conferred on them by or under the provisions of the EAC Treaty.

F. CONCLUSION

[77] The AG in this matter raised questions regarding the jurisdiction of the EACJ to conduct a merit review of the decisions of this Court and the effect of such review. This Court acknowledges the supremacy of the Constitution of Kenya but with respect for Kenya's regional and international obligations subject to the Constitution. The Constitution also entrenches its own supremacy meaning that, while international law is a source of law in our constitutional set-up by dint of Article 2(5) thereof, it cannot be applied in a manner as to upstage clear normative and procedural prescriptions of the Constitution.

[78] The Constitution also bestows upon the Supreme Court, as the apex Court, the final judicial authority in regard to the interpretation and application of its provisions. We further hold that, domestic courts and regional courts, in this case, the EACJ, do not have a vertical relationship, meaning that decisions of the Supreme Court are not subject to appeal at the EACJ. The EACJ also does not have a merit review jurisdiction over decisions of the Supreme Court. We so find.

[79] We shall make no Order as to costs.

DATED and **DELIVERED** AT **NAIROBI** this **31st** Day of **May 2024.**

.....

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

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P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE PRESIDENT OF THE** **SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
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S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

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SUPREME COURT OF KENYA