REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE,

GATEMBU, SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....APPELLANT

AND

DAVID NDII .....1ST RESPONDENT
JEROTICH SEII.....2ND RESPONDENT
JAMES GONDI.....3RD RESPONDENT
WANJIRU GIKONYO.....4TH RESPONDENT
IKAL ANGELEI.....5TH RESPONDENT
ATTORNEY GENERAL.....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....7TH RESPONDENT
SPEAKER OF THE SENATE.....8TH RESPONDENT
KITUO CHA SHERIA.....9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT
DR. DUNCAN OJWANG.....11TH RESPONDENT
OSOGO AMBANI.....12TH RESPONDENT
LINDA MUSUMBA.....13TH RESPONDENT
JACK MWIMALI.....14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT
THE STEERING COMMITTEE ON THE
IMPLEMENTATION OF THE BUILDING BRIDGES
TO A UNITED KENYA TASKFORCE.....16TH RESPONDENT
BUILDING BRIDGES NATIONAL SECRETARIAT.....17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE.....18TH RESPONDENT
THIRDWAY ALLIANCE.....19TH RESPONDENT
MIRURU WAWERU.....20TH RESPONDENT
ANGELA MWIKALI.....21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY.....22ND RESPONDENT
THE SPEAKER OF THE SENATE.....23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA.....24TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....26TH RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER.....27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU.....28TH RESPONDENT
COUNTY ASSEMBLY OF TAITA TAVETA.....29TH RESPONDENT

COUNTY ASSEMBLY OF GARISSA.....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....34TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI.....36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU.....37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI.....38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA.....41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI.....42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU.....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI.....52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET.....59TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA.....63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY.....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....67TH RESPONDENT
COUNTY ASSEMBLY OF KISII.....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY.....70TH RESPONDENT
PHYLISTER WAKESHO.....71ST RESPONDENT
254 HOPE.....72ND RESPONDENT
THE NATIONAL EXECUTIVE OF
THE REPUBLIC OF KENYA.....73RD RESPONDENT
JUSTUS JUMA.....74TH RESPONDENT
ISAAC OGOLA.....75TH RESPONDENT
MORARA OMOKE.....76TH RESPONDENT
RTD. HON. RAILA ODINGA.....77TH RESPONDENT
ISAAC ALUOCHIER.....78TH RESPONDENT

UHURU MUIGAI KENYATTA.....79TH RESPONDENT
PUBLIC SERVICE COMMISSION.....80TH RESPONDENT
THE AUDITOR GENERAL.....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI).....82ND RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with

Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021.)
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CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT).....1ST APPELLANT
HON. RAILA AMOLO ODINGA.....2ND APPELLANT

AND

DAVID NDII & 76 OTHERS .....RESPONDENTS
KENYA HUMAN RIGHTS COMMISSSION.....1ST AMICUS CURIAE
DR. DUNCAN OJWANG.....2ND AMICUS CURIAE
OSOGO AMBANI.....3RD AMICUS CURIAE
LINDA MUSUMBA.....4TH AMICUS CURIAE
JACK MWIMALI .....5TH AMICUS CURIAE

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

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CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT

AND

DAVID NDII & 73 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

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As Consolidated with

Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021.)

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CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA.....APPELLANT

AND

DAVID NDII & 82 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020

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As Consolidated with

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JUDGMENT OF D. K. MUSINGA, (P)

A. INTRODUCTION

1] That the ***Constitution of Kenya, 2010*** is a transformative one has never been in dispute at all. Its implementation has, however, not been without considerable challenges, mainly because of competing interests among three categories of Kenyans: the holders of political power; aspirants for political power; and the majority of Kenyans who are apolitical and whose foremost interest is to see that all the affairs of this country are well handled, irrespective of who wields political power.

2] The Constitution declares that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.

3] The people of Kenya have delegated their sovereign power to Parliament and legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals.

4] The Judiciary has been given constitutional mandate to arbitrate political, social and economic disputes amongst the people or among the three arms of government. It is required to do so by way of diligent and honest interpretation and application of the Constitution and the laws of the country. These appeals are basically about interpretation of three Articles of the Constitution, ***255***, ***256*** and ***257*** that form Chapter 16 of the Constitution.

5] The appeals arise from the judgment of the High Court sitting in Nairobi dated 13th May 2021 in ***Constitutional Petition No. E282 of 2020*** consolidated with seven (7) other Constitutional Petitions, ***Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020*** and ***2 of 2021***. Each of the petitioners challenged various aspects of ***the Constitution of Kenya (Amendment) Bill, 2020*** **(The Amendment Bill)** and the process that preceded the crafting of the Bill.

B. BACKGROUND

6] On 9th March 2018, ***President Uhuru Kenyatta*** and the ***Former Prime Minister, Raila Odinga***, who had come out of a bruising presidential election contest, decided to bury their political differences that were evidently causing considerable discord in Kenya and came together with the aim of uniting the country. In a symbolic ***"Handshake"*** the two leaders set in motion various events that were aimed at moving the country forward. The President and the former Prime Minister released a Joint Communiqué known as **"*Building Bridges to a new Kenyan nation*."** The communiqué contained nine (9) issues that affected our country and these are: ethnic antagonism and competition, lack of a national ethos, inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity and responsibilities and rights of citizens.

7] In order to address the identified issues, on 31st May 2018, the President vide ***Gazette Notice Number 5154 of 2018*** appointed the ***Building Bridges to Unity Advisory Taskforce*** **(the BBI Taskforce)** to document and recommend practical policy and administrative reform processes that would build the country's

lasting unity and the implementation modalities for each identified challenge areas. The terms of reference of the BBI Taskforce were to:

a) **Evaluate the national challenges outlined in the Joint Communiqué of BBI to a new Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity;**

b) **Outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and**

c) **Conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector and experts at both the county and national levels.**

8] The BBI Taskforce visited all the counties in Kenya and collected views from more than 7000 citizens from different ethnic groups, community leaders, religious institutions, to name just but a few. On 26th November 2019, the BBI released its report on what is known as ***"Building Bridges to a United Kenya; from a Nation of blood ties to a nation of ideals"*** (the BBI Taskforce Report). On the following day, the Report was unveiled to the public and the public engagement thereon kicked off.

9] The BBI Taskforce Report came up with various policy and administrative reform recommendations which included constitutional amendments, policy reforms, statutory enactments, institutional reforms, as well as behavioural and ethical changes amongst the citizens.

10] To actualize the aforesaid recommendations, the President vide ***Gazette Notice Number 264 dated 3rd January 2020 and published in a special issue of the Kenya Gazette dated 10th January 2020*** appointed a Steering Committee known as ***"The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force Report."*** The mandate of the Steering Committee was twofold;

1. **Conduct validation of the BBI Taskforce Report through consultations with citizens, civil society, Faith- Based organisations, cultural leaders, the private sectors and experts; and,**
2. **Propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the BBI Taskforce Report, taking into account any relevant contributions made during the validation period.**

11] The BBI Steering Committee held a number of stake holder consultation meetings and received memoranda from members of the public and organizations and on 21st October 2020 presented its Report, "**The Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report**." The Report recommended various constitutional, legislative, policy and administrative measures. The BBI Steering Committee also came up with a **"Draft Constitution of Kenya (Amendment) Bill, 2020**."

12] The recommendations made by the BBI Steering Committee and the Draft Constitution of Kenya (Amendment) Bill, 2020 were

viewed by various stake holders and members of the public as unconstitutional for various reasons that I will highlight hereafter. To accommodate those concerns, some amendments to the Draft Bill were made and the final Constitution of Kenya (Amendment Bill) 2020 was printed by the Government Printer on 25th November 2020.

C. PETITIONS TO CHALLENGE THE AMENDMENT BILL.

13] The aforesaid amendments did not stop various petitioners from moving the High Court in eight (8) petitions to challenge the processes by which the Amendment Bill was formulated and the contents thereof. They argued that they were unconstitutional.

14] The following petitions were instituted:

1. **Petition No. E282 of 2020, David Ndii & Others vs Attorney General & Others**.

Three main issues were raised in this Petition, namely: -

(a) Whether the legal and judicial doctrine of the "*basic structure"* of a Constitution, the doctrines of *"constitutional entrenchment clauses" "unamendable constitutional provisions"*, *"unconstitutional constitutional amendments"*, *"the theory of un-amendability of the Constitution"*, *"essential features in a Constitution"*, and the *"implied limitations of the amendment power in a Constitution*" are applicable in the Republic of Kenya.

(b) Whether Chapter One on Sovereignty of the People and the Supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary

and the provisions therein form part of the *"basic structure", "entrenchment clauses"* and *"eternity"* provisions of the Constitution and therefore cannot be amended either under Article 256 by Parliament or through popular initiative under Article 257 of the Constitution; and

(c) Whether, taking guidance from the doctrine of the *"basic structure"* of the Constitution, *"the constituent power"* and the doctrines of *"unconstitutional constitutional amendments"*, the *"limits of the amendment power in the Constitution*" and the theory of unamendability of "*eternity clauses*", there is an implied or implicit limitation to powers of constitutional amendments under Articles 256 and 257 of the Constitution.

15] **Dr. Duncan Oburu Ojwang, Dr. John Osogo Ambani, Dr. Linda Andisi Musumba** and **Dr. Jack Busalile Mwimali**, Law Professors, were admitted as *amici curiae* and they advanced similar arguments as the petitioners in **Petition No. E282 of 2020** regarding the basic structure doctrine, the limits of the constituents' power and the role of the court in interpretation of the Constitution, among others.

2. Petition No. E397 of 2020, Kenya National Union of Nurses vs Steering Committee of BBI & Others.

16] The petitioner urged the Court to determine whether the Taskforce on Building Bridges to Unity Advisory Committee was duty bound to include an independent and constitutional Health Service Commission in its October 2020 Report. The petitioner sought;

a) A declaration that the omission of the Petitioner's proposal for an independent and constitutional Health Service Commission in the October, 2020 Report of the Taskforce on Building Bridges to Unity Advisory offends ***Articles 10, 27, 41, 43*** and ***47*** of the ***Constitution of Kenya*** and the Taskforce on Building Bridges to Unity Advisory be compelled to publish a fresh Amendment Bill to include the same;

b) A declaration that the IEBC be prohibited from conducting the preparatory process towards the approval of the Amendment Bill and submission of the same to a referendum.

c) An order that Parliament be restrained from receiving and passing the Amendment Bill.

3. Petition No. E400 of 2020, **Thirdway Alliance Kenya vs Steering Committee of BBI & Others**.

17] The substantive issue raised by the petitioner was whether a popular initiative for the amendment of the Constitution of Kenya can be commenced by State actors, in particular, the President of the Republic of Kenya. The petitioner further argued that a popular initiative in the amendment of the Constitution cannot be commenced and undertaken without a legal framework for the same.

18] The petitioner sought the following reliefs: -

a) A declaration that the Constitution of Kenya (Amendment Bill, 2020) was not a popular initiative towards the amendment of the Constitution of Kenya,

b) A declaration that there is no legal framework to undertake an amendment by way of a popular initiative to wit; collection of signatures and their verification and conduct of a referendum, and

c) A declaration that County Assemblies have the power to amend the Amendment Bill.

4. Petition. E401 of 2020, 254 Hope vs The National Executive of the Republic of Kenya.

19] The petitioner herein urged the Court to determine whether the national executive or any State organ or entities can commence a popular initiative for the amendment of the Constitution of Kenya and utilize public funds in the initiation and pursuit of the process. It sought the invalidation of the entire process resulting in the publication, approval and passing of the Amendment Bill.

5. Petition No. E402 of 2020, Justus Juma & Isaac Ogola vs Attorney General & others.

20] The petitioners raised the question whether the creation of 70 constituencies by the promoters in the Amendment Bill was unconstitutional since the function of delimitation of the constituencies is vested in the IEBC. They urged the Court to declare as unconstitutional and annul the creation of the seventy (70) constituencies in the Amendment Bill.

6. Petition No. E416 of 2020, Morara Omoke vs Raila Odinga & others.

21] The petitioner raised the following issues: -

a) Whether the Constitution of Kenya (Amendment) Bill, 2020, can be submitted to County Assemblies for

consideration, tabled in Parliament for passing or rejection and transmitted to a referendum in the absence of a legal framework for facilitating the same;

b) Whether the Amendment Bill can be transmitted to a referendum before a nationwide voter registration exercise.

c) Whether the use of public funds by the President and Hon. Raila Odinga in the initiation and facilitation of the process culminating in the tabling of the Amendment Bill in Parliament is unconstitutional; and

d) Whether Parliament has power to act upon the Amendment Bill following the declaration of its unconstitutionality for want of enactment of the two-thirds gender laws and the advisory opinion by the Chief Justice to the President for its dissolution.

The petitioner prayed that the Court declares as unconstitutional and invalidates the entire process culminating in the publication of the Amendment Bill.

7. Petition No. E426 of 2020, Isaac Aluochier vs Uhuru Muigai Kenyatta & Others.

22] The substantive question raised by the petitioner was whether the President has power to initiate an amendment to the Constitution of Kenya in the manner relating to the Amendment Bill and to use public funds in such a process. He contended that the Steering Committee had converted an illegal Presidential constitutional change initiative into a popular initiative. He sought a declaration on unconstitutionality and the invalidation of the entire process. Worthy of notice is that this petitioner

sought certain declarations against the President in his personal capacity.

8. Petition No. E2 of 2021, Muslims for Human Rights (MUHURI) vs Independent Electoral Boundaries Commission (IEBC) & others.

23] The main contention by the petitioner was that the IEBC cannot undertake verification of signatures and registered voters without an enabling legal framework in place, and sought a declaration to that effect.

D. RESPONSES TO THE PETITIONS.

24] The Attorney General filed grounds of opposition raising a total of twelve (12) grounds which I shall summarise as follows: He stated that a declaration that the provisions founded under ***Article 255 (1)*** of the ***Constitution*** forms the basic structure, entrenchment clauses and eternity provisions of the Kenya Constitution and cannot be amended under ***Article 256*** of the ***Constitution*** or through a popular initiative under ***Article 257*** of the ***Constitution*** would be against the express provisions of the Constitution, including ***Article 255 (1)*** which will have been rendered otiose. He added that the petition did not meet the established legal threshold of justiciability for want of ripeness; that the interpretation propounded by the petitioner runs contrary to the constitutionally prescribed purpose mode of interpretation by negating express purposes of ***Article 255***, ***256*** and ***257*** of the ***Constitution***; and that any comparative analysis of foreign jurisprudence could not be used to either contradict or supplement the text of the Constitution of Kenya; that the petitioners were invoking an advisory opinion jurisdiction which the High Court cannot give.

25] The Speaker of the National Assembly who was the second respondent raised nine (9) grounds of opposition. He concurred with the arguments advanced by the Attorney General with regard to justiciability and ripeness. In addition, the Speaker of the National Assembly contended that the petitioners were pre-empting how the National Assembly would exercise its mandate with respect to the Amendment Bill; and that the issues advanced could have been tabled before Parliament during public participation exercise as envisaged under the Constitution of Kenya, 2010 and the Standing Orders of the House.

26] The second respondent further argued that the High Court lacked jurisdiction to intervene in active parliamentary processes and therefore, any challenges to the Amendment Bill had to await the completion of the legislative processes before the jurisdiction of the courts can be invoked to challenge the Bill.

27] The Speaker of the Senate who was the third respondent also filed grounds of opposition raising eight (8) grounds. He reiterated the grounds argued by the Attorney General and the Speaker of the National Assembly. He stated that the people of Kenya have the sovereign right to amend the Constitution in the manner prescribed under ***Articles 256*** and ***257*** of the ***Constitution***.

28] On their part, the ***BBI Secretariat*** and ***Hon. Raila Odinga*** filed consolidated grounds of opposition raising ten (10) grounds, most of which were a replica of the grounds raised by the 1st, 2nd and 3rd respondents. They also filed an affidavit that was sworn by ***Mr. Dennis Waweru***, who stated that he was one of the co-chair persons of the BBI Secretariat and its co-chairman was ***Hon. Junet Mohammed***; that the Building Bridges Initiative

(**BBI**) was created and mandated with the task of initiating a constitutional amendment process and unifying Kenya, among other functions.

29] Mr. Waweru deposed that ***Article 1*** of the ***Constitution of Kenya, 2010*** vests sovereign power to the people of Kenya and such power is to be exercised only in accordance with the Constitution of Kenya, 2010; that the Constitution is not a rigid document and pursuant to ***Articles 255, 256*** and ***257*** it can be amended as provided for in the said provisions; that if the framers of the Constitution did not intend that the Constitution be amended nothing would have barred them from having such an express provision included therein.

30] Regarding the doctrines and theories of basic structure, constitutional entrenchment clauses, and unamendable constitutional provisions as proposed by the petitioners, Mr. Waweru stated that they were mere theories and hypotheses only applicable in different jurisdictions and relevant depending on the special circumstances of each jurisdiction.

31] The IEBC contended that in the exercise of its powers under Article 257 it enjoys constitutional and administrative decisional and financial independence; that it carried out its constitutional mandate of verifying that the constitutional amendment initiative was supported by at least one million registered voters; that it was erroneous for the petitioners to argue that there was no legal framework for verification of registered voters as the provisions of Article 257 make it possible for the actors to know their obligations and therefore there was no basis of making any finding against it.

32] In respect of the petition by ***Mr. Isaac Aluochier*** challenging capacity of the President to initiate a popular initiative for amendment of the Constitution, the President did not respond to the petition at all. However, the Attorney General filed grounds of objection, stating, *inter alia*, that the President, Uhuru Muigai Kenyatta, cannot be sued in his personal capacity for any acts done during the pendency of his presidency; that the issue of constitutionality of the President's functions is *res judicata;* and that monies expended on the President's constitutional functions could only be audited by the Auditor General, the court could not be involved in such an issue.

E. FINDINGS BY THE HIGH COURT.

33] Having perused lengthy affidavits, written submissions, copious authorities as well as oral submissions by counsel, the High Court made the following declarations: -

> ***"i. A declaration hereby issues:***
>
> ***a) That the Basic Structure Doctrine is applicable in Kenya.***
>
> ***b) That the Basic Structure Doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution. In particular, the Basic Structure Doctrine limits the power to amend the Basic Structure of the Constitution and eternity clauses.***
>
> ***c) That the Basic Structure of the Constitution and eternity clauses can only be amended through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum.***
>
> ***ii. A declaration is hereby made that civil Court proceedings can be instituted against the President or a person performing the functions***

of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution.

iii. A declaration is hereby made that the President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under article 256 or through a Popular Initiative under Article 257 of the Constitution.

iv. A declaration is hereby made that the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by the President vide Kenya Gazette Notice No. 264 of 3 January, 2020 and published in a special issue of the Kenya Gazette of 10 January, 2020 is an unconstitutional and unlawful entity.

v. A Declaration is hereby made that being an unconstitutional and unlawful entity, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, has no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution.

vi. A declaration is hereby made that the entire BBI Process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and in usurpation of the People's exercise of Sovereign Power.

vii. A declaration is hereby made that Mr. Uhuru Muigai Kenyatta has contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

viii. A declaration is hereby made that the entire unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report is unconstitutional, null and void.

ix. A declaration is hereby made that the Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission carries out nationwide voter registration exercise.

x. A declaration is hereby made that the Independent Electoral and Boundaries Commission does not have quorum stipulated by section 8 of the IEBC Act as read with paragraph 5 of the Second Schedule to the Act for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat.

xi. A declaration is hereby made that at the time of the launch of the Constitutional of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of referenda.

xii. A declaration is hereby made that the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed.

xiii. A declaration is hereby made that County Assemblies and Parliament cannot, as part of their constitutional mandate to consider a Constitution of Kenya Amendment Bill initiated through a Popular Initiative under Article 257 of the Constitution, change the contents of such a Bill.

xiv. A declaration be and is hereby made that the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to predetermine the allocation of seventy constituencies is unconstitutional.

xv. A declaration be and is hereby made that the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation is unconstitutional.

xvi. A declaration be and is hereby made that the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to have determined by delimitation the number of constituencies and apportionment within the counties is unconstitutional for want of Public Participation.

xvii. A declaration is hereby made that Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of Article 94 of the Constitution and Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

xviii. A declaration is hereby made that Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People.

xix. A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020.

xx. The prayer for an order that Mr. Uhuru Muigai Kenyatta makes good public funds used in the unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by Mr. Uhuru Muigai Kenyatta is declined for reasons that have been given.

xxi. The prayer for the orders that the Honourable Attorney General to ensure that other public

officers who have directed or authorised the use of public funds in the unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report make good the said funds is declined from the reasons that have been given.

xxii. The rest of the reliefs in the Consolidated Petitions not specifically granted are deemed to have been declined. "

xxiii. This being a public interest matter, parties shall bear their own costs.

F. APPEALS TO THIS COURT.

34] Aggrieved by these findings, the following appellants preferred these consolidated appeals:

1. **Civil Appeal No. E291 of 2021- IEBC vs David Ndii & 82 others.**
2. **Civil Appeal No. E292 of 2021 - Building Bridges to a United Kenya, National Secretariat & Another vs David Ndii & 76 others.**
3. **Civil Appeal No. E293 of 2021-The Hon. Attorney General vs David Ndii & 73 Others.**
4. **Civil Appeal No. E294 of 2021 - Uhuru Muigai Kenyatta vs David Ndii & 82 Others.**

G. THE APPELLANTS' ARGUMENTS.

1. Civil Appeal No. E291 of 2021- Independent Electoral Boundaries Commission v David Ndii & 82 Others.

35] The IEBC in its memorandum of appeal raised twelve (12) grounds of appeal which may be summarized as hereunder: that the learned judges of the High Court erred in law in finding

that: the appellant lacks the requisite quorum for purposes of carrying out its constitutional and statutory mandate in relation to the intended appeal; in the interpretation of the role of the appellant to verify that the initiative is supported by at least one million registered voters under Article 257(4) of the Constitution and instead misconstrued the provision to mean verification of signatures; in finding that the provisions of Articles 257(4) required a special framework for verification of signatures; in finding that the administrative measures put in place by the appellant to verify that the constitutional review initiative is supported by at least one million registered voters are invalid.

36] The IEBC also faulted the learned judges for: finding that the appellant ought to have carried out a national wide voter registration exercise for the purpose of the intended referendum; for misconstruing the process of certification of the register of voters under ***sections 6*** and ***6(a)*** of the ***Elections Act*** with the requirements for continuous voter registration under ***section 5*** of the ***Elections Act***; for finding that the appellant had an obligation to ensure that the promoters of the Bill had complied with the requirements, public participation before transmitting the Amendment Bill to the County Assemblies.

37] The IEBC further faulted the learned judges of the High Court for misapprehending the place of public participation in relation to Constitution review processes by way of popular initiative, for failing to take note of its jurisdictional scope; for delivering a judgment that is internally incoherent, contradictory and inconsistence; for granting orders which threatened the usurpation of the functional independence of the appellant and for failing to appreciate that the evidential threshold for granting

the declaratory reliefs had not been satisfied by the petitioners and consequently arriving at the wrong conclusions.

3. Civil Appeal No. E292 of 2021 - Building Bridges to a United Kenya, National Secretariat & Another v David Ndii & 76 others.

38] The two joint appellants through ***Paul Mwangi & Company Advocates*** raised a total of nineteen (19) grounds of appeal. In summary they faulted the learned judges for misapprehending the factual matrix relevant to the constitutional amendment initiative; for finding that the basic structure, eternity clauses and un-amendability doctrines are applicable under the Constitution of Kenya 2010; for introducing an extraneous, mandatory and exclusive *"four sequence process"* unknown under the Constitution of Kenya, 2010; for imposing on the promoters of the Amendment Bill obligation to conduct nationwide public participation exercise prior to collection of signatures in support of the constitutional amendment initiative; for elevating the provisions of the Independent Electoral Boundaries Commission Act above Article 250 as read with Article 2(4) of the Constitution; and for misapprehending Article 257(4) and thereby unconstitutionally and unlawfully imposing a non-existent duty and or criterion for the verification of signatures.

39] The joint appellants further argued that the learned judges misdirected themselves in reading into Article 257(10) of the Constitution extraneous and constitutional requirements that separate and distinct the referendum questions be put to the people in a referendum rather than a bill; that the learned judges erred in law: by requiring the enactment of legal and

regulatory framework to govern the collection and verification of signatures and the conduct of a referendum; by pre-empting and usurping the people's sovereign power, exercisable at a referendum to determine the merit process and propriety of establishing the number, the delimitation and distribution of constituencies; in misconstruing the role of the President in a constitutional amendment by popular initiative; in finding that the Amendment Bill was promoted by the President; in misconstruing and misinterpreting the legality of the Steering Committee on the BBI Taskforce Report; by relying on academic non-existent and hypothetical legal theories contrary to the principles of justiciability and ripeness and for arriving at conclusions that were so unreasonable and far removed from the intentions of the people in promulgating the Constitution of Kenya, 2010.

4. Civil Appeal No. E293 of 2021-The Hon. Attorney General vs David Ndii & 73 Others.

40] In his memorandum of appeal, the Attorney General raised thirty-one (31) grounds which are abridged as hereunder: That the learned judges of the High Court erred in law: by finding that the basic structure doctrine applies to Kenya; in holding that the basic structure of the Constitution can only be amended through the exercise of the sovereign power of the people in the exercise of their primary constituent power and not as contemplated under Articles 255, 256 and 257 of the Constitution; by finding that certain provisions of the Constitution are insulated from amendments and thereby classifying them as eternity clauses; by admitting and vividly relying on submissions of purported amicus curiae that were partisan; by holding that the

Amendment Bill was not in tandem with an amendment of the Constitution by popular initiative as provided under Article 257 of the Constitution; in misinterpreting the role of the President and the Executive in the process leading to the Amendment Bill; in holding that the power to amend the Constitution through the popular initiative route is reserved for private citizens; by misinterpreting Article 257 with respect to the persons or entities that can promote amendments to the Constitution and holding that the BBI National Secretariat could not promote a constitutional amendment; by holding that the BBI process was not in compliance with Articles 10 and 33 of the Constitution, and in failing to appreciate that the Amendment Bill was subjected to all processes and motions contemplated under Article 257 of the Constitution.

41] The Attorney General further faulted the learned judges for finding that the President of Kenya can be sued in his personal capacity; for issuing orders against the President, Uhuru Muigai Kenyatta, without according him the opportunity to be heard contrary to the provisions of Article 50(1) of the Constitution; and for holding that the President had contravened Chapter 6 of the Constitution.

42] The Attorney General further faulted the trial judges for undermining the principle of harmony and consistency in the interpretation of the Constitution by contradicting the findings of a court of concurrent jurisdiction; by holding that the schedule to the Amendment Bill was unconstitutional within the meaning of Article 89 of the Constitution; in finding that the IEBC lacked the requisite quorum to make decisions connected with the Amendment Bill; by finding that there was inadequate legal

infrastructure to support signature verification under Article 257(4) of the Constitution; in finding that the administrative procedures developed by the IEBC were formulated without public participation; in finding that holding a referendum without first conducting voter registration would violate the political rights of citizens; and in finding that Article 257(10) requires all the specific proposed amendments to the Constitution to be submitted as separate and distinct referendum questions to the people.

5. Civil Appeal No. E294 of 2021 - Uhuru Muigai Kenyatta vs David Ndii & 82 Others.

43] The appellant through Messrs. ***Waweru Gatonye & Company Advocates*** raised seventeen (17) grounds of appeal which I will summarise as hereunder: That the learned judges erred in law and violated or acted contrary to the rules of natural justice by making a decision adversely affecting the appellant and without hearing him contrary to the provisions of Articles 27, 50 and 159 of the Constitution; by failing to find that the respondents, as petitioners in Petition No. E426 of 2020, having joined the appellant as a party to the petition, elected not to serve the said petition on the appellant and further elected to abandon the suit or all further proceedings against the appellant in the petition; in finding that there was a preliminary issue to be determined as to whether the appellant could be sued in his personal capacity and not as the President of the Republic of Kenya inspite of the fact that the appellant was not a party to the proceedings before the court at the election of the petitioners; in finding that the appellant neither entered appearance in the proceedings nor filed any grounds of objection or a replying affidavit; in

proceeding to hear and determine issues that had already been heard and determined by a competent court of concurrent jurisdiction in the matter of ***Thirdway Alliance Kenya & Another vs of the Head of the Public Service – Joseph Kinyua & 2 Others; Martin Kimani & 15 others (Interested Parties) 2020 eKLR***.

44] The appellant further stated that the learned judges erred in law; in making a declaration that the appellant had contravened Chapter 6 of the Constitution by initiating and promoting constitutional amendment process under Article 257; by failing to appreciate the scope and extent of the constitutional doctrine of presidential immunity granted by Article 143 in light of the constitutional mandate and the obligations imposed on the Office of the President by Articles 131 and 132 of the Constitution; in finding that the appellant acting as the President of the Republic of Kenya can be sued in a civil court in his personal capacity during his tenure of office; and by failing to adopt a holistic and contextual interpretation of the constitutional provisions regarding the powers and exercise of presidential authority to meet constitutional aspirations and values.

Cross Appeals

45] The 15th respondent; The Kenya National Union of Nurses (KNUN), the 72nd respondent; 254 Hope, and the 76th respondent; Mr. Morara Omoke, filed cross-appeals.

46] The 15th respondent's cross appeal was filed through the firm of Mayende and Busiega Advocates. The cross appeal was premised

on six (6) grounds being that the learned judges of the High Court erred in law and fact:

"a) By ignoring, misapprehending, and misconstruing the doctrine of stare decisis and stability of common law;

b) In failing to appreciate the petitioners claim before the trial Court on abuse of power, lack of public participation and breach of legitimate expectation by the BBI Taskforce as against the 15th respondent;

c) In finding that the 15th respondent's petition for an independent Health Service Commission was unmerited and could not be admitted for inclusion as a constitutional amendment;

d) In failing to take judicial notice of the state of health care in the Republic of Kenya;

e) In failing to consider and understand the claim before them and the written and oral arguments in support;

f) In dismissing the claim before them after holding a contrary view that the respondents in the petition had produced no evidence that there were contrary views to its proposals on constitutional amendments that were adopted in the first BBI Report and which recommendations were illegally left out of the Constitution Amendment Bill."

47] The 72nd respondent, 254 Hope, raised four (4) grounds in its cross appeal, contending that part of the impugned judgment ought to be varied to the extent and in the manner on the grounds that the learned Judges erred in law and facts:

"a) In failing to find that where the National Executive or any of its taskforces makes proposals, including legislative proposals and proposals to amend the Constitution, such proposals are subject to Article 47 of the Constitution.

b) In failing to find that the proposals to amend the Constitution for the failure to meet the

threshold of rationality, justifiable reasons for the amendments connected to the stated purpose of the amendments and reasonableness.

c) In ignoring that when the National Executive or any government agency proposes to amend the Constitution it is subject to a culture of justification through cogent and constitutionally sanctioned reasons in accordance with the Fair Administrative Actions Act, 2015.

d) In failing to find that there was a violation or at least a threatened violation of the prudent use of public resources including human resources and funds when the National Executive initiated the amendments of the Constitution."

48] The 76th respondent challenged parts of the decision of the High Court by raising 7 (seven) grounds of appeal. The grounds were that the learned judges erred in law:

"a. By declining the prayer for an order that President Uhuru Muigai Kenyatta makes good public funds used in the unconstitutional constitutional change process promoted by him through the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report despite making the findings that he had no constitutional mandate to initiate constitutional amendment through popular initiative and that he violated the provisions of Chapter 6 of the Constitution;

b) By declining to order the Auditor General to establish the amount of public funds utilized in the promotion of the Constitution of Kenya (Amendment) Bill, 2020;

c) By declining to order President Uhuru Kenyatta, Hon. Raila Odinga and the BBI Steering Committee to publish or cause to be published details of the budget and public funds allocated and utilized in promoting the impugned Bill;

d) By omitting to make a finding that the illegal authorization or use of public funds to initiate and promote the impugned Bill by the President

in the midst of the Covid-19 pandemic contravened Articles 10 and 201 of the Constitution;

e) By omitting to take judicial notice of the huge amount of public funds, including a Kshs. 4 Billion car grant to MCAs who had assisted the President in promoting the Constitution amendment through the Building Bridges Initiative; and that the surge in the incidence of Covid-19 associated with political rallies led by President Uhuru Muigai Kenyatta and Hon. Raila Odinga to popularize the impugned Bill has had an adverse effect on the people's right to the highest attainable standard of health; and that in view of the said issues, the prioritization of constitutional amendments through the Impugned Bill was a violation of the state's obligations under Article 43 of the Constitution.

f) By omitting to declare sections 32, 33, 37 (b), 39, 41 and 44 of the Impugned Bill unconstitutional.

g) By declining to find and hold that Parliament had no legal or constitutional capacity to debate and/or approve the impugned Bill in view of the advice of the Chief Justice (Rtd.) David Maraga to President Uhuru Muigai Kenyatta to dissolve Parliament.

g) By relying on ongoing frivolous litigation as a basis for declining to order President Uhuru Muigai Kenyatta to dissolve Parliament in accordance with the advice of Chief Justice (Rtd.) David Maraga."

(H) THEMATIC ISSUES ARISING FROM THE CONSOLIDATED APPEALS AND THE CROSS-APPEALS.

49] From the grounds of appeal filed by the four (4) appellants it is evident that some of the issues raised are cross cutting. The three (3) cross-appellants have also raised non-identical issues for determination. I propose therefore to set out the thematic issues raised in all the appeals and the cross-appeals, summarise them

and the corresponding responses, after which I will analyse them in the same chronology and make a determination on each.

50] The thematic issues are as follows: -

1) **Whether the basic structure doctrine, eternal clauses and unamendability doctrines applies in Kenya.**

2) **Who were the initiators and promoters of the BBI Initiative?**

3) **The legality of the BBI Steering Committee and the BBI Taskforce Report in the Constitution amendment process.**

4) **Whether the proposed amendments as contained in the Constitution Amendment Bill, 2020 were by popular initiative and whether there was public participation.**

5) **Whether the President of Kenya can initiate the process of amendment of the Constitution as a popular initiative.**

6) **Whether the IEBC had requisite quorum to carry out its business in relation to the Amendment Bill.**

7) **Role of the IEBC in Constitution amendment by popular initiative.**

8) **Whether the IEBC was under an obligation to conduct a nationwide voter registration exercise and verification of signatures.**

9) **Whether the proposals contained in the Constitution Amendment Bill are to be submitted as separate and distinct referendum questions.**

10) **Whether the High Court had jurisdiction to entertain the petitions on account of the principles of justiciability, mootness and ripeness.**

11) **Whether it was constitutional for the promoters of the Amendment Bill to create 70 Constituencies and allocate them.**

12) **Whether there was necessity for legislation or legal framework on conduct of referenda.**

13) **Whether civil proceedings can be instituted against a sitting President.**

14) **Whether Mr. Muigai Kenyatta was served with Petition No. E426 of 2020 and the effect of orders made by the High Court against his person.**

15) **Whether the proceedings against Mr. Uhuru Muigai Kenyatta were *res judicata*.**

16) **Whether President Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution.**

17) **Whether promotion of the Amendment Bill violated Article 43(1)(a) in view of the covid-19 pandemic.**

18) **Whether both or either of the Houses of Parliament were infirmed from considering the Amendment Bill in view of the Chief Justice's advisory for dissolution of Parliament.**

19) **Whether the High Court erred in finding that the BBI Taskforce did not create a legitimate expectation that the submissions by KNUN would be incorporated in the Amendment Bill.**

20) Whether the Petitioners had made out a case for disclosure and publication of the BBI Steering Committee's financial information.

21) Whether the High Court erred in law in admitting *amici curiae* who were partisan.

(I) SUBMISSIONS ON THE THEMATIC AREAS.

(1) Whether the basic structure doctrine, eternal clauses and unamendability doctrines applies in Kenya.

51] ***Mr. Orengo***, Senior Counsel, ***Mr. Otiende Amollo***, Senior Counsel, and ***Mr. Mwangi*** appeared for the BBI Secretariat and Hon. Raila Odinga. In addressing the basic structure doctrine, Mr. Orengo began by posing the question: "***Does the Constitution of Kenya create a situation where the people's sovereignty exists outside the Constitution?"*** Senior Counsel submitted that the way the High Court dealt with the question of basic structure was as if the people, being sovereign, can exist outside the Constitution and therefore operate outside it. In his view, the people can only exist and exercise their sovereign power within the confines of the Constitution. He cited the provisions of ***Article 1(1)*** of the Constitution which provides that: "***All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***." Senior Counsel also cited ***Article 2(1)*** of the Constitution which provides that: "***This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of the government***." The people can therefore exercise their sovereign power to amend any part of the Constitution, he stated.

52] Counsel added that every society has a basic structure, the relevant question is therefore one of amendability of the provisions

of the Constitution that are deemed to constitute its basic structure. He further submitted that Chapter 16 of the Constitution exhaustively deals with amendment of the Constitution and the procedure is very rigid.

53] The appellants submitted that the basic structure doctrine is associated with Indian constitutionalism derived from the writings of German scholar and jurist, **Prof. Dietrich Conrad's** theory of implied limitations on amending power, in "***Limitation of Amendment Procedures and the Constituent Power; Indian Year Book of International Affairs," (****1966-1967, Madras, pp. 375-430)* where the learned author observes, *inter alia*, that: "***any amending body organized within the statutory scheme, howsoever verbally and limited his power, cannot by its very structure change the fundamental pillars supporting its constitutional authority***."

54] The appellants also cited, *inter alia*, the Supreme Court of India decision in ***Kesavananda Bharati v State of Kerala*** *AIR* ***[1973] SC 1461*** where, by a majority of one (7-6) the Court held that **Article 368** of the Indian Constitution "***does not enable Parliament to alter the basic structure or framework of the Constitution***." However, the Kesavananda case did not delimit what is considered as unamendable provisions of the Indian Constitution, counsel submitted. Unlike Kenya, under the Indian Constitution, Parliament has the exclusive and final power to amend the Indian Constitution; there is no requirement for approval of an amendment of the Indian Constitution in a referendum; the popular initiative approach is neither provided for nor contemplated under the Indian Constitution; the court's jurisdiction to question parliamentary power to amend the Indian

Constitution on any ground is expressly ousted, the appellant submitted.

55] The appellants further submitted that the basic structure doctrine has been roundly rejected in many jurisdictions and cited, *inter alia*, Sri Lanka in the case of ***Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bills***, ***[1987]***, Malaysia in the case of ***Loh Kooi Choon vs Government of Malaysia [1977] 2MLJ 187*** and ***Phang Ching Hock vs PP [1980] 1 MLJ 70,*** in Singapore in the case of ***Teo Soh Lung vs Minister of Home Affairs [1989] 1SLR (R) 461,*** in Uganda, the Supreme Court decision in the case of ***Paul K. Ssemogerere and Others vs Attorney General: Supreme Court Constitutional Appeal No. 1 of 2002***, in Zambia, in the case of ***Law Association of Zambia and Another vs Attorney General of the Republic of Zambia 2019/CCZ/0013*** and in Tanzania, the Court of Appeal case of ***Hon. Attorney General of Tanzania vs Reverend Christopher Mitikila***, ***Civil Appeal No. 45 of 2009***.

56] The appellants submitted that an eternity clause is an actual constitutional provision expressly made in the text of a country's Constitution declaring some provisions unalterable and irrevocable. They cited the Constitution of the Switz Republic of Helvetica of 1798 which stated in the last sentence of Article 2: "***The form of government, even though it may change must always remain a representative democracy***." The appellants also cited several countries that have entrenched eternity clauses aimed at protecting specific constitutional provisions. They include Germany in Article 79(3); France in Article 89, Portugal in Article 288, Brazil in Article 60(464), Turkey in Articles 2, 3 and 4, Angola in Articles 236 and 237, Togo in Article 144, Algeria in Article 178 and Namibia in Article 131.

57] In contrast, the Constitution of Kenya does not contain any eternity clause; every clause of the Constitution of Kenya is amendable save those matters relating to ***Article 255(1)*** that can only be amended with the sanction of the people by way of a referendum, counsel submitted.

58] A further submission by the appellants was that eternity clauses and unamendability doctrines can sometimes bear unintended consequences on the stability of a country, hence the need to be circumspect and cautious in their adoption; that stability denotes that a Constitution should neither be too difficult nor too easy to amend; if it is too difficult, political actors often resort to extra constitutional means for its amendment including revolutions, coups and sudden changes.

59] ***Mr. Oraro***, Senior Counsel, led ***Mr. Ogeto,*** the Solicitor General, ***Mr. Kamau Karori*** and ***Mr. Nyamodi*** in arguing the appeal on behalf of the Attorney General.

60] The Attorney General submitted that the learned judges did not define the basic structure doctrine, instead they stated at paragraph 474(b) of the judgment what they considered to be the effect of applying of the doctrine in Kenya without explaining the context and legal basis of such an application. The Attorney General stated that according to **Yaniv Roznai** in his book book- "***Unconstitutional Constitutional Amendments – The Limits of Amendment Powers***", the basic structure doctrine is a judicial principle according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basis structure or identity.

61] This doctrine, it was submitted, has either been applied with circumspection or rejected altogether. Counsel submitted that courts have rejected it primarily on the grounds that had the framers of the Constitution intended to put limitations on the people's power of amendment they would have expressly stated so in the content of the Constitution. It was submitted that Chapter 16 of the Constitution expressly provides that our Constitution may be amended either through parliamentary initiative or popular initiative and therefore there is no limitation to the people's power to amend the Constitution. Mr. Ogeto submitted that the Constitution of Kenya, 2010 is self-contained and there is no room for drawing external inferences on rules of amending the same. He added that there is no mention in the Constitution of an unamendable clause or eternity clause.

62] Mr. Oraro submitted that a comprehensive analysis of the history of the Constitution of Kenya, 2010 reveals that its framers intended to balance between hyper amendability and rigidity in amending the Constitution with a view to attain and maintain constitutional stability. In that regard, he cited the **Final Report of the Constitution of the Kenya Review Commission,** at page 74, which reads as follows:

> ***"There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes."***

63] Counsel further submitted that Article 251(1) contains entrenched provisions which are what Kenyans considered as the essence of the constitutional order that they bequeathed to

themselves in 2010, and hence the requirement that those provisions cannot be amended or changed without a referendum. To the extent that the basic structure doctrine limits the amendment power, it is inconsistent with Chapter 16 of the Constitution, the Attorney General submitted.

64] From the foregoing, the Attorney General asserted asserted, the basic structure doctrine, eternity clauses and the doctrine of unamendability are incompatible with the Constitution of Kenya, 2010. Whereas it is generally accepted that a constitution cannot be interpreted the same as an ordinary statute, the High Court judges were faulted for their improper interpretation of the Constitution in the circumstances of the petitions that were before them. It was submitted that the learned judges improperly construed the historical context in the making of the 2010 Constitution and downplayed the role of political settlement and compromises made by various political players in the country towards promulgation of the new Constitution.

65] The 7th respondent, the Speaker of the National Assembly through ***Mr. Kuyioni***, the Speaker of the Senate, the 8th respondent through ***Mr. Wambulwa***; the 39th, 40th, 43rd 45th, 46th, 47th, 48th, 50th and 58th respondents (County Assemblies of Machakos, Makueni, Kirinyaga, Kiambu, Kericho, Samburu and West Pokot respectively supported the appellant's submissions. The County Assembly of Kirinyaga and the County Assembly of Kiambu and, the 43rd and 45th respondents were represented by ***Ms Njoki Mboce*** and ***Mr. Ndegwa Njiru*** respectively. ***Phylister Wakesho***, the 71st respondent, through Mr. George Gilbert also supported the appeals.

66] Both Ms Mboce and Mr. Njiru submitted that the basic structure doctrine, eternity clauses and doctrine of unamendability of the Constitution have no place in our constitutional set up. They added that the people of Kenya in exercise of their sovereign power can amend any part of the Constitution, provided that the procedure as prescribed in the Constitution is followed.

67] The Kenya National Union of Nurses associated themselves fully with the position taken by the Attorney General as regards basic structure doctrine. They argued that the basic structure doctrine is a foreign one and should not be applied in Kenya. Reliance was placed on the case of ***Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*** ***[2014] eKLR*** where the Court was said to have held that it was improper to unquestioningly apply foreign jurisprudence in Kenya.

68] ***Prof. Migai Aketch*** and ***Prof. Charles Manga Fombad*** were admitted by this Court as *amici curiae.* Prof Aketch filed an amicus brief on the historic context of the 2010 Constitution and Prof. Fombad filed amicus brief on the basic structure doctrine.

69] Prof. Migai Aketch submitted that the learned judges failed to appreciate that the 2010 Constitution was the product of a political settlement and painted a picture of the 2010 Constitution as being a product of ordinary citizens overthrowing the existing social order; further, the learned judges failed to appreciate the role played by the political elite, given that Constitution making is a deeply political process. He stated that the Draft Constitution that was subjected to a referendum in 2010 was not a product of the People's Constituent Assembly but one made through compromise of various interest groups.

70] Prof. Aketch concluded that constitution-making and amendment processes need to encourage compromises among the political elites and establish mechanisms that enable the public to influence the context and adoption of such compromises. He also observed that there are no pre-determined mechanisms for the people to exercise their constituent power, it is up to them to determine how they wish to do so; courts should not impose additional hurdles on the exercise of the power of amendment.

71] Prof. Fombad submitted a brief titled: "**The Basic Structure Doctrine: A Judicial Panacea or a Judicial Conundrum in checking arbitrary amendment of African Constitutions**?" His main contention in the brief is that ***"the importation of the Indian Basic Structure Doctrine to Africa is likely to create more problems that it would solve.***" In support of that contention, he provides an overview of African approaches to the doctrine and then discusses what he considers to be the main challenges to the applicability of the doctrine in Africa.

72] Among the conclusions Prof. Fombad makes are that there are substantial textual and contextual differences between modern African Constitutions and the Indian Constitution at the time that its Supreme Court developed the doctrine; that no constitution can ever be perfect and therefore courts must exercise maximum restraint and resist the temptation to impute an intention on the part of the framers to make certain parts of the Constitution unamendable; that courts should focus on strategies to enhance the constitutional amendment procedures provided for in the Constitution; and that the adoption of the basic structure doctrine could in some situations create a

gridlock that may provoke unnecessary conflict and temptation to alter the Constitution through extra ordinary means.

(J) RESPONDENTS' REPLY ON THE APPLICABILITY OF THE BASIC STRUCTURE DOCTRINE, ETERNITY CLAUSES AND UN-AMENDABILITY DOCTRINE IN KENYA.

73] ***Mr. Havi*** and ***Ms Ang'awa*** appeared for ***Mr. David Ndii, Ms Jerotich Seii, Mr. James Ngondi, Ms Wanjiru Gikonyo*** and **M*r. Ikal Angelei***, (the 1st, 2nd, 3rd, 4th and 5th respondents) respectively. Mr. Havi submitted that the basic structure doctrine is applicable in Kenya as held by the learned judges. In his written submissions, counsel argued that there is a clear dichotomy between the power of amendment and dismemberment of the Constitution. Making reference to **B.O. Ben Nwabueze in his text -"*Presidentialism in Commonwealth Africa", (***Rutherford Madison Teaneck Fairleigh Dickson University 1974), Counsel stated that there are three features to the amendment rules stipulated in Articles 255 -257 of the Constitution. First, the amendment rules entrenches certain provisions of the Constitution, the amendment of which is only permissible upon their approval by the people through a referendum. Second, the amendment rules codify a dual track to amending the Constitution, the parliamentary and popular initiative pathways, and third, that Chapter 16 of the Constitution does not contain provisions for the dismemberment of the Constitution, only provisions of its amendment.

74] The 1st to 5th respondents' contention is that what the Amendment Bill envisaged was not an amendment of the Constitution of Kenya, 2010 it is dismemberment of the same. They stated that there are 74 amendments that are proposed in

the Amendment Bill. Such number of amendments can only amount to dismemberment of the Constitution. They cited the definition of constitutional dismemberment by **Richard Albert**, "***Constitutional Amendments: Making, Breaking and Changing Constitutions"*** (Oxford University Press 2019), who argues that alterations designed to replace a constitution disguised as amendments are unconstitutional and liable to be quashed by the court, and the court is empowered to preserve the basic structure of the Constitution.

75] The 1st to 5th respondents cited the case of ***Minerva Mills Ltd & Others v Union of India & others [1980 AIR 1789, 1981] SCR (1) 206***, in which the Indian Supreme Court invalidated the 42nd amendment to the Indian Constitution that was made by way of an omnibus amendment that demolished "***the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any limitation whatsoever***."

76] The 1st to 5th respondents further submitted that the basic structure doctrine and the eternity clauses are implicit, not explicit; that it is only the people in exercise of their primary constituent power who can undertake fundamental alterations to the basic structure of the Constitution, and cited ***Njoya & 5 Others vs Attorney General & Others [2004] 1EA 194 (HCK)***, where ***Ringera, J.*** stated, *inter alia*:

> ***"All in all, I completely concur with the dicta in Kesavananda Case that Parliament has no power and cannot in guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution...Before I leave this aspect of the matter let me comment on the previous amendments to the Constitution of Kenya. Since***

> ***independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved ...change from a parliamentary to presidential system of governance...the effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structures or features of the Constitution and they all passed without challenge in courts."*** *(Emphasis added).*

77] The 1st to 5th respondents further argued that the Amendment Bill sought to alter the basic structure of the Constitution by creating a hybrid presidential-parliamentary system, whereas Kenya has a pure presidential system of government. Further, the Amendment Bill seeks to domicile cabinet in the Legislature and therefore interfere with the doctrine of separation of powers. It also sought to interfere with the independence of the Judiciary by creating the Judiciary Ombudsman.

78] Lastly, it was submitted that even local text affirms the basic structure of our Constitution. The respondents cited ***John Mutakha Kangu, "Constitutional Law of Kenya on Devolution***," (Strathmore University Press, 2015) who states that the basic structure of our Constitution should include the sovereignty of the people, the supremacy of the Constitution, the principle of sharing and devolution of power, democracy, rule of law, the Bill of Rights, separation of powers and the independence of the Judiciary.

79] ***Kituo Cha Sheria***, 9th respondent and the ***Kenya Human Rights Commission***, the 10th respondent through ***Dr. Khaminwa, Senior Counsel***, supported the 1st to 5th respondents' submissions on the basic structure doctrine, eternity clauses and the doctrine of unamendability. Counsel cited texts of celebrated scholars among them: **Yaniv Roznai**

(supra), and **Hanna Lerner, - "Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach, Nations and Nationalism."** (Journal 16(1) 2010).

80] Counsel submitted that the opposed constitutional amendments, if allowed to pass, are likely to take this country back to its rotten history where the executive, having masterminded amendments of the Constitution through Parliament, committed many abuses of peoples' rights with impunity. He urged this Court to defend the Constitution.

81] It was submitted that the High Court in its holding on the basic structure doctrine sought to not only preserve the basic features, values and spirit of the Constitution but also to cure the problem of rapid changes to the Constitution by the government, political elite and Parliament. The respondent quoted **Yaniv Roznai's Article**, ***"Unconstitutional Constitutional Amendments: A study of the Nature & Limits of Constitutional Amendment Power"*** where he opined as follows:

> ***"An overly flexible constitution that allows flexible frequent changes might cause instability, uncertainty and undermine faith in the political order. Second, an easy amendment process places fundamental principles and institutions at risk of being swept away by majorities momentarily fascinated with a new idea. Third, an overly flexible amendment process together with short term political interests and the danger of qualified majorities give rise to fears of abuse of the amendment power. Fourth, a constitution that could be easily and carelessly amended might lose its authority-its value as the supreme laws of the land-ultimately subverting any authentic constitutionalism. Lastly, extreme constitutional***

flexibility is empirically associated with increased risk of constitutional demise."

82] On the issue of "*eternity clauses*" and "*unamendability*" of the Constitution, the respondent submitted that there were certain clauses in the Constitution that had been insulated from amendment otherwise known as "eternity clauses." It was argued that these are the clauses that form the basic structure of the Constitution, and they can only be amended by the people of Kenya in the exercise of their primary constituent power.

83] The respondent submitted that looking back at the history of Constitution making in Kenya, the people of Kenya when they gave themselves the Constitution of Kenya, 2010, intended that future amendments to the basic framework of the Constitution would only be through primary constituent power as opposed to the secondary constituent power.

84] The 10th respondent on its part opposed the argument that the basic structure doctrine was a mere judge-made doctrine that went beyond the limit of written constitutions. The respondent contended that the doctrine was in fact a legal concept. Reliance was placed on the case of ***Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013] eKLR*** where ***Lenaola, J***. stated as follows:

> ***"To my mind the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and theudiciary is tasked with the responsibility of ensuring constitutional integrity and the Executive, the tasks of its implementation while Independent Commissions serve as the "people's watchdog" in a constitutional democracy. The basic structure of the Constitution which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency,***

deriving from certain unalterable constitutional values and principles."

85] The respondent submitted that the theories of restrictive competence of Parliament and that of separation of powers between the various arms of government were integral components of the basic structure. It was argued that basic structure finds expression in, among others, ***Articles 1*** and ***2*** of the Constitution on the sovereign power of the people and the supremacy of the Constitution. Therefore, a reading of these two Articles makes it abundantly clear that the framers of the Constitution sought to protect the fundamental F use of secondary constituted power.

86] It was submitted that under ***Article 255***, the Constitution had already provided for matters that form part of the basic structure and which could only be amended by the people in exercise of their sovereign power.

87] The respondent acknowledged that the Constitution of Kenya, 2010 requires transition from time to time to accord with developments in the society but the people and Parliament in undertaking this exercise must strictly do so in adherence to the prescribed rules.

88] The respondent further submitted that it is imperative for one to conduct a holistic interpretation of the text, spirit, structure and history of the Constitution in order to identify the basic structure thereof.

89] The respondent advanced the argument that courts have a critical role in reviewing and interpreting the substance of constitutional theory and amendments to protect the democratic

principles in the Constitution. The respondent cited **Hanna Lerner** *(supra)* to advance this argument.

90] It was also submitted that the doctrine of basic structure emerged from the theory of originalism which basically means that various provisions of the Constitution must be construed and interpreted to discover the true meaning that was given to them by framers of the Constitution. In this regard, the respondent opined that the Amendment Bill sought to introduce amendments to the Constitution of Kenya, 2010 which would destroy its basic structure. It was submitted that this was not what the framers of the Constitution intended.

91] ***Ms. Martha Karua***, Senior Counsel, together with ***Ms. Muthoni Nyuguto*** appeared for ***Dr. Ojwang***, ***Dr. John Osogo Ambani*** and ***Dr. Linda Musumba***, the 11th, 12th and 13th respondents respectively, who were joined as *amici curiae* in the High Court proceedings. In their written submissions, the respondents stated that the High Court rightly found that from a holistic reading of the Constitution, its history and context of the constitution making, its basic structure consists of fundamental matters as provided in the preamble, the 18th Chapter and the six schedules to the Constitution. The court further noted that the basic structure that was activated by the 2010 Constitution consists of provisions for the system of governance, land and environment, leadership and integrity, public finance, and national security. They urged this Court to uphold that finding. They added that the basic structure of the Constitution can only be discovered and not invented by courts.

92] Counsel further submitted, *inter alia*, that the existence of the basic structure of Kenya's Constitution is not in dispute, what is

contested is the question of the limit of constitutional changes through amendments. They urged this Court to find that the proposed constitutional changes, which have far reaching effects to the basic structure of our Constitution, is a matter solely reserved for the constituent's assembly, the people, as opposed to the power to amend the Constitution, which is derivative power, derived from the Constitution and subject to the limitations imposed by the Constitution.

93] Regarding eternity clauses and un-amendable constitutional provisions, the 11th, 12th and 13th respondents submitted that the notion of unamendable provisions may arise explicitly or implicitly. The explicit ones are where the Constitution specifically provides that the provisions cannot be amended, but the more common notion of unamendability of constitutions is implicit, mostly arising through judicial interpretation on the limit of amendment powers of the Constitution. They cited the ***Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others*** (supra).

94] ***Jack Mwimali***, the 14th respondent through ***Mr. Ochiel Dudley,*** also supported the High Court's finding on the basic structure doctrine, eternity clauses and unamendability clauses. The respondent submitted that a faithful application of the holistic interpretation of the Constitution leads to a conclusion that the basic structure doctrine applies in Kenya.

95] The 14th respondent argued that the appellant's opposition to applicability of the basic structure doctrine was misinformed by a textual reading of the Constitution and cited ***Njoya & 3 others v Attorney General & others*** (supra) where ***Ringera, J.*** cautioned against textualism, saying, ***"...Court should not be***

obsessed with the ordinary and natural meaning of words if to do so would lead to absurdity or vitiate constitutional values and principles."

96] In supporting holistic interpretation of the Constitution, the 14th respondent cited ***Yaniv Roznai*** *(supra),* who states that:

> ***"In order to "find" unamendable basic principles, one has to resort to... interpretation of the constitution as a coherent whole: "it is, after all, a constitution and not just a disjointed collection of constitutional pieces which must be interpreted." According to this approach, the language of the constitution is not merely the explicit one, but also the implicit one....By using a structural interpretation, the interpreter can discern whatever is implicitly written between the lines from the constitution's internal architecture- interactions and connections between different constitutional structures- and the text as a whole. It is...a matter of reading 'the document holistically and attending to its overarching themes'. In holistic constitutionalism, 'various parts are understood and treated as dependent on the integrity of the whole." Therefore, holistic interpretation considers the constitution's surrounding values and principles, basic structure, constitutional history, preambles, and basic principles' provisions."***

97] It was further submitted that the basic structure doctrine is theoretically sound and blocks constitutional dismemberment or replacement disguised as amendments.

98] ***Thirdway Alliance***, ***Miruru Waweru*** and ***Angela Mwikali***, the 19th, 20th and 21st respondents respectively, were represented by ***Prof. Kithure Kindiki***, ***Mr. Elias Mutuma*** and ***Ms Cherono***. Counsel supported the submissions made on behalf of the 1st to 5th respondents on the basic structure doctrine. They added that the proposed amendments had far reaching effects that would have fundamentally altered the basic structure of our

Constitution and could not be undertaken under the provisions of Articles 257 of the Constitution.

99] Prof. Kindiki submitted that the Constitution of Kenya, 2010 has a hierarchy of norms, some provisions are so fundamental that they cannot be amended under Article 257 of the Constitution. He gave theoretical examples of trying to convert Kenya from a multiparty democracy to a constitutional monarchy or changing the territory of the country. Counsel added that the learned judges did not say that the entrenched provisions under Article 255 cannot be changed; they held that changes to the basic structure can only be done through the primary constituent power of the people in a manner akin to the one that was used to birth the current Constitution.

100] Counsel further submitted that there were two legal ways of changing an existing Constitution, to wit, through an amendment or by way of repeal. It was submitted that there was no anticipation of repeal in our Constitution as the Constitution did not anticipate a situation where it would be repealed, either expressly or by implication, and that this therefore meant that the Constitution envisaged a lifetime/eternity. In this regard therefore, Article 255 could not be invoked in an attempt to repeal the Constitution either expressly or by implication as was the case with the Constitution of Kenya (Amendment) Bill, 2020.

101] ***Mr. Justus Juma*** and ***Mr. Isaac Ogola,*** the 74th and 75th respondents respectively, were represented by ***Mr. Elisha Ongoya*** and ***Mr. Evans Ogada***. Counsel supported the High Court's findings on the doctrine of basic structure, eternity clauses and un-amendability clauses.

102] ***Mr. Morara Omoke***, the 76th respondent, also made submissions supporting the High Court judgment on the basic structure doctrine, eternity clauses and unamendable clauses. In his view, the appellant's argument on the doctrine of basic structure, eternity clauses and unamendable constitutional provisions are flawed and untenable. He stated that at the High Court the Attorney General admitted the applicability of the basic structure doctrine to the Constitution of Kenya. Further, Kenyan Courts had already accepted the applicability of the basic structure doctrine many years before the High Court adjudicated on the constitutionality of the BBI process and the impugned Amendment Bill.

103] Regarding eternity clauses and unamendable clauses, Mr. Omoke submitted that these phrases did not mean that the relevant constitutional provisions are cast on stone till the end of time; that the High Court had correctly stated that all Articles of the Constitution can be amended through exercise of the primary constituent power. Counsel stated that the real meaning of the phrases "*eternity clauses*" and "*unamendable clauses*" of the Constitution is that the relevant constitutional provisions go to the basic structure of the Constitution and thus cannot be amended through exercise of secondary constituent power.

(2) Who were the initiators and promoters of the BBI Initiative?

104] Mr. Otiende Amollo submitted that the learned judges misdirected themselves in finding that a promoter of a popular initiative is synonymous with an initiator of a popular initiative, hence reaching an erroneous holding that the President was the promoter of the Amendment Bill. He submitted that in fact, the

same was a popular initiative promoted by Hon. Junet Mohamed and Hon. Dennis Waweru, which was evidenced in their letter dated 18th November, 2020 addressed to the IEBC forwarding the draft Bill duly signed by more than one million supporters of the draft Bill; the Chairman of the IEBC acknowledged receipt of the draft Bill, vide a letter dated 24th November, 2020, which has since been passed by a majority of County Assemblies and both houses of Parliament and is awaiting submission to the IEBC for a referendum.

105] It was the Attorney General's submission that the President was not one of the promoters of the amendment Bill as the same was promoted by the BBI Secretariat which is a voluntary political alliance of various political players in Kenya, distinct from the BBI Taskforce and the BBI Steering Committee.

106] On this issue, counsel for the 1st to 5th respondents in opposing the appeal urged that the President was the initiator of the Amendment Bill. Mr. Havi submitted that the President cannot be a party to a popular initiative.

107] Adding their voice in support of the above submissions, counsel for the 19th, 20th and 21st respondents contended that the President's hand was at all times at play in the BBI process culminating into drafting of the Amendment Bill, its launch, the the submission of signatures to the IEBC, the campaign and use of State mechanisms and civil servants to collect signatures and the initiation of political meetings with Members of the County Assemblies as well as offering incentives in the name of car grants to lure them into passing the Bill. It was further submitted that from the contents of the supporting affidavit of Miruru Waweru sworn on 3rd December 2020 and a Further

Affidavit sworn on 23rd February 2021 it was clear that the BBI was a presidential initiative as opposed to a popular initiative.

108] Buttressing the 1st to 5th respondents' submissions, the 78th respondent, submitted that the evidence on record suggested that the Amendment Bill was initiated by the BBI Steering Committee as the signatory to the version of the Bill dated 25th November 2020 and by the BBI Secretariat, represented by Junet Mohamed and Dennis Waweru.

(3) Legality of BBI Taskforce and BBI Steering Committee.

109] The appellants challenged the declarations of the learned judges in their impugned judgment touching on the reports by the BBI Taskforce and the BBI Steering Committees that:

> ***" iv. A declaration is hereby made that the Steering Committee on the implementation of the Building Bridges to A United Kenya Taskforce Report established by the President vide Kenya Gazette Notice No. 264 of 3 January, 2020 and published in a special issue of the Kenya Gazette of 10 January, 2020 is an unconstitutional and unlawful entity.***
>
> ***v. A declaration is hereby made that being an unconstitutional and unlawful entity, the Steering Committee on the Implementation of the Building Bridges to A United Kenya Taskforce Report, has no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution."***

In an affidavit sworn by Mr. Joseph Kinyua, the Head of Public Service, the President confirmed that he established both the BBI Taskforce and the BBI Steering Committee pursuant to the functions and obligations conferred upon him by ***Articles 131*** and ***132*** of the Constitution; and that the same was upheld by

Mativo, J. in his decision in ***Thirdway Alliance case*** (supra) where the learned judge stated that: -

> ***"It is not in dispute that the President is obligated by the Constitution to ensure national unity is realized. It is not in dispute that he has the power to appoint the Taskforce to advise him on among other means of realizing this constitutional requirement."***

110] It was argued that the learned judges erred in reaching their conclusion without justification for the reason that the Steering Committee was not mandated and never did embark on any exercise to *"initiate constitutional changes"*; that it did not submit a constitutional amendment Bill to Parliament; initiate a popular initiative by collecting at least one million signatures; nor submit the same to the IEBC with a constitutional amendment Bill.

111] Moreover, that the Steering Committee was well within its rights under ***Articles 33***, ***37*** and ***119*** of the Constitution to make any proposals that it deemed fit to make and share them with the People of Kenya, who were at liberty to adopt its ideas wholly or in part and draft a Bill, as Hon. Junet Mohamed and Hon. Dennis Waweru did; and that neither of them were members of the BBI Taskforce and the Steering Committee.

112] The same was reiterated by the BBI Secretariat and Hon. Raila Amolo Odinga, who further submitted that the learned judges factually and legally misapprehended the role of the BBI Taskforce and the Steering Committee by combining their roles with those of Hon. Junet Mohamed and Hon.Dennis Waweru, trading in the name and style of the BBI National Secretariat.

113] It was their argument that the BBI Taskforce, the Steering Committee and the BBI National Secretariat are different

entities. In furtherance of their argument, the BBI National Secretariat and Hon. Raila Amolo Odinga pointed out that as at 30th June, 2020 and at the time of filing the Petitions at the High Court, neither of the said two entities, BBI Taskforce and Steering Committee, were in existence as their mandate had ended on October, 2019 and 30th June, 2020 respectively and that only their reports remained publicly available as public information. Moreover, it was argued that the Constitution of Kenya (Amendment) Bill, 2020 was published on 25th November, 2020 way after the expiry of the mandate of both the Taskforce and the Steering Committee.

114] The 1st to 5th respondents rebutted the appellants' averments and submitted that as much as the President had the mandate of establishing the BBI Steering Committee, there was no legal underpinning upon which he would have purported to mandate it with the responsibility to initiate or to propose constitutional amendment by popular initiative. The 19th, 20th and 21st respondents also raised the same argument.

115] In advancing their argument, the 1st to 5th respondents quoted the words of **Sir William Wade** in his book ***"Administrative Law***, **(**10th Edition) Page. 236 where he stated that:

> ***"The rule of law has a number of different meanings and corollaries. Its primary meaning is everything must be done according to laws applied to the power of government, this requires that every government authority which does some act which would otherwise be a wrong...must be able to justify its action as authorized by law and in nearly every case this will mean authorized directly or indirectly by Act of Parliament. Every act of governmental power i.e. every act which affects the legal rights, duties, or liberties of any person, must be shown to have a strictly legal pedigree."*** [Emphasis added]

111] The 19th, 20th and 21st respondents were in agreement with the decision in **Thirdway Alliance case** *(supra)* as far as the President had a duty as the symbol of national unity to establish the BBI Taskforce. However, with respect to the legality of the Steering Committee, they associated themselves with the arguments of the 1st to 5th respondents.

116] They further submitted that the President wrongly invoked ***Articles 131*** and ***132*** of the Constitution to authorize the Steering Committee to propose constitutional changes, as that unconstitutional mandate is what gave rise to the impugned Bill.

117] The 78th respondent shared similar views and emphasized that the BBI Steering Committee was unconstitutional and unlawful in the sense that firstly, it purported to perform the functions reserved for Parliament among other State Organs, pursuant to ***Articles 94 (3)*** and ***256*** of the Constitution. Secondly; that the President set it up without the recommendation of the Public Service Commission pursuant to ***Article 132 (4) (a)*** of the Constitution.

118] In conclusion, the said respondents urged this Court to affirm the decision of the learned judges and consequently hold that the BBI Steering Committee was unconstitutional entity and everything that came from it was null and void.

(4) Whether the Amendment Bill was by popular initiative and whether there was public participation.

119] The appellants' counsel submitted that the proposed amendments to the Constitution were by way of popular initiative. They sought to demonstrate the origin and the importance of the popular initiative in the Constitution

amendment process. It was submitted that prior to the enactment of the Constitution of Kenya, 2010, the people were not directly involved in the process of amendments to the Constitution, all amendments were parliamentary driven.

120] It was argued that the concept of popular initiative in the country is traceable to the clamour by the citizens for repeal of ***section 2A*** of the retired Constitution. Before then, the people of Kenya did not have any power to make any amendments to the Constitution, only Parliament had power to do so. The Court was told that the Committee of Eminent Persons that spearheaded the writing of the new Constitution observed the need for the people to be able to make desired amendments to the Constitution. In its Report dated 30th May 2006, the Committee stated, *inter alia*:

> ***"As matters now stand, the Constitution of Kenya must be read in light of the ruling of the Njoya case. The varied interpretations of Section 47 have already been canvassed above. To settle the debate around section 47, there is arguably need to amend the Constitution to specifically recognize the inherent right of the people to replace their Constitution. This is important on account of lessons learnt from the review process."***

121] It was further submitted that the need to have a provision enabling the people to initiate constitutional amendments by way of popular initiative was also considered by the Constitution of Kenya Review Commission, which stated in one of its Reports that the inclusion of ***Article 1*** in the Constitution was to acknowledge in the Constitution the fact that ultimately the Constitution was a product of the people and must serve the aspirations of the people.

122] In support of the argument that the Amendment Bill was by way of popular initiative, Mr. Otiende Amollo submitted that the right of amendment by popular initiative under Article 257 of the Constitution was open to any person, including politicians and public servants. It was submitted that the framers of the Constitution of Kenya, 2010 did not intend popular initiative to be limited to a special class of people to the exclusion of others, and that the only threshold to be met for the commencement of an amendment to the Constitution by popular initiative was that it be supported by at least one million registered voters.

123] On his part, the Attorney General faulted the finding of the High Court that amendment to the Constitution through popular initiative could not be undertaken by the government, and that amendments by popular initiative were only reserved for the private citizen. It was submitted that popular initiative under Article 257 of the Constitution did not in any way discriminate between a private citizen, State organs or even public officers. In other words, a popular initiative was open to any person, including politicians and public servants.

124] The High Court was faulted for failing to consider the practice in other jurisdictions such as Switzerland in which governments, political parties and other organized interest groups were involved in popular initiatives. Article 139 of the Federal Constitution of Switzerland which provided that any one hundred thousand (100,000) persons eligible to vote may propose a complete or partial revision of the Constitution was said to be in *pari materia* with Article 257 of the Constitution of Kenya, 2010. To buttress the argument of the inclusion of other stakeholders in constitutional amendment by way of popular

initiative, the Attorney General argued that the success of a constitutional amendment by popular initiative was hinged on mobilizing political will and public support.

125] It was submitted that the objective of popular initiative route to amend the Constitution was to guard against monopoly by Parliament on constitutional amendments.

126] According to the Attorney General, a popular initiative only commences when one million signatures of registered voters have been collected. Counsel submitted that the learned judges focused entirely on the process that preceded the collection of signatures, which was an error because the steps prior to the collection of the signatures was not part of the popular initiative.

127] In sum, the Attorney General submitted that whereas Article 257 of the Constitution did not bar any person from initiating constitutional amendments by popular initiative, including the President, State organs and public officers, the Amendment Bill was promoted by the BBI Secretariat and it is the same entity that collected the one million signatures required in support of the Bill, which was subsequently submitted to the IEBC.

128] On its part, the IEBC submitted that under Article 257 (4) of the Constitution, the promoters of a popular initiative are required to deliver the draft Bill and supporting signatures to the Commission, which shall verify that the initiative is supported by at least one million registered voters. In this regard, the promoters of the Amendment Bill submitted the draft Bill and the supporting signatures to the IEBC for verification, after which the IEBC ascertained that the requirements of Article 257 (4) of the Constitution of Kenya, 2010 had been met. The

Amendment Bill was therefore by way of popular initiative. These submissions were echoed by the 7th, 8th, 22nd and 23rd respondents.

129] Kenya National Union of Nurses, in support of the appeals submitted that the learned judges erred by failing to adopt the ordinary meaning of the word "*popular initiative.*" It was submitted that the ordinary understanding of popular initiative was "*a new plan to solve a problem that is supported by many people.*" In this connection, it was argued, that the Amendment Bill was supported by millions of Kenyans, and therefore it was by all means a popular initiative.

130] The 71st respondent associated herself with the position taken by the appellants.

131] On their part, the 1st to 5th respondents submitted that the Amendment Bill was formulated in an unstructured, non-transparent and non-participatory manner and did not amount to a popular initiative. It was submitted that the process culminating in the Bill was driven by the National Executive at every stage.

132] Counsel observed that an executive driven initiative for amendment of the Constitution was neither voter-driven initiative nor Parliament led initiative. He added that popular initiative was meant for the exclusive use of the ordinary citizens.

133] It was further submitted that the President cannot initiate constitutional amendment as a popular initiative, given the power he wields and the role he plays in a democracy. The people must be permitted to exercise their constituent power. In

support of that submission, the respondents cited Professor Nwabueze, *(supra),* who states that:

> ***"Recalling that the President under the presidential system in Commonwealth Africa is the organ that co-ordinates, and therefore dominates, the executive and legislative processes of government- in particular that it is he who, as the executive, has and controls the legislative initiative- we ask the question whether his power in this behalf includes or should include constituent power. The nature and importance of the constituent power needs to be emphasized. It is a power to constitute a framework of government for a community, and a constitution is the means by which this is done. It is primordial power, the ultimate mark of a people's sovereignty."***

134] The respondents further argued that the manner in which the process culminating in the Amendment Bill was initiated, coupled with other procedural shortcomings such as lack of public participation and verification of signatures, vitiated the Bill in its entirety.

135] The 9th and 10th respondents took a view that the Steering Committee, which sponsored the Amendment Bill, did not fall under the category of persons who could initiate constitutional amendments by popular initiative. They submitted that the Steering Committee was a State organ established by Gazette Notice No. 264 of 2020, and it was domiciled in the Office of the President. In other words, the Steering Committee was part of the Presidency/National Executive, and was therefore incapable of initiating constitutional amendments.

136] The 11th, 12th and 13th respondents reiterated the submissions of the 1st to 5th respondents and submitted that constitutional

amendments by popular initiative could only be initiated by ordinary citizens in the exercise of their sovereign power.

137] Echoing the submissions by the 1st to 5th respondents, the 19th, 20th and 21st respondents argued that the executive was not permitted to initiate a popular initiative because that power had not been donated to it and for that reason, the impugned Bill was unconstitutional. It was not a popular initiative but a Presidential initiative.

138] Turning to the issue of public participation, the appellants faulted the learned judges for holding that: -

> "***The IEBC was also under obligation to ensure that the BBI Steering Committee had complied with the requirements for public participation before determining it had met constitutional requirements for transmission to the County Assemblies for voting."***

139] The IEBC submitted that it bears no such constitutional obligation. It argued that at the point of delivery of the draft Bill under ***Article 257(4)***, its role in the process is limited to that envisaged under that Article, which does not include public participation at that stage, and that at the point of delivery of the draft Bill, it is not seized of the referendum and cannot engage members of the public before it is properly seized of the matter under ***Article 257(10)*** of the Constitution.

140] The BBI National Secretariat and Hon. Raila Odinga submitted that the scope and object of participation of the people in the context of constitutional amendment process is unique by the fact that it is not intended to enrich or in any way alter the contents of a draft Constitution Amendment Bill as in the case of an ordinary Bill, and therefore the principles outlined in ***Kiambu***

County Government & 3 Others v Robert N. Gakuru & Others [2017] eKLR regarding public participation are distinguishable. They therefore submitted that the learned judges erred in striking down the Amendment Bill on account of the standard of public participation applicable to ordinary Bills.

141] The BBI National Secretariat and Hon. Raila Odinga contended that there was sufficient public participation, and it was still going on even at the time of the hearing of the consolidated petitions, and in any event, the anticipated referendum would have been the most potent form of public participation and validation by the people.

142] The 1st to 5th respondents submitted that public participation by the people is an incidence of the social contract and exists in and outside the provisions of the Constitution. They submitted that the public ought to have been involved at every stage of the Constitution amendment process.

143] The 11th, 12th and 13th respondents supported the submissions by the 1st to 5th respondents, adding that public participation at every stage of law making is a constitutional imperative because it enables citizens to participate in decision making processes.

144] The 19th, 20th and 21st respondents submitted that meaningful public participation is vital for citizens access to information that is relevant to policy making and ability to hold their leaders to account and influence on the decision-making process; that it enhances transparency and accountability and an assurance that pressing social concerns will be addressed by responsive leaders. They added that from the onset of its establishment, it was not implicit that the mandate of the BBI Taskforce would

include amendment of the Constitution so that citizens of the Republic of Kenya would be called to give their views and or suggestions on whether they wanted amendments to the Constitution. They faulted the promoters of the Amendment Bill for not carrying out civic education in the first place. They added that the promoters did not prepare the ground for collection of views towards a constitutional amendment process.

145] Stressing the importance of public participation as stipulated under ***Article 10*** of the Constitution, the respondents cited this Court's decision in ***Kiambu County Government & 3 Others v Robert N. Gakuru & Others*** *(supra)*, where the Court held that:

> ***"The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation, but does not define or say how it should be implemented."***

146] The respondents further submitted that for public participation to take place in a popular initiative constitutional amendment, civic education, public participation, constituting constituent assemblies and referendum must be in the core.

147] Phylister Wakesho, the 71st respondent, entirely supported the submissions by the 19th, 20th and 21st respondents on the issue of public participation.

148] Mr. Morara, supporting the ground that there was no adequate public participation, added that the promoters of the Amendment Bill embarked on collecting signatures before

providing the people with copies of the Bill in English, Kiswahili, indigenous languages, Kenyan sign language, braille and other communication formats and technologies accessible to persons with disabilities. He also faulted them for not allowing the people reasonable time to read and understand the draft Amendment Bill.

(5) Whether the President can initiate the process of amendment of the Constitution as a popular initiative.

149] Mr. Kimani argued that the learned judges erred by finding that the only people that are entitled to access and/or utilize the provision of Article 257 are those who cannot utilise Article 256 which provides for amendment of the Constitution through parliamentary initiative.

150] Counsel argued that the said finding was erroneous to the extent that the impugned judgment was premised on the fact that the President could not be a promoter under Article 257 of the Constitution. He argued that from a cursory reading of Article 119 of the Constitution, it is apparent that every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation, so that even the common man has power to promote a Bill through Article 256.

151] He maintained that the learned judges reached an erroneous finding that the President was behind the popular initiative yet there was no evidence to so indicate. Further, that the judges introduced the concept of an initiator, yet there is no provision in Article 257 for an initiator of a popular initiative.

152] Counsel submitted that there was no evidence that the President either initiated the process of amendment of the Constitution or collection of signatures in support of the Amendment Bill. In his view, the burden of proof that the President was the promoter of the popular initiative was not discharged.

153] The BBI Secretariat and Hon. Raila Odinga submitted that the term 'promoter' under Article 257 is not defined. However, the Article does not expressly or implicitly define who may or may not promote a constitutional amendment process by popular initiative.

154] They submitted that from a historical perspective and a purposive construction of Article 257, the right of amendment by popular initiative is open to any person. Mr. Otiende Amollo contended that there is no historical evidence that the framers of the Constitution intended that the promoters of a constitutional Amendment Bill be limited to a specific class of people to the exclusion of others. Citing Articles 24 and 38(1)(c), he maintained that every citizen has a right to campaign for a political party or public cause and that such right can only be limited by law. There is no legislation that limits the President from promoting the subject initiative, counsel added.

155] On this issue, Counsel for the 1st to 5th respondents maintained that the President was the initiator of the Amendment Bill, and as Head of State and government, he cannot exercise constituent power.

156] It was contended that the President's role in a popular initiative is limited by Article 257(9) of the Constitution and section 49(1) of the Elections Act to assenting to an Amendment Bill and/or

referring the same to the IEBC for purposes of conducting a referendum.

157] Counsel for the 72nd respondent submitted that a popular initiative, ought to be purely an initiative of the people and the role of State actors is not sanctioned by law. Therefore, that any interference in the process by the State renders the initiative flawed.

158] The 78th respondent (Isaac Aluochier) reiterated the above arguments in opposition of the appeals.

(6) Whether the IEBC had requisite quorum to carry out its business in relation to the Amendment Bill.

159] On the issue of quorum, ***Prof. Githu Muigai***, Senior Counsel, who led ***Mr. Gumbo***, ***Mr. Munyithya*** and ***Mr. Kipkogei*** for the IEBC, argued that the learned judges erred by misconstruing the provisions of paragraphs 5 and 7 of the second schedule of the IEBC Act hence arriving at erroneous findings that the statute requires the IEBC to have a minimum of five commissioners; that the Act categorically places the quorum of IEBC for purposes of transacting business at five commissioners; and therefore that IEBC did not have the requisite quorum for purposes of carrying out its constitutional and statutory mandate.

160] He maintained that the provisions upon which such erroneous findings were premised were declared unconstitutional in ***Katiba Institute & 3 others v Attorney General & 2 Others, Constitutional Petition No. 548 of 2017*** and therefore the High Court erred by relying on provisions that did not have the force of law at the time the impugned judgment was rendered.

161] Citing the Supreme Court case of ***Mary Wambui v. Gichuki Kingara, Petition No.7 of 2014***, Indian Supreme Court case of ***State of Gujarat v. Ambica Mills 1947*** and Ghanaian Supreme Court Case of ***Prof. S. Asare v. Attorney General ACCRA A.D. 2017***, Senior Counsel argued that the effect of the declaration of unconstitutionality of the provisions is that the subject provisions of the statute or subsidiary legislation forthwith cease to have legal effect and cannot be relied upon.

162] He submitted that the learned judges ought to have been guided by the provisions of ***Article 250(1)*** of the Constitution which provides for the minimum membership of a commission as three. He maintained that the IEBC was duly constituted.

163] Prof. Muigai added that the issue of quorum had previously been determined by another court in ***Isaiah Biwott Kangwony v. Independent Electoral and Boundaries Commission, Nairobi High Court Petition No. 212 of 2018***, where it was held that vacancies in the Commission did not render it unconstitutional, considering that the Commission still met the constitutional threshold, a minimum of three members, as provided for under ***Article 250*** of the Constitution. He maintained that the said decision remains an authoritative pronouncement and can only be overturned by an appellate court. Therefore, the issue of quorum was not available for consideration by the High Court in the consolidated petitions by virtue of the principle of estoppel. (See: ***Ravndahl v. Saskatchewan [2009] SCC 7*** *and* ***Emms v. The Queen [1979] 102 DLR (3d) 193***).

164] Mr. Otiende Amollo fully associated himself with Prof. Muigai's submissions on the issue of quorum.

165] Opposing the appeal on this issue, Miss Ang'awa submitted that the term "*composition"* was not the same as the "*quorum".* She maintained that the composition of the IEBC and other independent commissions is provided for under ***Article 250(1****)* of the Constitution and it is a minimum of 3 and a maximum of 9. Further, that the specific composition of the IEBC is set out at paragraph 7 of the second schedule of the IEBC Act and the quorum, which is the number of commissioners required for it to undertake its business, is set at paragraph 5 of the second schedule of the IEBC Act.

166] Counsel proposed that a purposive construction of ***Article 250(1)*** of the Constitution and paragraph 5 of the second schedule of the IEBC Act anchored on the public interest to have all commissions perform at optimum capacity, supports the finding of the trial court that the IEBC lacked quorum for the conduct of business meetings in which decisions on the Amendment Bill were made with three instead of five commissioners.

167] She contended that the appellants misinterpreted and misapplied the decision in ***Katiba Institute & 3 others v Attorney General & 2 Others*** *(supra);* that the judgment ought to be interpreted in accordance with Part C of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya; and in tandem with the legal effect of a declaration of unconstitutionality by the court.

168] Miss Ang'awa contended that in the circumstances of the ***Isaiah Biwott Case*** (supra), the contention was in relation to the conduct of by-elections, which are regulated by existing legislation, unlike in the instant case where the contention was

in relation to the formulation of a legal framework used for the collection, verification of signatures and voter registration, which lacked governing legislation. Further, that seeing that the two are different processes that cannot be said to be governed by the same laws, then the case cannot apply *mutatis mutandis*.

169] Mr. Morara Omoke reiterated the 1st to 5th respondents' arguments. He submitted that the appellants failed to demonstrate how the learned judges erred by departing from the earlier decision in ***Isaiah Biwott Case*** *(supra)*. He added that the learned judges gave good reasons for their departure.

(7) Role of the IEBC in the amendment of the Constitution by popular initiative.

170] Counsel for the Attorney General submitted that ***Article 83(3)*** of the Constitution mandates the IEBC to come up with administrative procedures for the registration of voters and the conduct of elections to ensure that all citizens are accorded an opportunity to exercise their right to participate in elections. Therefore, the petitioners ought to have first sought information from the IEBC under ***Article 35*** of the Constitution on the administrative procedures that it had put in place to facilitate voting by all eligible citizens in a referendum.

171] The appellants reiterated that the dispute on registration of voters had not crystallized since the Amendment Bill was still at the preliminary stages and therefore no prejudice would have been occasioned upon any citizen. Moreover, the referendum had not yet been conducted, hence no one could claim to have been denied the right to participate in the process (See: ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR***).

172] Counsel for the IEBC submitted that the learned judges erred in introducing a requirement for a special nationwide voter registration for the specific purpose of the intended referendum, whereas the obligation placed on the IEBC is for continuous voter registration, which the IEBC has been carrying out.

173] Counsel argued that no evidence was tendered before the trial court to suggest that the IEBC had not carried out sensitization on its programmes or that such sensitization was not adequate. Further, it was premature to anticipate the certification of the register of voters since the IEBC was yet to be seized of the referendum under ***Article 257(10)*** of the Constitution.

(8) Whether the IEBC was under an obligation to conduct a nationwide voter registration exercise and verification of signatures.

174] On this issue, Mr. Gumbo and Mr. Kipkogei submitted that ***Article 257(4)*** of the Constitution does not provide for verification of signatures; that the IEBC is mandated to verify that the initiative is supported by one million registered voters; that the High Court wrongfully introduced the issue of verification of signatures as an obligation of the IEBC. They submitted that it was not logical for the IEBC or indeed any institution in Kenya to verify millions of signatures.

175] It was maintained that the issue of verification of the initiative as having met the requisite threshold of support is a matter of fact, and no one had come forward to deny their assent to the initiative.

176] Counsel for the Attorney General submitted that it is impermissible under the current Constitution to take away the

right to amend the Constitution on the basis that there is no or inadequate guidelines and procedure for the verification of such initiatives having been supported by the requisite number of registered voters. They supported the submission by the IEBC that Chapter 16 of the Constitution does not provide for verification of signatures.

177] Mr. Otiende Amollo echoed the IEBC's and the Attorney General's arguments. He added that by subjugating the constitutionally entrenched right to a referendum to the prerequisite that an enabling law be enacted first, the learned judges acted unreasonably and contrary to the long-settled principle that the absence of enabling legislation or regulations cannot of itself suspend the enjoyment of a constitutional right. (See: ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR***.)

178] Submitting on behalf of the 1st to 5th respondents, Miss. Ang'awa, citing ***James Omingo Magara v Manson Onyongo Nyamweya & 2 Others [2010]***, argued that verification of votes is not a basic exercise but a matter that goes beyond ascertainment by simple arithmetic. In her view, the IEBC was mandated to go beyond verifying that at least one million registered voters supported the initiative.

179] The 10th, 19th, 20th, 21st 76th and 82nd respondents buttressed the 1st to 5th respondents' submissions on the issue.

(9) Whether the proposals contained in the Amendment Bill are to be submitted as separate and distinct referendum questions.

180] On the issue of whether the proposed amendments needed to be placed as separate and distinct referendum questions, Mr. Oraro on behalf of the Attorney General submitted that the manner of presenting the Bill to the people for a referendum is extensively provided for under ***Article 256*** of the Constitution and that it does not specifically provide that the draft Bill is to contain a single amendment proposal or several. He maintained that whether it is an amendment or amendments, it must be formulated into a draft Bill as envisaged under ***Article 257(3)*** and it is that draft Bill that is submitted for a referendum. He argued that there is no legal requirement to have question presented in respect of each issue.

181] It was contended that as at the time the High Court was hearing the petitions, the IEBC was yet to conclusively determine the mode of framing the referendum questions. The matter was therefore not ripe for any judicial determination and therefore the court made a premature declaration. The case of ***Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2016] eKLR*** was cited in support of that submission.

182] In addition, that in issuing the said declaration, the trial court failed to consider the cost implication of holding a multiple-question-referendum in respect of the Amendment Bill. (See: ***Titus Alila & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) v Attorney General & another [2019] eKLR***.

183] Opposing the appeals, the 1st to 5th respondent's submissions were that from a reading of ***Article 255(1)*** and ***section 49(2)*** of the ***Elections Act***, it is clear that each proposed amendment must be submitted as a separate question.

184] Miss Ang'awa submitted that ***section 51(1)*** of the ***Elections Act*** provides that all referendum questions require a "**yes**" or "**no**" answer. Further, that under ***Article 257*** the word *"amendment"* is in singular, proving as much. She maintained that if the Amendment Bill was to be subjected to a referendum, there ought to be a question of each amendment proposal.

185] Similarly, Counsel for the 76th respondent submitted that the unity of content doctrine requires the formulation of multiple referendum questions in cases where a Bill for amendment of the Constitution by way of a popular initiative seeks to effect several distinct and unrelated changes spread across different unrelated provisions of the Constitution. Further, that the only way that the State can ensure that the public is accorded an opportunity to participate in the referendum process is by giving members of the public an opportunity to freely decide whether they support or reject each of the specific amendments being proposed by the impugned Bill; that this can only be achieved if the public is issued with multiple but separate referendum questions corresponding to the multiple amendments being proposed by the impugned Bill.

186] Counsel for the 19th, 20th, 21st and the 78th respondents reiterated the 1st to 5th respondents' submissions on this issue.

(10) Whether the High Court had jurisdiction to entertain the petitions on account of the principles of justiciability, mootness and ripeness.

187] The IEBC, the Attorney General, the BBI National Secretariat, Hon. Raila Odinga, the Senate, the Speaker of the National Assembly and the Speaker of the Senate argued that some of the issues that the High Court was asked to determine were either not justiciable (as they were political questions) or were moot and or not ripe for court determination.

188] The IEBC stated that as at the date of the impugned judgment, it was not seized of the referendum and had not formulated any referendum question; to the extent that it is an independent Commission it is not subject to direction or control by any person or authority in the performance of its functions. Accordingly:

a) It ought to have been allowed to frame the referendum question at the appropriate stage in the process, and therefore the High Court should have exercised constitutional avoidance when invited to determine an issue which in law should have been left to the IEBC.

b) By assuming jurisdiction and making a determination of the issue of the referendum question in the absence of any dispute having crystalized, the High Court exercised what would be akin to an advisory opinion contrary to the law.

c) The High Court's determination of the referendum question offended the doctrine of ripeness.

189] In view of the foregoing, counsel submitted that the High Court was turned into a philosophical forum in that it determined issues that were not live and in controversy.

190] In response, a large number of the respondents who opposed the appeal argued that under ***Article 165*** of the Constitution, the High Court has unlimited original jurisdiction that includes jurisdiction: to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; to hear any question in respect of the interpretation of the Constitution, including the determination of the question whether any law is inconsistent with or in contravention of the Constitution.

191] The 1st to 5th respondents cited ***Black's Law Dictionary*** which defines "*political question"* as "***a question that a court will not consider because it invokes the exercise of discretionary powers by the executive or the legislative branch of government."*** In their view, the issues that were raised in the petition were not mere political questions, they were constitutional in nature and required determination by the High Court.

192] Relying on this Court's decision in ***Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others [2014] eKLR***, counsel submitted that mere existence of a political question cannot oust the jurisdiction of the High Court to determine an

otherwise valid constitutional issue under Article 165. In that matter, this Court held: -

> ***"Though the process of removal of a governor from office is both a constitutional and a political process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution."***

193] The 2nd and 3rd appellants also argued that the principle of separation of powers estops the High Court from adjudicating on matters before the County Assemblies, the National Assembly and the Senate. They argued that the High Court should have restrained itself from reviewing the legality of steps undertaken to process the Amendment Bill in deference to the principle of separation of powers.

194] In response, the 1st to 5th respondents argued that the principle of separation of powers cannot be a bar to judicial intervention in appropriate matters, especially the kind of petitions that the High Court was urged to determine. They further contended that the doctrine of separation of powers does not apply as between citizens and the Judiciary and vis-à-vis citizens and any of the three arms of the Government. They submitted that the consolidated petitions before the High Court challenged the validity of the constitutional amendment by popular initiative under ***Article 257*** and not one by a parliamentary process under ***Article 256***. They added that the primary disputants in the petitions are the promoters of the Bill and the petitioners.

195] They further pointed out that Parliament cannot challenge the consolidated petitions on the basis of separation of powers since the amendment process did not originate from Parliament under Article 256, and the petitions were filed before the Amendment Bill was presented to Parliament for debate and approval.

196] The 1st to 5th respondents further submitted that the question of justiciability was raised as a preliminary objection by the 1st and 4th appellants and was dismissed by the High Court in a ruling delivered on 30th November 2020.

197] They added that on the basis of the evidence presented, the High Court ascertained justiciability of their claim and went on to determine the petitions.

(11) Whether it was constitutional for the BBI Steering Committee to create 70 constituencies and effect constituency delimitation.

198] On this issue, Mr. Karori submitted that the learned judges erroneously found that the second schedule of the Amendment Bill was unlawful and unconstitutional because it purported to: impermissibly direct the IEBC on the execution of its constitutional functions; set criteria for the delimitation and distribution of constituencies contrary to ***Article 89(5)***; ignore a key due process in delimiting and distributing constituencies, namely, the public participation requirement; impose timelines for the delimitation exercise contrary to the Constitution; impermissibly take away the rights of individuals who are aggrieved by the delimitation decisions of the IEBC to seek judicial review of those decisions; and by tucking in the apportionment and delimitation of the seventy newly created constituencies in the second schedule using a pre-set criteria

which is not within the constitutional standard enshrined in ***Articles 89(4), (5), (6), (7), (10)*** and ***(12)*** of the Constitution; and extra-textually amending or suspending the intended impacts of ***Article 89*** of the Constitution which they said are unamendable.

199] Counsel submitted that by reaching such findings, the learned judges failed to consider that the most fundamental objective for the creation of additional constituencies, as proposed in the Amendment Bill, was to facilitate and ensure the attainment of fair representation in the National Assembly and to actualize the aspiration of the equality of the vote principle, especially in the currently under-represented electoral areas.

200] He submitted that under the proposed amendment in the impugned Bill the creation of seventy new constituencies would be determined and effected by the people through a referendum, hence becoming the new constitutional provision. It is therefore as a subversion of the people's sovereign power as envisaged under ***Article 1*** of the Constitution for the court to stop the process.

201] He argued that the question as to which areas in Kenya are under-represented and therefore require additional constituencies is not a legal one to be delved into by courts, it is a political one and the right avenue to deal with the same is the legislature and debates in the County Assemblies and ultimately the referendum process itself.

202] Counsel submitted that the learned judges erred by finding that the effect of the proposed amendment would lead to the indirect deletion or amendment of ***Articles 89(5), (6)*** and ***(7)***.

203] Counsel also faulted the learned judges for finding that such amendment is also unconstitutional as it purports, at ***section 1(6)*** of the second schedule, to suspend the operation of ***Article 89(4)*** of the Constitution, hence permitting the IEBC to begin and complete the delimitation exercise outside the timelines expressly provided in the Constitution.

204] He argued that the proposal to suspend the operation of that section is not new. Further, that the same is verbatim from ***section 27(3)*** of the sixth schedule of the Constitution, which suspended the operation of Article 89(2) in relation to the first elections held under the 2010 Constitution. In addition, that the schedule was not found to be unconstitutional and was applied for purposes of the last election and thus, it is within the people's power to suspend such provisions in the Constitution, so long as the correct procedure under Chapter 16 is followed.

205] Regarding this issue, Mr. Ndegwa buttressed the Attorney General's position that Article 89 of the Constitution is clear that the IEBC should review only the names and boundaries of constituencies and not the numbers.

206] In conclusion, he argued that the canons of interpretation require that the court is obligated to interpret the provisions of the Constitution in a manner that does not negate any one of its provisions.

207] Counsel for the 1st to 5th respondents argued that the provisions of the second schedule of the Amendment Bill in creating the seventy new constituencies and purporting to allocate them to different counties was a usurpation of the constitutional mandate of the IEBC.

208] Counsel appearing for the 76th respondent reiterated the 1st to 5th respondents' arguments on this issue.

12. Whether there was necessity for legislation or legal framework on conduct of referenda.

209] Prof. Muigai submitted that the learned judges erred in finding that: there was no legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda at the time of launch of the Amendment Bill and the collection of endorsement signatures and that therefore the attempt to amend the Constitution through the Amendment Bill was flawed; that Part V of the Elections Act does not adequately cover the process contemplated in the referendum process as it does not address the issue of public participation, which is a constitutional imperative under ***Article 10*** of the Constitution and fails to address the manner in which a referendum Bill is to be handled by the County Assemblies in cases where the Constitution mandates those County Assemblies to debate the Bill.

210] Senior Counsel maintained that to the contrary, ***Articles 255***, **256** and **257** of the Constitution as read together with ***sections 49*** to ***55***, ***Part V*** of the ***Elections Act, 2011***, ***Elections Offences Act*** and ***Elections Campaign Financing Act, 2013*** constitute an effective legal framework for the conduct of referenda. Further, that the IEBC is clothed with power to make administrative arrangements for the proper conduct of referenda, including those envisaged under ***sections 53*** and ***55*** of the ***Elections Act and Regulation 100*** of the Elections ***(General) Regulations, 2012***.

211] It was argued that the learned judges erred by finding that the administrative procedures developed by the IEBC were invalid as they were developed without public participation contrary to Article 10; that they were in violation of the Statutory Instruments Act for want of parliamentary approval and lack of publication; that they were developed without quorum; and that even if the administrative procedures were valid, they had been violated by the IEBC.

212] Senior Counsel maintained that the learned judges misapprehended the nature and character of the administrative procedures and as a result characterized them as Statutory Instruments, yet they did not fall within the meaning of "*statutory instruments*" under ***section 2*** of the ***Statutory Instruments Act***; they were no more than internal standard operating procedures intended to merely guide the IEBC staff while undertaking its mandate under ***Article 257(4)*** of the Constitution.

213] Supporting the Attorney General's submissions, Mr. Otiende Amollo reiterated that the Constitution has already set up a proper legislative framework for holding a referendum.

214] Mr. Kuyioni and Mr. Wambulwa reiterated the IEBC's submissions on this issue to the effect that the learned judge's findings that the IEBC lacked a legal framework to conduct the referenda at the time of launch of the Amendment Bill was erroneous as it lacked legal basis.

215] Mr. George Gilbert on behalf of the 71st respondent, associated himself with the IEBC's arguments, submitting that the Constitution does not specifically provide for the necessity of

legislation governing the conduct of a referendum. Counsel maintained that the framework for conducting a referendum is provided for under ***section 49*** of the ***Elections Act***.

216] Opposing the appeals, counsel for the 1st to 5th respondents supported the trial court's findings that there was need for a legal framework on how to conduct a referendum and that such findings could not be faulted.

217] The 19th, 20th and 21st respondents reinforced the 1st to 5th respondents' submissions, stating that the IEBC does not have a proper legal framework to conduct referenda.

218] Miss Kituku for the 82nd respondent submitted that the IEBC required a legal framework to undertake its mandate under ***Article 257***. She argued that ***Article 82(1)*** placed an obligation on Parliament to enact legislation to provide for the conduct of referenda and because referenda is not a one-day event, such legislation should cover activities that precede the actual voting. These include the verification and certification envisaged by ***Article 257(4)***.

(13) Whether civil proceedings can be instituted against a sitting President.

219] Mr. Nyaoga submitted that the learned judges erred in holding that the President could be sued in his personal capacity. Although Mr. Aluochier had sued President Uhuru Muigai Kenyatta in his personal capacity, the petition revealed that the grievances that had been raised against him were in respect of acts done by the appellant in his capacity as the President of the Republic of Kenya. Counsel cited the gazette notices that were issued by the President and Commander in Chief of the Kenya

Defence Forces, a fact that was established by the learned judges in the impugned judgment.

220] Further, counsel submitted that under ***Article 143(2)*** of the Constitution, the President is conferred with absolute immunity against civil proceedings in respect of anything done or not done in the exercise of his powers under the Constitution.

221] Counsel submitted that the Constitution provides a mechanism for dealing with the President where there is a basis to assert that he had violated the Constitution or any other law. In that regard, he pointed at Article 145(1) which provides for impeachment of the President by the National Assembly. Counsel therefore submitted that a proper reading of ***Articles 143*** and ***145*** of the ***Constitution*** shows that:

> ***"a) The President is protected from legal proceedings during his tenure of office in respect of things done in exercise of his powers under the Constitution;***
>
> ***b) Where there is a basis to assert that the President has engaged in gross violation of the Constitution or any other law, impeachment proceedings can be commenced against him in the National Assembly;***
>
> ***c) It is only if and after the President is impeached or otherwise leaves office that he loses immunity and is no longer protected from legal proceedings."***

222] The Attorney General submitted that the person elected by the people as the President must be protected from "***daily vagaries of intrusion and interference in his or her work."***; that the immunity allows the President to exercise his or her duties without looking over his shoulders for litigation and parliamentary processes that seek to counter his or her every

action. The Attorney General therefore faulted the learned judges for finding that the President of the Republic of Kenya can be sued in his personal capacity during his tenure. He contended that such finding is contrary to the clear text of ***Article 143(2)*** of the ***Constitution*** which stipulates that: -

> "***Civil proceedings shall not be instituted in any form against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution***."

223] Kenya National Union of Nurses and 254 Hope supported the submission that the appellant enjoyed immunity from civil proceedings.

224] Mr. Aluochier submitted that the question whether civil proceedings could be instituted against the President or a person holding the office was not one of the issues framed by the court for determination but was nonetheless introduced in the judgment as a preliminary one.

225] With regard to the issue of immunity, Mr. Aluochier submitted that under ***Article 143(2)*** of the Constitution, the President does not enjoy absolute immunity in respect of civil proceedings, he may be sued for conduct or misconduct outside the functions of the Presidential Office. He added that during the Constitution-making process, Kenyans said that they wanted a more accountable President, one who is subject to the rule of law and so the President was only granted limited immunity in respect of civil proceedings in the performance of functions of that office during the President's tenure of office. Mr. Aluochier cited this Court's decision in ***Kenya Human Rights Commission & Another v Attorney General & others, [2019] eKLR***.

226] The 14th respondent, Jack Mwimali, equally submitted that the President does not enjoy absolute immunity in civil proceedings. The immunity is limited to anything done or not done by the President in the exercise of his powers under the Constitution. He cited ***Republic v Chief Justice of Kenya & 6 Others (exparte Moijo Mataiya Ole Keiwua) [2010] eKLR*** where the Court ruled that the President's immunity cannot be used to defeat public interest or applied contrary to public policy.

227] Prof. Kindiki on behalf of the 19th, 20th and 21st respondents, submitted that absolute presidential immunity is an old concept that has since been abandoned in all the Constitutions of the world under International Law.

(14) Whether Mr. Muigai Kenyatta was served with Petition No. E426 of 2020 and the effect of orders made by the High Court against his person.

228] On the first issue, Mr. Gatonye submitted that every person against whom allegations are made is entitled to be informed of all the allegations against them and be given an opportunity to respond to the allegations. He cited ***Articles 25, 27*** and ***50*** of the Constitution of Kenya, 2010.

229] Counsel contended that the learned trial judges proceeded to deal with the issue of representation without addressing themselves to the question whether the appellant was served with ***Petition No. E426 of 2020*** filed by ***Mr. Isaac Aluochier*** as required by law to enable him respond.

230] It was submitted that the appellant was condemned without being afforded a fair hearing contrary to his constitutional rights and rules of natural justice. Mr. Gatonye submitted that the

President, as the Head of National Government under ***Articles 131(1)(a)*** and ***156(4)(b)*** of the Constitution is ordinarily represented by the Attorney General in Court and other legal proceedings in which he is a party. However, the learned trial judges held that the appellant ought not to have been represented by the Attorney General. But having so stated, the learned judges failed to consider whether the appellant had been served with the petition by law to enable him respond to it.

231] Senior Counsel emphasized that the two issues, service and representation, were preliminary ones that the court ought to have dealt with conclusively at the first instance before confirming the petition for hearing. He argued that it was important to do so because a constitutional question on the immunity of the appellant under ***Article 143*** of the Constitution had arisen, and it was crucial for the trial court to exhaustively deal with it before it assumed jurisdiction and proceeded to determine the suit. Mr. Gatonye submitted that the trial court erred in dealing with the two issues for the first time in its judgment.

232] Mr. Gatonye further submitted that the appellant was not served with Petition No. E426 of 2020 despite the fact that he was sued in his private capacity, and that there is no such evidence of service on record. He added that the petitioner has admitted in a sworn affidavit filed in this Court in response to the appellant's application for stay of execution that he did not serve the appellant. Thus, in the absence of service, it was inferred that the Petitioner had abandoned his claim as against the appellant. There was therefore failure by the petitioner to observe an

essential step required of him if he intended to pursue a case against the appellant.

233] Counsel further submitted that the learned judges erred in making decisions that were in breach of the rules of natural justice. In that regard he cited this Court's decision in ***Onyango Oloo v Attorney General [1986-1989] EA 456***, where the Court held:

> "***A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at... Denial of the right to be heard renders any decision made null and void ab initio.***"

234] Counsel further submitted that ***Article 27*** of the Constitution guarantees all persons the right to equal protection and benefit of the law; that ***Article 159(2)*** requires that judicial authority is exercised in a manner that ensures justice is done to all persons irrespective of their status and therefore the decision that was arrived at against the appellant cannot stand.

235] Responding to the issue of service, Mr. Aluochier stated that he personally served the appellant via email, and further sought the assistance of the court to effect service on the appellant. He drew the court's attention to a supplementary record of appeal dated 8th June 2021 which contained an affidavit of service dated 16th January 2020. He therefore contested the appellant's argument that he was not served. He further argued that by virtue of the service of the court process that had been effected upon him, the appellant cannot be heard to argue that he was condemned unheard, or received unfair hearing, or that any of his rights were infringed.

236] Mr. Morara Omoke supported Mr. Aluochier's submissions. In addition, he argued that what negated the appellant's assertion that his right to a fair hearing was violated was the fact that he elected to be defended in the suit by the Attorney General, despite the fact that he was sued in his personal capacity.

237] Mr. Morara further argued that if the appellant had not been served as alleged, then the appropriate remedy for him was to apply to have the impugned judgment set aside at the High Court on grounds that the proceedings proceeded ex-parte and not to appeal as he had done. This submission was echoed by the 1st to 5th respondents.

(15) Whether the proceedings against Mr. Uhuru Muigai Kenyatta were res judicata.

238] Mr. Kimani, Senior Counsel, argued that the 20th and 21st respondents; Miruru Waweru and Angela Mwikali, in the ***Thirdway Alliance case*** *(supra),* in which judgment had been delivered on 20th March, 2020 had unsuccessfully challenged the Building Bridges Initiative on several constitutional grounds. That notwithstanding, more or less the same grounds were repeated by most of the petitioners in the consolidated petitions. By virtue of explanations 4 and 6 of ***section 7*** of the ***Civil Procedure Act***, all parties in the consolidated petitions were estopped from re-litigating the issues that had been raised in the ***Thirdway Alliance case***.

239] Relying on a number of cases, among them ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR***, ***Africa Oil Turkana Limited (Previously Known as Turkana Drilling Consortium Ltd) & 3 Others v Permanent Secretary,***

***Ministry of Energy & 17 Others* [2016] eKLR** and ***Muchanga Investments Ltd Safari Unlimited (Africa) Ltd & 2 Others* [2009] eKLR**, Mr. Kimani urged this Court to find that the issues raised in the consolidated petitions were *res judicata* and were not therefore available for adjudication by the High Court.

240] In response to this issue, Mr. Mutuma representing the 19th, 20th and 21st respondents submitted that when they filed Petition No. 451 of 2018 at the High Court challenging the constitutionality of the establishment of the BBI Taskforce, the BBI Steering Committee was not yet in existence. Mativo, J., after considering the terms of reference of the Taskforce, found nothing wrong with them and held that the President was within his power under ***Articles 130*** and ***131*** of the Constitution to foster national unity and establish a taskforce but only to the extent that it was going to advise him on policy issues. His clients did not fault the decision of Mativo, J., hence no appeal was preferred against it.

241] Mr. Mutuma further submitted that the instant appeals are not *res judicata* as the parties were different from the ones in the earlier matter and the issues were not the same.

(16) Whether the President violated Chapter 6 of the Constitution (Article 73 (1)(A)).

242] On this issue, Mr. Kimani submitted that while the appellant is the President of the Republic of Kenya, he also enjoys all constitutional rights like any other Kenyan, including political rights under ***Article 38*** which guarantees every citizen freedom to make political choices. He further submitted that it was not in dispute that the appellant caused both the BBI Taskforce and the BBI Steering Committee to be gazetted, pursuant to the

functions and obligations conferred upon him by ***Articles 131*** and ***132*** of the Constitution. He faulted the learned judges for finding that the appellant in his capacity as the President of Kenya violated ***Article 73*** by initiating the process of amending the Constitution by popular initiative.

243] He further contended that under ***Article 257*** there is no such person or entity known as an "*initiator",* and neither was the appellant the promoter of the Amendment Bill, although there was nothing that barred him from being a promoter of the Bill or participating in the amendment process by popular initiative in his capacity as a registered voter.

244] Lastly, Senior Counsel contended that the learned judges misinterpreted the nature and context of a popular initiative by finding that ***Articles 131*** and ***132*** of the Constitution prohibits the appellant from supporting such an initiative. For those reasons, he urged us to set aside the findings of the High Court.

245] In response, the 1st to 5th respondents submitted that the President was the initiator of the BBI process that culminated in the Amendment Bill. They argued that the appellant, as the Head of State and Government, cannot exercise constituent power. His role in a popular initiative is limited by ***Article 257(9)*** of the Constitution and ***section 49(1)*** of the ***Elections Act*** to assenting to an Amendment Bill and or referring the same to the IEBC for purposes of conducting a referendum.

246] With regard to the authority and functions of the President under Articles 131 and 132 of the Constitution, Mr. Havi submitted that the Constitution is very specific as to what the President may or may not do. In his view, Article 257 makes it clear that amendments of the Constitution by popular initiative

can only be initiated by the common man and not the President, irrespective of whether he is a registered voter.

247] The 11th, 12th and 13th respondents submitted that under ***Article 257*** of the Constitution, the design of who becomes the promoter of a popular initiative and the method of making the amendment has a bearing on the principle of separation of powers and is part and parcel of sovereignty of the people. It follows therefore that the President cannot usurp power of the people by initiating a popular initiative for amendment of the Constitution.

248] The 19th, 20th and 21st respondents supported the submissions of the 11th, 12th and 13th respondents in regard to the issue of the President initiating the popular initiative for amendment of the Constitution. In their view, there was no dispute that the President was the initiator of the BBI constitutional amendment process and was therefore a promoter of the same.

249] Phylister Wakesho, the 71st respondent, the 72nd, 75th, 76th and 78th respondents also supported the submissions of the 1st to 5th respondents.

(17) Whether *amici curiae* were properly admitted.

250] The Attorney General submitted that the learned judges erred in law by admitting and heavily relying on submissions of purported *amicus curiae* who were openly partisan. He cited the Kenya Human Rights Commission, Dr. Duncan Oburu Ojwang, Dr. John Osogo Ambani, Dr. Linda Andisi Musumba and Dr. Jack Busalile, whose appointment, he argued, did not meet the threshold of *amici curiae* as set out in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*** *(supra).*

251] In the aforesaid decision, the Supreme Court held, *inter alia*, an *amicus* brief should be limited to legal arguments; *amici curiae* are bound by principles of neutrality and fidelity to the law; should address points of law not already addressed by the parties to the suit; and the Court should regulate the extent of *amicus* participation in proceedings to forestall the degeneration of *amicus* role in to partisan role.

252] The Attorney General further submitted that the High Court went as far as allowing the *amici curiae* to be represented by advocates in addition to the *amici* briefs that had been filed. In his view, the *amici curiae* were not neutral as required of them, they were biased.

253] In response, Kenya Human Rights Commission stated that the participation of *amici curiae* was not taken up as an issue in the High Court proceedings and had been raised as an after - thought before this Court.

254] It was argued that the *amici*, being legal academics and licensed non-governmental organizations with constitutional law expertise and authority, sought admission to the High Court proceedings and were procedurally admitted; and were all brought together by their genuine desire to defend the Constitution.

255] The Kenya Human Rights Commission stated that its main objective is to investigate and provide redress for human rights violations as well as to research and monitor the compliance of human rights norms and standards, and the matter at hand falls within its ambit.

256] The 11th, 12th and 13th respondents, who were joined as *amici curiae* in the High Court proceedings but were named as respondents by the appellant, stated that the High Court exercised its discretion in permitting them to be represented by an advocate, and this is largely so because the *amici* are not conversant with court processes.

18) Whether the Amendment Bill violated Article 43(1)(a) in view of the Covid-19 pandemic.

257] In his cross appeal, the 76th respondent contended that President Uhuru Muigai Kenyatta was in violation of ***Articles 10*** and ***201*** of the Constitution when he illegally authorized or used public funds to initiate and promote the impugned Amendment Bill in the middle of the crisis that the country is facing in battling Covid-19 pandemic.

258] He further submitted that the learned judges failed to take judicial notice of the huge amount of public funds, including a Kshs. 4 Billion car grant to Members of County Asemblies who had assisted the President in promoting the Amendment Bill through the Building Bridges Initiative; and that the surge in infections with Covid-19 associated with political rallies led by President Uhuru Muigai Kenyatta and Hon. Raila Odinga to popularize the impugned Bill has had an adverse effect on the people's right to the highest attainable standard of health; and that in view of the said issues, the prioritization of constitutional amendments through the impugned Bill was a violation of the State's obligations under ***Article 43*** of the Constitution.

259] None of the parties in the consolidated appeals submitted in support or in opposition to this issue.

(19) Whether both or either of the Houses of Parliament were infirmed from considering the Amendment Bill in view of the Chief Justice's advisory for the dissolution of Parliament.

260] Mr. Morara Omoke argued vide his written submissions that the learned judges erred in law and fact by declining to find and hold that Parliament had no legal or constitutional capacity to debate and/or approve the impugned Bill in view of the advisory opinion of the then Chief Justice David Maraga to President Uhuru Muigai Kenyatta on 21st September 2020 to dissolve Parliament pursuant to the provisions of ***Article 261 (7)*** of the Constitution.

261] It was further submitted that the learned judges erred by relying on ongoing litigation as a basis for declining to order President Uhuru Muigai Kenyatta to dissolve Parliament in accordance with the advice of the Chief Justice.

262] None of the other parties submitted on this issue.

(20) Whether the High Court erred in finding that the BBI Taskforce did not create a legitimate expectation that the submissions by KNUN would be incorporated in the Amendment Bill.

263] ***Mr. Busiega***, appearing on behalf of the KNUN, argued that the proposals which KNUN had submitted to the BBI Taskforce vide its Memorandum dated 8th August 2019 were not incorporated in the Report of the BBI Steering Committee. It was argued that KNUN and its members had legitimate expectation that their views would be incorporated in the Report by the BBI Steering Committee and finally in the Amendment Bill.

264] Counsel maintained that the BBI Steering Committee had no legal basis for ignoring, dismissing, and throwing out the views

and suggestions of KNUN on constitutional amendments. KNUN submitted that such action was in violation of ***Article 257*** of the Constitution whose import, according to counsel, was that no constitutional amendment proposal can be thrown out unless by the people in a referendum. This Court was therefore asked to find that the act of casting aside the proposals of KNUN and more so, the proposal on the establishment of the independent Health Service Commission by the BBI Steering Committee was an abuse of power, and to that extent make a finding that the Amendment Bill in its present form was a legal fraud as it did not represent the views and wishes of the people.

(21) Whether the petitioners had made out a case for disclosure and publication of the BBI Steering Committee's financial information.

265] Mr. Morara Omoke's main argument in his cross appeal was that the learned judges erred, firstly, in declining to order the Auditor General to ascertain the amount of public funds utilized in the promotion of the impugned Bill, and secondly, by declining to order President Uhuru Kenyatta, Hon. Raila Odinga and the BBI Steering Committee to publish or cause to be published details of the budget and public funds allocated and utilized in promoting the impugned Bill.

266] ***Mr. Topua Lesinko*** and ***Mr. Andole*** submitted on his behalf and argued that Mr. Morara Omoke in his supplementary affidavit sworn on 19th February 2021 in support of his Petition No. E416 of 2020 as contained in his supplementary record of appeal dated 23rd June, 2021, had adduced sufficient evidence that the referendum would cost Kshs. 14 billion, while the signature verification process would cost a total of about Kshs.

93 million based on IEBC's estimates. In addition, that it was in the public knowledge that the BBI Steering Committee had been drawing their allowances from public funds for an illegal process in violation of sustainable development principles as enshrined in ***Article 10*** of the Constitution. They added that courts are under an obligation under ***Article 226 (5)*** of the Constitution to order any public officer who commissions illegal use of public funds to make a refund of such money expended in the illegal process.

267] ***Mr. Andole*** invited this Court to consider the provisions of ***Article 73 (1)*** and find that the President has an obligation under ***Article 1*** to ensure that there is accountability and transparency in the use of public funds, which he violated. Counsel further urged the Court to direct the Auditor-General to audit the money expended in the illegal BBI initiative.

268] Mr. Aluochier associated himself with the submissions of Mr. Morara Omoke.

269] ***Mr. Munyithya*** for the IEBC submitted that no sufficient evidence had been led to warrant grant of the aforesaid orders. ***Mr. Mwangi*** appearing for the BBI National Secretariat and Hon. Raila Amolo Odinga stated in his written submissions that the issues raised in the cross appeals regarding use of public funds were not pleaded with specificity and urged this Court to dismiss them

270] The 86th respondent, the Auditor- General, in response urged this Court to affirm the findings of the High Court that it is not required to compute financial statements and reports of auditees, the office only ensures that public expenditure is in

compliance with the Constitution, the Public Audit Act, the Public Finance Management Act and any other legislation relevant to the auditee in question; and that the Auditor-General may audit the process under ***Article 229 (5***) which provides for audit and report on accounts of entities funded by public funds.

271] Relying on the case of ***Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission (IEBC) & Another [2013] eKLR***, the Auditor-General submitted that it is not within the power of the court to order an independent office to exercise its discretion.

(K) ANALYSIS AND DISPOSITION

1. The Basic Structure Doctrine, unamendability theory and eternity clauses: their applicability in Kenya.

272] I had the benefit of reading, in draft, the elaborate opinion of ***Kiage, J.A.*** on this issue and I substantially agree with His Lordship's views and findings. However, I would like to make some additional views on the same.

273] The basic structure doctrine has been defined as a concept of implied limitations on Parliament's power to amend the Constitution. From the summary of the submissions made by various parties in this matter, it is evident that the appellants and a few respondents contend that the basic structure, eternity clauses and unamendability doctrines are not applicable under the Constitution of Kenya, 2010; and that Chapter six of the Constitution ***(Articles 255, 256*** and ***257)*** contain explicit provisions regarding amendment of the Constitution. They argued that each provision of the Constitution is amendable,

either by way of parliamentary initiative or by popular initiative under Article 257.

274] On the other hand, the 1st to 5th respondents, the 9th, 10th, 11th, 12th, 13th, 14th, 19th, 20th, 21st, 72nd, 74th, 75th and 76th respondents took a strong position that the said doctrines are applicable; and that implicitly, certain provisions of the Constitution cannot be amended in the manner proposed by the appellants.

275] To determine the first issue, the High Court considered, *inter alia*, the history of the making of the Constitution; the people's participation in the process; the text and structure of the Constitution, the transformative nature of the Constitution; and the interpretive principles as stipulated under ***Article 259*** of the Constitution as expounded by the Supreme Court in a number of its decisions. The High Court concluded that:

> ***"These principles of interpretation, applied to the question at hand, yield the conclusion that Kenyans intended to protect the Basic Structure of the Constitution they bequeathed to themselves in 2010 from destruction through gradual amendments. We can discern this doctrinal illumination by correctly interpreting both the history of Constitution-making and the structure of the Constitution Kenyans made for themselves. At every step of the way, Kenyans were clear that they wanted a Constitution in which the ordinary mwananchi, Wanjiku, took centre-stage in debating and designing. So clear were Kenyans about the need for informed public participation in constitution-making, that they ensured that the laws regulating constitution-making contained very detailed and specific requirements for four distinct processes:***
>
> ***a) Civic education to equip people with sufficient information to meaningfully***

participate in the constitution-making process;

b) Public participation in which the people – after civic education – give their views about the issues;

c) Debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making in a Constituent Assembly; and

d) Referendum to endorse or ratify the Draft Constitution."

276] The Court went on to state:

> ***"472. What we can glean from the insistence on these four processes in the history of our constitution-making is that Kenyans intended that the constitutional order that they so painstakingly made would only be fundamentally altered or re-made through a similarly informed and participatory process. It is clear that Kenyans intended that each of the four steps in constitution-making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010. Differently put, Kenyans intended that the essence of the constitutional order they were bequeathing themselves in 2010 would only be changed in the exercise of Primary Constituent Power (civic education; public participation; Constituent Assembly plus referendum) and not through Secondary Constituent Power (public participation plus referendum only) or Constituted Power (Parliament only). Paraphrased, there are substantive limits on the constitutional power to amend the Constitution by the Secondary Constituent Power and the Constituted Power."*** *(Emphasis supplied)*

277] The Court further stated:

> ***"473. To be sure, there is no clause in the Constitution that explicitly makes any Article in***

the Constitution un-amendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited. The structure and history of this Constitution makes it plain that it was the desire of Kenyans to barricade it against destruction by political and other elites. As has been said before, the Kenyan Constitution was one in which Kenyans bequeathed themselves in spite of, and, at times, against the Political and other elites. Kenyans, therefore, were keen to ensure that their bequest to themselves would not be abrogated through either incompatible interpretation, technical subterfuge, or by the power of amendment unleashed by stealth."

278] From the foregoing, the learned judges concluded that the basic structure doctrine is applicable in Kenya; that the doctrine protects certain fundamental aspects of our Constitution from amendment through the use of either secondary constituent power or constituted power; and that the essential features of the Constitution forming the basic structure can only be altered or modified by the people using their primary constituent power, which is only exercisable after civic education, public participation coupled with collation of views, constituent assembly debate, consultations and public discourse; and finalized by way of a referendum.

279] As earlier stated, one of the major issues before the trial court was whether there are certain essential features of the Constitution that form the basic structure and therefore cannot be radically changed through a popular initiative, which the Amendment Bill was touted to be. The judges answered that question in the affirmative and held that ***"The essential features of the Constitution forming the Basic Structure***

can only be altered or modified by the People using their Primary Constituent Power."

280] The learned judges described Primary Constituent Power as ***"the extraordinary power to form (or radically change) a constitution."***

281] The trial court held that the basic structure outlines the system of government Kenyans chose, "*the constitutional edifice"* that cannot be altered using the amendment power. They added that the basic structure doctrine ***"protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure."***

282] Taking into consideration the submissions by all the parties, as far as the issue of basic structure is concerned, I do not think that there is any serious contestation that the Constitution of Kenya, 2010 has a basic structure. What is not agreed upon are the matters that form the basic structure. The Attorney General, the BBI Secretariat and Hon. Raila Odinga argued that what constitutes the basic structure are the entrenched provisions listed under ***Article 255(1)*** which states as follows: -

> ***"255. (1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters-***
>
> ***(a) the supremacy of this Constitution;***
>
> ***(b) the territory of Kenya;***
>
> ***(c) the sovereignty of the people;***

(d) the national values and principles of governance referred to in Article 10 (2) (a) to (d);

(e) the Bill of Rights;

(f) the term of office of the President;

(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(h) the functions of Parliament;

(i) the objects, principles and structure of devolved government; or

(j) the provisions of this Chapter."

283] Whereas the appellants and some respondents who support the appeals were of the view that the basic structure of our Constitution is not limited to the above matters, the contested issue is whether the basic structure doctrine limits the amendment power of the Constitution as set out in ***Articles 255-257***. Related to that issue, the 1st to 5th respondents argued that the Amendment Bill, though styled as introducing various amendments to the Constitution, it actually proposes a dismemberment of the Constitution. **Richard Albert** in "***CONSTITUTIONAL AMENDMENT AND DISMEMBERMENT***" *(supra),* describes constitutional dismemberment as a deliberate effort to disassemble one or more of the Constitution's constituent parts, whether codified or uncodified, without breaking the legal continuity that is necessary for maintaining a stable polity.

284] What is a constitutional amendment?

In their petition, the 1st to 5th respondents stated: -

"255 Constitutional amendments come in two types; they can either be corrective or elaborative.

Properly defined, a constitutional amendment is a correction made to better achieve the purpose of the existing constitution. For example, The Twelfth Amendment of the US Constitution was designed to reduce the possibility of a tie by requiring electors to differentiate their selections for president and vice-president. It corrected a technical flaw in the original Constitution. (Emphasis supplied)

256. A constitutional amendment can also be elaborative. An elaboration is a larger change than an amendment in so far as it does more than simply repair a fault or correct an error in the constitution-making project BUT DOES SO in line with the current design of the constitution. Instead of repairing an error in the constitution, however, an elaboration advances the meaning of the constitution as it is presently understood."

285] I agree with the 1st to 5th respondents' submission that an amendment corrects or modifies the existing system without fundamentally changing its nature; that an amendment operates within the parameters of the existing Constitution, as stated by **Walter**, **Murphy**, in "***CONSTITUTIONS, CONSTITUTIONALISM, AND DEMOCRACY-TRANSITIONS IN THE CONTEMPORARY WORLD"*** (Douglas Greenberg et al. eds. Oxford University Press, 1993, 3 [1993 A].

It follows, therefore, that any amendment that alters constitutional fundamental values, norms and institutions cannot pass as an amendment, it is in the nature of dismemberment. In my view, the omnibus constitutional Amendment Bill that seeks to fundamentally alter certain constitutional pillars of our supreme law like the concept of separation of powers and the independence of the Judiciary is not an ordinary constitutional amendment, it amounts to a dismemberment of the Constitution.

286] Let me illustrate this by closely considering some aspects of the impugned Amendment Bill. This omnibus Bill is titled ***"A Bill for an Act to amend the Constitution by popular initiative."*** It contains 74 proposed constitutional amendments. Some of the proposed amendments have the effect of interfering with the concept of separation of powers which is well ingrained in our Constitution. ***Article 1(1***) of the Constitution stipulates that all sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. This arrangement ensures that these three broad arms of government remain distinct from each other and do not encroach upon each other's functions, but subject to the usual constitutional and statutory checks and balances.

287] ***Clause 44*** of the Amendment Bill proposes to create the Office of the Judiciary Ombudsman by introducing a new ***Article 172A***. The clause states as follows: -

> ***"(1) There is established the Office of the Judiciary Ombudsman.***
>
> ***(2) The President shall nominate and, with the approval of the Senate, appoint the Judiciary Ombudsman.***
>
> ***(3) The Judiciary Ombudsman shall-***
>
> ***(a) receive and conduct inquiries into complaints against judges, registrars, magistrates, and other judicial officers and other staff of the judiciary;***
>
> ***(b) sensitise and promote engagement with the public on the role and performance of the***

Judiciary; and (c) improve transparency and accountability of the Judiciary.

(c) improve transparency and accountability of the Judiciary.

(4) The Judiciary Ombudsman shall prepare regular reports to the Judicial Service Commission and an annual report to Parliament on any complaint under clause (3), which shall state-

(a) the findings of the Judiciary Ombudsman; and

(b) recommendations on the action to be taken by the Judicial Service Commission.

(5) The qualifications for appointment as the Judiciary Ombudsman are the same as for the appointment as a judge of the Supreme Court.

(6) The Judiciary Ombudsman shall not investigate any matter pending before any court or tribunal or reopen a court or tribunal case or review a judge's decision.

(7) The Judiciary Ombudsman shall hold office for a single term of five years and is not eligible for re-appointment.

(8) Parliament shall-

(a) allocate adequate funds to enable the office of the Judiciary Ombudsman to perform its functions; and

(b) enact legislation to give full effect to this Article."

288] There are a few observations that I wish to make regarding this proposed amendment as relates to the independence of the Judiciary.

i. The fact that the Judiciary Ombudsman shall be an appointee of the President entrenches executive control in the Judicial Service Commission and by extension in the Judiciary. Under ***Article 171(2)***, four of the eleven members are appointed by the executive. If the proposed

Bill goes through, the executive's appointees shall be a total of five.

ii. Of even greater concern is that the proposed duties and functions of the Judiciary Ombudsman, whose allegiance is to the President, has the effect of making the holder of that office a terror to judges, magistrates and all judicial staff. That office shall not only receive and conduct inquiries into complaints against judges, magistrates, registrars and all judicial staff, but will also play a critical role in the removal of judges. ***Clause 41*** proposes to amend ***Article 168(2)*** of the Constitution so that it will read:

> ***"(2) The removal of a judge may be initiated only by the Judicial Service Commission acting <u>on a motion by the Judiciary Ombudsman</u>."***
> *(Emphasis supplied)*

iii. In passing the 2010 Constitution, Kenyans wanted to have a strong and independent Judiciary but the proposed amendment is the exact antithesis of such a Judiciary. If a presidential appointee is empowered to receive and investigate a complaint against judges, craft a motion for the judge's removal, and present it for consideration by the Judicial Service Commission, where he sits as an ex officio member, it is not difficult to discern that in making judicial pronouncements, most judges would be very cautious of going against the will of the President, otherwise the President may resort to use of his or her appointee to initiate removal proceedings of the judge because "*he who pays the piper calls the tune."*

iv. This is an ingenuous and subtle claw back to the independence of the Judiciary. I highly doubt whether

there was any meaningful civic education and public discourse on the issue during the promotion of the impugned Bill. Decisional and institutional independence of the Judiciary in a democratic state should be jealously guarded, and before any constitutional amendment that is likely to interfere with the same is made, the people must be given an opportunity to exercise their Primary Constituent Power. In **The Final Report of the Constitution of Kenya Review Commission**, **Clause 13.5.4** at page 209, among the things that the people said about the Judiciary are that: -

> ***"(i) the independence of the Judiciary should be entrenched in the Constitution;***
>
> ***(ii) the Constitution should ensure that there is no interference in the Judiciary by the Executive and by politicians."***

If this is not executive interference in the work of the Judiciary, then I do not know what else amounts to such interference.

v. There seems to be a duplication of mandates between the Judicial Service Commission and the Judiciary Ombudsman in so far as the function to receive and investigate complaints is concerned. ***Article 172 (1) (c)*** states that one of the functions of the Judicial Service Commission is to:

> ***"(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament."***

Without any proposed deletion or amendment to the above provision, the proposed ***Article 172A (3) (a)*** states:

> ***"3) The Judiciary Ombudsman shall-***
>
> ***(a) receive and conduct inquiries into complaints against judges, registrars, magistrates, and other judicial officers and other staff of the judiciary."***

These two, almost similar constitutional provisions, will create parallel and incompatible centres of power, which is not good for the country. There is a possibility of parallel complaints against judges and judicial officers being instituted before the two offices. What would happen if they were to arrive at different conclusions on the question of removal?

289] Turning to the legislature, ***Clauses 29, 32*** and ***33*** of the Amendment Bill proposes to remove the requirement for vetting by the National Assembly of Cabinet Ministers, Secretary to the Cabinet and Principal Secretaries. ***Clause 31*** proposes to introduce the position of Deputy Ministers whose appointment shall not be vetted by Parliament. There is also the proposal to do away with the pure presidential system and replace it with a hybrid one, where there will be a Prime Minister, Deputy Prime Minister, Cabinet Ministers, Attorney General and Leader of Opposition, who will also sit in Parliament.

290] The people of Kenya in promulgating the 2010 Constitution opted for a pure presidential system, and in my view the proposal interferes with the concept of separation of powers as members of the executive will also be members of the legislature.

291] I now turn to consider the proposed increase of constituencies and their allocation to some counties by the promoters of the

Amendment Bill. Under ***Clauses 10*** and ***74*** as read together with the ***second schedule*** of the Amendment Bill, the promoters of the Bill proposed to increase the number of constituencies from 290 to 360. However, without proposing to delete ***Article 89(2)*** of the Constitution which empowers the IEBC to review the names and boundaries of constituencies, the promoters decided to allocate the proposed 70 additional constituencies to 29 counties but left it to the IEBC to determine their boundaries. The IEBC protested, and rightly so, saying that it has the exclusive mandate of delimiting constituencies as per ***Article 89(2)***.

292] I have no hesitation in stating that the task of review of names and delimitation of constituencies exclusively belongs to the IEBC. The people of Kenya decided that the task of delimitation of boundaries should be handled by an independent commission, following the criteria set out under ***Article 89(5) (6)*** and ***(7)*** of the Constitution The task of deciding which county should have extra constituencies should have been handled by the IEBC. Entrusting such a delicate responsibility to persons with declared political interests is tantamount to gerrymandering, which **James Ruley** describes as "*the process of dividing political units in ways that deliberately create advantages for incumbents or their political allies, by placing voters based on their predicated behavior at the polls in districts that dilute the vote of some voters and consolidate the votes of others*." (See **Ruley, James**. "***One person, One Vote***: ***Gerrymandering and the Independent Commission***, ***A Global Perspective***." **Indiana Law Journal, Vol. 92, No. 2, Spring 2017 at page 783**).

293] It is not all the 74 proposed amendments that seek to fundamentally alter basic structure of the social contract that Kenyans entered into when they gave to themselves the Constitution of Kenya, 2010, after decades of political struggle. But the few that I have highlighted point to attempts to alter fundamental aspects of the basic structure of our Constitution, and that to me is constitutional dismemberment. That is why I would agree with the learned judges that it is necessary that we replicate the same procedure that we used to give to ourselves the 2010 Constitution if we have to fundamentally amend certain provisions of the Constitution.

294] ***Richard Albert*** says that an amendment continues the Constitution making project in line with the current design of the Constitution, while a dismemberment is incompatible with the existing framework of the Constitution and instead seeks to unmake some of its constituent parts. He states:

> ***"Where the rules of change do not state a distinguishable procedure for dismemberments-for example, where the constitution entrenches only one procedure for formal constitutional change-the theory of constitutional dismemberment suggests a default procedure to legitimase a dismemberment. Here, when the constitution is silent on the distinction between amendment and dismemberment, the deep constitutional transformation that dismemberment entails can be legitimated, with few exceptions, only by at least the same or similar configuration of constitution-making bodies that made the commitment that dismemberment later seeks to undo. This is ordinarily the original ratification procedure that authorized the constitution at its creation."***

(See **Constitutional Amendment and Dismemberment**, supra.)

295] According to ***Yaniv Roznai***, (supra) constitutional amendments that violate fundamental rights or basic principles are "*unconstitutional constitutional amendments."* The power to amend a constitution is therefore not unlimited. He further states that a country's constitution is built upon certain pillars and foundations that fill its essence. The focus should therefore not simply be the Constitution's procedures, but also on its substance. He adds:

> ***"Substantively, a constitutional change may be deemed unconstitutional, even if accepted according to the prescribed constitutional procedures, if it conflicts with unamendable constitutional provisions, or collapses the existing order and its basic principles, and replaces them with new ones thereby changing it identity."***

296] Regarding provisions that have been referred to as *"unamendable" "immutable", "unchangeable", "unutterable", "irrevocable"* or *"eternity clauses*", ***Yaniv Roznai*** *(supra)* argues that these provisions are neither eternal nor unchangeable. They serve as a mechanism for limiting the amendment power, ***"they do not- and cannot - limit the Primary Constituent Power."*** He further argues that unamendable provisions are subject to changes introduced by extra constitutional forces (read primary constituent assembly of the people) or through judicial interpretation.

297] Unamendable provisions reflect the idea that certain constitutional subjects ought to be protected from alteration. He states that: -

> ***"Provisions upholding the democratic order are often unamendable, and unamendable provisions also protect other principles such as separation of***

powers, rule of law, independence of courts and judicial review of statutes."

298] He opines that preservation of core constitutional values is the most common aim of unamendable provisions. I respectfully approve and endorse the views of this learned author.

299] From the foregoing, I would agree with the learned judges that the basic structure doctrine is applicable in Kenya, and that certain fundamental aspects of the Constitution of Kenya, 2010 cannot be amended except through the sovereign Primary Constituent Power of the people.

300] However, I do not think that the alteration of the basic structure must be undertaken through the repeal of the Constitution and promulgation of another one, as argued by some of the proponents of the doctrine of basic structure. Any provision that may be found to be part of the basic structure of our Constitution may be amended by the people by exercise of their Primary Constituent Power after civic education, public participation, constituent assembly debate and a referendum. Chapter 16 (Articles 255-257) only applies to pure amendments of the Constitution that do not alter any feature that forms the basic structure.

301] The Constitution of Kenya (Amendment) Bill, 2020 as structured violates certain components of our Constitution's basic structure.

2. Who were the initiators and the promoters of the Constitution of Kenya (Amendment) Bill, 2020?

302] The BBI Secretariat and Hon. Raila Odinga challenged the High Court's finding that a promoter of a popular initiative is synonymous with an initiator of a popular initiative, hence

reaching an erroneous holding that the President was the promoter of the Amendment Bill.

303] Contrary to this finding, the BBI Secretariat and Hon. Raila Odinga argued that Hon. Junet Mohamed and Hon. Dennis Waweru were the promoters of the Amendment Bill. The same was evidenced in their letter dated 18th November 2020 addressed to the IEBC forwarding the draft Bill duly signed by more than one million registered voters who were in support of the draft Bill.

304] The Attorney General, taking the same position as the BBI Secretariat, emphasized that the President was not the promoter of the Amendment Bill, as the same was promoted by the BBI National Secretariat, which they described as a voluntary political alliance of various political players in Kenya.

305] On the other hand, most of the respondents, except those who supported the appeals, argued that the President was the initiator of the Amendment Bill, and that the President's hand was openly manifest in the BBI process leading to the impugned Bill.

306] Before I delve into this issue, it is necessary to consider the meaning of an "*initiator*" and a "*promoter*". As per the Cambridge English Dictionary, an initiator is an instigator, the one who begins something. It also means a person who causes something to begin. Other words that can be used to describe an initiator are creator, designer, mastermind, pioneer, engineer, originator, deviser, producer, planner or framer.

307] A promoter on the other hand means a person who encourages or incites. *See Black's Law Dictionary, Ninth Edition*. In other

words, a promoter can also be defined as a supporter of a cause or aim. Synonymous to promoter is an advocate, champion, supporter, campaigner, protagonist or booster.

308] Going back to the issue at hand, the genesis of the BBI can be traced back to the 9th March 2018 handshake between President Uhuru Muigai Kenyatta and Hon. Raila Odinga that I alluded to earlier.

309] Thereafter, the President established an initiative referred to as "*Building Bridges to Unity Advisory Taskforce*" (BBI Taskforce) through Gazette Notice No. 5154. I set out the terms of reference of the BBI Taskforce at the beginning of this judgment. The BBI Taskforce in November, 2019 came up with an interim report.

310] Subsequently, the President, vide Gazette Notice No. 263 dated 3rd January, 2020 and published in a Special Issue dated 10th January, 2020 appointed the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (BBI Steering Committee) whose mandate was to conduct a validation of the BBI Taskforce Report. On 21st October 2020 at Kisii State Lodge the President and Hon. Raila Odinga received the BBI Steering Committee Report and the Draft Constitution of Kenya (Amendment) Bill, 2020 was one of the annexures to that Report, among other proposed Bills.

311] The President, in the submissions made before this Court, confirmed that he established both the BBI Taskforce and the BBI Steering Committee pursuant to the functions and obligations conferred upon him by ***Articles 131*** and ***132*** of the Constitution.

312] From the foregoing, there can be no dispute that the President was the initiator of the BBI Initiative, having established and gazetted under his hand the BBI Taskforce and the BBI Steering Committee. I am in agreement with the High Court's finding that the Amendment Bill was an initiative of the President.

313] On the question of the promoter of the Amendment Bill, the BBI Secretariat and Hon. Raila Odinga through their Senior Counsel, Mr. Otiende Amollo, submitted that the Bill was promoted by Hon. Junet Mohamed and Hon. Dennis Waweru, the Co-Chairpersons of the BBI National Secretariat. The same argument was also advanced by the Attorney General, who added that the BBI Secretariat was a voluntary political alliance of various players in Kenya, distinct from the BBI Taskforce and the BBI Steering Committee.

314] Mr. Kimani, one of the Senior Counsel who appeared for the President, submitted that the President under ***Article 38*** of the Constitution of Kenya, 2010 has a right to make political choices, just like any other Kenyan. He went further to state that there is no such person or entity as an *"initiator"* under Article 257. He emphasized that the President was not the promoter of the Amendment Bill. In addition, that there is nothing in law that bars the President from being a promoter or participating in the amendment process by popular initiative in his capacity as a registered voter. Further, it was submitted that by virtue of ***Article 38 (1) (c)*** the President has a right to campaign for a political party or cause and that includes mobilization and promotion of a popular initiative.

315] I had earlier defined who a promoter is, and he or she can be referred to as a supporter of a cause or aim. In our context, a

promoter is cited under ***Articles 257(3)*** and ***(4)*** of the Constitution which provides as follows-

> ***"257 (3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.***
>
> ***(4) The promoters of the popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters."***

316] The record of appeal contains a letter dated 18th November 2020 by Hon. Dennis Waweru and Hon. Junet Mohamed as the Co-Chairpersons of the BBI Secretariat addressed to the chairperson of the IEBC, indicating their intention to collect one million signatures in support of the proposed Amendment Bill. The same was acknowledged by a letter dated 24th November 2020 by the Chairperson of the IEBC. It is also in the public domain that on 10th December2020, the BBI Secretariat Co-Chairpersons handed the signatures and the Bill to the IEBC Chairperson, Mr. Wafula Chebukati. There is therefore no dispute that the promoter of the Amendment Bill was the BBI National Secretariat.

3. The legality of The BBI Steering Committee and its Report in the Constitutional Amendment Process: Was it a popular initiative?

317] A discussion on this issue must commence with the joint communique' that was released by President Uhuru Kenyatta and Hon. Raila Odinga following the famous handshake on 9th March 2018. This joint communique' heralded a significant change in the country's political climate and was welcomed by

all Kenyans of goodwill. It was a master stroke by the leaders of the big two political divides in the country. Their commitment and resolve to address the nine issues I stated earlier was astounding.

318] The two leaders stated, *inter alia*:

> ***"Intent on not witnessing the country suffer similar future cycles of the same tribulations it has since 1963, they are determined to offer the leadership that prevents future generations inheriting dangerous division and offers them a path to a bright future for all. Both H.E. President Uhuru Kenyatta and H.E. Raila Odinga have agreed to launch this initiative that aims to create a united nation for all Kenyans living today, and all future generations."***

319] The work of the BBI Taskforce eventually gave rise to the BBI Steering Committee, whose terms of reference were to:

> ***"a) conduct validation of the Taskforce Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and***
>
> ***b) propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report, taking into account any relevant contributions made during the validation period."***

320] It is important that I highlight the other contents of the Gazette Notice for their full effect and appreciation. They were as follows:

> ***"2. In the performance of its functions, the Steering Committee shall-***
>
> ***a) appoint its chairperson and vice-chairperson from among its members;***
>
> ***b) regulate its own procedure within confines of the law and the Constitution;***

c) privilege bipartisan and non-partisan groupings, forums and experts;

d) form technical working groups as may be required in the achievement of its terms of reference;

e) hold such number of meetings in such places and at such times as the it shall consider necessary for the proper discharge of its functions;

f) shall solicit, receive and consider written memoranda or information from the public; and

g) may carry out or cause to be carried out such assessments, studies or research as may inform its mandate.

3. The Joint Secretaries shall to be *(sic)* ***responsible for all official communication on behalf of the Steering Committee.***

4. The Joint Secretaries may co-opt any other persons as may be required to assist in the achievement of the terms of reference of the Steering Committee.

5. The Steering Committee shall submit its comprehensive advice to the Government by 30th June, 2020 or such a date as the President may, by notice in the Gazette, prescribe."

321] It is evident that one of the major functions of the BBI Steering Committee was to propose, among other things, constitutional changes that were thought necessary for the implementation of the recommendations contained in the BBI Taskforce Report and submit a comprehensive to the Government. If this was intended, as it turned out to be, a move towards amendment of the Constitution as a popular initiative, that is where the rain started beating the process.

322] Under the Constitution of Kenya, 2010, there are only two ways of amending the Constitution. The first one is by parliamentary

initiative under Article 256, and the second one is by popular initiative under Article 257. The High Court held that what was presented as a popular initiative to amend the Constitution was the President's initiative.

323] What is popular initiative? It is defined as a process of a participatory democracy that empowers the people to propose legislation and to enact or reject the laws at the polls, independent of the law-making power of the governing body (see Legal – dictionary-the free dictionary.com).

324] At paragraph 483, the learned judges stated: -

> ***"483. According to Wikipedia:***
>
> > ***In political science, an initiative (also known as a popular or citizens' initiative) is a means by which a petition signed by a certain minimum number of registered voters can force a government to choose to either enact a law or hold a public vote in Parliament in what is called indirect initiative, or under direct initiative, the proposition is immediately put to a plebiscite or referendum, in what is called a Popular initiated Referendum or citizen-initiated referendum. In an indirect initiative, a measure is first referred to the legislature, and then put to a popular vote only if not enacted by the legislature. If the initiative (citizenproposed law) is rejected by the Parliament, the government may be forced to see the proposition put to a referendum. The initiative may then take the form of a direct initiative or an indirect initiative. In a direct initiative, a measure is put directly to a referendum. The vote may be on a proposed federal level, statute, constitutional amendment, charter amendment or local ordinance, or to simply oblige the executive or legislature to consider the subject by submitting it to the order of the day. It is a form of direct democracy."***

325] Considering the way the Amendment Bill was developed and processed, it cannot pass muster as a popular initiative. The Bill came into being after "*the President and Commander –in-Chief of the Defence Forces*" appointed the BBI Taskforce which prepared a report and presented it to the President, who in turn set up the BBI Steering Committee that eventually drew up the Bill. It is however not in dispute that the BBI Steering Committee toured all the counties and received views from various stakeholders, but that cannot qualify the process as a popular initiative. There is no indication whatsoever that this was a citizen initiated move. By all means, it was an executive led and driven initiative.

326] The learned judges retraced the history of ***Articles 255-257*** of our Constitution to place them in their historical context. That was in line with several decisions of the Supreme Court regarding constitutional interpretation, among them ***The Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR*** at Paragraph 26 where the Court held:

> "***476: ...a holistic interpretation of the Constitution...must mean 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."***

327] They noted that the **Final Report of the Constitution of Kenya Review Commission** acknowledged that the people of Kenya

stated that apart from Parliament, there was need for them ***"to exercise their constituent power in any matter relating to the amendment of the Constitution. It was therefore recommended that citizens and the civil society be enabled to initiate constitutional amendments through a process called popular initiative."***

328] The "***Ghai Draft***" did not however contain that mode of amendment, the only provision for amendment was through Parliament. The Ghai Draft was revised, bringing forth the ***"Zero Draft***" that was subsequently revised to give way to the "***Revised Zero Draft***" in which ***Article 346*** in ***Chapter 19*** was titled: "***Amendment by the People"*** and clause 1 thereof stated:

> ***"An Amendment of this Constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote."***

329] The ***"Bomas Draft***" retained that clause but in the subsequent revision that produced the ***"Wako Draft"***, the provision on popular initiative was slightly enacted to read:

> ***"An Amendment of this Constitution may be proposed by a popular initiative supported by the signatures of at least one million registered voters."***

330] The Wako Draft did not pass in the 2005 referendum and when the Constitution review process resumed in 2008, it was agreed that all the previous drafts would be harmonized, and only contentious issues were to be re-opened for discussion. The Committee of Experts that was established in 2009 prepared the ***"Revised Harmonized Draft"*** which was handed to the Parliamentary Select Committee on Constitutional Review. In that Draft, Article 238 titled: "***Amendment by Popular Initiative***" stated: -

> ***"An Amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters."***

The exact words were replicated in ***Article 257(1)*** of the ***Constitution of Kenya, 2010***.

331] From the foregoing, I agree with the learned judges that the BBI Steering Committee had no constitutional mandate to initiate constitutional changes under ***Article 257*** of the Constitution, disguised as a popular initiative. This was a move initiated by the political elite, not by the people of Kenya.

4. Whether there was public participation in the passage of the Amendment bill.

332] The 76th respondent's contention was that ***Articles 7, 10, 33, 35*** and ***38*** were violated in that the promoters of the Amendment Bill started collecting signatures of its supporters before providing the people with copies of the Bill in English, Kiswahili, indigenous languages, Kenyan sign language, Braille and other communication formats and technologies accessible to persons with disabilities; and for not allowing the people sufficient time to read and understand the Bill.

333] It was not disputed that the promoters of the Amendment Bill simply posted English versions of it on the internet. The appellants did not tell the High Court the number of Kenyans that have reliable access to internet and were able to read and understand the English version of the impugned Bill. ***Article 7(1)*** of the Constitution states that the national language of the Republic is Kiswahili, while ***Article 7(2)*** provides that the official languages of the Republic are Kiswahili and English.

334] Considering that the national language is Kiswahili, and all major political gatherings are addressed in Kiswahili, it was dishonest on the part of the promoters to purport to have reached out to the masses by simply posting on the internet the Amendment Bill in English language. The 76th respondent submitted that according to the 2019 Kenya Population and Housing Census (Volume IV) only 22.6 per cent of Kenyans aged 3 years and above use intent, while only 10.4 per cent use a computer.

335] Turning to ***Article 10***, participation of the people must be done in a transparent manner. Transparency is one of the national values and principles of governance that bind all State organs, State officers, public officers and persons whenever any of them makes or implements public policy decisions. Although more than a million registered voters signed in support of the Amendment Bill, it was not demonstrated that the exercise was conducted transparently. Transparency in this case required that before collection of the signatures is done, proper civic education is conducted where, *inter alia*, each of the 74 proposed amendments would be well explained to the people to that they understand and appreciate the ramifications of each of them.

336] Some of the proposed amendments are rather superfluous, and strictly speaking they ought not to have been proposed as constitutional amendments by the promoters. At best, they could only be proposed as statutory amendments but were intentionally included in the Amendment Bill and appropriate statutory amendment Bills drawn by the to act as sweeteners to coax voters into supporting the proposed constitutional amendments. An example is ***clause 3*** which proposes to create

a ***new Article 11A*** on Economy and shared prosperity. The same reads as follows: -

> ***"(1) This Constitution recognises the need for an economic system that provides equitable opportunities for all the people of Kenya to benefit from economic growth in a comprehensive, fair and sustainable manner.***
>
> ***2 The State shall promote-***
>
> ***(a) productivity through protection of intellectual property rights;***
>
> ***(b) investment, enterprise and industrialisation for sustainable economic development;***
>
> ***(c) sustainable agriculture;***
>
> ***(d) an economic system that supports small and micro enterprises;***
>
> ***(e) an infrastructure that supports the digital economy; and***
>
> ***(f) application of science and technology in the production system."***

337] Together with the Amendment Bill, the promoters also drew the ***Micro and Small Enterprises (Amendment) Bill,* 2020** which, *inter alia*, proposed to give youth-owned enterprises a seven-year tax break.

Another example is the proposed amendment of the ***Higher Education Loans Board Act, 1995*** to give loanees a grace period of four years from the date of completion of their studies and to exempt loanees without a source of income from paying interest on the loans advanced to them.

338] These are definitely very good and appealing proposals, but anchoring them on the Constitution of Kenya (Amendment) Bill, 2020 that also proposed very far reaching alterations of the basic structure of our Constitution was a clever bait to entice the

populace, and particularly the young registered voters, who are the majority, to support the Amendment Bill, without proper civic education on all the contents of the entire Bill.

339] The Thirdway Alliance (the 19th respondent), also questioned the speed at which some County Assemblies passed the Amendment Bill without any public participation The County Assembly of Tana River is a classic example. In ***Abe Semi Buere v County Assembly of Tana River & Another; Speaker of The National Assembly & Anther*** ***(Interested Parties) [2021] eKLR***, ***Nyakundi, J***. established that the County Assembly of Tana River considered and approved the Amendment Bill on 23rd February 2021, whereas it had published in the local newspapers and social media that there would be public hearings and presentation of memoranda on the Bill on 25th February 2021. The learned judge declared that the resolution to pass the Bill was tainted with procedural illegality and was therefore fatally defective and unconstitutional.

340] It is also on record that Members of County Assemblies (MCAs) demanded and were given car grants of Kshs.2 million each shortly before an overwhelming majority of County Assemblies passed the Amendment Bill, paving way for it to be placed before Parliament under ***Article 257 (7)***. Whereas it is desirable that MCAs be facilitated in their performance of their legislative work in our county governments and therefore the car grants may have been lawful, its timing was said to have been deliberately intended to influence them to pass the Amendment Bill. The Salaries and Remuneration Commission had previously raised various objections to the car grants, but the Commission suddenly changed its position and gave a green light to the car

grants during the promotion of the impugned Bill, the 19th respondent asserted.

341] It was also demonstrated that some senior public servants were deployed to go to their counties to promote and campaign for the support of the Amendment Bill.

342] In ***Robert N. Gakuru & Another v Governor of Kiambu County & 3 Others*** (supra), it was held, *inter alia*, that public participation must be real and not illusory; should not be treated as a mere formality because it is a constitutional requirement; and must be attained quantitatively and qualitatively. I may add that public participation must be done transparently and in demonstrable utmost good faith, without any coercion.

343] All these acts and omissions I have highlighted above amounted to violation of certain aspects of ***Article 10***, in particular, participation of the people, inclusiveness, integrity, transparency and accountability. Amendment of a country's Constitution ought to be a very sacrosanct public undertaking and its processes must be undertaken very transparently and in strict compliance with the country's law. Deliberate compromise of the process will invalidate even a well-intentioned proposal.

344] As ***George Washington*** said,

> ***"If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by ursupation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."***

345] In view of the foregoing, I find and hold that the Amendment Bill was not by popular initiative, and though there was a degree of public participation in its development and passing it was not in accordance with the national values and principles under ***Article 10*** of the Constitution.

5. Whether the President can initiate the process of amendment of the Constitution as a popular initiative.

346] It is clear in my mind that amendment of the Constitution by the popular initiative was intended for ordinary citizens who are registered voters. I agree with the learned judges that ***"the power to amend the Constitution using the popular initiative route is reserved for the private citizen. Neither the President nor any State organ is permitted under our Constitution to initiate constitutional amendment using Popular Initiative."***

347] It was submitted that the President enjoys all the constitutional rights and freedoms like any other Kenyan, including equality and freedom from discrimination under ***Article 27*** and political rights under ***Article 38***. That is correct, but as it has been held in a plethora of authorities, the Constitution must be read as a whole and in a manner that promotes its purposes, values and principles. The President, through the office of the Attorney General, can use the parliamentary initiative to propose amendments to the Constitution, if he so wishes, but cannot initiate a process for dismemberment of the Constitution disguised as a popular initiative.

348] The learned judges rightly rejected the submissions that the President can utilize ***Article 257*** as a private citizen. They stated: -

"495. More importantly is the question whether the President can, under the guise of being a private citizen, exercise the powers of amendment reserved under Article 257 of the Constitution. A textual reading of Article 1(2) of the Constitution which we have referred to above reveals that the powers thereunder are exercisable either directly or through their democratically elected representatives. The employment of the phrase "either directly or" is a clear manifestation that the drafters of the Constitution intended that there be a distinction between direct and representative exercise of sovereign power. This Court, in interpreting the Constitution, must do so holistically as we have explained above. As was held in *Tinyefuza vs. Attorney General* ***Const. Petition No. 1 of 1996 (1997 UGCC3):***

> *"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."*

496. In our view, in interpreting the Constitution holistically as we are enjoined to do, Article 1(2) must be read together with Articles 256 and 257 of the Constitution. When one considers these provisions together the only reasonable conclusion is that Article 257 of the Constitution is reserved for situations where the promoters of the Bill do not have recourse to the route contemplated under Article 256. Our view is in tandem with the historical genesis of the provision we have set out hereinabove. In other words, the Article 257 route is meant to be invoked by those who have no access to Article 256 route. Those who have access to Article 256 route are, therefore, barred from purporting to invoke the Article 257 route. There is no doubt that the President, if he intends to initiate a constitutional amendment, may do so through the aegis of Parliament. It follows that since the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce

Report was a brainchild of the President, it has no locus standi in promoting constitutional changes pursuant to Article 257 of the Constitution.

497. It is our view that a Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment independent of the law making power of the governing body cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests."

349] I hold and find that under our constitutional architecture, the President cannot initiate the process of amendment of the Constitution as a popular initiative. The President's intentions in initiating the process were noble, but the process of its execution was not in line with the Constitution.

(6) Whether the IEBC had requisite quorum to carry out its business in relation to the Amendment Bill.

350] The Attorney General submitted that the learned judges erred in law in finding that the IEBC lacked the requisite quorum to make decisions connected with the Amendment Bill, including the verification of signatures in support of the popular initiative. The IEBC had only three Commissioners, out of an establishment of seven.

351] **Article 88** of the Constitution provides that the IEBC shall exercise its powers and perform its functions in accordance with the Constitution and national legislation. **Article 250(1**) of the Constitution stipulates that each Commission shall consist of at least three, but not more than nine members.

352] ***Section 5(1)*** of the ***IEBC Act*** states as follows: -

> ***"The Commission shall consist of a chairperson and eight other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act."***

Section 8 of the Act stipulates that the regulation of the business and affairs of the Commission shall be as provided in the second schedule. Paragraph 5 of the second schedule states as follows: -

> ***"5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission."***

353] Sometime after the 2017 general election, four commissioners of the IEBC resigned, leaving only the Chairman and two commissioners. Subsequently, the National Assembly passed the Election Laws Amendment Act, 2017 which, *inter alia*, had the effect of reducing the quorum to "***half of the existing members of the Commission, provided that the quorum shall not be less than three members***." *Emphasis supplied*.

354] In ***Katiba Institute & 3 Others v Attorney General & 2 Others*** (supra), the High Court was asked to declare the said amendment, among others, unconstitutional. In his judgment rendered on 6th April, 2018, ***Mwita, J.*** held, *inter alia*: -

> ***"74. The Commission is currently composed of 7 members including the chairperson. The quorum for purposes of conducting business is half of the members but not less than three. This means the Commission can comfortably conduct business with three out of seven members, a minority of the Commissioners. Taking into account the new paragraph 7 which requires that if there is no unanimous decision, a decision of the majority of the Commissioners present and voting shall prevail, has one***

fundamental flaw. With a quorum of three Commissioners, there is a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. This would not auger well for an independent constitutional Commission that discharges very important constitutional mandate for the proper functioning of democracy in the country. Such a provision, in my respectful view, encourages divisions within the Commission given that the Commission's decisions have far reaching consequences on democratic elections as the foundation of democracy and the rule of law.

75. Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason, paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

What is the legal effect of such a declaration?

355] In ***Carr v State*** **[1890] 127 Ind. 204**, the Supreme Court of Indiana held that: -

"An act which violates the Constitution has no power and can, of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality."

356] Similarly, the United States Supreme Court ***in Chicago Indianapolis & Louisville Ry v Hackett***, ***[1912] 227 U.S. 559 S. CT; 57 L. ED. 966*** held: -

> ***"That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."***

357] In Kenya, the Supreme Court in ***Mary Wambui v Gichuki King'ara***, ***Supreme Court Petition No. 7 of 2014***, the Court held that it had jurisdiction to state whether its declaration of unconstitutionality would have a retrospective or prospective effect. Indeed, that same power equally applies to any other superior court when it is called upon to pronounce itself on the constitutionality of any statute or provision thereof. In ***Mary Wambui's case***, the Supreme Court's declaration of invalidity of ***section 76 (1) (a)*** of the Elections Act was effective from the date of commencement of the Act.

358] In ***Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR***, the Supreme Court held: -

> ***"[42] The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of "prospective annulment". Such***

recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands."

359] It follows, therefore, where a court having declared a provision of a statute as unconstitutional but does not state the effective date of that declaration, the declaration becomes effective from the date of the judgment, unless an appeal is preferred against the decision.

360] The judgment in ***Katiba Institute case*** was a judgment *in rem*. Neither the Attorney General nor the National Assembly, who were the respondents, filed any appeal against the decision. The IEBC must also be presumed to have been aware of the judgment. In my view, therefore, the relevant provisions in the Election Laws Amendment Act, 2017, having been declared unconstitutional on 6th April 2018, had no effect upon the sections of the IEBC Act that were sought to be amended or repealed, the previous provisions remained the law as though the National Assembly had not repealed them. In essence, paragraph 5 of the second schedule remained as it was, meaning that the quorum for the conduct of business at a meeting of the IEBC is five members of the commission.

361] In ***Isaiah Biwott Kangwony v Independent Electoral and Boundaries Commission & Another***, *(supra)*, the petitioner sought the following declarations: -

"1. A DECLARATION does issue to the effect that the current composition of the Independent Electoral and Boundaries Commission is illegal and unconstitutional as a result of the resignation of four commissioners and hence the Commission lacks the requisite quorum to conduct and/or carry out its business.

2. ***<u>A DECLARATION</u> does issue to the effect that the current composition of the Commission is illegal and unconstitutional as a result of the resignation of four Commissioners and hence, the Commission as constituted cannot hold and/or supervise any such elections moreover, the By-elections for Baringo South Bobasi Chache Ward; and for Member of County Assembly North Kadem Ward scheduled for 17th August, 2018.***

3. ***<u>A DECLARATION</u> does issue to the effect that the current composition of the Commission is illegal and unconstitutional as a result, any purported By-elections to be held by the Commission, shall be null and void.***

4. ***<u>AN ORDER</u> does issue to the effect that all such administrative action taken by the Commission in regard to the preparations of the intended By-elections for Baringo South Constituency; Bobasi Chache Ward are illegal, unlawful and null and void and contrary to the provisions of Article 47 of the Constitution.***

5. ***<u>AN ORDER</u> awarding costs of the Petition to the Petitioner.***

6. ***Any other orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners' fundamental rights and freedoms."***

362] The petition, where the Attorney General was the second respondent, was filed sometime in June 2018. This was after the resignation of four of the Commissioners of the IEBC and shortly after the determination of ***Mwita, J.*** in ***<u>Katiba Institute & 3 Others v The Attorney General</u>*** *(Supra).*

The gist of the petitioner's case was that following the resignation of the four commissioners, the composition of the IEBC did not comply with the provisions of the Constitution and sections 4, 5 and 7 of the second schedule of the IEBC Act and

therefore the IEBC lacked the requisite quorum to conduct any business and/or undertake its constitutional mandate.

363] It is not clear whether the Attorney General filed any response to that petition. The record shows that it is only the IEBC that filed a replying affidavit dated 19th June 2018 sworn by its chairman and written submissions.

364] The IEBC's counsel, one Ms Owuor, submitted, *inter alia*, that by-elections are administrative issues that do not involve the Commissioners directly as it is the Commission's Secretariat that is charged with the function of executing the elections while the Commissioners merely play the oversight role; that since ***Article 250*** of the Constitution stipulates that the minimum number of Commissioners is three, paragraph 5 of the Second Schedule of the IEBC Act is unconstitutional as it offends ***Articles 250(1)*** and ***248(2***) of the Constitution; that the Commission was therefore properly constituted notwithstanding the vacancies that were occasioned by the resignation of the four commissioners.

365] In her judgment, ***Okwany, J.*** held that: -

> ***"The mere fact that there are vacancies in the Commission does not mean that the Commission becomes unconstitutional and by extension, the mere fact that the appointing authority has not initiated the process of recruiting new Commissioners does not mean that the Commission as presently constituted, is not constitutional."***

366] In the ***Katiba Institute*** case, ***Mwita, J***. had held: -

> ***"Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was***

previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason, paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

On her part, Okwany, J. having cited the above quoted portion of the decision by Mwita, J. held: -

"44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the

commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed.

45. It is worth noting that in the instant case, the lack of quorum has been occasioned by vacancies in the commission which vacancies cannot be attributed to the fault of the remaining commissioners or the Commission so as to warrant the issuance of a declaration that the Commission is not properly constituted. In any event, the vacancies ought to have been addressed through the immediate recruitment of new commissioners as I have already found in this judgment."

367] The learned judge also held that the conduct of elections or by-elections is not a matter that arises out of resolutions or decisions made by the Commissioners at a meeting of the Commission but are dictated by operation of the law following the declaration of vacancies by the Speakers of Parliament. I personally do not agree with that finding. It has rightly been stated that an election is not a one-time event, it is a process. There are very many policy decisions that must be made by Commissioners in their meetings and such meetings must not only be quorate, but also the decisions, which bind the entire Commission, and have major impact and consequences on the country's politics, must be arrived at in accordance with the dictates of the Constitution and the IEBC Act. They must therefore be either unanimous decisions or by a clear majority of the Commissioners.

368] Going back to the holding of Okwany, J., at paragraph 44 of her judgment the learned judge was well aware of Mwita, J.'s finding that the amendment to paragraph 5 of the second schedule to reduce quorum from 5 (five) to 3 (three) was unconstitutional and therefore the quorum remained five. She then said: ***"I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of Commissioners would be appointed."***

369] It is however, not explicit whether the learned judge departed from Mwita, J.'s earlier finding. At paragraph 45 she noted that the IEBC did not have the quorum of five. That ***"lack of quorum had been occasioned by vacancies in the commission..."*** It may be said that her view was that though the Commission did not have quorum as per paragraph 5 of the second schedule, the conduct of a by-election was not predicated on a resolution passed at a meeting of the Commissioners.

370] In the appeal before this Court, the learned judges of the High Court were faulted for their holding at paragraph 714 that: -

> ***"714. In our view, the statute is clear: the IEBC requires five commissioners in order to conduct any business. The statute does not distinguish between "policy" and other business. We, therefore, respectfully depart from the holding in the Isaiah Bitwott Kangwony Case that the IEBC can conduct business other than making "policy decisions" when its membership is below the minimum five stipulated in paragraph 5 of the Second Schedule. The statute requires the IEBC to have the minimum of five commissioners in order to conduct any business. Period.***
>
> ***715. In any event, verifying of signatures and determining whether the promoters of the***

Constitution of Kenya Amendment Bill met constitutional requirements under Article 257(4), is a threshold question and, therefore, would be, by any definition of the word, a policy issue that would require the IEBC, as a commission, to determine. Such a serious constitutional question, being a policy issue, could not be determined by a committee of the Commission. Only where the IEBC had quorum could it make such a fundamental determination. Similarly, verification of signatures and determination of whether or not they met constitutional requirements was also a question to be determined by the IEBC as a business of the commission, with the necessary quorum and after full and critical considerations. Hence, even under the holding in the Isaiah Biwott Kangwony Case, the verification of signatures and the determination of whether the constitutional threshold had been met for purposes of Article 257(4) of the Constitution, are definitionally policy considerations which required quorum under paragraph 5 of the Second Schedule to the IEBC Act."

371] I entirely agree with the above findings. The conduct of all the processes of a referendum that had the potential to change the country's constitutional landscape is an exercise of paramount importance. It must be conducted by an institution that is properly constituted in accordance with the law of the land, and which must make sound decisions that are quorate. Parliament, well aware of the provisions of Article 250(1) of the Constitution, enacted the IEBC Act and stipulated that the Commission **shall** consist of a Chairperson and six other members. Appreciating the mandate of the Commission, Parliament fixed the quorum at five members.

372] The resignation of the four Commissioners took place way back in 2017. It is unfathomable that for almost four years since then,

the vacancies have not been filed. ***Section 7A (2)*** and ***(3)*** of the ***Act*** states as follows: -

> ***"(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.***
>
> ***(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2)."***

373] Parliament did not want vacancies in the Commission to remain for a long period of time. That is why the President is required to publish a notice of a vacancy within such a short period upon occurrence of such a vacancy.

374] For these reasons, I would dismiss the Attorney General's challenge to the learned judges' finding that the IEBC lacked the requisite quorum to make decisions connected with the Amendment Bill.

7. Role of the IEBC in the Constitution amendment by popular initiative

375] ***Article 257(4)*** and ***(5)*** of the ***Constitution*** provides: -

> ***"(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.***
>
> ***(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission."*** *(Emphasis supplied)*

376] Muslims for Human Rights, (the 82nd respondent), contended that the IEBC cannot undertake verification of signatures and registered voters without an enabling legal framework in place.

377] The IEBC and the Attorney General faulted the learned judges for upholding that contention. The court also held that the internal Administrative Procedures for the verification of signatures in support of Constitutional Amendment Referendum that were prepared in April 2019 and revised in 2020 were invalid for want of public participation, for violating the Statutory Instruments Act in that they were not approved by Parliament; and because they were developed without quorum.

378] A textual reading of ***Article 257(4)*** of the Constitution reveals that the first role of the IEBC is to verify that the popular initiative is supported by at least one million voters, and if so, to submit the draft Bill to each county assembly. What is to ***"verify"*** in this context?

379] This important question finds its answer in a document that was prepared by the IEBC dated 22nd March 2016 titled: ***"The Findings of the Commission on the Process of the verification of signatures for the Proposed Amendment to the Constitution of Kenya 2010 through a popular initiative (Okoa Kenya Initiative)"*** dated 26th March 2016. It was annexed to the affidavit of Dennis Waweru on behalf of the BBI Secretariat. The document states, *inter alia*, that: -

> ***"The operative phrase as far as the mandate of the Commission under Article 257(4) is concerned is to verify that the initiative is supported by at least one million signatures of registered voters. The questions the Commission posed were what is to***

> ***verify? How do you verify that a person is a registered voter? How do you go about the entire verification process?... It appears that therefore to verify is not to look casually at information presented to you but to take steps that will allow one to affirm even under oath the correctness, accuracy, truthfulness or exactness of the information... The Commission's view is that the verification entails confirming that the initiative is supported by registered voters as evidenced by their signatures. After reviewing practices in other jurisdictions... It was clear that a person mandated to verify signatures must satisfy herself or himself that the said signatures belong to the persons whose names appear against them."***

380] At paragraph 13 of the said document, the IEBC stated: -

> ***"Once the Commission is satisfied that one million registered voters support the initiative it would then proceed to the next step of verifying that the signatures appended thereto are valid signatures of the registered voters. This is the process that the Commission followed in the Okoa Kenya Initiative."***

381] In this appeal, the IEBC adopted quite a different stand from what I have highlighted above. It stated that its role is limited to merely ascertaining that the required number of registered voters in support of the popular initiative has been attained. I do not entirely agree. The IEBC cannot approbate and reprobate as and whenever it suits its case. I however agree that under Article 257(4), the constitutional obligation of the IEBC is to verify that the initiative is supported by at least one million registered voters. The question is whether apart from the supporting signatures there are other ways of conducting the verification exercise.

382] According to an affidavit filed by the IEBC in the High Court in response to the petition, the IEBC maintains a Register of Voters that contains biometric data and other particulars of every

registered voter. ***Section 2*** of the ***Elections Act*** defines the term "***biometric"*** to mean "*unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures.*"

The IEBC submitted that a signature is just one of the unique identifies it can use to verify whether a supporter of the popular initiative is a registered voter; that it also considers the unique identifiers of each registered voter.

383] IEBC has a record of all Form As for each registered voter that contain the signature or thumbprint of a voter, their constituency, county, ward, registration centre, surname, other names, identity card number or Kenyan passport number, date of birth, sex, residential address, contact telephone, postal address, email, and particulars of any disability a registered voter may have.

384] When the promoters went out to collect signatures of supporters of the initiative, the form for collection of signatures that they had been given by the IEBC required the supporters of the initiative to also indicate their name, identity card number or passport number, constituency, county, ward, polling station, mobile telephone number and email address. These are certainly some of the unique identifiers of a registered voter. A signature or thumb print is one of them but is not the only one. People's signatures can change with time for various reasons, be it age, injury or disability of their hands, and it is therefore unrealistic to rely on signatures only to identify registered voters. By use of modern technology, I believe it is not difficult to compare the information contained in Form A of a registered voter with the information captured in the Form for collection of

signatures of supporters of a popular initiative and determine whether the person is a registered voter.

385] In view of the foregoing, I do not entirely agree with the learned judges' finding that "*the IEBC's role under Article 257(4) involved both the ascertainment of numbers of registered voters in support of a popular initiative for amending the Constitution as well as verification of the authenticity of those signatures*."

386] It follows, therefore, that there is no constitutional or statutory requirement for a legal framework for verification of signatures under ***Article 257(4)*** of the Constitution. What is required is a legal/regulatory framework for verification of registered voters. I however agree with the learned judges that the Administrative Procedures that were developed by the IEBC are invalid because they were developed without public participation by a commission that did not have quorum.

8. Whether the IEBC was under an obligation to conduct a nationwide voter registration exercise before the anticipated referendum.

387] Morara Omoke, the 76th respondent, had argued in his petition that the IEBC cannot conduct a referendum before conducting nationwide voter registration, otherwise many unregistered voters would be disenfranchised. The position taken by the IEBC was that its mandate is to conduct a continuous voter registration at constituency offices and has been doing so.

388] ***Article 88(4)*** of the Constitution states that the IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of

Parliament. The Commission is also mandated to conduct continuous registration of citizens as voters and regular revision of the voters' roll. ***Section 4*** of the ***IEBC Act*** contains the same requirements. Voter registration is an essential facilitator of the exercise of citizens' constitutional right to vote in any election or referendum and to be a candidate in any elective political office for which they are qualified. See ***Article 38*** of the Constitution.

389] ***Section 5*** of the ***Elections Act*** states as follows: -

> ***"(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except-***
>
> ***(a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty-day period immediately before the election and the date of such election: Provided that this applies to the first general election under this Act;***
>
> ***(b) in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or***
>
> ***(ba) in the case of a referendum, between the date of the publication and the date of the referendum."***

390] It is therefore evident that there is constitutional and statutory requirement for continuous registration of voters, and this is imperative, as the 76th respondent put it, is informed by the fact that hundreds of thousands of citizens become eligible to be registered as voters every month. The Register of voters must also be updated from time to time as required under ***section 8*** of the ***Elections Act***.

391] ***Regulation 11*** of the ***Elections (Registration of Voters) Regulations*** provides useful emphasis on the issue of an updated voters register. It states as follows: -

> ***"11. <u>Periodic list of changes.</u>***
>
> ***(1) At least once every six months, each registration officer shall prepare a list of changes to the register of voters for his constituency and post the list at a place at the headquarters of the division and district within which the constituency is located where the public has access.***
>
> ***(2) The changes included on a list under subregulation (1) shall consist of the changes made since the previous list was prepared under subregulation (1).***
>
> ***(3) The list posted under subregulation (1) shall be posted for at least thirty days.***
>
> ***(4) The changes included on the first list prepared by each registration officer under subregulation (1) shall consist of the changes made since this regulation came into operation."***

392] It is against this backdrop that I shall consider the sufficiency of the evidence tendered by the IEBC in support of its contention that it has been carrying out continuous voter registration. Mr. Michael Goa, the IEBC's Director in charge of Legal and Public Affairs filed a replying affidavit before the trial court, and with leave of this Court, filed a further affidavit before commencement of the appeal.

393] Mr. Goa reiterated that the IEBC has been conducting continuous voter registration and annexed to his affidavit a Gazette Notice dated 16th September 2020 which is a schedule that demonstrates the periodic list changes on the Register of Voters as at ***31st December 2019***. The Gazette Notice revealed that up to 31st December 2019 there were ***19,678,885***

registered voters. No information was availed to the court regarding the number of voters between then and June 2021 when leave was granted to file the further affidavit.

394] In my view, the IEBC did not adduce sufficient evidence that it has been conducting continuous voter registration. If the law requires at least once every six months each registration officer to prepare a list of changes to the register of voters for his or her constituency, why was that information not availed? The IEBC did not also provide any evidence that it has been sensitizing the public about its role of conducting continuous voter registration and the importance of citizens to register as voters.

395] I find and hold that there is no constitutional or statutory requirement for the IEBC to carry out a *"nationwide voter registration"* before any proposed referendum, but the Commission is under a constitutional and statutory obligation to do a continuous registration of voters in each constituency. I further find and hold that in view of that constitutional and statutory obligation, the IEBC should continually sensitize Kenyans about its role, and encourage them to continually register as voters, except at such periods as specified by statute when voter registration should not be done.

9. Whether the proposals in the Amendment Bill are to be submitted as separate and distinct referendum questions.

396] ***Article 257(10)*** states as follow: -

> ***"(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum."*** *(Emphasis supplied)*

The learned judges in explaining their understanding of this Article stated that:

> ***"619. ...What is to be subjected to the referendum is the question or questions as opposed to the Constitution of Kenya Amendment Bill itself. It is, therefore, our finding and, we so hold, that Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively."***

397] Their view was partially informed by the provisions of ***section 49*** of the ***Elections Act***, which, in my view, is not exactly applicable in the context of a referendum in relation to amendment of the Constitution by popular initiative under ***Article 257*** which sets out the entire process.

398] A plain reading of ***Article 257*** requires that the proposed amendment be reduced into a Bill, which is then submitted to the people in a referendum. What is to be submitted to the people is not a question or questions, it is a Bill. However, the IEBC may require the people to approve or disapprove the Bill by answering a question or questions, either in the affirmative or in the negative. The IEBC, as an independent constitutional body, has the sole responsibility of conducting or supervising a referendum and it is up to it to determine how the referendum should be conducted, subject only to constitutional and statutory guidelines. For example, under ***section 49*** of the ***Elections Act***, the question or questions framed by the IEBC must be approved by Parliament.

399] A Bill is a proposed legislation and may contain more than one proposed amendments. As stated by the learned judges, the drafters of the Constitution were alive to the fact that a Bill to

amend the Constitution may propose different amendments. The Bill ought to be subjected to a proper public participation where each and every proposed amendment is explained, debated upon and well-informed views taken before the people eventually vote on the Bill. That notwithstanding, it is improper to lump together 74 proposed constitutional amendments in a Bill.

400] I do not therefore agree with the learned judges that what is to be subjected to the referendum is a question or questions, it is the Amendment Bill, but the people are to approve or disapprove of the Bill by answering a question or questions as framed by the IEBC and approved by Parliament.

10. Whether the High Court had jurisdiction to entertain the petitions on account of the principles of justiciability, mootness and ripeness.

401] The word justiciability is defined to mean *the quality or state of being appropriate or suitable for adjudication by a court* (See ***Black's Law Dictionary***, ***9th Edition*** at ***page 943***). For a matter to be justiciable, it has to be one that is properly brought before a court and capable of being disposed of judicially. In other words, the issue must be ripe for determination and devoid of any mootness.

402] ***The Black's Law Dictionary, 9th edition*** defines the term "*ripeness*" at page 1442 as follows:

> ***"The state of a dispute that has reached, but has not passed, the point when facts have developed sufficiently to permit an intelligent and useful decision to be made."***

403] The doctrine of ripeness precludes courts from entertaining or determining issues when it is too early, out of apprehension,

when they are not yet ripe, that is, apprehended abstract disputes.

404] On the other hand, the doctrine of mootness dictates that a court of law should not hear a matter in which a controversy no longer exists, one that presents only an abstract question that does not arise from the existing facts.

405] The appellants argued that the issues before the High Court were in their very sense political questions that could have been better resolved either by political players or by other branches of government. In other words, that the High Court erred in adjudicating on these issues because their resolution ought to have been left to other arms of government.

406] Under ***Article 258(1)*** of the Constitution, every person has a right to institute court proceedings to challenge a contravention of the Constitution or any threatened contravention of the Constitution. The onus is on a Petitioner to demonstrate with some degree of precision the right, fundamental freedom, or the part of the Constitution it alleges has been violated or threatened with violation, the manner or evidence of violation or threatened violation and the relief it seeks for that violation or threat to violation.

407] The jurisdiction of the High Court is granted under ***Article 165(3)*** of the Constitution. The High Court has original jurisdiction by dint of ***Article 165(3) (b)*** of the Constitution to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*. Under ***Article 165(3) (d***) the High Court has jurisdiction to hear and determine any question on the

interpretation of the Constitution, including a determination on the following four issues:

> ***"(i) the question whether any law is inconsistent with or in contravention of the Constitution;***
> ***(ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution;***
> ***(iii) any matter relating to the Constitutional powers of State organs, in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and***
> ***(iv) a question relating to conflict of laws under Article 191 of the Constitution."***

408] A close examination of the issues raised in the consolidated petitions yields the interpretation that the issues in their very sense are not mere political questions but are in their very nature constitutional issues requiring the determination by a constitutional court. Going by the nature of the issue raised in the petitions and the jurisdiction of the High Court as stated above, I find that the issues could only have been determined by the High Court in the exercise of its jurisdiction under ***Article 165*** of the Constitution. In this regard therefore, the High Court could not have exercised deference as argued by some of the appellants since, firstly, it had jurisdiction to entertain the consolidated petitions, and secondly, the issues could only have been properly and adequately adjudicated upon in a judicial process.

409] That may be perceived by some people as unwarranted judicialization of politics. However, it must be understood that judicilization of politics in our country is a function of the 2010 Constitution that has in several ways widened the scope of the

Judiciary, and in particular commands judges to defend the Constitution. Whereas judges must exercise judicial restraint appropriately and respect the doctrine of separation of powers, when litigants come to court and claim that any person, whether from the executive or legislative arm of the government is violating or threatening to violate the Constitution, judges must look into the matter and decide one way or the other.

410] On the issue or ripeness, it was the argument of the appellants that there were no real issues and or controversy for determination by the High Court. The basis for this argument was that the Amendment Bill was still at the consideration stage by the various County Assemblies and would thereafter proceed to Parliament and finally to the people at a referendum. It was therefore argued that the issues relating to the Amendment Bill as captured in the consolidated petitions were premature and ought to have awaited the entire process to run its full course.

411] This Court in ***Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR*** stated as follows:

> ***"34. We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the Constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat."***

412] ***Lenaola, J***. (as he then was), ***Mumbi, J.*** (as she then was), ***Ong'udi, J.***, ***Chemitei, J.***, and ***Onguto, J.)*** in **Petitions Nos. 628, 630 of 2014 & 12 of 2015 (Consolidated)**, ***Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 others [2015] eKLR*** discussed the issue as follows: -

"112. However, we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 258 of the Constitution, that the words of the Constitution, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution. *(Emphasis added).*

113. We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened... contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as; "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" *(Emphasis added).* ***The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another.***

114. The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent.

115. What is the test to apply when a court is confronted with alleged threats of violations aforesaid? In our view, each case must be looked at in its unique circumstances, and a court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of constitutional violations. In that regard, Lenaola, J. in *Commission for the Implementation of the Constitution vs The National Assembly & 2 Others [2013] eKLR* ***differentiated between hypothetical issues framed for determination in that case and the power of the***

High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where the impugned Act has been enacted and has come into force. He stated in that regard that:

> *"…… where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution."*

413] The Petitioners before the High Court were apprehensive of the violation of certain fundamental constitutional rights and freedoms through the constitutional amendment process that culminated in the Amendment Bill and hence approached the High Court seeking various orders to safeguard their rights against the intended violations. The issues in the consolidated petitions were not academic, or theoretical claims but were issues that posed real threat of constitutional violations.

414] Accordingly, I find and hold that the petitions were neither moot nor non-justiciable. The petitioners demonstrated that there had been some violation of constitutional values and principles in the way the Amendment Bill had been mooted and processed, and the Constitution was about to be dismembered unless the court intervened. To that extent, the petitions did not offend the principle of ripeness. Whereas the process of amending the Constitution was still ongoing, there was every indication that a majority of County Assemblies as well Parliament were poised to approve the impugned Bill, (which they eventually did), and thus pave way for a constitutionally flawed referendum. Our transformative Constitution cannot countenance that. Had the learned judges declined to assume jurisdiction on account of the principles of justiciability, mootness and ripeness, they would have violated their respective oaths of office which they

individually subscribed to. A judge's oath of office requires the judge, among other things, to protect, administer and defend the Constitution without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. The learned judges were true to their oath of office, I so find.

11. Whether it was constitutional for the promoters of the Amendment Bill to create 70 Constituencies.

415] In my determination of the issue of applicability of the doctrine of the basic structure, I held that it was unconstitutional for the promoters of the Amendment Bill to increase the number of constituencies in the manner they did. The promoters also took it upon themselves to predetermine the allocation of the constituencies. What yardstick did they use to determine the counties that were to benefit from the additional seventy constituencies?

416] The task of delimiting constituencies, reviewing their names and boundaries is assigned to the IEBC by the Constitution. The Joint Justice and Legal Affairs Committee on the Constitution of Kenya (Amendment) Bill, 2020 admitted the unconstitutionality of the second schedule to the Amendment Bill. At page 1538 of its Report, it stated as follows: -

> ***"The Committee however, found that the Second Schedule to the bill is unconstitutional, for the following reasons-***
>
> ***a) The attempt to oust the application of Article 89(4) of the Constitution, as proposed in the Second Schedule of the Bill, could only be possible if the Article was amended expressly and not by having separate provisions in the schedule. This is because the Schedule does not amend Article 89(4) of the Constitution. Even with***

the provision, Article 89(4) would still exist and operate. As such, this would create parallel and conflicting mandates to review the names and boundaries of constituencies.

b) The Schedule is predicated on clause 74 of the Bill, which deals with transitional and consequential provisions in the Bill. There is no substantive provision of the Bill dealing with delimitation of constituencies, on which the Second Schedule would be anchored."

417] In view of the foregoing, I agree with the learned judges that the ***second schedule*** to the Amendment Bill, in so far as it purports to pre-determine the allocation of 70 constituencies is unconstitutional.

12. Whether there was necessity for legislation or legal framework on conduct of referenda.

418] ***Article 82(1)*** of the ***Constitution*** states as follows: -

"82. (1) Parliament shall enact legislation to provide for-

(a) the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies;

(b) the nomination of candidates;

(c) the continuous registration of citizens as voters;

(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; and

(e) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote." *(Emphasis supplied).*

419] On this issue, the ***Final Report of the Constitution of Kenya Review Commission*** stated that Parliament would enact a Referendum Act to govern the conduct of referenda. The intended Act has not come into being. The High Court was told that there is a Referendum Bill that is pending before Parliament. Whereas ***section 49*** to ***55C*** of the ***Elections Act*** contain provisions regarding conduct of referenda, the High Court held that it was not sufficient. It stated:

> ***"602. As regards the provisions of the Elections Act, we have considered Part V thereof which deals with referendum. It is, however, our view that the said part does not adequately cover the processes contemplated in a referendum process. It does not, for example, address the issue of public participation which is a constitutional imperative under Article 10 of the Constitution. It also fails to address the manner in which a referendum Bill is to be handled by the County Assemblies in cases where the Constitution mandates the County Assemblies to debate the Bill. This lacuna, in our view, cannot be addressed by mere reference to the provisions of the Elections Act since a referendum is a very important process in the history of a nation as was contemplated by the drafters of the Constitution. We associate ourselves with Nyamweya, J's opinion in*** *Republic vs. County Assembly of Kirinyaga & Anor Ex-Parte Kenda Muriuki & Anor (2019) eKLR* ***where the Learned Judge observed at paragraph 58:***
>
> > *"While it is not the place of this Court to prescribe what procedures should be adopted by the legislative bodies, it in this regard considers it prudent to recommend that since the passage of a constitutional amendment by popular initiative is a national exercise that affects the Independent Electoral and Boundaries Commission, all County Assemblies, and Parliament, the national Parliament needs to develop and enact a law to ensure uniformity in the procedures of consideration and approval*

by County Assemblies of bills to amend the Constitution by popular initiative, and to ensure the inclusion and insulation of key constitutional and democratic requirements and thresholds in the said procedures. This law should also address the other procedural aspects demanded by Article 257 of the Constitution."

420] The learned judges held that the Elections Act does not meet the intention of the drafters of the Constitution in recommending that Parliament enacts a Referendum Act to govern the conduct of a referenda.

421] That notwithstanding, the judges held the referendum may still be undertaken **"*as long as the constitutional expectations, values, principles and objects are met*.**"

422] I entirely agree. In my view, it is not the absence of an appropriate legal framework that posed the greatest challenge to the Amendment Bill and the proposed referendum. The political elitism, opaqueness and lack of transparency that characterised the entire process of the proposed amendment of the Constitution were the greatest impediments.

423] The Constitution, the Elections Act and the Independent Electoral and Boundaries Commission Act contain broad provisions that can be used to conduct a referendum, as long as commitment to adhere to the stipulated principles, values and statutory dictates is observed.

13. Whether civil proceedings can be instituted against a sitting President.

424] ***Articles 143(2)*** and ***(3)*** states as follows: -

"(2) Civil proceedings shall not be instituted in any court against the President or the person

performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law."

425] According to ***Mr. Nyaoga, SC***, the President enjoys absolute immunity against civil proceedings during the tenure of his office in respect of things done or not done in exercise of his powers under the Constitution, and in the event that he grossly violates the Constitution or any other law, the National Assembly can impeach him. But once the President leaves office civil proceedings may be instituted against him in respect of anything done or not done when he was in office, notwithstanding limitation of time under the Limitations of Actions Act, Senior Counsel submitted.

426] The learned judges' views on this issue were as follows: -

"546. On the specific question of whether the President can be sued in his personal capacity during his tenure, our answer is in the affirmative because it is apparent from Article 143(3) that the President or any other person holding that office is only protected from such actions 'in respect of anything done or not done in the exercise of their powers under this Constitution.'

547. The rationale for so holding is simple to see: Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it not be prudent that he should be stopped in his tracks rather than wait until

the lapse of his tenure by which time the country may have tipped over the cliff? We think that in such circumstances, any person may invoke the jurisdiction of this Court by suing the President, whether in his personal or in his official capacity; whichever capacity he is sued may very well depend on the nature of the violation or threatened violation and will certainly depend on the circumstances of each particular case."

427] With respect, I do not agree with Mr. Nyaoga's submission that under ***Article 143(2)*** the President is conferred with absolute immunity against civil proceedings in respect of anything done or not done in the exercise of the President's powers under the Constitution. That interpretation would take us back to the repealed Constitution where ***section 14(2)*** thereof stated as follows:

"(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the Office of President."

428] In ***Kenya Human Rights Commission & another v Attorney General & 6 others [2019] eKLR***, where I sat with ***Gatembu and Murgor, JJ. A.***, the Court held, *inter alia*:

"In effect, a plain and ordinary interpretation of Article 143 (2) would infer that, the President's immunity is limited; (i) to proceedings instituted during his or her term in office and (ii) to anything done or not done in exercise of the President's powers under the Constitution. Put differently, the immunity does not extend to acts or omissions that have resulted in civil proceedings commenced prior to assumption of the office of the President or that were not in exercise of the President's powers."

429] The Court further stated:

> ***"The aforegoing makes it clear that it was the intention of the framers of the Constitution to limit the extent of the President's immunity in civil proceedings to only those instituted while he or she was in office. This intent is evident from the difference in construction between Article 143 (1) and Article 143 (2). Whereas Article 143 (1) expressly prohibits institution or continuance of criminal proceedings once the President assumes office, under Article 143 (2) the immunity in civil proceedings is limited to only those suits instituted against the President during the term of office in respect of anything done or not done in the exercise of power as the President of Kenya. Acts or omissions that gave rise to civil proceedings instituted prior to assuming office are not covered by the prescribed immunity."***

430] I have not been persuaded to hold otherwise. The President of Kenya does not enjoy absolute immunity against civil proceedings during the tenure of office and neither is the President above the law; he is subject to the Constitution. However, no civil proceedings can be instituted against the President during the President's tenure of office, if the complaint is based on any act or omission of the President in the exercise of the powers conferred upon the President by the Constitution.

431] If the President, in his or her own private capacity, not in the exercise of the President's constitutional powers, were to do anything against a person's private rights, that person would have liberty to file a civil suit against the President in his personal capacity during the tenure of office of the President. But if the President, in exercise of powers conferred by the Constitution, does or fails to do anything that is alleged to be contrary to the Constitution or statute, civil proceedings can

only be instituted against the President when his or her term comes to an end.

432] Going back to the learned judge's findings at paragraph 547 of the judgment, if the President, in the execution of his constitutional functions violates the Constitution, he can be sued in his governmental or official capacity through the Attorney General. Such proceedings are usually instituted by way of Judicial Review or a constitutional petition.

14. Was the Appellant, Mr. Uhuru Kenyatta afforded a fair hearing?

433] To answer this question, I shall consider whether the appellant was served with the Petition No. E426 of 2020 and a hearing notice and therefore given an opportunity to be heard. Rules of natural justice require that every person must be accorded a reasonable opportunity to be heard before an adverse decision is made against them. If that is not done, any resultant decision that aggrieves the person is a nullity. See ***Onyango Oloo v Attorney General*** *(supra).*

434] Counsel for the appellant submitted that there was no service of the petition upon their client. The petitioner, Isaac Aluochier, filed an affidavit of service dated 16th January 2021 in which he stated that he electronically served the appellant as it was impossible to effect personal service upon him.

The email address that he used was cos@president.go.ke.

435] The record of appeal shows that on 21st January 2021 the trial court directed that: -

> ***"2. All the petitioners in the 7 petitions to serve the petitions on all the other parties by close of***

business on 22/1/2021. The Deputy Registrar to facilitate the process where necessary.
The Respondents, interested parties and amici to file their responses to the various petitions within 14 days of tomorrow."

436] On 1st February 2021 the trial court gave further directions on an application that had been filed under certificate of urgency in Petition No. E400 of 2020. The court ordered that "*service will be electronic by email through a list (serve) to be created and confirmed by the Deputy Registrar. It will be the responsibility of each counsel to ensure that their correct email address is included in the list serve." (sic).*

437] When the consolidated petitions came up for hearing on 17th March 2021, in respect of Petition No. E426 of 2020, the record shows as follows: -

"For Petitioner (Aluochier) - Mr. ALuochier in person.
For 1st Respondent (Uhuru) - N/A.
For 2nd Respondent (AG) – Mr. Bitta.
For 3rd Respondent (IEBC) -Mr. Kipkogei, Maly Ocholla & Gumbo.
For 1st Interested Party (Public Service) – N/A
For 2nd Interested Party (Auditor General)- Mr. Rukwa"

Without making any enquiry as to service of the court process upon the appellant (Mr. Uhuru Muigai Kenyatta), who had been named as the 1st respondent, the court commenced the virtual hearing. On 18th and 19th March 2021 the record again shows that there was no appearance for the 1st respondent.

438] Before this Court, the appellant filed an application for stay of execution of the High Court and in response to that application, Mr. Aluochier, responding to the issue of service of the court process in the High Court proceedings stated in his replying affidavit as follows:

> ***"6. Paragraph 6 of the Ruling delivered on 8th February, 2021 in Consolidated Petitions E282 of 2020, David Ndii & Others v Attorney General & Others [2021] eKLR reads, in part:***
>
> ***[6] ...on 21st January 2021, with the concurrence of all the parties to the seven petitions, we consolidate all of them with Petition No. E282 of 2020 being the lead file. We, then, issued the following directions:***
>
> ***1) ....***
>
> ***2) All the petitioners in the 7 petitions to serve the petitions on all the other parties by close of business on 22/1/2021. The Deputy Registrar to facilitate the process where necessary...***
>
> ***7) Following this direction, together with oral guidance from the Superior Court given in open court virtually, the Deputy Registrar set up an email list serve through which all the parties would concurrently serve each other. Parties hereby served all the parties electronically, and have continued to do so, even with respect to the instant matter in the Court of Appeal, without the need for any party serving any other personally."***

439] In the affidavit of service filed by Mr. Aluochier on 18th January 2021 he stated that: -

> ***"1. On 21st December 2020 at 15.22 hours, I served the petition, by email, to all the parties. Attached is a copy of the email.***
>
> ***2. Additionally, I had lodged a service request on the Judiciary e-filing platform, and paid the requisite fee. Upon checking on 15th January 2021 the outcome of the lodging request, the information feedback states that all parties were served by email. Attached is a copy of the same."***

440] The copy of the email that is attached to the affidavit of service shows that service was effected using address: ***cos@president.go.ke***.

The petitioner neither told the trial court where he got the email address from, nor did he demonstrate that it was the personal email address of Mr. Uhuru Muigai Kenyatta. As stated earlier, the trial court did not make any enquiry as to service. I must state that in all proceedings where a party is alleged to have been served with a hearing notice (or any other court process) in any manner, before a court proceeds to commence a hearing in the absence of such a party, even if there is an affidavit(s) of service indicating that all the parties in the matter had been duly served, the court, in the interest of justice and to ensure a fair hearing, has to satisfy itself that there was proper service before it commences a hearing. The record of the court should so reflect.

But more importantly, the court gave directions regarding service on 21st January 2021, but the petitioner said that he effected service on 21st December 2020. It is evident that the doubtful service was effected before the court's directions were given.

441] But assuming the email address ***cos@president.go.ke*** is the official one for the Office of the President or State House, the Petitioner did not demonstrate that it was proper to sue the President in his personal capacity but purport to effect service upon him through the official email address of the Presidency. In my view, the petitioner should have sought leave to effect substituted service by way of advertisement in the local newspapers if he could not get the personal email address of Mr. Uhuru Muigai Kenyatta.

442] Considering the kind of orders that were being sought against the appellant and the effect of grant of the same, the trial court

ought to have been satisfied that there had been proper service of court process upon the appellant. I find and hold that there was no proof of service of the petition and the hearing notice upon the appellant. The appellant's constitutional right to a fair hearing as guaranteed under ***Article 50*** of the Constitution was violated in that he was condemned unheard. Consequently, all the orders made against Mr. Uhuru Muigai Kenyatta in his personal capacity cannot stand. I would therefore set aside the declaration made by the High Court that Mr. Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution.

15. Were the proceedings against Mr. Uhuru Muigai Kenyatta res judicata?

443] The appellant's main contention was that the High Court judges erred in law in proceeding to hear and determine issues that had already been determined by another court of concurrent jurisdiction, ***Thirdway Alliance Kenya & Another v The Head of Public Service, Joseph Kinyua & 2 Others*** (supra). That matter was decided by ***Mativo, J.*** sometime in March 2020. Many of the grounds that were raised in that petition had also been raised by some of the petitioners in the subsequent petitions. One of the prayers sought in the petition that was before Mativo, J. was a declaration that any report produced by the BBI Taskforce is illegal and unconstitutional, but the court declined to do so.

444] Citing the provisions of ***section 7*** of the ***Civil Procedure Act***, (*res judicata*), the appellant argued that the leaned judges were estopped from re-litigating all the issues that had been determined in the earlier petition.

445] On the issue of *res-judicata*, the learned judges delivered themselves as follows: -

> ***"528. We must state at the outset that we are conscious that the decision in the Third Way Alliance case is cited before us not necessarily as a decision from a Court of coordinate jurisdiction persuading us to take any particular position on a point of law and from which we are entitled to depart if there are reasons to do so. Instead, it is presented in the context of a judgment in rem binding us on a specific point of law. It is from this perspective that we shall consider it.***
>
> ***529. Of the several questions that we have been asked in these Consolidated Petitions, one question that was not asked in the Third Way Alliance case is whether the President can establish a committee, or any other entity for that matter, to initiate the change or amendment of the Constitution outside the means prescribed by the Constitution itself. To be precise, can the amendment of the Constitution be initiated in any way other than those envisaged in Article 256 and 257? As we understand it, the Petitioner's case in Petition No. E426 of 2020 is that the BBI Steering Committee impermissibly initiated the amendment of the Constitution in the guise of an amendment by popular initiative under Article 257 when, in fact, it is an initiative by the President hiding behind the BBI Steering Committee. The question we are faced with is whether BBI Steering Committee which, in the Petitioner's view, was established with the sole purpose of undertaking an assignment which is contrary to the provisions of the Constitution, is constitutional and, by the same token, whether anything done by such a committee is constitutional.***
>
> ***530. In our humble view, the answer to this question cannot be found in the judgment in the Third Way Alliance Party case not because the Court in that case was incapable of answering it but***

because it is a question that was not asked and interrogated. In the words of explanation 3 of section 7 of the Act, it is not a matter 'alleged by one party and either denied or admitted, expressly or impliedly, by the other'. What is before us is a more specific question that narrows down from the question whether the President can generally form any committee, of whatever form or shape, on any matter to a more specific question whether he can form such a committee to initiate changes or amendment to the Constitution. This was a question not before the Learned Judge in the Thirdway Alliance Case. This is because, in the Thirdway Alliance Case, the BBI Taskforce did not have the mandate to initiate constitutional amendments. However, the BBI Steering Committee has, as one of its terms of reference, the mandate to initiate constitutional changes – which is the exact reason the Petitioner in Petition E426 of 2020 – is challenging its legality.

531. It is for the foregoing reason that we are or of the firm view that we are not estopped from discussing the constitutionality of the BBI Steering Committee and its mandate in so far as the amendment of the Constitution is concerned. In other words, this issue is not res judicata."

446] On my part, I cannot fault the findings made by the learned judges. I agree with them that the issue as to whether the President could establish a committee to initiate a change or amendment of the Constitution outside the remit of ***Articles 255-257*** of the Constitution had not been raised in the earlier petition. The learned judges were therefore bound to hear and pronounce themselves on that important issue.

17. Whether the Constitution (Amendment) Bill, 2020 Violated Article 43 (1) (A) in view of the Covid-19 Pandemic.

447] This ground of Mr. Omoke's cross appeal is premised on ***Article 43 (1)(a)*** which provides that:

"(1) Every person has the right-

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;"

448] Mr. Omoke argued that the President was in total violation of the Constitution when he authorized or used public funds to initiate and promote the impugned Bill amidst the Covid -19 pandemic. His argument was twofold, first, that since the country was and still is engulfed by a pandemic that poses a serious health challenge to all, the State should have priotised the fight against the spread of the Covid-19 virus by allocating sufficient resources rather than engaging in political activities. Secondly, the President and his agents, by organizing or attending what he termed as *"massive super spreader events including rallies and signature collection to promote the BBI agenda amidst the Covid-19 pandemic crisis*" was a violation of ***Article 43 (1)(a)***. It was also in disregard of the Covid-19 directives and regulations issued by the President himself and the Ministry of Health banning public gatherings; maintenance of social distance; and putting on of masks, counsel added.

449] The learned judges held that the above arguments were not well supported by sufficient evidence and therefore declined to grant the orders sought. However, Mr. Omoke submitted before this Court that through his supplementary affidavit sworn on 19th February 2021, he adduced evidence to show that if held, the referendum would cost Kshs.14 billion, while the signature verification cost was Kshs.93,729,800, according to figures given by the IEBC.

450] While I agree that holding public rallies that are attended by thousands of people militates against Covid-19 mitigative measures, there was no empirical data or scientific evidence provided to the learned judges to enable them make a determinative finding that the holding of the said events *per se* amounted to a violation of ***Article 43 (1)(a)*** of the Constitution.

451] Regarding the amounts that were spent or scheduled to be spent, the cross-appellant's argument was that: "*This kind of expenditure during a pandemic violates the principle of sustainable development enshrined in Article 10 of the Constitution.*" Whereas it was earlier demonstrated that there was no sufficient public participation before the public collection of signatures was commenced, I find that there was no sufficient evidence to enable the learned judges reach a finding that the expenditure amounted to a constitutional violation. I would therefore dismiss this ground of the cross appeal.

18. Whether both or either of the Houses of Parliament were infirmed from considering the constitutional Amendment Bill in view of the Chief Justice's advisory for the dissolution of Parliament.

452] One of the grounds in the cross appeal by the 76th respondent/cross appellant was that the learned judges erred by declining to find and hold that Parliament had no legal or constitutional capacity to debate and/or approve the impugned Bill in view of the advice of the Chief Justice (Rtd.) David Maraga to President Uhuru Muigai Kenyatta to dissolve Parliament.

453] The former Chief Justice vide an advisory dated 21st day of September 2020 titled '***CHIEF JUSTICE'S ADVICE TO THE PRESIDENT PURSUANT TO ARTICLE 261(7) OF THE***

CONSTITUTION' advised President Uhuru Muigai Kenyatta to dissolve Parliament pursuant to the provisions of ***Article 261(7)***.

454] The advice to the President was premised on four court orders compelling Parliament to enact legislation required to implement the two thirds gender rule in accordance with ***Article 27(3)*** read together with ***Asrticles 81(b)*** and ***100*** of the Constitution. According to the advisory, Parliament had blatantly failed, refused and/or neglected to enact the relevant legislation.

455] ***Article 261 (7)*** of the ***Constitution*** which the Chief Justice relied on in giving his advisory provides as follows:

> ***"7. If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament."***

456] ***Article 261 (1)*** which provides the basis for the enactment of legislation states as follows:

> ***"(I) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.***

457] On 24th September 2021, barely three days from the date of the advisory opinion, the High Court (***Korir, J.)*** in Petition No. E291 of 2020 as consolidated with Petitions Nos. E300 of 2020; E302 of 2020; E305 of 2020; E314 of 2020; E317 of 2020; E337 of 2020; 228 of 2020; 229 of 2020 and JR E1108 of 2020 issued orders suspending the implementation of the advisory by the Chief Justice pending the hearing and determination of the application by a bench of not less than three judges. The Court

noted that the petitioners had raised weighty constitutional issues and directed that the file be sent to the Chief Justice to appoint a bench of three judges to hear and determine it.

458] The High Court observed that it was in the public interest not to subject the country to parliamentary elections before exhaustively interrogating the constitutionality of the advisory by the Chief Justice and that public interest supported the issuance of an order suspending any decision to dissolve Parliament.

459] The Amendment Bill was tabled before the National Assembly and the Senate on 4th March 2021 for first reading. A vote on the Amendment Bill was taken in both Houses on 6th and 11th May 2021 respectively. As at the date of tabling and voting on the Amendment Bill, the Orders issued by the High Court suspending the implementation of the advisory by the Chief Justice were still in force and there was no indication that the Orders had been vacated.

460] Accordingly, none of the Houses of Parliament were infirmed from considering and or debating the Amendment Bill owing to the advisory opinion by the Chief Justice.

19. Whether the High Court erred in finding that the taskforce did not create a legitimate expectation that the submissions by KNUN would be incorporated in the constitutional Amendment Bill.

461] The KNUN argued that the proposals that it had submitted to the BBI Taskforce vide its detailed Memorandum dated 8th August 2019 which was in the form a Bill were not incorporated in the Report of the BBI Steering Committee. According to KNUN, their proposals were on four thematic areas which were:

the establishment of an Independent Constitutional Health Service Commission; Recognition of Universal Health Care as a Human Right; Expansion of Free Basic Education; and *The Removal of the Salaries and Remuneration Commission.*

462] It was argued that by submitting proposals to the BBI Taskforce pursuant to an invitation that had been made to members of the public, KNUN and its members had legitimate expectation that their views would be incorporated in the Report by the BBI Steering Committee and finally in the Amendment Bill.

463] **Pollard**, **Parpworth** and **Hughes** in their book, "**CONSTITUTIONAL AND ADMINISTRATEIVE LAW: *TEXT WITH MATERIAL", 4th Edition at page 583***, the learned authors posited thus: -

> ***"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment."***

464] Also in ***4th Edition, Vol. 1(1)*** at page 151, paragraph 81 of ***Halsbury's Laws of England***, legitimate expectation is outlined as follows: -

> ***"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in***

private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice"

465] In **De Smith, Woolf & Jowell**, ***"Judicial Review of Administrative Action"* 6th Edition Sweet & Maxwell** page 609, the learned authors state that:

> ***"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."***

466] In ***Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR***, the Supreme Court held:

> ***"Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."***

467] As I held earlier, the mandate of the BBI Taskforce was to *evaluate the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity; outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and conduct consultations with*

citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and national levels.

468] The BBI Taskforce did not have mandate to receive proposals on constitutional amendments as this was tasked to the BBI Steering Committee that was established on 3rd January 2020. One of the terms of reference of the BBI Steering Committee was to *propose administrative, policy, statutory or Constitutional changes that may be necessary for the implementation of the recommendations contained in the Task Force Report, taking into account any relevant contributions made during the validation period.*

469] As at the date KNUN made their proposals to the BBI Taskforce, to wit, 8th August 2019, the BBI Steering Committee that was mandated to propose statutory or constitutional changes was yet to be established.

470] In the South African case of ***National Director of Public Prosecutions v Phillips & Others*** ***[2002] (4) SA 60 (W)***, in respect of the concept of legitimate expectation, the Court held, *inter alia*:

> ***"The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:***
>
> ***(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';***
>
> ***(ii) The expectation must be reasonable:***
>
> ***(iii) The representation must have been induced by the decision-maker;***
>
> ***(iv) The representation must be one which it was competent and lawful for the decision-***

maker to make without which the reliance cannot be legitimate."

471] Although the BBI Taskforce Report came up with various policy and administrative reform recommendations that included constitutional amendments, a close examination of the requirements for legitimacy of the expectation as laid down in the ***National Director of Public Prosecutions*** case *(supra),* yields the interpretation that the BBI Taskforce did not create a legitimate expectation that the proposals made by KNUN would be incorporated in the Amendment Bill. Based on the Supreme Court's decision in ***Communications Commission of Kenya & 5 Others*** *(supra),* it cannot be said that KNUN had any legitimate expectation since no representation and/or promise had been made to it that their proposals would be incorporated in the intended Amendment Bill.

472] In this regard, the fact that the proposals by KNUN were not incorporated in the Amendment Bill cannot be a basis of invalidating the Amendment Bill. It was not demonstrated that it was only the proposals by KNUN that were not incorporated in the Amendment Bill. For these reasons I would dismiss the cross appeal by KNUN.

(20) Whether the petitioners had made out a case for disclosure and publication of the Steering Committee's financial information.

473] Another issue raised by Mr. Morara in his cross appeal was that the learned judges declined to order President Uhuru Muigai Kenyatta, Hon. Raila Odinga and the BBI Steering Committee to publish or cause to be published details of the budget and public funds allocated and utilized in promoting the impugned Bill.

474] The learned judges held that as much as the petitioner's prayer was anchored on ***Article 35*** of the Constitution, the Petitioner failed to demonstrate that he had sought for the information he wanted the court to order its publication and the same was denied; if that was the case, then Mr. Morara ought to have moved the court for a determination whether his right of access to information had been infringed, in which case he would have been at liberty to seek appropriate orders. In the circumstances, the learned judges held, the prayer for disclosure as sought was premature.

475] ***Article 35*** provides for access to information and states as follows-

> ***"35. (1) Every citizen has the right of access to-***
>
> ***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***
>
> ***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***
>
> ***(3) The State shall publish and publicise any important information affecting the nation."***

476] Going by those provisions, it is clear that information held by the State is accessible by citizens and the information ought to be availed upon request. ***Access to Information Act, 2016*** that was enacted by Parliament in actualization of ***Article 35*** of the Constitution elaborates the citizens' right of access to information. See the Supreme Court decision in ***Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR***.

477] ***Section 4*** of the Act provides that:

"4. 1. Subject to this Act and any other written law, every citizen has the right of access to information held by -

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

2. Subject to this Act, every citizen's right to access information is not affected by -

(b) any reason the person gives for seeking access; or

(c) the public entity's belief as to what are the person's reasons for seeking access.

3 Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4. This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

5. Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information."

478] ***Section 8*** of the ***Act*** provides for the mode of making an application for access to information and states as follows: -

"8. (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested."

479] Further, ***section 9*** requires a public officer to decide on the application and communicate the same within twenty-one days of receipt of the information. Under ***subsection (4)*** the officer is required to communicate the decision to the requester indicating

whether the public entity or private body holds the information sought and whether the request for information is approved. If the same is not communicated, then it will be deemed that the application is rejected.

480] In ***Njonjo Mue case*** *(supra)* the Supreme Court held as follows:

> ***"[13] Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd Respondent. In addressing that issue, the Court in*** *Petition No. 479 of 2013, Rev. Timothy Njoya v. Attorney General & Another; [2014] eKLR,* ***it was held;***
>
> > ***"A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In*** *Nairobi Law Monthly v. Kengen (supra)* ***the Court dealt with the applicability of the right to information as follows:***
> >
> > > *"The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the state." "*
>
> ***[14] This right of access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically, procedures are provided in a law on how a person ought to***

access information held by another person and particularly a State organ or entity."

481] This Court also made an observation on the same in the case of ***Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR*** where it held that:

> ***"83. ...Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution..."***

482] From the foregoing, if anyone wishes to have access to any information held by the State or a public body, then one is required to follow the laid down procedure and make a formal application to be provided with the information or for publication of the same.

483] There is no demonstration at all by Mr. Morara that he requested for any information from the President, Hon. Raila Odinga and the BBI Steering Committee regarding the budget and public funds allocated and utilized in promoting the impugned Bill. The learned judges cannot therefore be faulted for declining to issue the aforesaid orders. Consequently, I would dismiss Mr. Morara's cross appeal on the issue.

21. Whether the High Court erred in admitting *amici curiae* who were partisan.

484] Kenya Human Rights Commissions and four (4) Law Professors sought admission as *amici curiae* in ***Petition No. E282 of 2020*** and the applications were granted, despite objection by the Attorney General's representative. Before this Court, the appellants contested the admission of the *amici curiae,* arguing that they were partisan.

485] The *amici* were admitted on account of their wealth of knowledge on constitutional issues, to assist the trial court in its appreciation of the rather novel doctrines of the basic structure, unamendability of the Constitution and eternity clauses.

486] An *amicus curiae* is defined as a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because the person has a strong interest in the subject matter. See *Black's Law Dictionary, 11th Edition.*

487] A perusal of the *amici curiae's* briefs in the record of appeal shows that they are constitutional law experts possessed of extensive experience as constitutional law practitioners, academicians and law lecturers in various Universities.

488] The Supreme Court of Kenya in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*** ***[2015] eKLR*** set down useful guidelines regarding admission of *amicus curiae* in court proceedings. The guidelines include the following:

i. An amicus brief should be limited to legal arguments.

ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.

iii An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.

iv. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or

where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Others v. IEBC & Others;* ***S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as*** *amicus)***.**

v. The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.

489] The court widened the guidelines to incorporate the emerging issues that arose in the case of ***Justice Philip K. Tunoi & another v Judicial Service Commission & 2 others*** ***[2014] eKLR*** to include, among others:

"1. ...

2. The applicant ought not to raise any perception of bias or partisanship either from the documents filed, his submissions or conduct prior to the making of the application.

3. The applicant ought to be neutral in the dispute where the dispute is adversarial in nature.

4. The applicant ought to show that the submissions it intends to advance will give such assistance to the Court as would otherwise not have been enjoyed by the Court. He ought to draw attention of the Court to relevant matters of law or fact which would otherwise have not been drawn. Therefore, the applicant ought to show that he does not intend to repeat the arguments already made by the parties but that he intends to raise new contentions. The new contentions however must be based on the data already before the Court and not on fresh evidence.

5. The applicant ought to show that he has expertise in the field relevant to the matter in dispute. Therefore, general expertise in law does not suffice."

490] The Supreme Court in dealing with the role of *amici* further relied on the Constitutional Court of South Africa in the case *of* ***Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others*** ***(CCT 69/12) [2012]*** where it was held that:

> ***"...the role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution."***

491] It is evident that an *amicus curiae* must be impartial and owe fidelity only to the court and no one else. In the case of ***Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign & Others*** ***(CCT8/02) [2002] ZACC 13*** the Constitutional Court of South Africa stated as follows:

> ***"The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court."***

492] Likewise, in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*** *(supra)* the Supreme Court stated:

> ***"...an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Court room.***
>
> ***...On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his***

cause is to ensure that a legal and legitimate decision is achieved."

493] It was the appellants' case that the High Court admitted *amici* who were partisan. However, an *amicus* should not be considered partisan simply because his or her expert opinion or analysis is more favourable or advances one party's case and is disadvantageous to the other. The important consideration is whether the *amicus'* conclusion or position taken is adequately supported by the expert analysis of the issue(s) in controversy. The court is not bound to follow or accept the position taken by the *amicus*. Before this Court, Prof. Migai Aketch and Prof. Charles Manga Fombad sought and were admitted as *amici curiae*. Their respective briefs and views, which I found quite illuminating and relevant, were cited by the appellants. That does not necessarily imply that the two Professors were partisan. The fact that there is a convergence of views between a party and an *amicus* does not, *per se,* indicate that the latter is biased or partisan.

494] In my view, there is no evidence that that the *amici* who were admitted to the High Court proceedings were biased. Their respective briefs were of great assistance to the learned judges in determining the issues I have alluded to. Although the *amici* were not parties to the High Court matters, having been admitted in the proceedings in that limited capacity, in the appeals the 1st appellant named them as respondents and therefore they had to file submissions in reply. I must add that I found their submissions quite useful in this appeal.

DISPOSITION

495] Having determined all the issues that we consider germaine in these consolidated appeals, the final orders of the Court are as follows:

A. We uphold the judgment of the High Court to the extent that we affirm the following:

i. The basic structure doctrine is applicable in Kenya. (Sichale, J. A. dissenting).

ii. The basic structure doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution. (Okwengu & Sichale, JJ.A. dissenting).

iii. The basic structure of the Constitution can only be altered through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum. (Okwengu, Gatembu & Sichale, JJ. A. dissenting).

iv. Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. (Tuiyott, J.A. dissenting).

v. The President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution.

vi. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (The BBI Steering Committee) has no legal capacity to initiate any action towards promoting

constitutional changes under Article 257 of the Constitution.

vii. ***The Constitution of Kenya Amendment Bill, 2020 is unconstitutional and a usurpation of the People's exercise of sovereign power.***

viii. ***The Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum in the absence of evidence of continuous voter registration by the Independent Electoral and Boundaries Commission. (Sichale, J.A. dissenting).***

ix. ***The Independent Electoral and Boundaries Commission does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification whether the initiative as submitted by the Building Bridges Secretariat is supported by the requisite number of registered voters in accordance with Article 257(4) of the Constitution. (Sichale, J.A. dissenting).***

x. ***At the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was neither legislation governing the collection, presentation, and verification of signatures, nor an adequate legal/regulatory framework to govern the conduct of referenda. (Sichale, J.A. dissenting).***

xi. ***County Assemblies and Parliament cannot, as part of their constitutional mandate, change the contents of the Constitution of Kenya Amendment Bill, 2020 initiated through a popular initiative under Article 257 of the Constitution.***

xii. ***The second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to: predetermine the allocation of the proposed additional seventy constituencies, and to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation, is unconstitutional. (Sichale, J.A. dissenting).***

xiii. ***The Administrative Procedures for the verification of signatures in support of the Constitution***

Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum and in violation of Sections 5, 6 and 11 of the Statutory Instruments Act, 2013. (Sichale, J.A. dissenting).

xiv. A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill, 2020.

B. We hereby set aside the following declarations and orders of the High Court:

i. That President, Uhuru Muigai Kenyatta has contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

ii. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People. (Nambuye, Okwengu & Kiage, JJ.A. dissenting).

iii. The BBI Steering Committee established by the President vide Kenya Gazette Notice No. 264 of 3rd January 2020 and published in a special issue of the Kenya Gazette of 10th January 2020 is an unconstitutional and unlawful entity.

C. The Cross appeals fail and are hereby dismissed.

496] This being a public interest matter, the parties shall bear their own costs in these appeals and in the High Court.

497] In conclusion, on behalf of the entire bench that heard these unprecedented appeals, I wish to sincerely thank all the parties and their respective advocates for the diligent manner in which they argued these appeals, and for the industry that they put in the preparation of all the useful material that was availed to tnyuhe Court. The authorities were so voluminous that time did not permit us to peruse and cite as many as we would have wished to. I found the submissions by all the parties quite concise and well researched and that eased our task of preparing this judgment. I also wish to thank our legal researchers and secretarial staff for their immense help in the preparation of this judgment.

Dated and delivered at Nairobi this 20th day of August, 2021.

D. K. MUSINGA, (P)

.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original

Signed

DEPUTY REGISTRAR

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE,

GATEMBU, SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....APPELLANT

AND

DAVID NDII .....1ST RESPONDENT
JEROTICH SEII.....2ND RESPONDENT
JAMES GONDI.....3RD RESPONDENT
WANJIRU GIKONYO.....4TH RESPONDENT
IKAL ANGELEI.....5TH RESPONDENT
ATTORNEY GENERAL.....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....7TH RESPONDENT
SPEAKER OF THE SENATE.....8TH RESPONDENT
KITUO CHA SHERIA.....9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT
DR. DUNCAN OJWANG.....11TH RESPONDENT
OSOGO AMBANI.....12TH RESPONDENT
LINDA MUSUMBA.....13TH RESPONDENT
JACK MWIMALI.....14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT
THE STEERING COMMITTEE ON THE
IMPLEMENTATION OF THE BUILDING BRIDGES
TO A UNITED KENYA TASKFORCE.....16TH RESPONDENT
BUILDING BRIDGES NATIONAL SECRETARIAT.....17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE.....18TH RESPONDENT
THIRDWAY ALLIANCE.....19TH RESPONDENT
MIRURU WAWERU.....20TH RESPONDENT
ANGELA MWIKALI.....21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY.....22ND RESPONDENT
THE SPEAKER OF THE SENATE.....23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA.....24TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....26TH RESPONDENT

COUNTY ASSEMBLY OF TANA RIVER.....27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU.....28TH RESPONDENT
COUNTY ASSEMBLY OF TAITA TAVETA.....29TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA.....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....34TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI.....36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU.....37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI.....38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA.....41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI.....42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU.....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI.....52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET.....59TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA.....63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY.....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....67TH RESPONDENT
COUNTY ASSEMBLY OF KISII.....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY.....70TH RESPONDENT
PHYLISTER WAKESHO.....71ST RESPONDENT
254 HOPE.....72ND RESPONDENT
THE NATIONAL EXECUTIVE OF

THE REPUBLIC OF KENYA.....73RD RESPONDENT
JUSTUS JUMA.....74TH RESPONDENT
ISAAC OGOLA.....75TH RESPONDENT
MORARA OMOKE.....76TH RESPONDENT
RTD. HON. RAILA ODINGA.....77TH RESPONDENT
ISAAC ALUOCHIER.....78TH RESPONDENT
UHURU MUIGAI KENYATTA.....79TH RESPONDENT
PUBLIC SERVICE COMMISSION.....80TH RESPONDENT
THE AUDITOR GENERAL.....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI).....82ND RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT) .....1ST APPELLANT
HON. RAILA AMOLO ODINGA 2NDAPPELLANT

AND

DAVID NDII & 76 OTHERS ..... RESPONDENTS
KENYA HUMAN RIGHTS COMMISSSION.....1ST AMICUS CURIAE
DR. DUNCAN OJWANG.....2ND AMICUS CURIAE
OSOGO AMBANI.....3RD AMICUS CURIAE
LINDA MUSUMBA.....4TH AMICUS CURIAE
JACK MWIMALI .....5TH AMICUS CURIAE

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020

****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL..... APPELLANT

AND

DAVID NDII & 73 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA..... APPELLANT

AND

DAVID NDII & 82 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with

Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

JUDGMENT OF NAMBUYE, J.A.

1] These are first consolidated appeals arising from the judgment of the High Court of Kenya at Nairobi, Constitutional and Human Rights Division Petition No. E282 of 2020 as consolidated with Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021 delivered on 13th May, 2021 by **J. M. Ngugi, G. V. Odunga, J. Ngaah, E. C Mwita and Mumbua T. Matheka, JJ**.

A. BACKGROUND:

2] The background to the appeals has its roots in what has come to be popularly known as the **"Handshake"** between His Excellency the President and Commander in Chief of the Armed Forces of the Republic of Kenya, **Hon. Uhuru Muigai Kenyatta** (the President) and **Hon. Raila Amolo Odinga** (**Hon. Raila**) on 18th March, 2018, that gave rise to the **"Building Bridges Initiative"** (BBI) aimed at uniting Kenyans following what befell Kenyans after the 8th August, 2017, Elections and 25th October, 2017, repeat Presidential Elections. The President, in exercise of his mandate under the COK, 2010 appointed the **Building Bridges to Unity Advisory Task Force** (Taskforce) through Gazette Notice No. 5154 of 24th May, 2018, to come up with recommendations and proposals for building a lasting unity in the country with specific terms of reference as specified therein.

3] The Taskforce filed an interim report in November, 2019, pursuant to which the President on 3rd January, 2020, vide Gazette Notice No. 264 appointed a Steering Committee (**Steering Committee**) on the implementation of the Taskforce Report whose terms of reference included an item for recommendation for constitutional changes giving rise to the **"The impugned Constitution of Kenya (Amendment) Bill, 2020"** (impugned Bill) triggering the consolidated petitions whose determination by the High Court gave rise to the consolidated appeals subject of this appeal.

4] The first in line was **Petition No. E282 of 2020** in which **David Ndii, Jerotich Seii, James Gandi, Wanjiru Gikonyo** and **Ikal Angelel** sued the Attorney General (AG), the Speaker of the National Assembly (SNA), Speaker of the Senate (SS) and the Independent Electoral and Boundaries Commission (IEBC), anchored on **Articles 3(1**) and **22(1)(2)(c)** of the **CoK, 2010** substantively seeking declarations that: (i) basic structure, eternity clauses, constitutional entrenchment clauses, unamendable constitutional clauses are applicable to the **CoK, 2010** in the manner specified in the petition and therefore cannot be amended either under **Article 256** by Parliament or through the popular initiative under **Article 257** of the **CoK, 2010** which in their opinion could only be applied to amend the ordinary provisions of the **CoK, 2010** and gave reasons for this proposition as set out both in their pleadings and submissions.

5] In rebuttal to this petition, the AG, SNA, SS and the BBI Secretariat (Secretariat) jointly with **Hon. Raila** argued that the above doctrines do not apply and faulted the Judges reliance on them for failure to consider: the unique cultural, historically developed constitutional norms and national

identity of the **CoK, 2010**; the limitations on the application of comparative jurisprudence premised on constitutional borrowing and transplanting of foreign constitutional norms which have no relevance to Kenya; that the petitioners case was not only unjusticiable but was also based on speculative future contingencies and therefore premature. Lastly, that the issues were *res judicata* and founded on a misinterpretation of the law.

6] The second was **Petition No. E397 of 2020** in which the Kenya National Union of Nurses sued the Steering Committee, the AG, IEBC, the NA and the Senate, anchored on **Article 22** of the **CoK, 2010** complaining that the framers of the impugned amendment Bill infringed on their legitimate expectation to have their recommendation for a constitutionally entrenched independent constitutional commission to be in charge of all the affairs of health workers in Kenya as initially captured in the Taskforce report released in October, 2019 but subsequently erroneously omitted in the impugned amendment Bill generated by the Steering Committee, which in their opinion offended **Articles 10, 27(1), 27(2), 27(4), 27(5),27(6), 27(8), 41(1), (2),43(1)(2)** and **47(1)** of the Constitution. In rebuttal, the respondents asserted that the Steering Committee had discretion to determine what to include and what not to include in the impugned Bill.

7] The third was **Petition No. E400 of 2020** in which the **Third way Alliance Kenya, Muiruri Waweru** and **Dr. Angela Mwikali** sued the Taskforce, Secretariat, IEBC, AG, SNA, SS and all County Assemblies, anchored on **Articles 3(1)** and **22** of the **CoK, 2010** substantively seeking to vitiate the impugned Bill for lack of public participation, violation of National Values and Principles of Good Governance espoused under **Article 10** of the **CoK, 2010**, among numerous other complaints and if not

declared unconstitutional, the provisions would become unchallengeable law. The process also stood vitiated for lack of a National law on referendum. In rebuttal, the Steering Committee, IEBC, AG and County Assemblies of Mombasa and Nairobi asserted *inter alia* that the petition was *res judicata* as the petitioners had sought a similar relief through **Nairobi High Court Petition No. 451 of 2018, Thirdway Alliance Kenya vs. Attorney General and Others** which was dismissed and not appealed against and that IEBC had discharged its mandate in accordance with the Constitution, and further, that under **Article 260** of **CoK, 2010**, the Steering Committee and the Secretariat have the constitutionally conferred personality to initiate and promote a popular initiative.

8] The fourth was **Petition No. E401 of 2020** in which the petitioner herein, **254 Hope**, sued the President, the Deputy President and the rest of the cabinet, complaining *inter alia* that the Amendment Bill having been initiated and pushed through the BBI process with roots in a Government process was unlawful and in violation of the **Fair Administrative Action Act**, as it failed to give the People a fair opportunity to contest the proposals which in their opinion defy the basic structure of the Constitution. In rebuttal, the AG, IEBC and the Secretariat cumulatively asserted that the **CoK, 2010** does not expressly preclude the government at the national or county level, a state organ or a public officer from promoting an amendment to the Constitution through a popular initiative.

9] The fifth was **Petition No. E402 of 2020** brought by **Justus Juma** and **Isaac Ogola**, anchored on numerous constitutional provisions cited in its heading majorly complaining that the proposal for the impugned Bill to create an additional seventy (70) constituencies offend **Article 89(1)** of the

CoK, 2010. That the process was therefore irregular, illegal and unconstitutional. In rebuttal, the AG asserted that the petition as framed was not justiciable on account of want of ripeness for reasons given in their response and invited the court to exercise both judicial restraint and constitutional avoidance as according to the AG, the petition as framed was an invitation to the court to determine a political question constitutionally reserved for political organs.

10] The sixth was **Petition No. E416 of 2020** by **Morara Omoke**, anchored on numerous Articles of the of the **CoK, 2010** cited in its heading, directed against **Hon. Raila**, the AG, the Steering Committee, the NA, the Senate and IEBC on grounds as extensively set out in the petition.

11] In rebuttal, **Hon. Raila**, the AG, NA, the Senate and IEBC cumulatively argued *inter alia* that the petition was *res judicata*, issues therein having been determined in the case of **Third way Alliance** (supra); legality of Gazette Notice No. 264 of 2020 was pending before court in the **Omutata** case and therefore *sub judice*; all the processes resulting in the Amendment Bill were regular, legal, procedural and constitutional; IEBC was properly constituted when it undertook the impugned exercise especially when no complaints were raised by the supporters indicated to have endorsed their signatures that their names were included without their knowledge; IEBC's administrative procedures for verification of signatures were sufficient; there was no requirement under **Article 261 (1)** as read with the Fifth Schedule to the Constitution for such legislation, notwithstanding that according to them, there were adequate Election Laws and procedures for the conduct of elections and referenda.

12] The seventh was **Petition No. E426 of 2020** by **Isaac Aluoch Polo Aluochier**, against **Uhuru Kenyatta**, the AG and IEBC, with the Public Service Commission and the Auditor General being named as interested parties, in which they were faulted for expanding the mandate of the Steering Committee to include proposals and constitutional changes that gave rise to the impugned Amendment Bill in contravention of **Article 132(4)(a)** of the **CoK, 2010** as it was not a popular initiative prescribed in **Article 257** of the **CoK, 2010**. IEBC therefore had no mandate to process the draft Bill for submission to the County Assemblies in the first instance and the National Assembly in the second instance. The President therefore bore responsibility and must make good public funds that had been incurred in the unlawful and unconstitutional process.

13] In rebuttal, the AG and IEBC asserted cummulatively that since **Uhuru Muigai Kenyatta** was currently the President of the Republic of Kenya *ipso facto*, he could not be sued in his personal capacity for any acts done during the pendency of his Presidency; the petition was *res judicata*; there was no evidence of misuse of public funds; and lastly, that IEBC had already discharged its statutory and constitutional mandate. The litigation against it was therefore moot while the Office of the Auditor General stated that it was not as yet seized of audits relating to expenditure of funds subject of the petition.

14] The eighth was **Petition No. 2 of 2021** by Muslims for Human Rights (**Muhuri**) who directed its petition against IEBC and speakers of both the Senate and the National Assembly complaining *inter alia* that the actions undertaken by IEBC in furtherance of the constitutional Amendment Bill were neither supported nor guided by any regulatory or legal framework;

any alleged Procedural Rules or guidelines made and applied by IEBC to carry out the above highlighted exercise were in violation of **Articles 10, 81, 94** and **249** of the **CoK, 2010** having been developed contrary to **Sections 5, 6** and **11** of the **Statutory Instruments Act**, rendering them legally infirm among numerous other complaints. The petitioners therefore substantively sought declarations to vitiate the process as more particularly set out in their prayers.

15] In rebuttal, IEBC, the Senate, NA and BBI Secretariat contended *inter alia* that IEBC acted within the ambit of both its statutory and constitutional mandate in the discharge of its functions; **sections 4(2)** and **(3)** of the **Elections Act, 2012** and **Regulation 8** of the **Elections (Register of Voters) Regulations, 2012** provide sufficient regulatory and legal framework for the execution of IEBC's statutory and constitutional mandate; there was no law requiring IEBC to maintain a database of signatures for purposes of **Article 257(4)**; the fact that Parliament had not exercised its powers under **Article 94** of the Constitution did not mean there was a legal vacuum; the administrative procedures for verification of signatures in support of the constitutional amendment were not illegal as they are not statutory instruments as stipulated in the **Statutory Instruments Act** but internal procedures which IEBC was empowered to make for the ease of execution of its mandate; and **Article 257** of the **CoK, 2010** and **sections 49 - 55** of the **Elections Act, 2011** provide sufficient guidelines and procedures for undertaking constitutional amendments through popular initiative or referendum especially when there was no requirement under **Article 257** for either the National Assembly or the Senate to come up with legislative frameworks to guide IEBC on verification of signatures or to regulate the constitutional amendment process through a popular initiative.

16] The Amici (Amicus Curiae) namely, the Kenya Human Rights Commission (KHRC) supported the petitions contending that: there was an implied limitation on constitutional amendments; the proposed constitutional amendments if carried through would not only alter a pure presidential system, the basic structure of the executive and the concept of separation of powers but would also undermine the independence of the people; Chapters One, Two, Four, Nine and Ten form part of the basic structure of the Constitution and cannot therefore be amended under **Article 256** or **257**; and lastly, that since the Steering Committee did not fall under the category of citizens, it could not therefore initiate a citizens' popular initiative.

17] Duncan Oburu Ojwang, John Osogo Ambani, Linda Andisi Musumba and **Jack Busalile Mwimali** on the other hand submitted *inter alia* that doctrines of basic structure and unamendability or eternity clauses did not apply to shield the entire specific chapters of the Constitution from unamendability, but rather, to protect the amendment of specific provisions to the Constitution whose effect would either be to interfere with the basic structure or essential features of the Constitution; while the position of the **Law Professors** on the other hand was that any constitutional amendment process promoted by entities other than voters or by voters in concert with other entities violates the spirit of a popular initiative. Similarly, any process that relies on the support of the State in any way violates the same principle and the prudent use of resources. Any action of the State undertaken in furtherance of popular initiative is a violation of the principle of equality and proportionality since **Articles 255, 256** and **257** of the Constitution talk of **"an amendment"** in singular, not

"amendments" in plural and the Amendment Bill being in plural was not in compliance with **Articles 255 – 257** and should therefore be vitiated.

B. ISSUES IDENTIFIED BY THE HIGH COURT FOR DETERMINATION:

18] The petitions were consolidated and canvassed through written submissions orally highlighted, at the conclusion of which the learned Judges of the trial court (Judges) identified issues for determination which may be rephrased as follows:

i. *Whether the Basic Structure Doctrine of Constitutional interpretation is applicable in Kenya? and if the answer is in the affirmative, what are its implications for the amendment powers enshrined in **Articles 255** to **257** of the Constitution of Kenya?*

ii. *What is the constitutional remit of amendment of the Constitution through a Popular Initiative and who could initiate a Popular Initiative process under the **CoK, 2010** set up;*

iii. *Whether the BBI process of initiating amendments to the Constitution was in conformity with the legal and constitutional requirements as currently obtain in the CoK, 2010;*

iv. *Should the President and Public Officers who directed or authorized the use of public funds for the BBI Constitutional Amendment Process be ordered to refund the monies so used;*

v. *Was the President in contravention of **Article 73(1)(a)** of the Constitution when he purported to initiate constitutional changes through the BBI Process;*

vi. *Whether there were adequate legislative framework in place to guide constitutional amendments through a Popular Initiative, and if the answer was in the negative; whether that was fatal to the halted constitutional amendment processes;*

vii. *Whether it was permissible for County Assemblies and Parliament to incorporate new content into or alter the existing content in the Constitution of Kenya which envisages the possibility of a Bill to amend the Constitution by Popular Initiative to be in the form of an omnibus bill or specific proposed amendments to the Constitution to be submitted as separate and distinct referendum questions;*

viii. *Was it unlawful for the promoters of the impugned Constitution of Kenya Amendment Bill to leave out the proposal for an Independent Constitutional Health Services Commission from the Constitution Amendment Bill;*

ix. *Was it lawful for the promoters of the impugned Constitution of Kenya Amendment Bill to set a specific number of constituencies under **Article 89(1)** of the Constitution? and, to directly allocate and apportion the constituencies it created without a delimitation exercise being undertaken using the criteria and procedures as set out in **Article 89** of the Constitution;*

x. *Whether IEBC had carried out nationwide voter registration and if the answer to this question was in the negative, could the proposed referendum be carried out before IEBC had done so;*

xi. *Was IEBC properly constituted to conduct the proposed referendum including verification of the minimum voter support required for a Popular Initiative before submitting the Constitution of Kenya Amendment Bill to the County Assemblies;*

xii. *Was a Legal/Regulatory Framework to regulate the verification and other processes required under **Article 257(4)** and **(5)** of the Constitution necessary, and if the answer was in the affirmative, whether one exists;*

xiii. *Whether the promoters of the impugned Constitution of Kenya Amendment Bill violated rights enshrined in **Article 43** for pursuing the constitutional amendments process in the midst of Covid-19 Pandemic;*

xiv. *Whether an order should issue directing the President to dissolve Parliament pursuant to the Chief Justice's Advice issued pursuant to **Article 261(7)** of the Constitution; and,*

xv. *The appropriate reliefs, if any, to be granted?*

19] On the totality of the Judges assessment and reasoning on the respective rival positions before them, drew out conclusions as follows:

i. *The text, structure, history and context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by our Constitution yield the conclusion that the Basic Structure Doctrine is applicable in Kenya;*

ii. *The Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either Secondary Constituent Power or Constituted Power;*

iii. *The essential features of the Constitution forming the Basic Structure can only be altered or modified by the People using their Sovereign Primary Constituent Power and not merely through a referendum;*

iv. *From a holistic reading of the Constitution, its history and the context of the making of the Constitution, the Basic Structure of the Constitution consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and the six schedules of the Constitution. It also includes the specific substantive areas Kenyans thought were important enough to pronounce themselves through constitutional entrenchment including Land and Environment; Leadership and Integrity; Public Finance; and National Security;*

v. *The Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amendable through the procedures outlined in Articles 255, 256 and 257 of the Constitution in as long as they do not change the Basic Structure;*

vi. *There are certain provisions in the Constitution which are insulated from any amendment at all because they are deemed to express categorical core values. These provisions are therefore, unamendable and cannot be changed through the exercise of Secondary Constituent Power or Constituted Power;*

vii. *The Sovereign Primary Constituent Power is only exercisable by the People after four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum;*

viii. *The power to amend the Constitution through the Popular Initiative route under Article 257 of the Constitution is reserved for the private citizen. Neither the President nor any State Organ is permitted under our Constitution to initiate constitutional amendments using the Popular Initiative;*

ix. *Under Article 143(3) of the Constitution, the President can be sued in his or her personal capacity during his or her tenure in office except for actions or omissions in respect of anything done or not done in the exercise of [his or her] powers under [the] Constitution;*

x. *The Constitution Amendment Bill, 2020 which was developed by the BBI Steering Committee and was being promoted by the BBI Secretariat was an initiative of the President. The President does not have constitutional mandate to initiate constitutional amendments through Popular Initiative under Article 257 of the Constitution to the extent that the BBI Steering Committee was employed by the President to initiate proposals to amend the Constitution contrary to Article 257 of the Constitution, thus, the BBI Steering Committee is an unconstitutional entity; additionally, the BBI Steering Committee is unlawful because the President violated the provisions of Article132(4)(a) of the Constitution in its establishment;*

xi. *In taking initiatives to amend the Constitution other than through the prescribed means in the Constitution, the President failed to respect, uphold and safeguard the Constitution and, to that extent, he has fallen short of the leadership and integrity threshold set in Article 73 of the Constitution and, in particular, Article 73(1)(a) thereof;*

xii. *The history of Article 257 of the Constitution read together with Articles 95(3) and 109(1) and (2) of the Constitution yields the conclusion that in order to effectively carry out a referendum process as contemplated under the Constitution, it is necessary that a specific legislation be enacted for that purpose; notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still be undertaken as long as the constitutional expectations, values, principles and objects especially those in Article 10 of the Constitution are met;*

xiii. *Parliament and the County Assemblies or any other State organ cannot under the guise of consideration and approval of a Popular Initiative to amend the Constitution under Article 257 of the Constitution, alter or amend the Constitution Amendment Bill presented to them;*

xiv. *Article 255(1) of the Constitution yields the conclusion that each of the proposed amendment clauses ought to be presented as a separate referendum question;*

xv. *Article 89(1) of the Constitution – which provides for the exact number of constituencies – while being part of the Basic Structure of the Constitution, is not an eternity clause: it can be amended by reducing or increasing the number of constituencies by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution;*

xvi. *The criteria and procedure for delimitation and apportionment of constituencies set out in Articles 89(4); 89(5); 89(6); 89(7); 89(10);*

89(12) are unamendable constitutional provisions. They can only be amended by the exercise of Primary Constituent Power; it is unconstitutional for a Constitution of Kenya Amendment Bill to directly allocate and apportion constituencies in contravention of Article 89 of the Constitution;

xvii. *The Independent Electoral and Boundaries Commission (IEBC) cannot conduct any proposed referendum because: it has no quorum; the quorum for the conduct of business by the IEBC is five Commissioners; it has not carried out nationwide voter registration; and, it has no legal/regulatory framework for the verification of signatures as required by Article 257(4) of the Constitution; and thus, all actions taken by the IEBC with respect to the Constitution Amendment Bill, 2020 are null and void.*

On disposition the Judges issued declarations as follows:

i. *the Basic Structure Doctrine is applicable in Kenya;*

ii. *the Basic Structure Doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution. In particular, the Basic Structure Doctrine limits the power to amend the Basic Structure of the Constitution and eternity clauses;*

iii. *The Basic Structure of the Constitution and eternity clauses can only be amended through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum;*

iv. *Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution;*

v. *The President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under* ***Article 256*** *or through a Popular Initiative under* ***Article 257*** *of the Constitution;*

vi. *The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by the President vide*

Kenya Gazette Notice No. 264 of 3 January, 2020 and published in a special issue of the Kenya Gazette of 10 January, 2020 is an unconstitutional and unlawful entity; being an unconstitutional and unlawful entity, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, has no legal capacity to initiate any action towards promoting constitutional changes under ***Article 257*** *of the Constitution;*

vii. *The entire BBI Process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and in usurpation of the People's exercise of Sovereign Power;* ***Mr. Uhuru Muigai Kenyatta*** *has contravened Chapter 6 of the Constitution and specifically* ***Article 73(1)(a)(i)*** *by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution;*

viii. *The entire unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report is unconstitutional, null and void;*

ix. *The Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission carries out nationwide voter registration exercise;*

x. *The Independent Electoral and Boundaries Commission does not have quorum as stipulated by* ***section 8*** *of the* ***IEBC Act*** *as read with paragraph 5 of the Second Schedule to the* ***Act*** *for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under* ***Article 257(4)*** *of the Constitution submitted by the Building Bridges Secretariat;*

xi. *At the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures, there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of referenda; the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to*

amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed;

xii. *County Assemblies and Parliament cannot, as part of their constitutional mandate to consider a Constitution of Kenya Amendment Bill initiated through a Popular Initiative under* ***Article 257*** *of the Constitution, change the contents of such a Bill;*

xiii. *The Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to predetermine the allocation of seventy constituencies is unconstitutional; the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation is unconstitutional; the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to have determined by delimitation the number of constituencies and apportionment within the counties is unconstitutional for want of Public Participation;*

xiv. *Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of* ***Article 94*** *of the Constitution and* ***Sections 5, 6*** *and* ***11*** *of the Statutory Instruments Act, 2013;*

xv. ***Article 257(10)*** *of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People;*

xvi. *Granted a permanent injunction restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under* ***Article 257(4)*** *and* ***(5)*** *in respect of the Constitution of Kenya (Amendment) Bill 2020;*

xvii. *Declined to grant orders that Mr. Uhuru Muigai Kenyatta makes good public funds used in the unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by Mr. Uhuru Muigai Kenyatta; and the Attorney General to ensure that other public officers who either directed or authorized the use of public*

funds in the unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report make good the said funds for reasons given in the judgment together with attendant order that reliefs in the Consolidated Petitions not specifically granted are deemed to have been declined with each party to bear own costs.

C. GROUNDS OF APPEAL AND CROSS APPEAL:

20] Appellants and cross-appellants were variously aggrieved and are now before this court on first appeals and cross-appeals rising various grounds. The first in line is **Civil Appeal No. E291 of 2021** by **the Independent Electoral and Boundaries Commission vs. David Ndii and 81 Others**, raising twelve (12) grounds of appeal subsequently condensed into four (4) thematic issues namely:

a) **Quorum of the appellant (ground 1).**
b) **Interpretation of the role of the appellant in relation to the process of amendment of the Constitution of Kenya from a popular initiative (grounds 2, 3, 7, 8 and 9).**
c) **The place of administrative measures and processes guiding the performance of the appellants' mandate (grounds 4, 5 and 6).**
d) **Parameters within which the jurisdiction of the High Court under Article 165(3) can be exercised (grounds 10, 11 and 12).**

21] The second in line is **Civil Appeal No. E292 of 2021** by **Building Bridges to a United Kenya, National Secretariat** and Hon. **Raila Amolo Odinga**. The appeal is directed against **David Ndii & 76 Others** with Amicus Curiae being named individually namely, **Kenya Human Rights Commission**, **Duncan Oburu Ojwang, John Osogo Ambani, Linda Andisi Musumba** and **Jack Busalile Mwimali** as the 1st, 2nd, 3rd, 4th and 5th

Amicus Curiae respectively. A total of nineteen (19) grounds of appeal are raised which were subsequently condensed into three broad thematic themes namely:

a) **The Basic Structure, eternity and unamendability doctrine and their applicability to the Constitution of Kenya, 2010 (grounds 1, 2, 3 and 4).**
b) **Constitution amendment by popular initiative – contextual analysis of the amendment methodology under Chapter 16 of the Constitution of Kenya, 2010 (grounds 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16).**
c) **General submissions (grounds 17 and 18).**

22] The third in line is **Civil Appeal No. E293 of 2021** by the Hon. Attorney General. He has directed his appeal against **David Ndii & 73 Others** raising a whooping thirty-one (31) grounds of appeal subsequently condensed into thematic areas as follows:

a) **The Basic Structure doctrine (grounds 1 – 5, 17 and 18).**
b) **The popular initiative (grounds (7 – 17).**
c) **The public participation (grounds 15 – 17).**
d) **The creation of new constituencies (grounds 24).**
e) **The presidential immunity (grounds 19 – 23)**
f) **The Independent Electoral & Boundaries Commission quorum (grounds 25 and 26).**
g) **The adequacy of the legal infrastructure to support signature verification (grounds 27 – 29).**
h) **The single or multiple referendum questions (grounds 31).**
i) **The issue of voter registration as relates to holding of referendum (ground 30).**
j) **The Amicus Curiae (ground 6).**

23] The last is **Civil Appeal No. E294 of 2021** whose appellant is **H. E. Uhuru Muigai Kenyatta**. The appeal is directed against **David Ndii & 82 Others**. A total of seventeen grounds of appeal are raised in this appeal. these were subsequently condensed into the following:

a) **The right to a fair hearing (grounds 1, 2, 3, 4, 5, 6, 7, 8 and 9).**
b) **On the scope, extent and nature of the doctrine of presidential immunity and presidential authority under the Constitution (grounds 8, 9, 12, 13, 14, 15 and 17).**
c) **On the doctrine of estoppel by record and issue (grounds 6, 7, 10, 11 and 12).**
d) **The concept of the constitutional violation, applicable test and how the test was not met in the petition (grounds 13, 14, 15, 16 and 17).**

24] Civil Appeal No. E291 of 2021 attracted two cross appeals. The first in line was the cross-appeal filed by **Morara Omoke**, the 76th respondent raising eight (8) grounds of cross-appeal namely, whether:

a) **The promoters of an amendment to the constitution through a popular initiative should fund the process with public funds and if so, whether public funds can be used in the initiation stage;**
b) **President Uhuru Muigai Kenyatta should personally refund the national treasury the public funds utilized by the BBI Steering Committee.**
c) **H.E. President Uhuru Muigai Kenyatta, Hon. Raila Odinga and the BBI Steering Committee should be ordered to publish or cause to be published details of the budget and public funds allocated and utilized in promoting the impugned bill.**
d) **The auditor general should be ordered to determine the amount of public funds utilized in the promotion of the impugned Bill.**
e) **The illegal authorization/use of public funds to initiate and promote the impugned Bill by H. E. President Uhuru Muigai Kenyatta and the prioritization of amendments to the constituencies through the Building Bridges Initiative during**

Covid-19 Pandemic contravened Articles 10, 43 and 201 of the Constitution.

f) **Sections 32, 33, 37(b), 39, 41 and 44 of the impugned Bill are unconstitutional.**

g) **Parliament had legal or constitutional capacity to debate and/or approve the impugned Bill under Article 257(8) and (9) of the Constitution in view of the advise of the Chief Justice (Rtd) David Maraga to H. E. President Uhuru Muigai Kenyatta to dissolve Parliament pursuant to Article 261(7).**

h) **H. E. President Uhuru Muigai Kenyatta should be ordered to dissolve parliament in accordance with the advise of Chief Justice (Rtd) David Maraga.**

25] The second was that of the 15th Respondent's whose grounds of cross-appeal are namely, whether the Judges:

a) **Ignored the doctrine of stare decision and the stability of common law.**

b) **Failed to find that the BBI Secretariat abused its power and breached KNUNS legitimate expectation.**

c) **Failed to take judicial notice of the state of health care in the nation.**

d) **After holding that there was no evidence of views expressed to the BBI Secretariat that were in opposition to the views expressed by KNUN, erred by finding that the views adopted in BBI – 1 (the BBI Taskforce report) could be left out in BBI – 2 (constitutional amendment Bill.**

26] For plenary hearing, the consolidated appeals and cross appeals were canvassed through written submissions orally highlighted by learned senior and other counsel for the respective parties.

27] This is a first appeal. The mandate of the Court is as spelt out in **Rule 29(1)(a)** of the **Court of Appeal Rules** which provides:

29(1) On any appeal from a decision of a superior court, acting in exercise of its original jurisdiction, the Court shall have power -

a) To reappraise the evidence and to draw inferences of fact; and

28] The court itself has also delimited its mandate on a first appeal as enunciated in **Selle vs. Associated Motor Boat Company [1968] E. A 123**, **Jabane vs Olenja [1986] KLR 661, 664**. This court stated in **Jabane vs. Olenja** [supra] that it will not lightly differ from the findings of fact of a trial judge and will only interfere with them if they are based on no evidence. See also **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 E. A 212** wherein the court summarized the principle in the following words: *"This being a first appeal to this court, it is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...."*; and **Githiaka vs. Nduriri [2004] 1 KLR**.

29] I have considered the above mandate in light of the totality of the record as assessed above. The issues falling for my determination are thematic issues tabulated in the lead judgment of the **Hon. Mr. Justice D. K. Musinga**, Judge of Appeal, President, C.A, in the Court's lead judgment namely:

1) **Whether the basic structure doctrine, eternity clauses and unamendability doctrines applies in Kenya.**
2) **Who were the initiators and promoters of the BBI Initiative?**

3) **The legality of the BBI Taskforce Report and the BBI Steering Committee's Report in the Constitution amendment process.**

4) **Whether the proposed amendments as contained in the Constitution Amendment Bill, 2020 were by popular initiative and whether there was public participation.**

5) **Whether the President of Kenya can initiate the process of amendment of the Constitution as a popular initiative.**

6) **Whether the IEBC had requisite quorum to carry out its business in relation to the Amendment Bill.**

7) **Role of the IEBC in the Constitution amendment by popular initiative.**

8) **Whether the IEBC was under an obligation to conduct a nationwide voter registration exercise and verification of signatures.**

9) **Whether the proposals contained in the Amendment Bill are to be submitted as separate and distinct referendum questions.**

10) **Whether the High Court had jurisdiction to entertain the petitions on account of the principles of justiciability, mootness and ripeness.**

11) **Whether it was constitutional for the promoters of the Amendment Bill to create 70 Constituencies and allocate them.**

12) **Whether there was necessity for national law on referendum and statutory framework before the envisaged referendum.**

13) **Whether civil proceedings can be instituted against a sitting President.**

14) **Whether Mr. Uhuru Muigai Kenyatta was served with Petition No. E426 of 2020 and the effect of orders made by the High Court against his person.**

15) **Whether the proceedings against Uhuru Muigai Kenyatta were *res judicata*.**

16) **Whether President Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution.**

17) **Whether the Constitution (Amendment) Bill, 2020 violated Article 43(1)(a) in view of the covid-19 pandemic.**

18) **Were both or either of the houses of Parliament were infirmed from considering the Constitutional Amendment Bill in view of the Chief Justice's advisory for the dissolution of Parliament.**

19) **Whether the High Court erred in finding that the BBI Taskforce did not create a legitimate expectation that the submissions by KNUN would be incorporated in the Constitution Amendment Bill.**

20) **Whether the Petitioners had made out a case for disclosure and publication of the BBI Steering Committee's financial information.**

21) **Whether the High Court erred in law in admitting *amici curiae* who were partisan.**

30] The approach I take in determining the above issues is to adopt the background information, impugned judgments analysis and the rival submissions both on the facts and case law as assessed firstly, in the lead judgment and second herein. Appellants in the respective appeals and cross-appellants in the respective cross-appeals, together with supporting respondents will be cumulatively referred to as appellants, while those in opposition to the respective appeals and or those seeking to affirm either in whole or in part the impugned judgment will be referred to cumulatively as respondents.

1) **WHETHER THE BASIC STRUCTURE DOCTRINE, ETERNITY CLAUSES AND UNAMENDABILITY DOCTRINES APPLIES IN KENYA**

31] In response to the above issue, the Judges paused a question to themselves as to whether the **CoK, 2010** comprehends the **"Doctrine of Basic Structure"** and if so what its implications are for the amendment powers and rights enshrined in **Articles 255-257** of the Constitution. To resolve the above, they took into consideration the historical background that informed the constitutional review process that eventually gave rise to the **CoK, 2010**, carried out an appraisal and appreciation of both foreign and local jurisprudence as well as inbuilt provisions in the **CoK, 2010** on proper constitutional interpretation namely: **In the matter of the Speaker of the Senate & Another vs. Attorney General & 4 Others [2013] eKLR**; **In the Matter of the Principles of Gender Representation in the National Assembly and Senate Supreme Court Application No. 2 of 2012**; **Jasbir Singh Ra i& 3 Others vs. Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012**; **Communication Commission of Kenya vs. Royal Media Services Ltd & 5 Others [2014] eKLR** and **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**. The principles distilled therefrom in a summary are that the **CoK, 2010** is a transformative charter, the Constitution must be interpreted holistically, rules of constitutional interpretation do not favour formalistic or positivistic approaches to constitutional interpretation and neither is the Constitution to be interpreted in the manner legislative statutes are interpreted, the court has to bear in mind what the Supreme Court termed as inbuilt interpretation frameworks upon which fundamental hooks, pillars and solid foundation on which the interpretation of the constitution should be based, namely: each matter has to be considered on its own set of circumstances bearing in mind constitutional interpretation must be done in a manner that advances its purposes, gives effect to its intents and illuminates its contents, the court has to bear in mind that constitution

making requires compromise and constitutional making does not end with the promulgation of the Constitution but continues with its interpretation.

32] Armed with the principles on constitutional interpretation distilled above which the Judges christened *"canons of constitutional interpretation principles to Kenya's transformative constitution"*, embarked on the determination of the first issue identified above. They set out in *extenso* the history of Kenya's constitutional reforms giving rise to the **CoK, 2010** and adopted the position taken by **Maraga CJ.** (as he then was) in the case of **Council of Governors & 47 Others vs. Attorney General & 3 Others**; **Katiba Institute & 2 Others (Amicus Curiae) [2020] eKLR** in which the learned C.J. expressed himself *inter alia* that:

> **"... the Kenyan independence Constitution embraced the doctrine of separation of powers that mainly focused on securing the sovereignty of State and setting up the governance machinery. After that was achieved, shortly after independence, the political elite,** in what the CJ. described as **"driven by greed and selfish ambitions, jettisoned the concept of Constitutional implementation and instead embarked on, and succeeded in, making numerous amendments, the overall objective of which was to consolidate all state power and authority in the Executive arm of Government, and in particular the Presidency which led to patrimonialism that did not tolerate any form of opposition, and established what, in the Kenyan parlance, is referred to as the 'imperial presidency": .....**

33] Also considered among numerous others was the High Court decision, in the **Timothy Njoya & Others vs. Attorney General & Others [2004] eKLR** (the **Njoya case**) described by the Judges as marking a milestone in constitutional review history of Kenya for the holding *inter alia* that **"any new Constitution needed to be ratified through a national referendum"**

and also agreed with the holding in this case *inter alia* that **"the right to a referendum was a fundamental right of the people in exercise of their constituent power,"** which in the Judges' opinion accounted for incorporation therein of inbuilt provisions on:

> **a) Civic education to equip people with sufficient information to meaningfully participate in the constitution-making process;**
>
> **b) Public participation in which the people – after civic education – give their views about the issues;**
>
> **c) Debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making in a constituent Assembly; and**
>
> **d) Referendum to endorse or ratify the Draft Constitution.**

and concluded *inter alia* that the basic structure doctrine applies in Kenya to protect the preamble, the eighteen chapters and the six schedules of the **CoK, 2010** forming the fundamental core structure, also known as constitutional edifice which cannot be amended without recalling the primary constituent power of the people exercisable only after civic education, public participation and collation of views from the people after appropriate civil education to generate ideas on the type of governance charter they want sanctioned through a referendum. They left open certain provisions of the **CoK, 2010** as amendable for amendment **"as long as they do not fundamentally tilt the Basic Structure"** but declined to give an exhaustive literature of the provision forming the eternity clauses in **CoK, 2010** for the reason that this was inadvisable to make in a vacuum and would therefore depend on a case to case basis. The above position notwithstanding, the Judges gave three examples to demonstrate the distinction between un-amendable and amendable constitutional

provisions namely: amendable through secondary constituent power under **Article 255** and **Article 89(1)** of the **CoK, 2010** anchored in Chapter Seven.

34] Appellants were aggrieved as I have already mentioned above. They contend that the doctrine of basic structure is not applicable to the **CoK, 2010** as in their opinion **Articles 255, 256** and **257** of the **CoK, 2010** contain explicit provisions regarding the amendment of the **CoK, 2010**. Second, neither the **Kesavananda** case believed to be the genesis of the above doctrine as expounded subsequently by numerous scholars nor the Judges who in the impugned judgment imported the doctrine and purported to entrench it in the Kenyan context define the doctrine, and that the failure of the **CoK, 2010** itself and the Judges, firstly, to define the doctrine in relation to the Constitution is sufficient basis for them (appellants) to assert that the framers of the **CoK, 2010** never intended to entrench the said doctrine into the its context.

35] The Judges are therefore faulted for relying heavily on the Indian Supreme Court decision in the case of **Kasevananda Bharati vs. State of Kerata [1973] SC 1461** (**Kesavananda** case) in support of the application of the basic structure doctrine to the **CoK, 2010** for failure to appreciate the historical jurisprudential background then obtaining in India and which in their opinion informed the various positions taken by the Judges in the **Kesanavanda** case decision which had affirmed the unlimited power of the Indian Parliament to amend the Constitution which did not obtain in Kenya as at the time the **CoK, 2010** was being processed for promulgation. The Judges also failed to properly appreciate the import of lack of unanimity margin in the **Kesavananda** case of (seven –six) which made its application questionable, lack of similarity in **Article 368** of the Indian

Constitution then under construction in the **Kesavananda** case with any of the Articles in the **CoK, 2010**; and lastly, lack of popularity of the said doctrine around the globe.

36] On want of popularity of the doctrine, the appellants cited the case of **Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill, (1987) 2 Sri LR 312, 329-330** in which the Supreme Court of **Srilanka** rejected the doctrine on account of expansive language used to describe it; Malaysia in the case of **Loh Kooi Choon vs. Government of Malaysia (1977) 2 MLJ 187** and **Phang Chin Hock vs. PP (1980) 1 MLJ 70** as adopted in **Vincent Cheng vs Minister for Home Affairs (1990) 1 MLJ 449** in which the doctrine was rejected citing historical differences. In Singapore the case of **Teo Soh Lung vs. Minister of Home Affairs [1989] 1 SLR(R) 461** and the case of **Ravi S/O Madasamy vs Attorney General, Originating Summons No 548 Of 2017 and Summons Nos. 2619 and 2710 of 2017**, in both of which the doctrine was rejected first for lack of express provision for the application of the same in their Constitution and second, because in the court's view **Article 5** of their Constitution which included the power to repeal constitutional provisions recognized the need for a degree of flexibility.

37] On the continent, the appellants cited the Supreme Court of Uganda decision in the case of **Paul K. Ssemogerere and Others vs. Attorney General, Supreme Court Constitutional Appeal No. 1 Of 2002** and Constitutional Court of Uganda in the case of **Male Mabirizi and Others vs. Attorney General of Uganda, Constitutional Petition 49 Of 2017 (Consolidated With Petition Nos 3, 5, 10 and 13 Of 2018), [2018] Ugcc 4 (26 July 2018)**, in both of which the doctrine was rejected first by the Supreme Court of Uganda because constitutional change is necessary to

respond to societal change; and, second there was no crystallized global legal position on the applicability of the doctrine not even in India itself where the doctrine is said to have its roots.

38] Also cited is the Zambian case of the **Law Association of Zambia and Another vs. Attorney General of The Republic of Zambia, Constitution Court of Zambia, 7 2019/Ccz/0013** approving the Supreme Court decision in the case of **Zambia Democratic Congress (ZADECO) vs. Attorney General** in which the doctrine was rejected because the Constitution then under construction mandated Parliament to amend the Constitution so long as the parameters for the exercise are adhered to.

39] The appellants also had recourse to the Tanzanian case of **Honourable Attorney General of Tanzania vs. Reverend Christopher Mitikila, Civil Appeal No. 45 Of 2009** in which the doctrine was rejected for lack of clear parameters on what does or does not amount to a basic structure of a Constitution. From South Africa, the appellants cited the case of **Premier of Kwazulu Natal and Others vs President of the Republic of South Africa and Others (CCT36/95) [1995] ZACC 10; 1995 (12) BCLR 1561; 1996 (1) SA 769 (29 November 1995)** which was approved in the **United Democratic Movement vs President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002)** for the observation that there has been no application of the doctrine to bar amendments to the South African Constitution.

40] Lastly, on the home jurisprudence, the appellants cited the case of **Rev. Dr. Timothy Njoya vs Attorney General and Others** (supra) in which the doctrine was raised but the court declined to as much as discuss the same. In **Petition No. 496 of 2013 Commission for the Implementation of the Constitution vs National Assembly of Kenya & 2 others [2013] eKLR** in which **Lenaola J.** (as he then was) simply stated that it may be applied.

41] On alleged improper application of the basic structure doctrine to Kenya, appellants adopted the definition of basic structure doctrine from the writings of **Prof. Yaniv Roznai**, namely that "**the Basic Structure Doctrine is a judicial principle according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basic structure or identity."**

42] In summary, the appellants faulted the Judges reasoning and conclusion reached in paragraphs 469,471, 472, 473, 474 and 783 of the impugned judgment arguing that: *"applying the Basic Structure Doctrine to the dispute before them without defining it, failed to explain the context and legal basis of such application of the said doctrine to Kenya, failed to appreciate that a vast majority of courts all over the world have approached the basic structure doctrine with circumspection and caution, in jurisdictions where it has not been totally rejected all together primarily on the ground that had the framers of the subject constitutions intended limitation in any of the provisions forming the Constitutions, then they would have explicitly stated so, an overwhelming number of scholars in scholarly works reviewed by appellants and placed before the Judges have taken the view that a comparative experience with the doctrine demonstrates clearly that it is never*

used against constitutional changes that appear unlikely to pose a substantial threat to the fundamental values of the constitution hence the necessity of not giving the courts unfettered power to invalidate amendments for incompatibility with their own prior preferred reading of a Constitution. Lastly, that the scholars have rejected the notion of implied limitation in favour of express limitation."

43] Appellants also had recourse to the CKRC report and more particularly paragraph 7.2.6 on the proposals that informed the present day Chapter Sixteen (16) of the **CoK, 2010** and submitted that they fully associate themselves with the sentiments expressed therein that these arose from the need to maintain constitutional stability while at the same time protecting the Constitution against the culture of hyper-amendability associated with the 1963 Constitution, hence provision made for amendment of the constitution without having recourse to the referendum popularly known as parliamentary route and that undertaken through the referendum route. The Judges were also faulted for introducing procedures for constitutional amendments that were at variance with Chapter 16 of the **CoK, 2010** in particular the history of the making of the Constitution; failing to appreciate that the **CoK, 2010** was not a product of a constituent assembly as none had been provided for in **Section 5** of the **Constitution Review Act, 2008** which only made provision for the Committee of Experts, Parliamentary Select Committee, the National Assembly and a referendum; no basis was given for the Judges' finding at paragraph 472 of the impugned judgment that the constitution could only be amended through the exercise of the primary constituent power, that is civic education, public participation, constituent assembly plus referendum; for ignoring the fact that although the people ultimately approved the **CoK 2010** in a referendum, they did not deliberate on it as a constituent assembly and

which in significant respects according to their appraisal of the historical text on the constitutional making process that gave rise to the **CoK, 2010** demonstrated clearly that **CoK, 2010** was the outcome of a political settlement.

44] On improper application of the Basic Structure Doctrine, appellant has cited the case of **Jasbir Singh Rai & Others vs. Estate of Tarlochan Singh Rai & 4 Others** [supra], **Kesavananda Bharati vs. State of Kerala.** [supra] and in particular the holding that *"the power to amend the Constitution does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity"* as basis for entrenching the application of the above doctrine in Kenya. They also contend that the position taken by the Judges in reaching the above conclusion is erroneous for the Judges' failure to take into consideration relevant factors namely that unlike in Kenya, the power to amend the constitution in India vests exclusively in Parliament, and the rationale behind the decision in the **Kesavananda** case was to curb abuse of the amendment power by India's Parliament contrary to Kenya's position whose **CoK, 2010** has in built mechanisms which limits parliament's power to amend certain Articles of the Constitution as they require approval of certain amendments by the people through a referendum.

45] On **alleged existence of eternity clauses** in the **CoK, 2010**, appellants submit that an eternity clause is an actual Constitutional provision expressly made in the text of a country's Constitution declaring some provisions unalterable and irrevocable which clauses are according to the appellant, aimed at protecting the specific country's provision for specific purposes. Among examples numerously highlighted were **Article 79(3)** of the Basic Law of Federal Republic of Germany which expressly

bars amendments to provision concerning the federal structure and to "the basic principles laid down in its **Articles 1** and **20** (on human rights and the democratic and social set up) owing to the bitter experience of the Nazi era, intended to safeguard against a repeat of the atrocities perpetrated by the National Socialist Party against Jews, and for those in France, eternity clauses proclaiming France as a Republic were intended to ensure stability and guard against a return to a monarchy or Bonarpartism.

46] Applying the above threshold to the **CoK, 2010**, appellants submit that the **CoK, 2010** lacks a clause that prohibits amendments to the Constitution as correctly admitted by the learned Judges, in the impugned judgment at paragraph 474. In further support of the above proposition, appellants assert that **Professor Charles Fombad** in his paper Published at Oxford University by the International Journal of Constitutional Law, titled, **"Some Perspectives on Durability of Constitution in Africa"** has explicitly stated therein that unlike the Constitution of Namibia, Senegal, Madagascar and Equatorial Guinea which have unamendable provisions, the **CoK, 2010** has none. The learned Judges therefore had no power to impose a higher hurdle to be surmounted on the basis of implied, as opposed to explicit limitations on the amendment power reserved for the people under the Constitution. They therefore submit that save for matters relating to **Article 255(1)** of the Constitution which can only be amended with the sanction of the people, as Sovereign power under **Article 1(1)** of the Constitution at a referendum every other clause in the Constitution is amendable.

47] Appellants have relied on decisions of the **Constitutional Council of France numbers 62-20 of 6 November 1962, 92–312 of 2 September**

1992, 2003-469, 26 March 2003; the Supreme Court of Ireland decision in the case of **Byrne vs Ireland, [1972] IR 241 262**; Finland decision in **Finn vs Attorney General, [1983] IR 154** all of which frowned on the existence of eternity clauses in their respective countries constitution in favour of entrenching the rights of the people to amend their Constitution.

48] In light of the above, appellants assert that there is sufficient demonstration that eternity clauses and unamendability doctrines have no universal acceptability. Their application therefore depends on the peculiar circumstances of the particular jurisdiction in which they are rendered applicable and are never left to judicial craft. They also depend on the historical phenomena they are deliberately and explicitly intended to address which position makes it necessary for courts to be cautious when adopting foreign concepts and applying them to local peculiar circumstances which in their opinion must not be applied abstractly.

49] The Judges were also faulted for relying heavily on foreign jurisprudence. To buttress the above assertion, appellants have relied on the case of **Kenya Airports Authority vs Mitu-Bell Welfare Society [2016] eKLR; Jasbir Singh Rai & 3 others vs Estate of Tarlochan Singh Rai & 4 others [2013] eKLR**; **Paul K. Ssemogerere and Others vs. Attorney General** [supra]; **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others [1987] 61 Comp Cas 663**; **Rev. Dr. Timothy Njoya vs Attorney General and Others**, [supra]; **Re the Speaker of the Senate & Another vs. Attorney General & 4 Others, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR**; all for the caution or holding/proposition that application of foreign jurisprudence

principles has to bear in mind local societal needs prevailing as at that particular point in time.

50] As for alleged flouting of the code of proper interpretation of constitutional provisions, appellants rely on the case of **Minister of Home Affairs vs. Fisher (1979) 44 WKR 107** in which the **Privy Council** expressed itself *inter alia* that: **"A Constitution is a legal instrument giving rise amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language"** and urged the court to fault the Judges for the failure to appreciate that: a Constitution must be interpreted holistically meaning only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers; our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute; the Constitution has provided its own threshold for its interpretation to protect and preserve its values, objects and purposes; and lastly, in interpreting **CoK, 2010**, non-legal considerations are important to give it its true meaning and values.

51] Appellant also relies on the case of **Council of Governors vs. Attorney General & 7 Others (2019) eKLR** on the caution given by the Supreme Court therein that:

> **"courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be "unduly strained". It should avoid "excessive peering at the language to be interpreted."**

and submit that a proper appreciation of Chapter 16 of the Constitution is that all provisions of the Constitution are amendable subject only to the limitation prescribed in **Articles 255, 256** and **257** of the Constitution

which as alluded to earlier by appellants were meant to curb abuse of the amendment power. These restrictions in the appellants' opinion provide sufficient safeguards against abuse of amendment power with no veto power being reposed in the County Assemblies, the National Assembly, the Senate and the people for amendments stemming from a popular initiative and the National Assembly, the Senate and the people for amendments with parliamentary initiative roots. With such an arrangement, there is sufficient demonstration that the constitutional provisions on amendments demonstrably strike a balance between preserving its value content while at the same time making provision for room and or permitting adaptation to societal social, economic and political changes as and when need arises for such challenges.

52] Relying on scholarly works of **Prof. Dieter Grimm** in his article **"Constituent Power and Limits of Constitutional Amendments" 2016 1 at 6 [2016]** on the observation that in France the constitution can be amended either by a vote of parliament or by a referendum; and **Prof. Yaniv Roznai** [supra] on the need to examine the link between the limitations that ought to be imposed upon amendment powers and amendment procedures, submits that in light of the above assertion, the basic structure doctrine does not apply in Kenya because in their opinion the jurisdiction where it has been upheld like in India do not have a referendum requirement such as the one set out in **Article 255** of the Constitution.

53] On amendment procedure, appellants cite the **Njoya** case [supra] on the discussion on the constituent power with regard to the historical constitutional process, **Ravi s/o Madasamy vs. Attorney-General [2017] SGHC 163** (High Court of the Republic of Singapore) for the proposition

that if the framers of the Constitution intended to place any limitations on the constitutional power then nothing prevented them from making explicit provision for such limitation; **Commission for the Implementation of the Constitution vs. National Assembly of Kenya & 2 Others** [supra] and **Premier of Kwa Zulu Natal vs. President of South Africa** [**1995] CCT 36/95 Constitutional Court of South Africa Case No. CCT 36/1995** on the proposition that where a constitutional amendment procedure is provided, it has to be followed, and faulted the Judges on the conclusions reached at paragraphs 470, 474 and 479 for holding *inter alia* that the Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendments through the use of either secondary constituent power or constituent power and that these powers can only be exercised through the primary constituent power. The appellants take on the above holding is that the discussion on the need for a constituent power in the **Njoya** case has no relevance to the post Kenya Constitution promulgation period as it related to the constitutional making process on the nature of the Constitution Kenyans wanted to have and the nature of inbuilt amendment procedures to counter the hyper-amendability scenario that characterized the 1963 Constitution. It cannot therefore be employed to oust the express provisions in **Articles 255, 256** and **257** of the Constitution. lastly, that the people of Kenya in exercise of their secondary constituent power are at liberty to amend the Constitution without resorting to the primary constituent power provided that such changes are done in accordance with the provision of Chapter 16 of the Constitution.

54] On the error relating to eternity clauses, appellants faulted the Judges' conclusion at paragraph 474(g) and (k) that certain provisions of the Constitution are innoculated from any form of amendment because they

are deemed to express categorical core values, and that those provisions were therefore unamendable and could not be changed by exercise of the secondary constituent power or constituted power, as these were deemed to be eternity clauses; and submit that going by the clear wording of Chapter 16 of the Constitution of Kenya, no provision of the **CoK, 2010** is eternal, in the absence of any express provision to that effect as was the position in foreign constitutions where such provisions had expressly been provided for as alluded to above. Examples of these were given as: German Basic Law at Article 79 (3); Italian Constitution of 1947 at Article 139; the French Constitution of 1958 at Article 89: the Senegalese Constitution of 2001 under Article 103; Gabon's 1991 Constitution under Article 116; Equatorial Guinea's 1996 constitution under Article 134; Madagascar's 1992 Constitution under Article 142; Mali's 1992 Constitution under Article 118: and Morocco's 2011 Constitution under Article 175.

55] Appellants also associated themselves with the sentiments expressed by **Prof. Charles Fombad** on observation in his article[supra] that the Constitution of Kenya, 2010 does not have any unamendable clauses, especially when it is explicit from the record that the Judges failed to either identify these clauses or provide the contrary for such identification. Lastly, that the manner in which the Judges coined the concluding remarks left no doubt in the appellants' minds that each time this issue arises parties have to seek the courts intervention to determine as to whether the issue on which interpretation is sought is an eternity clause or not.

56] The respondents' submission in rebuttal of appellants above submissions is that it was not correct as erroneously contended by appellants that a majority of courts and scholars around the globe have

rejected the basic structure doctrine. The respondents rely on propositions /holdings in the following local jurisprudence: **Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others [2014] eKLR; Thirdway Alliance Kenya & another vs. Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR; Martha Kerubo Moracha vs. University of Nairobi [2021] eKLR; Commission for the Implementation of the Constitution vs. The National Assembly & 2 Others [2013] eKLR; Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya &10 others [2015] eKLR; Wycliffe Khisa Lusaka vs. Independent Electoral and Boundaries Commission [2017] eKLR;** Apollo **Mboya vs. Attorney General & 2 Others [2018] eKLR;** and **Jacqueline Okuta & Another vs. Attorney General & 2 others [2017] eKLR;** which I find prudent to distill as hereunder:

i) the Kenyan Constitution sets, through the judiciary, its barricades against the destruction of its values and weakening of its institutions;

ii) The command in Article 259 is instrumental in shaping the constitutional jurisprudence of in this country;

iii) in interpreting the Constitution, a Court must always remain alive to the truism that a Constitution has a structural posture;

iv) where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution;

v) clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene;

vi) one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review, and it is un-questionably... part of the basic structure of the constitution;

vii) in our constitutional dispensation, judicial review is part of the basic structure of the Constitution that cannot be excluded;

viii) the right to uninhibited freedom of expression conferred by Article 33 is basic and vital for the sustenance of parliamentary democracy, which is a part of the basic structure of the Constitution.

57] Those from foreign jurisprudences namely: **Indira Gandhi a/p Mutho vs. Pengarah Jabatan Agama Islam Perak & Ors [2018]; Sivarasa Rasiah vs. Badan Peguam Malaysia & Anor [2010] 3 CLJ; Ravi s/o Madasamy vs. Attorney-General and other matters [2017] SGHC 163**; **Bangladesh Italian Marble Works Ltd vs. Bangladesh, (2006) 14 BLT (Special) (HCD) 1 (29.08.2005); Darvesh M. Arbey vs. Federation of Pakistan PLD 1980 Lah. 846;** Executive **Council of the Western Cape Legislature vs. President of the Republic [1995] ZACC 8 at para 204 (per Albie Sachs);** and which I also distill as hereunder:

i) features in the basic structure of the constitution cannot be abrogated by Parliament by way of constitutional amendment and that the power of judicial review, is an essential feature of the basic structure of the constitution;

ii) there are certain features that constitute its basic fabric... Parliament cannot enact laws that violate the basic structure of the constitution;

iii) did not reject the existence of the basic structure in the constitution *but that it did not apply to that particular litigation;*

iv) Parliament may amend the Constitution, but it cannot abrogate it, suspend it, or change its basic features or structure;

v) Parliament has no mandate to amend the Constitution as and when deemed fit with a view to changing the basic structure of the constitution;

vi) although there is no express limitation on parliamentary amendment powers, there may be implied.

58] Turning to scholars, the respondents have recourse to **Adem Kassie Abebe, 'The Substantive Validity of Constitutional Amendments in**

South Africa [2014] 131 South African Law Journal 658-694, 661 on observations made on amendments to the South African Constitution which though appear to be more were merely on technical issues none of which radically altered the essential aspects of the South African Constitution; **Jaclyn L Neo, Constitutional Interpretation in Singapore Theory and Practice (Routledge, 2017)** for the opinion *inter alia that "the application of basic structure doctrine can be ascertained only by looking at the context (historical and textual) of the Constitution or constitutional provisions in question"*; and lastly, **Andrew J. Harding**, '**Does the 'Basic Structure doctrine' Apply in Singapore's Constitution?: An Inquiry Into Some Fundamental Constitutional Premises' in Jaclyn L Neo (ed), Constitutional Interpretation in Singapore: Theory and Practice**; for the opinion that the basic structure doctrine is contextual based on what in the respondents opinion supports the Judges holding at paragraph (474(b) that *"an exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in a vacuum."*

59] On the mode of approach the Judges took in addressing the issue, the respondents cite, choices from bad, same perspective on durability and change under **Modern African Constitutions' [2013] 11 IJCL 382-413], Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Amendment' (2015) 13 IJCL 606-638**; and submit that the Judges cannot be faulted for evaluating and relying on foreign material to arrive at the conclusion reached on this issue as these had been placed before them by the respective parties for consideration. The supreme court of Kenya in the **Jas Bir Singh** case, [supra] and the **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others** [supra]; **Judges & Magistrates Vetting Board & 2 others vs.**

Centre for Human Rights & Democracy & 11 others [supra] on the basis of which they contend their stand clearly indicates that these did not ban use of foreign jurisprudence but only cautioned the courts that these should be applied with caution bearing in mind the peculiar prevailing circumstances.

60] On the soundness of the basic structure doctrine, the respondents cite the **CCK** case [supra], **Martha Kerubo Moracha** [supra] as well as the **Thirdway Alliance** Case [supra] and reiterates that the doctrine is sound and was properly applied by the Judges as it binds the courts in the discharge of its mandate especially when **Article 1** of the Constitution is explicit that the people delegate their sovereign power equally to all three arms of Government directing them to perform their mandates in accordance with the Constitution. second there is nothing in **Article 255** and **257** that mandates invasion and alteration of the constitution's basic structure in any way and maintain that recourse to the basic structure especially when the two provisions use the word **"amendment"** without defining it. It also protects the constitution from dismemberment disguised as amendment.

61] To arrive at the conclusion of the applicability of the basic structure doctrine, the Judges addressed the constitutional amendment power enshrined in **Articles 255-257**, took into consideration the historical background in the constitutional amendment process that gave rise to the promulgation of the **CoK**, applied principles on constitutional interpretation as distilled from case law assessed by them and concluded that the basic structure doctrine **"protects the core edifice, foundational structure and values of the Constitution but leaves open certain**

provisions of the Constitution as amendable for amendment in as long as they do not fundamentally tilt the Basic Structure."

62] My take on the above rival position starting with applicability or otherwise of the basic structure doctrine issue is that it is common ground that the **CoK, 2010** itself does not contain a definition for **"a basic structure"**. Neither did the Judges offer one, hence my association with the definition given above by **Prof. Yaniv Roznai** that *"it is a judicial principle that guide courts in their exercise of their judicial mandate to guard against sanctioning amendments to constitutions likely to have the effect of either dismembering or changing their identity completely."* The Judges cannot therefore be faulted for using what appellants have termed judicial craft to imply the applicability of the said doctrine to the **CoK, 2010** notwithstanding admitted lack of express provision for its applicability. I associate myself fully with propositions in the local jurisprudence relied upon by respondents in support of the application of the doctrine that the phrase **"basic structure"** of a constitution means **"the constitution itself and what it contains."**. I therefore find as did the Judges and correctly so in my view that the basic structure doctrine applies to the **CoK, 2010**.

63] As for justification for the courts intervention to halt the amendment, it is my opinion, as did the Judges that the impugned Bill attempts to alter fundamental aspects of the **CoK, 2010** akin to completely overhauling certain provisions and clauses which if passed, would have explicitly changed the **CoK, 2010** and given it a new identity, affecting the constitutional pillars namely separation of powers, independence of the Judiciary and the independence of independent constitutional commissions among others. The historical context that gave rise to the **CoK, 2010** is clear demonstration that Kenyans were categorical during

that constitutional making process through public participation that resulted in the **CoK, 2010**, that they intended to insulate the **CoK, 2010** against hyper-amendability characterized by the old independence Constitution of Kenya order.

64] I therefore associate myself fully with the position taken by **Yaniv Roznai** (supra) in his exposition that constitutional amendments that violate fundamental rights or basic principles are "*unconstitutional constitutional amendments"* when he expressed himself that:

> **"Substantively, a constitutional change may be deemed unconstitutional, even if accepted according to the prescribed constitutional procedures, if it conflicts with unamendable constitutional provisions, or collapses the existing order and its basic principles, and replaces them with new ones thereby changing its identity."**

Further that:

> **"Provisions upholding the democratic order are often unamendable and unamendable provisions also protect other principles such as separation of powers, rule of law, independence of courts and judicial review of statutes."**

Also that these clauses **"do not and cannot limit the primary constituent power**" as the same are subject to changes introduced by extra constitutional forces (primary constituent assembly of the people) or through judicial interpretation.

65] On **alleged existence of eternity and unamendable clauses** in the **CoK, 2010**, the position I take is that taken by the appellants that these do not exist. Reason being that in jurisdictions where these are found to exist, going by the examples highlighted above in the appellants' submissions, they are expressly provided for in the respective jurisdictions' constitutions. A proper construction of the **CoK, 2010** based on a proper

application of the principles for interpretation and construction as highlighted above in the assessment leaves no doubt in my mind that these doctrines have no application in Kenya. That is why the people reserved in themselves the power to amend the **CoK, 2010** which in my view includes the power to overhaul it as they did with the former Constitution or partially amend it subject to compliance with the prerequisites of the amendment power. Second, going by the guiding principles in **Article 10** of the Constitution, there is nothing therein to suggest that the Kenyan society will remain static in its life span so as to stick to the value system as obtained at 2010 when the **CoK, 2010** was promulgated. Good prudence would demand that there be constitutional changes which would in turn inform changes in the law to meet societal needs as and when such need arises.

2) WHO WERE THE INITIATORS AND PROMOTERS OF THE BBI INITIATIVE?

66] On who were the initiators and promoters of the BBI initiative, I adopt what I have already highlighted in the background information that the BBI initiative arose from what has come to be popularly known as the handshake between **the President** and **Hon. Raila** on 18th March, 2018. The discourse between the two dignitaries is what gave rise to the Building Bridges Initiative (BBI) aimed at uniting Kenyans following what befell them after the 8th August 2017, general elections and the 28th October, 2017 repeat presidential elections. To carry the conversation further to fruition the President appointed the Taskforce vide Gazette Notice No. 5154 of 24th May, 2018, whose terms were:

> **The Terms of Reference of the Taskforce are to –**
> **1 a) evaluate the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation, and having done so, make practical**

recommendations and reform proposals that build lasting unity;

b) outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and

c) conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and national levels.

2. In the performance of its functions, the Taskforce -

a. shall regulate its own procedures including appointing revolving co-chairs from among its members;

b. regulate its own procedure while working within confines of the Constitution;

c. shall privilege bipartisan and non-partisan groupings, forums and experts;

d. shall form technical/working groups as necessary;

e. shall outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area;

f. shall consider and propose appropriate mechanisms for coordination, collaboration and cooperation among institutions to bring about the sought changes;

g. shall pay special attention to making practical interventions that will entrench honourable behaviour, integrity and inclusivity in leading social sectors;

h. shall hold such number of meetings in such places and at such times as the committee, in consultation with its secretaries, shall consider necessary for the proper discharge of its functions;

i. shall solicit, receive and consider written memoranda or information from the public; and

j. may carry out or cause to be carried out such assessments, studies or research as may inform its mandate;

3.The Joint Secretaries will be responsible for official communication on behalf of the Taskforce.

4. **The Joint Secretaries may co-opt any other persons, as and when necessary, to assist in the achievement of the terms of reference.**
5. **The Taskforce shall make periodic written recommendations for action by the Government and will submit its comprehensive advice not later than twelve (12) months from the date of its official launch. His Excellency the President may, if necessary, extend the period.**

67] The Taskforce came up with an interim report in November, 2019. With a view to implementing the said report the President, vide Gazette Notice No. 264 dated 3rd January, 2020 published in a special issue dated 10th January, 2020 appointed the Steering Committee whose mandate was to validate the recommendations of the Taskforce. It is also a matter of public notoriety which require no scholarly discourse from me that the two dignitaries either jointly with their supporters or alone have traversed the nation with a view to sensitizing the public on ideals of the BBI. The Cambridge English Dictionary describes an **"initiator"** as an instigator or one who begins something or who causes something to begin. On the other hand, Black's Law Dictionary, 9th Edition describes a promoter as a person who encourages or incites. In simple terms, it can be said that a **"promoter"** is a supporter/campaigner of a cause or aim.

68] In light of the above, I reiterate my earlier stand that it is the President and **Hon. Raila** who initiated the BBI initiative. When considered in relation to the impugned Bill, this stems from the concept on the role of a promoter and an initiator with regard to the **CoK, 2010** inbuilt constitutional amendment process. The appellants submit that **Article 257(3)** of the Constitution mandates the promoter of a popular initiative where the initiative is in the form of a general suggestion to formulate it into a draft bill, while **sub-Article 4** mandates them to deliver the initiative together

with the supporting signatures to IEBC for verification to ensure that the initiative is supported by at least one million registered voters but does not expressly or implicitly define who may or may not promote a constitutional amendment process by popular initiative.

69] In the appellants' opinion, a proper and purposive construction of the constitutional provision on the above is that the right of amendment by popular initiative is open to any person. Second, it is a deliberate entrenchment to broaden the participation of the sovereign in constitutional amendment processes and/or demystify the myth that constitutional amendment process is an exclusive preserve of politicians or public servants. Third, it is appellants position that there is no evidence in the history of Kenya's constitution making or amendment process to demonstrate that framers of the above provision intended that the promoters of a constitutional amendment be limited to a special class of people at the exclusion of others, hence their assertion that the tiered requirement that the promoter of a popular initiative must be supported by at least 1 million registered voters is the sole threshold for commencement of an amendment process by a popular initiative. It is also their position that the Constitution does not define the term initiator. It was therefore erroneous for the Judges to erroneously hold that a promoter of a popular initiative was synonymous with an initiator which according to appellants was deliberately intended to create a foundation for the argument that the President was the initiator of the impugned Bill when it is explicit from the contents of a letter dated 18th November, 2020 from **Hon. Junet Mohammed** and **Hon. Dennis Waweru** to IEBC.

70] The term **"promoter"** is captured under **Article 257(3)** and **(4**) of the **CoK, 2010** which provides as follows:

"257(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of the popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters."

The record contains a letter dated 18th November 2020, by **Hon. Dennis Waweru** and **Hon. Junet Mohamed** described as the co-chairpersons of the BBI Secretariat, addressed to the chairperson of the IEBC. The said letter indicates their intention to collect one (1) million signatures in support of the proposed Amendment Bill and the same was acknowledged by a letter dated 24th November, 2020 by the chairperson of the IEBC; on 10th December, 2020, the Secretariat handed over the signatures and the Bill to the IEBC chairperson, **Mr. Wafula Chebukati**. My position is that, despite evidence of the letters exchanged between the Secretariat and the IEBC Chairperson, in light of my construction of **Article 257(3)**, the Secretariat did not formulate the initiative and neither did they formulate it into a draft bill, rather, as already stated hereinabove, it was the initiative of the President borne out of the handshake between the President and **Hon. Raila**. The role played by the Secretariat is the delivery of the draft bill and the supporting signatures to IEBC for verification and further actions.

71] From the above definition of the word initiator and promoter, I reiterate my position taken above that the initiators and promoters of the BBI initiative were the two principals as supported by those who shared in the BBI ideals.

3) **ON THE LEGALITY OF THE BBI TASKFORCE AND THE BBI STEERING COMMITTEE'S REPORTS IN THE CONSTITUTION AMENDMENT PROCESS**

72] On the constitutional amendment process, the approach the Judges took in resolving the rival position on this issue was, first of all to interrogate the lawfulness of the BBI process in general and that of the Taskforce in particular in light of the provisions in **Articles 7, 10, 33, 35** and **38**. **Article 7** stipulates that the national language is Kiswahili while official language is English and Swahili, **Article 10** enshrines national values and principles of governance, **Article 33** on freedom of expression, **Article 35** on access to information and **Article 38** on political rights. Also construed were **Articles 255 – 257** of the Constitution enshrines principles that guide amendment procedures of the Constitution.

73] Applying the threshold in the above Articles to the rival position before them, the Judges made observation thereon albeit in a summary form that there was no demonstration that copies of the reports and the impugned bill were provided to the people in the form complained of and concluded that this was in breach of the values and principles of good governance enshrined in **Article 10** of the Constitution which was binding on all state organs, state officers, public officers and all persons in the discharge of their statutory mandates. Second, that there had been no sufficient demonstration that the Steering Committee flouted the constitutional provisions at every stage of the process, that there is nothing in **Articles 255–257** that mandates the executive in general or the President in particular to initiate proposals for amendment of the Constitution in **Articles 255–257** hence their conclusion that the Taskforce which was the brain child of the two dignitaries and later morphed into the Steering

Committee that came up with the impugned bill was the President's and not people initiative.

74] Second, that the bill to amend the Constitution was as a result of the proposals of the Steering Committee hence their conclusion as to what had been portrayed as a popular initiative to amend the constitution was in reality the President's initiative contrary to **Article 257** of the Constitution. Further that in so far as the Steering Committee was created to perpetuate what is clearly an unconstitutional purpose it was not only an unlawful but also unconstitutional outfit.

75] The appellants have relied on the **Third Way Alliance Kenya & Another vs. Head of Public Service & Two Others** [supra] and submitted that, the President acted within his mandate when he appointed the Taskforce which delivered on its mandate in October, 2019 and the Steering Committee appointed on 10th January, 2020 and lapsed on 30th June, 2020; that save for the reports of the two entities which remain publicly available, the two entities ceased to exist long before the petitions giving rise to the impugned judgment were filed. Likewise, the impugned Bill, 2020 was published on 25th November, 2020 way after the expiry of the mandate of the two entities. There was therefore nothing to counter the assertion of **Hon. Junet Mohammed** and **Hon. Denis Waweru** that they are the promoters of the impugned Bill and were duly entitled to deliver it to IEBC for processing. It is also appellants' contention that the source of material forming the impugned Bill is immaterial, provided the promoters formulates his/her proposed amendments formally into a bill. It was therefore not open to the judges to question and/or impugn its legitimacy on the basis only that the same originated from a known public document.

Lastly, that a promoters' freedom of thought, conscience and opinion guaranteed under **Article 32** and the freedom to seek and receive information under **Article 33** of the **CoK** includes his/her right to determine his/her free will, the content and origins of their amendment proposals including by imitation. It was therefore erroneous for the judges to attribute the promotion of the impugned Bill to the Secretariat as opposed to the named persons.

76] In rebuttal, to appellants' submissions, the respondents have urged the court to affirm the conclusions reached by the Judges that the entire BBI process is constitutionally infirm as it was not well founded both on the pleadings and the rival submissions presented before the Judges. They contend there was sufficient demonstration by evidence on record that the Secretariat is a creation of the Steering Committee as the former could not operate in a vacuum, and that the BBI process is an attempt to effect far-reaching constitutional amendments that were intended to circumvent the popular initiative through a process dubbed the BBI which according to them was an elite-led process, initiated and controlled by the president. That had it succeeded it would have operated as a claw-back of the people-led process that gave rise to the **CoK, 2010**.

77] By way of rejoinder, the appellants have also contended that the issue raised on the legality or otherwise of both the Taskforce and Steering Committee were raised by the 20th and 21st respondents herein who were the petitioners. They substantively sought an order declaring any report produced by the BBI Taskforce illegal and unconstitutional which they introduced to the court under a supplementary affidavit. According to the appellant, issues that the court in the **Thirdway Alliance** (case) was

confronted with was whether: the report produced by the Taskforce, including its contents and the constitutional amendments proposed therein should be declared illegal and unconstitutional, the taskforce including the manner, purposes and the authority by and for which it was appointed should be declared unconstitutional, illegal, null and void, the President acted within the power and for purposes of discharging his duties under **Article 131(2)** on appointing the Taskforce, hence their position that the above are the same issues that arose in the consolidated petitions. They were accordingly brought to the attention of the judges as basis for appellants' request to the judges to down their tools and decline jurisdiction on the basis of both estoppel and *res judicata*. The appellants further aver that the judges indeed addressed themselves to the issues borne out by the contents of the reasoning and conclusion in paragraphs 528, 529 and 530 of the partially impugned judgment.

78] The Judges are however faulted on the conclusion reached in the highlighted paragraphs for the failure to appreciate that the mandate of the BBI Taskforce was very broad namely, **"Outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area"**, on the basis of which the report made several significant constitutional proposals. Those highlighted by the appellant included proposal in relation to the creation of the position of a prime minister, Leader of the opposition, shadow cabinet working under the leader of the official opposition, need for the cabinet to be drawn from both parliamentarians and technocrats, with the latter being made ex-officio Members of Parliament upon successful Parliamentary approval, enhancing the share of national revenue allocated to counties from 15% to 35%, and requirement for vetting of Principal Secretaries by the National assembly.

79] With regard to the amendment of the **CoK, 2010**, the same can only be done via a parliamentary initiative or a popular initiative as provided for under **Article 256** and **257**. According to the trial court Judges, the BBI initiative was neither a parliamentary initiative or a popular initiative, rather, it was the President's initiative. My answer is in the negative for reasons explained above. My take on the above rival position is that the President's action in coming up with the BBI initiative with a view to coming up with modalities on how to forge national unity following what the two dignitaries agreed upon following the handshake was not only lawful but constitutional as it is within the President's mandate to forge national unity as a presidential duty. The process is therefore both legal, regular, lawful and constitutional up to that point. It becomes tainted and unlawfulness sets in at the Steering Committee level when the President included an item on constitutional amendment in the mandate of the Steering Committee which in my view contravened **Articles 255 – 257** of the **CoK, 2010** as more particularly discussed above.

4) **WHETHER THE PROPOSED AMENDMENTS AS CONTAINED IN THE CONSTITUTION AMENDMENT BILL, 2020 WERE BY POPULAR INITIATIVE AND WHETHER THERE WAS PUBLIC PARTICIPATION**

80] As to whether the proposed amendments contained in the impugned Bill were by popular initiative and whether there was public participation, the Judges construed **Articles 255, 256** and **257** on the amendment of **CoK, 2010** retraced the genesis of those provisions in the historical background and made observation albeit in a summary form *inter alia* that the **Kenya Review Act, 2008** incorporated the views in the **Njoya** case [supra] that the sovereign right to replace the Constitution is vested collectively in the people of Kenya and shall be exercisable by the people of

Kenya through a referendum. Similar notion was also traced in the report of the Parliamentary Select Committee on constitutional review which read as follows **"an amendment to the constitution may be proposed by a popular initiative signed by at least one million voters"** and concluded that the intention of the promoters of the **CoK, 2010** was that the right to popular initiative was only meant for voters.

81] Turning to the meaning of popular initiative, the Judges had recourse to similar clauses in Switzerland; Moldova; Venezuela; and Liechtenstein as well as the term in Wikipedia and concluded that going by the above definition, a popular initiative cannot be initiated by the Government when it is the same entity that would be compelled to undertake the amendment process and that the same can only be undertaken under **Article 1(2)** of the Constitution which provides explicitly that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the **CoK, 2010** namely that the people may exercise their sovereign power to amend the Constitution either directly or through their democratically elected representatives. There is also provision that the sovereign power of the people is delegated to Parliament and the legislative assemblies in the County Governments, the national executive and the executive structure in the county and the Judiciary exercisable at the National and County levels.

82] The appellants' arguments in support of the issue that the impugned Bill was a product of a popular initiative is a reiteration of their earlier submissions on related issues that: the promoters were **Hon. Dennis Waweru** and **Hon. Junet Mohamed**; that they posted the English version of the impugned bill on the internet and people were able to read and understand the content, the Steering Committee visited all the counties and got views from various groups of people. Further that none of the

supporters of the impugned Bill who appended their signatures as a show of support for the Bill had come forward to say that they had not been provided with a copy of the Bill nor that they did not understand the content.

83] In rebuttal, the respondents argued that the impugned Bill is tainted with BBI initiative as it has its roots in the handshake; that the alleged promoters are not the ones who formulated the Bill. All they did was to deliver it to IEBC together with the supporting signatures, that they started collection of signatures before providing the people with copies of the Bill in English, Kiswahili, indigenous languages, Kenya sign language Braille and other communication formats and technologies accessible to persons with disabilities. Neither did they allow the people sufficient time to read and understand the Bill, all in violation of **Articles 7, 10, 33, 35** and **38** of the **CoK, 2010**. Their conduct therefore fell short of the threshold of a promoter as provided for in **Article 257** of the **CoK, 2010**. The respondents have relied on the case of **Robert N. Gakuru & Another vs. Governor of Kiambu County & 3 Others [2014] eKLR** where the court was explicit that in order to pass muster, public participation ought to be real and not illusionary and ought not to be treated as a mere foundation for purposes of fulfilment of the constitution dictates because it is a constitutional requirement which must be attained quantitatively as well as qualitatively and urged for the process to be vitiated.

84] As already stated hereinabove, **Hon. Dennis Waweru** and **Hon. Junet Mohamed** were joint secretaries to the Steering Committee set up to implement the Taskforce report. One of the committee's mandate was to address among others matters falling under item (b) requiring them to come

up with recommendations on constitutional changes. This is the same Taskforce that had been set up by the President to come up with recommendations on how to forge national unity. **Article 10** of the **CoK, 2010** provides for among others, participation of the people in governance matters affecting them which would demand civic education on the proposed amendments to explain to the people through sensitization on what they are to sign up for. Second, to explain to them in details the intend and purport of the 74 proposed amendments for them to know the ramification of each of them. It was therefore imperative for the promoters to provide meaningful opportunities for that exercise which the Judges find were lacking as explained in the impugned judgment and which were not rebutted. I therefore, find no basis for flouting the Judges finding that the impugned Bill was not a popular initiative in terms of the constitutional provision interrogated above.

5) **WHETHER THE PRESIDENT OF KENYA CAN INITIATE THE PROCESS OF AMENDMENT OF THE CONSTITUTION AS A POPULAR INITIATIVE.**

85] On the role of the President in constitutional amendment by popular initiative, appellants submit that a proper construction of **Article 255** as read with **Articles 256** and **257** of the **CoK, 2010** both in context and also as against the history on constitution making and amendment highlighted above yielded no explicit bar against the President promoting a constitution amendment by popular initiative. The Judges are therefore faulted in reaching the conclusion reached on this issue in the impugned judgement first for premising the argument on an exclusive promoter known as **"Wanjiku"** a term unknown in law thereby creating an impression that there is a category of persons who are treated as special or different,

precluded from promoting a popular initiative merely on account of the status as such or because that process is exclusively reserved for Wanjiku.

86] On whether the impugned Bill fell within the initiative contemplated in Chapter 16, the Judges construed **Article 131(2)(c)** on the authority of the President to promote and enhance the unity of the nation **Article 131(1)(b)** donating power to the President to exercise the executive authority of the Republic with the assistance of the Deputy President and Cabinet Secretaries, **Article 255(1)** that proposed amendment to the **CoK, 2010** must be in compliance with **Articles 256** and **257(5)** which enjoins IEBC to sanction the process in line with their mandate if satisfied that the process meets the threshold. They considered the above provision in light of the mandates of the Taskforce and the Steering Committee as set out in the creating Gazette notices no. 5754 establishing the Taskforce and special issue of Gazette Notice No. 264 of 10th February, 2020 establishing the Steering Committee whose mandate touched on issues of constitutional amendment and concluded that the process was initiated by the President.

87] Also construed was **Article 1(2)** on the mode of the exercising of people's sovereignty, that is individually and also through their elected representative under **Articles 256** and **257** on amendment by popular initiative and concluded that the Article 257 is reserved for promoters of a constitutional bill who have no recourse to Article 256 procedures and vice versa, and since the Taskforce was the brain child of the President, the Steering Committee which has its genesis in the Taskforce had no *locus standi* promoting constitutional changes pursuant to **Article 257** of the **CoK, 2010**.

88] Second, **Article 27,** of the **CoK, 2010** which entitles every person to equal protection and benefit of the law. Also prohibits discrimination directly or indirectly on any ground hence their assertion that under **Article 24** of the Constitution there is no law that directly or indirectly limits any person's right to promote a popular initiative under **Article 257** of the Constitution of Kenya 2010. Lastly, that a proper construction of **Article 130(2)(e)** as read with **132 (1) (c) (i) & (ii)** yielded nothing to suggest that the President who under the above provision is not only a symbol of national unity but is also mandated under the same provision to promote unity cannot be by any means other than through the Parliamentary process, promote a popular initiative for constitutional amendment.

89] In rebuttal, the respondents on the other hand submit that the President's hand was at all times at play in every step of the BBI process culminating into the formulation of the BBI Bill, the launching of the Bill, the roll out for signatures and even campaigning and using state machinery and civil servants to collect signatures and through political meetings with Members of the County Assemblies (MCAs) as well as offering incentives in the form of car grants to lure MCAs into passing the Bill as captured by the respective parties pleadings and submissions as analyzed in-depth by the judges and which to them confirm without a doubt that the President established the Building Bridges to a United Kenya Task Force and the BBI Steering Committee with the amendment of the constitution in mind. They appreciate appellants raised objections citing *res judicata* in Petition E400 of 2020 on account of the judgment in **Thirdway Alliance Kenya & another vs Head of the Public Service Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR in Petition 451 of 2018** and submit that the objections were rightly declined by the judges because at the point of establishing the Task force, the President,

as held in **Thirdway Alliance** case [supra], was within his mandate to establish the BBI Taskforce as part of his administrative duties, him being a symbol of national unity.

90] The superior court also made a pronouncement by distinguishing the striking differences in the **Petition 451 of 2018** as distinct from **Petition E400 of 2020** (paragraphs 527 to 531 of the judgment) hence their position that the President violated the Constitution and the oath of allegiance when he used his executive mandate to usurp the sovereign power of the very people who elected him considering that the terms of reference in the Gazette Notice No 5154 of 24th May, 2018 had nothing to do with initiating a process to amend the constitution especially when appellants did not controvert the Respondents' assertions in the Superior court that the whole BBI process was flagged off by the President, who is an elected representative of the People, a position also defended by the BBI Steering Committee through the replying affidavit of **Dennis Waweru** sworn on 5th February, 2021 by stating that nothing stopped the President from establishing an entity or using state organs to propose changes to the Constitution which contradicts all go to demonstrate that the process was triggered by the presidential action informing the Taskforce which gave rise to the Steering Committee whose brain child is the impugned Bill.

91] On alleged misinterpretation of the meaning and purpose of the **"popular initiative"** under **Article 257** (grounds 7 – 17) appellants faults the Judges' assessment at paragraphs 484 and conclusion thereon at paragraph 492; terming them a serious misdirection. It is appellants position that from the text of **Article 257** of the **CoK, 2010**, the popular initiative route to amend the **CoK, 2010** does not discriminate as between the private citizen and State organs or public officers in terms of who

initiates or promotes such an amendment as clearly borne out by an analysis in the final CKRC report that idea was introduced to guard against parliamentary monopoly over constitutional amendment by according citizens either individually or collectively to initiate amendments to the constitution either by way of general suggestion on impugned Bill. There is no prohibition against such a move by either a state organ or a state officer with the only caveat being that it has to be popular meaning that it has to be supported by the requisite number of registered voters supporting and second, that it is processed through the stringent requirements spelt out in **Article 257** of the Constitution, including approval by the County Assemblies.

92] It was therefore erroneous for the judges to assume that popular initiative will necessarily and always be commenced in opposition to the government of the day. It also stands faulted for failure to take into account a relevant consideration that **Article 257** of the Constitution has inbuilt mechanisms to ensure that the popular initiative route remains people-centric, regardless of how it is initiated, namely, the bill to be signed by one million registered voters, approved by a majority of the County Assemblies and both Houses of Parliament and the Senate before being subjected to a referendum. There is therefore nothing in the said provision to bar the Government and State organs from initiating amendments to the Constitution.

93] The appellant also contends likewise that it was erroneous for the judges to hold that if the President plays a role in promoting a Bill to amend the Constitution through popular initiative, his role in determining whether or not the Bill is to be subjected to a referendum may well amount to a

muddled-up conflict of interest. It is also the appellants position that the judges misconstrued the import of **Article 257(10)** of the **CoK, 2010** when they held at paragraph 492 of the judgment that the provision gives power to the President to determine whether or not a referendum is to be held. No such discretion is donated to the President as the requirement for a referendum is drawn from the text itself as stipulated for in **Articles 255(1)** and **257(10)** notwithstanding that in the circumstances resulting in this appeal, the President was not one of the promoters of the impugned Bill.

94] On the declaration that the President contravened **Chapter 6 (Article 73(1)** of the Constitution, appellant faults the judges both on the reasoning and conclusions reached on this issue at paragraphs 485 – 499 and 582 to 588 of the partially impugned judgment that pursuant to the provisions of **Articles 131** and **132** of the Constitution the President does not have power to initiate the amendment of the Constitution by a popular initiative; and without any constitutional basis that the only pathway the President can use to amend the Constitution is Parliamentary initiative. They restricted the popular initiative process to ordinary citizens (Wanjiku) on the erroneous reasoning that Wanjiku cannot access and make use of the parliamentary initiative route and consequently ruled that the President breached **Article 73(1)** of the Constitution. Appellant relies on the High Court decision of **Thirdway Alliance Kenya & Another vs. Head of the Public Service - Joseph Kinyua Building Bridges to Unity Advisory Taskforce & 2 Others; Martin Kimani & 15 Others (Interested Parties) [2020] eKLR** and submits that it is common ground that it is the appellant who caused both the BBI Task Force and the BBI Steering Committee to be gazetted pursuant to the function and obligation conferred upon him by **Articles 131** and **132** of the Constitution.

95] The conclusion reached above are termed erroneous by the appellant because the judges failed to appreciate that in as much as it is undisputable that the appellant is a President of the Republic of Kenya, he is a registered voter and he is entitled to participate in the amendment of the Constitution by popular initiative under Article 257 of the Constitution. Likewise, as a citizen and leaders of a political party, he is entitled to the enjoyment of political rights guaranteed under Article 38 of the Constitution including the right to participate in the activities of a political party such as to campaign for a political party or case. It is also appellants position that the judges impugned conclusion are erroneous because according to him there is no such a person as an **"initiator"** with regard to a popular initiative under **Article 257** of the Constitution, the appellant was not an initiator of the Amendment Bill notwithstanding that there is nothing in law that bars him from being a promoter or in any way participating in the amendment of the Constitution by popular initiative in his capacity as a registered voter. To hold otherwise in the appellants' opinion would be tantamount to violation of appellants right to equal protection and equal benefit of the law under **Article 27** of the Constitution. The conclusion also failed to appreciate that unlike under the old constitutional arrangement, the President under the current constitutional arrangement is not a member of Parliament. It was also erroneous for the judges to assume that Wanjiku cannot initiate a constitutional amendment through the Parliamentary route when she can do so through duly elected Parliamentary representatives. Second, the fact that the President assents to a Bill for it to become law is not perse sufficient reason to bar the President from enjoyment of constitutional rights guaranteed to an individual.

96] On constitutional amendment by popular initiative, the respondent submits that this is enshrined in **Article 1** and **10(2)** of the Constitution enshrining the sovereignty of the people to amend the constitution either directly or through their duly elected representatives. It was therefore erroneous for the judges to go off tangent and describe the "people" as only private citizens leaving out citizen holding any State/Public office as the only person eligible to promote a constitutional amendment in contravention of **Article 27** of the Constitution. Their position is that the concept of popular initiative was never meant to curtail and discriminate against a section of the citizenry from initiating an amendment but roles were given to the **"people"** to sanction the amendment process at various stages especially when it is evident from a proper construction of **Article 5(3)** and **(4)** that regardless of the source of the constitutional amendment bill, the people's participation still needed to ensure that the amendment bill is seconded by more than one million signatures emanating from the people before the same is submitted to the County Assemblies where the **"people"** also have a say.

97] On the role of the President in the process, the appellants submit that the conclusion reached that the President was the promoter of the impugned Bill was erroneous as according to the appellants the bill was promoted by an alliance of political forces; and that even if the President did there is nothing unconstitutional about such an action as such an action would be in line with the President's constitutional mandate to ensure National unity. By the judges limiting the President's role in a constitutional amendment process is tantamount to undermining the President's role under **Article 130(2)(e)** as read with **Article 132(1)(c)(i)** and **(ii)** of the Constitution.

98] I have considered the above rival submissions, my take is that contrary to appellants' assertions, the president cannot play such a role as a sitting President. I therefore take the position taken by the Judges in the impugned judgment and the respondents in their respective submissions herein and I concur with the Judges in their holding that:

> **"The power to amend the Constitution using the popular initiative route is reserved for the private citizen. Neither the President nor any State organ is permitted under our Constitution to initiate constitutional amendment using Popular Initiative."**

99] It was argued by appellants that the President is entitled to enjoy all the constitutional rights and freedoms like any other ordinary Kenyan, including equality and freedom from discrimination and political rights under **Articles 27** and **38** respectively. However, as already highlighted above, the Constitution must be read as a whole and in a manner that promotes its purposes, values and principles. That is to say, the President can use the parliamentary initiative to propose amendments to the Constitution if he so wishes, but he cannot initiate a process of an amendment(s) to the Constitution disguised as a popular initiative. The President cannot therefore utilize **Article 257** as a private citizen as rightly rejected by the judges as there is nothing in **Article 131(1)** creating the mandate of the national executive in the President, Deputy President and the Cabinet; **Article 131(1)** vesting authority in the president which among others creates that office as a symbol of national unity.

100] The function set out therein enjoins him to discharge them in his capacity as a symbol of national unity. He is also required to uphold and safeguard the Constitution, sovereignty of the people, promote and enhance the unity of the nation, provide respect for the diversity of the people and

communities of people, ensure the protection of human rights and fundamental freedom and the rule of law under **Article 131(3)** is explicit that the President shall not hold any other official capacity under the Constitution which according to me includes that of an ordinary citizen. I therefore agree with the Judges' expression as hereunder:

> **"495. More importantly is the question whether the President can, under the guise of being a private citizen, exercise the powers of amendment reserved under Article 257 of the Constitution. A textual reading of Article 1(2) of the Constitution which we have referred to above reveals that the powers thereunder are exercisable either directly or through their democratically elected representatives. The employment of the phrase "either directly or" is a clear manifestation that the drafters of the Constitution intended that there be a distinction between direct and representative exercise of sovereign power. This Court, in interpreting the Constitution, must do so holistically as we have explained above. As was held in <u>Tinyefuza vs. Attorney General Const. Petition No. 1 of 1996 (1997 UGCC3)</u>:**
>
> > **"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."**
>
> **496. In our view, in interpreting the Constitution holistically as we are enjoined to do, Article 1(2) must be read together with Articles 256 and 257 of the Constitution. When one considers these provisions together, the only reasonable conclusion is that Article 257 of the Constitution is reserved for situations where the promoters of the Bill do not have recourse to the route contemplated under Article 256. Our view is in tandem with the historical genesis of the provision we have set out hereinabove. In other words, the Article 257 route is meant to be invoked by those who have no access to Article 256 route. Those who have access to Article 256 route are therefore barred from purporting to invoke**

the Article 257 route. There is no doubt that the President, if he intends to initiate a constitutional amendment, may do so through the aegis of Parliament. It follows that since the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report was a brainchild of the President, it has no locus standi in promoting constitutional changes pursuant to Article 257 of the Constitution.

497. It is our view that a Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment independent of the law making power of the governing body cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests."

101] On totality of the above assessment and reasoning, I reiterate that I agree with the Judges expression highlighted above, that the popular initiative with regard to the amendment of the constitution was intended for ordinary citizens.

6) **WHETHER THE IEBC HAD REQUISITE QUORUM TO CARRY OUT ITS BUSINESS IN RELATION TO THE AMENDMENT BILL**

102] On the issue of IEBC readiness and propriety to conduct the then proposed referendum, the Judges construed **Article 250(1)** of the **CoK, 2010** on the composition of independent constitutional commission namely that each commission shall consists of at least three but not more than nine members; **Section 5(1)** of IEBC Act No. 9 of 2011 that the commission shall consist of a chairperson and eight other members appointed in

accordance with **Article 250(4)** of **CoK, 2010** and the provisions of the Act, Section 8 provides that the regulation of the business and affairs of the commission shall be as provided for in the Second Schedule with leave for the commission to regulate its own proceedings.

103] Schedule 2 of **IEBC Act** makes provision for the conduct of the business and affairs of the commission while **Schedule 2(5)** sets the quorum to be at least five members of the commission and concluded *inter alia* that a legal/regulatory framework for verification of signatures under the Constitution was required as it does not exist, the existing statutes do not adequately form the requisite regulation framework required under **Article 257(4)** of the Constitution, the administrative procedures developed by IEBC were invalid as these were developed without public participation contrary to **Article 10** of the Constitution. They were also developed in contravention of the **Statutory Instruments Act** for want of parliamentary approval and public participation in their making. They were developed without governance even if they were valid.

104] My take on the above is that it is a common position that as at now there is no legal framework governing a constitutional referendum. IEBC itself admitted as much, save that they qualified that position and found succor in their Administrative procedures which they asserted would suffice. The Judges found these wanting based on their (Administrative Procedures) non-compliance with the prerequisites in the Statutory **Instruments Act**. **Section 2** of the **Statutory Instruments Act, 2013** define a statutory instrument as;

> **"Any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power**

conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

105] On prerequisites for preparation of statutory instruments, the Act requires statutory instruments to be prepared by a Cabinet Secretary or a body with power to make them, e.g. a commission, authority or a board. IEBC as a commission therefore falls into this category. There is a requirement that the statutory instruments must conform to the constitution by requiring that regulation making authorities must ensure that the provision in the statutory instrument are in tandem with the principles, values and general spirit of the Constitution. In particular, statutory instruments should not in any way reduce the rights of an individual or those who will be affected by them. They must also pass the requirement that they must also conform to the provisions of the **Interpretation and General Provisions Act** in regard to construction, application and interpretation.

106] This is the Act which provides for limits within which Statutory Instruments operate for instance, the penalties that may be imposed under a Statutory Instrument; and lastly that in making statutory instruments, the regulation-making bodies must do so in conformity with the parent Act delegating that authority with attendant requirement that particular attention must be paid to the provision delegating legislative powers, including adherence to the stipulated timelines so as to ensure that a statutory instrument is made without unreasonable delay.

107] Where a statutory instrument requires pre-publication scrutiny by the National Assembly, the regulation-making body must cause the

instrument to be tabled in the House before publication. For instance, **section 17** of the **Election Laws (Amendment) Act, 2016** required the Independent Elections and Boundaries Commission to table drafts of all election-related Regulations to the National Assembly for approval before publication. There is also a requirement that these be in conformity with the **Statutory Instruments Act**. **Section 5** requires a regulatory making body to carry out consultations with persons who are likely to be affected by a proposed instrument and indicate, in detail in the explanatory memorandum attached to the statutory instrument that consultations were carried out, including the outcome of such consultations.

108] Sections 6, 7 and **8** of the **Act** provides for the need to carry out impact assessment if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community. The regulatory making authority must give a certificate in writing specifying that -

a) the requirements relating to regulatory impact statements in the Statutory Instruments Act and the guidelines have been complied with; and

b) in the Cabinet Secretary's opinion, the regulatory impact statement adequately assesses the likely impact of the proposed statutory rule.

There is also provision for guidelines on the execution of the above mandate as more particularly set out in the **Act**.

109] In light of all the above, I find nothing to fault the Judges findings that the alleged existence of administrative procedures would not suffice and affirm the position taken by the Judges that IEBC's readiness to undertake

the then impending exercise was wanting especially when they did not controvert the respondents position that the said Administrative procedures were neither developed with public participation as required by the **Statutory Instruments Act** nor approved by Parliament and Gazetted as also required by the same **Statutory Instruments Act** and were therefore inconsequential for purposes of the issues in controversy herein.

110] On the requirement for nationwide voter registration raised by the petition in E416 of 2020 the Judges faulted IEBC for not conducting continuous voter registration and regular revision of the voter register as provided under **Article 88(4)(a)** of the **CoK, 2010** stipulating explicitly that the commission is responsible for conducting or supervising referenda and election to any elective body or office established by the constitution and any other election as prescribed by an Act of Parliament. The continuous registration of citizens as voters, regular revision of the voters' register, voter education and to exercise its powers and perform its function in accordance with this constitution and national legislation and **Section 5** of the Elections Act No. 24 of 2011 Rev. 2016, providing that registration of voters and revision of the register of voters under the Act is to be carried out throughout except as specified therein and, concluded that by IEBC failing in its duty as provided for by disenfranchising citizens who had attained voting age but had not been given an opportunity to register as voters, thus violating their constitutional right to vote and make political choices as guaranteed under **Article 38** guaranteeing political rights to every citizens.

111] My take on the conclusions reached above by the Judges is that they were well founded going by the IEBC's own admission that the last time the register of voters was updated was in 2017 during the Kibra by-election.

Also apart from asserting that the registration centres were open for any citizen wishing to register to do so there was no demonstration that they had taken it upon themselves to sensitize Kenyans to embrace it as part of their statutory and constitutional duties.

112] On the quorum of IEBC, appellants rely on the case of **Isaiah Biwott Kangwony vs. Independent Electoral & Boundaries Commission & Another** [supra] and faults the judges in their conclusion that IEBC lacked the requisite quorum to make decisions connected with the Amendment Bill including the verification of signatures in support of the popular initiative and determination of whether or not the Constitutional threshold under **Article 257** of the Constitution had been met contrary to **Article 250(1)** of the constitution which provides for the composition of IEBC and which provides the commissioners to be at least three and not more than nine Commissioners. To them IEBC as currently constituted meets the minimum constitutional requirement. It was therefore erroneous for the judges to rely on **sections 5(1)** and **8** as read with paragraph 5 of the second schedule of the **IEBC Act** which provides that the quorum for conduct of business at the meeting of the IEBC is at least five members.

113] The appellant further relies on the case of **Peter Muiruri vs. Credit Bank Limited and Others Civil Appeal No. 23 of 2003** as approved in **Philip Moi vs. Pluda Moi Petition No 65 of 2012** in support of their submissions that the judges though sitting as a bench of five judges had no mandate to overrule the decision of the single judge in the **Isaiah Biwott Kangwony** case [supra] on the ruling that IEBC was quorate to conduct both its statutory and constitutional mandate. They also rely on the case of **Isaiah Biwott Kangwony vs. Independent Electoral and Boundaries**

Commission and Another [supra] and reiterates the submission of the Attorney General on the issue that paragraph 5 of the second schedule of the IEBC Act that purported to stipulate a quorum for IEBC of five (5) Commissioners as opposed to that of three (3) stipulated in the Constitution was not only ultra vires the constitutional provisional but was also null and void *ab initio*.

114] In rebuttal, the cross-appellant submitted that **Section 8** of the IEBC Act is explicit that the quorum required for IEBC to conduct business is five members; it is not in dispute that at the material time when events resulting in this appeal were triggered, IEBC had only three officials. It mattered not that IEBC had been conducting routine business as then constituted which to the cross-appellant was no justification for appellants to contend that IEBC was properly constituted to conduct the constitutional amendment process. The Judges therefore committed no error in departing from the **Isaiah Biwott Kangwony vs. IEBC** case [supra] as the reasoning for departure was well founded.

115] Mr. Omoke's argument if I got him right is that he is not challenging the constitutionality or legality of IEBC as a commission under **Article 250(1)** of the **CoK, 2010** but only on the issue of quorum for it to conduct business of such great magnitude such as mounting a referendum likely to impact on issues forming the impugned Bill. I have considered the respective parties rival position on this issue in light of the Judges reasoning and conclusion reached with regard to this issue at paragraph 716 – 719 of the impugned judgment on the reason as to why the Judges declined to down tools as requested by appellants based on the plea of res judicata arising from what appellants have asserted is a decision **"in rem"**

by a court of coordinate jurisdiction that sanctioned IEBC to carry out its mandate with regard to holding of a by election as their quorate and which position still obtained as at the time the court was invited to down its tools and decline jurisdiction.

116] My take on the position taken by the Judges on the impugned judgment is that their position that **Okwany J's** sanctioning of IEBC to conduct the by election was because it was not a policy issue as such IEBC could conduct the by election as they were quorate, which according to the Judges and correctly so in my view did not touch on policy issues falling within the mandate of IEBC. The second major consideration and which I also agree with is the magnitude and serious impact of the intended constitutional amendment process which could not be entrusted to IEBC without their being quorate. I therefore find no fault in the Judges conclusion and would affirm it and hold that IEBC was not quorate and could not therefore be allowed to conduct the constitutional amendment process to its finality.

7) ON THE ROLE OF THE IEBC IN CONSTITUTIONAL AMENDMENT BY POPULAR INITIATIVE WITH REGARD TO VERIFICATION OF SIGNATURES

117] On this issue, I adopt the reasoning and conclusion reached by the Judges on their determination of this issue as already highlighted above. In addition, I wish to also highlight the Judges observation on the adequacy or otherwise of the legal/regulatory framework IEBC needed to have before it embarking on the above exercise especially dealing with verification of signatures. In resolving this issue, the Judges revisited the history of constitutional making process, appreciated the common position before

them that there was no specific legislation as at that point in time to guide the procedure for conducting a referendum.

118] The Judges also construed **Article 95(3)** of the constitutional obligation on the national assembly to enact legislation in accordance with the **CoK, 2010**, and **Article 109(1)** and **(2)** on the exercise of legislative powers of Parliament with regard to Bills passed by Parliament and assented to by the President and those Bills concerning County Government considered only in the National Assembly and passed in accordance with **Article 122** and the standing orders made thereunder. **Article 255(1)** on the requirement that a proposed amendment to the constitution be enacted in accordance with **Articles 256** and **257, 256(1)** on amendment of the Constitution by parliamentary initiation. Notable of this provision is the requirement that the bill to amend the Constitution through this process may be introduced in either house of parliament.

119] There is an attendant caveat that such a bill will not address any other matter apart from consequential amendments to legislation coming from the Bill, and shall not be called for second reading in either house within ninety (90) days after the first reading of the bill in that house; and shall have been passed by Parliament when each house has passed the bill in both its second and third reading by not less than two-thirds of all members of that house and lastly, **Article 257(3**) that if a popular initiative is in the form of a general suggestion the parameters of that popular initiative shall formulate it into a bill.

110] The Judges made findings thereon *inter alia* that Part V of the Elections Act does not adequately cover the processes contemplated in a referendum process for the failure to address the issue of public

participation, a constitutional imperative under **Article 10** of the Constitution neither does it cover the manner in which a referendum bill is to be handled by the County Assembly in cases where the constitution mandates the County Assemblies to debate the Bill, that the provision of the Elections Act alluding to referendum is not a referendum Act as historically contemplated; and lastly that although they were in agreement that section 4 of the Elections Act gives IEBC the discretion to frame the questions or question to be determined through a referendum, that mandate was not tantamount to framing a composite Bill touching on different parts of the impugned Bill.

111] The constitutional obligation of IEBC in Article 257 was summarized by the Judges as follows:

> **741. There is no doubt that the IEBC understands that its mandate and role under Article 257(4) of the Constitution includes a two-step process of, first, ascertaining the numbers of registered voters in support of a Popular Initiative to amend the Constitution, and second, verifying the authenticity of the signatures of the registered voters claimed to be in support of the Popular Initiative.**
>
> **742. It is, therefore, plainly startling that in the present Petition, the IEBC has taken the clearly disingenuous position that its role is limited to merely ascertaining the numbers of registered voters in support of the Popular Initiative. This position is belied by its own report analysed above. It is also belied by the text and spirit of the Constitution. As the IEBC Verification Report plainly acknowledged, the only reasonable meaning of the term "verify" as used in Article 257(4) of the Constitution includes both the ascertainment of numbers and confirming the authenticity of the signatures submitted.**

112] From the above analysis of the judges in the impugned judgement it is clear that IEBC requires a form of regulatory framework to enable it undertake its constitutional obligation in relation to verification of signatures for purposes of a proposed constitutional amendment. The High Court held that IEBC has a framework that guides it on the process of voter verification in terms of **section 6A** of the **Elections Act and Rules 27A and B of the Election (Voter Registration) Rules, 2012**. Under the above provision, IEBC is obligated to open the register of voters for verification of biometric data by members of the public at their respective polling station for a period of thirty (30) days not later than sixty days before the date of a general election, revise the registration expiry of the verification of voters to take into account any changes in particular arising out of verification process and upon due compliance with the above publish a notice in the Gazette to the effect that the revision under subsection(2) has been completed and then post the register online and in such other manner as may be prescribed by the regulations.

113] The High Court acknowledged the above detailed processes that IEBC undertakes in verification of voters and concluded correctly so in my view that;

> **750. If the IEBC is so scrupulous in carrying out its role in voter verification for elections' purposes, it follows that the same standard at the very least should apply in the case of verification of signatures for purposes of constitutional amendments through Popular Initiative under Article 257(4).**

114] As already highlighted above, the constitution requires IEBC to verify the signatures that support a popular initiative and communicate the outcome of the verification process to the promoters of the initiative and where found to be in order forward the Bill to the county assemblies for

consideration where IEBC is satisfied that on the record before it, the initiative has met the requirements of **Article 257(4).** It is my position that the importance of IEBC carrying out a similar exercise for purposes of constitutional amendment is what informed the inclusion of provisions on provision of those other identifiers of registered voters.

115] I am therefore in agreement and fully concur with the analysis of the findings of the High Court on the role of the IEBC from paragraphs 733-763 of the impugned judgment and reiterate that the obligation for IEBC to verify the initiative as signed by registered voters is mandatory. It therefore requires a regulatory framework distinct from that provided for under the Elections Act to guide it in the discharge of its mandate for purposes of a constitutional amendment. It also has a database of specimen signatures to facilitate the verification exercise, which in my view is mandatory as without a database it is difficult to ascertain what IEBC verified. Lack of provision for this process would make the discharge of functions by IEBC unaccountable to any law and are thus a violation of **Article 257(4)** of the constitution.

116] Lastly, I wish to reiterate what I have already alluded to above that the administrative procedures fronted by IEBC as sufficient tools to guide them in the exercise of their mandate with regard to this issue was rightly vitiated by the Judges for their failure to meet the threshold in the Statutory Instruments Act as already highlighted above.

8. WHETHER THE IEBC WAS UNDER AN OBLIGATION TO CONDUCT A NATIONWIDE VOTER REGISTRATION EXERCISE AND VERIFICATION OF SIGNATURES

118] I adopt fully the conclusions reached by the Judges with regard to this issue as already highlighted above and categorically respond to the

question in the affirmative that the requirement of the law is that the exercise was meant to be continuous so as to accord the citizenry an opportunity to participate in the exercise that would have resulted in the ideals proposed in the impugned amendment becoming binding in the constitutional provisions likely to affect the citizens for life. There was therefore need for all those eligible to vote to be given an opportunity to contribute in either way as deemed fit. The Voter verification process for purposes of elections provided for in **Section 6A** of the **Elections Act** and **Rules 27A** and **B** of the **Election (Voter Registration) Rules, 2012** which I need not to rehash is as has been summarized above. It is also sufficient for me to state that **Rules 27A** and **27B**, also mentioned above provide further guidelines on IEBC's obligations on verification and the process of verification and which I also find no need to set out in explanation as the appeals do not arise from an election dispute.

119] I will simply adopt the High Court's elaborate exposition in paragraph 744-754 of the impugned judgment on the obligation of IEBC to conduct a nationwide voter registration exercise and verification of signatures for purposes of election. That the process is meticulous and would also apply to the constitutional regulation regime whenever called upon to verify signatures for purposes of a constitutional amendment process.

120] As I have already mentioned elsewhere in the assessment in this judgment, it is common ground that there is no legal framework to guide IEBC in the exercise of its mandate under **Article 257(4)**. The High Court therefore correctly held that the existing statutory framework is "not sufficient for verification of signatures under **Article 257(4)** of the Constitution. The Judges cannot therefore be faulted for vitiating the process.

9) **WHETHER THE PROPOSALS CONTAINED IN THE AMENDMENT BILL ARE TO BE SUBMITTED AS SEPARATE AND DISTINCT REFERENDUM QUESTIONS**

121] On the form of popular initiative questions for a referendum, the judges construed **Article 257(10)** and concluded that **Article 255(1)** of the Constitution makes provision for the amendment of the Constitution to be made in accordance with **Article 256** or **257** of the Constitution and contemplates a situation whereby each amendment to the Constitution shall be considered on its own merit and not within the rubric of other amendments; that lumping all such proposals together in an omnibus Bill would not only lead to confusion but also denies the voters the freedom to decide on what to vote for and what to reject; and that presentation of amendment clauses on separate referenda question not only avoids confusion but also allows voter freedom to decide on how to vote on each presented amendment question based on its own merit. Secondly, a voter confronted with an omnibus Bill for amendment runs the risk of being forced to vote for an outcome he/she did not contemplate and concluded that the judges understanding of this section was that what was to be subjected to the referendum is the question or questions as opposed to the impugned Bill itself hence the holding that **Article 257(10)** requires all the specific proposed amendments be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively.

122] My response to the above issue is in the affirmative. The basis for the position I have taken herein is that in my view a proper construction of the applicable constitutional provisions, going by the principles on constitutional interpretation I am enjoined to take into consideration when construing the applicable provision and which I fully adopt, are as were

distilled by the Judges before embarking on their noble task of determining whether the doctrine of basic structure applies to the **CoK, 2010**.

123] In summary, these are as follows: the principles distilled therefrom in a summary are that the **CoK, 2010** is a transformative charter, the Constitution must be interpreted holistically, rules of constitutional interpretation do not favour formalistic or positivistic approaches to constitutional interpretation and neither is the Constitution to be interpreted in the manner legislative statues are interpreted, the court has to bear in mind what the Supreme Court termed as inbuilt interpretation frameworks upon which fundamental hooks, pillars and solid foundation on which the interpretation of the constitution should be based, namely: each matter has to be considered on its own set of circumstances bearing in mind constitutional interpretation must be done in a manner that advances its purposes, gives effect to its intents and illuminates its contents, the court has to bear in mind that constitution making requires compromise and constitutional making does not end with the promulgation of the Constitution but continues with its interpretation.

124] The 19th, 20th and 21st respondents put forth a contrast between the provisions of **Article 257** of the **CoK 2010** with **Article V** of the Constitution of the United States which states that: "**The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several 30 States, shall call a Convention for proposing Amendments...".** In light of the above, they submit that the textual differences between these two constitutional provisions means that nothing would have been easier than for the drafters of the **Cok 2010** to provide for **"amendments"** in **Article 257** had they so

intended. According to them, the phrase **"an amendment"** in its use is singular in contrast to **"amendments**" as used in the United States' amendment clause. It is their opinion that this shows that it was intended that an amendment under the popular initiative in Kenya would cover a single issue.

125] My attention has also been drawn to the **"Code of Good Practice on Referendums"** adopted jointly by the European Commission for Democracy Through Law (Venice Commission) and the Council for Democratic Elections, Study No. 371/2006, the bodies adopted Guidelines for Referendums at national level to include the principle of "unity of content/single subject". The Code of Good Practice on Referendums notes: *"The principle of unity of content means that, except in the case of a total revision of the constitution or another piece of legislation, there must be an intrinsic connection between the various parts of each question put to the vote in order to guarantee freedom of suffrage (the voter must not be expected to accept or reject as a whole provision without an intrinsic link between them)."*

126] Article 10 of the **CoK, 2010** provides that **"transparency"** is a value and principle of governance; **33(1)** that every person has **"the freedom of expression"**; **38(1)** that every citizen is **"free to make political choices"**; **38(2)** that every citizen has the right to **"the free expression of the will of the electors"**, **82(1)(d)** and **82(2)** that the conduct and voting in referendum should be **"simple and transparent**".

127] My take on the **Articles** referred to above **33(1), 38(1), 38(2), 82(1)(d),** and **82(2)** of the **CoK, 2010** is that the voters have a right, to free choice and expression of their will in a referendum which can only be achieved if care is taken to ensure that a voter is not disadvantaged by exposure to a

situation where by he/she will be in a dilemma brought about by an omnibus amendment bill. It is also my position that the Kenya Constitution envisages that a referendum on constitutional amendment should be on a single subject matter thus must respect the **"unity of content"** principle. The High Court (**F. Ochieng J**.) has articulated the concerns in **Titus Alila & 2 Others 10 (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR** as follows:

> "**Meanwhile, I note that it may be logical to have a referendum which addresses one specific issue, rather than an omnibus question. That could result in the people of Kenya having a clear picture of the exact issue they were being called to vote upon ..... simply because the omnibus issue contained one or more objectionable matters, which had been lumped together with good amendments**."

128] It is further my position that, when a bill is limited to a single subject, it is easier for the public to more fully understand the impact of the enactment. It also prevents fraud upon the people by minimizing the possibility of promoters of the amendment hiding harmful proposals in the midst complex multi-subject measures that the common man might not be able to grasp and understand.

129] In support of this proposition, I associate myself with the position taken by the **Constitutional Court of the Republic of Lithuania, Case No. 16/2014-29/2014,** where that Court reasoned as follows:

> **"The Constitutional Court [has previously] pointed out that the direct participation of citizens in the governance of their state is a very important expression of their supreme sovereign power; therefore, a referendum must be a testimony to the actual will of the nation. In view of this**

fact, it should be noted that, where the most significant issues concerning the life of the state and the nation are put to a referendum, they must be such issues regarding which it would be possible to determine the actual will of the nation: inter alia, they must be formulated in a clear and not misleading manner. ……

Consequently, under the Constitution, several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated 10 provisions of laws may not be put to a vote in a referendum as a single issue. Acting otherwise would deny the possibility of determining the actual will of the nation separately regarding each most significant issue concerning the life of the state and the nation……

…… Otherwise, no opportunity would be ensured for citizens to separately decide regarding their support for each initiative to call a referendum, and it would be impossible to determine whether each of the aforementioned issues, which are unrelated by their content and nature, is indeed requested to be put to a referendum.

130] In light of the above persuasive position, I reiterate my stand taken above that omnibus constitutional amendment questions are likely to cause problems because according to me they may lead to the adoption of measures that do not enjoy true majority support by the people leading to a serious failure of expression of the constituent choice. It is also my position they would also be violating the principles of sovereignty meant to be enjoyed by people as provided by **Articles 1(1)** and **(2)** of the **CoK, 2010** can easily qualify to be termed as arbitrary, undemocratic, and a demand and limit to the people's voice in expressing the public will.

131] It is therefore my position that, a proper interpretation of **Articles 255** and **257** of the Constitution when carried out in light of the historical context (amendment culture) that informed the inclusion of the particular

texts in the constitution leaves no doubt in my mind that a single-subject rule in referenda stipulates that the proposed legislation should deal with one subject only to allow the voter to form and express their opinion freely and genuinely in respect to one issue so that if a proposed constitutional amendment includes several substantive questions, the voter may not have a free choice and to avoid any hidden proposals that voters may miss when reading the proposed constitutional amendments lumped together and to prevent proponents of constitutional amendments from attaching unpopular provision to an unrelated popular one, in the hope of covering/hiding the unpopular one through, or in the hope of causing the popular one to be rejected. See **Njoya & 6 others vs. Attorney General & Another, [2004] 1 KLR.**

132] My finding on this issue and in terms of what I believe to be a proper construction of **Article 257(10)** is that the said Article requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively, hence I affirm both the reasoning and the findings of the high court at paragraphs 611 to 619 of the impugned judgment.

10) **WHETHER THE HIGH COURT HAD JURISDICTION TO ENTERTAIN THE PETITIONS ON ACCOUNT OF THE PRINCIPLES OF JUSTICIABILITY, MOOTNESS, SUB JUDICE, RIPENESS AND THE POLITICAL QUESTION;**

133] On the doctrine of *sub judice*, the Judges construed **section 6** of the **Civil Procedure Act (CPA) Cap 21 Laws of Kenya**, reviewed jurisprudence both local and foreign on the subject and applied the crystalized jurisprudential position on this issue to the contents of Petition No. E426

of 2020 in which the preliminary objection had been raised and High Court Petition No. 12 of 2020, also referred to as the **Okiya Omutata case** alleged to be raising similar issues and declined to allow the preliminary objection because: only one segment of the matters in issue in the consolidated petitions was the issue in the **Omutata case**; the **Omutata** petition had two additional parties added therein as interested parties namely, **Katiba Institute and Muslims for Human Rights (Muhuri)** who were not parties in the petition; the petitioner in E226 of 2020 was not a party in the **Omutata petition**; the objection did not meet the threshold for exercise of the court's mandate under **section 6** of the **CPA**; the consolidated petitions were wider in scope than the **Omutata case** and could not therefore be said to be an abuse of the court process; besides filing the **Omutata petition**, there was no evidence that any further step had been taken towards prosecution and determination of that Petition; and while the nature of the dispute in E426 of 2020 demanded an expedient determination, it was also in the public interest that the Consolidated Petitions be resolved at the earliest possible opportunity unknown.

134] On the justiciability of the consolidated petition, the respondent relies on the case of **Judicial Service Commission & Secretary, Judicial Service Commission vs. Kalpana K. Rawal [2015] eKLR** and submits that Judges were properly seized of the petition as **Article 22** of the constitution mandates them to adjudicate over alleged threatened violation of the bill of rights which the respondent claim was not only a core but also a live issue in the consolidated petition.

135] On the application of the political question doctrine, the respondent cites the Communications **Commission of Kenya & 5 others vs. Royal**

Media Services Limited & 5 others **[2014] eKLR**; **Martin Nyaga Wambora & 3 others vs. Speaker of the Senate & 6 others** **[2014] eKLR; Kenya Human Rights Commission & 3 others v Attorney General & 3 others**; **Council of Governors & 2 others (Interested Parties)** **[2020] eKLR**; for the holding/position *inter alia* that the political question doctrine is a function of separation of powers unique to the American constitutional context and is linked to **Marbury vs. Madison** [supra]; and second that the political question doctrine cannot operate to oust the jurisdiction vested in the High Court to interpret the constitution or to determine the question is anything said to be done under the authority of the constitution or of any law is consistent with the Constitution; and lastly, that where matters raised touch on the interpretation of the constitution, they are constitutional rather than political questions and submits that issues raised in the consolidated petition touched on the interpretation of the constitution and do not therefore fall into realm of political question.

136] In chapter 3 of his well-known book, **American Constitutional Law**, **Prof. Lawrence H. Tribe** has in the second edition, discussed jurisdiction in American constitutional law. At page 67, he refers to the limitation of the court through a description of the subjects which the court has jurisdiction to entertain and also the parties. He also discusses at pages 69-93, the doctrine of justiciability and expressed himself that this doctrine encompasses such principles as the refusal of the court to make declarations to, assume jurisdiction over matters which are allocated to such other branches of the government as the legislature or the executive, refusal to decide issues which are not ripe or those which are mute.

137] See **Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others**, **Application No. 2 of 2011 [2012] eKLR**, where the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:-

> **"(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law." (Emphasis provided).**

138] In **Wanjiru Gikonyo & 2 Others vs. National Assembly of Kenya & 4 Others [2016] eKLR**, the High Court had this to say of political question, *"it is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future*

holds either. It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined."

139] On justiciability of the petitions, I take into consideration the fact that the Superior Court also has jurisdiction to adjudicate on disputes founded on completed and incomplete breaches or infringements of the Constitution. See **Articles 22 (1), 23 (1) and 258 (1)** of the Constitution). Since **section 89** of the **Elections Act** expressly permits the courts to adjudicate on the validity of referenda, it is inconceivable that processes leading up to referenda can be said to be immune to judicial review. The dispute before the Superior Court was neither abstract nor academic. The impugned Bill had been published and processes to have it become law set in motion and were pending approval by the County Assemblies.

140] In **Wanjiru Gikonyo & 2 Others** [supra], the court held that the citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favor in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.

141] Further in the same case, the Court cited with approval the United States of America Supreme Court decision in **Ashwander vs Tennessee Valley Authority [1936] 297 U.S 288,** which states that courts should only decide cases which invite *"a real earnest and vital controversy".* Thus, justiciability prohibits the court from entertaining hypothetical or academic

interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

142] The position I take with regard to the above discourse is as was taken by the High Court that the consolidated petitions fully complied with the tenets of justiciability and complied with the principle of ripeness more particularly that the petitions also touched on threat of violation of the Bill of Rights hence the trial court could hear and determine the same. In **John Harun Mwau & 3 others vs. Attorney General & 2 others [2012] eKLR** the court stated as follows:

> **"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."**

In **Martin Nyaga Wambora vs. Speaker of the County of Assembly of Embu & 3 Others [2014] eKLR**, the court observed as follows:

> **"It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability."**

Also in **Jesse Kamau & 25 Others vs. Attorney General Misc. Application 890 of 2004**, the court dedicated a great part of the judgment to the exploration of the doctrine of justiciability and which I still adopt, rendered itself as follows:

"**B. THE POLITICAL QUESTION, JUSTICIABILITY, RIPENESS AND MOOTNESS**

On Ripeness pp 80 - 81 Tribe says: "In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development or underlying facts. For example litigants alleging that a government action has effected an unconstitutional "taking" without just compensation" are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe"....Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available"

Essentially, the complaints and the allegations or questions raised by the Applicants in the Originating Summons are anchored in Section 66 of the Constitution. It is this section which is being challenged and impugned. It is the Section to be declared discriminatory, unconstitutional, inconsistent with the Constitution, null and void and of no effect. It is the Section sought to be expunged... In the case of Anarita Karimi Njeru vs the Republic (No 1 [1979] KLR 154 the court's attention was drawn to a text and commentary on the Constitution of India where the author says: - "In the United States, it has been established that constitutional questions must be raised "reasonably" that is at the earliest practicable moment. As a result of this rule, a constitutional right may be forfeited in a criminal as well as civil case by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

...

Mr. Orengo also referred the court to the discussion of the doctrine of the political question and justiciability in American Constitutional Law by Laurence H. Tribe. The views expressed are both appropriate for consideration and are persuasive. Professor Tyler summarizes the constitutional view of the doctrine of the political question as grounded in the assumption that there are constitutional questions which are inherently non-justiciable and that these practical

questions, it is said concern matters as to which departments of government, other than the courts or perhaps, the electorate as a whole must have the final say, that with respect to these matters, the judiciary does not define constitutional limits...

On the question of Ripeness (of issues for adjudication) and the courts' competence to issue declaratory orders, Hon. Orengo submitted that the issue at hand must not only be ripe for determination but must also not be either academic or hypothetical. He referred us to the excerpts from the case of Blackburn vs Attorney – General and Justice Ringera's remarks in the Njoya case that one of "the most fundamental aspects of the court's jurisdiction is that we are not an academic forum and we do not act in vain does indeed resonate in line with authorities and legal texts." The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. Stamp LJ in Blackburn vs Attorney General (supra) states at p.138 3 h J "It is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical". In Matalinga and Others vs Attorney General [1972] E.A. 578 Simpson J held: Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it."In the Matalinga case, the Plaintiffs (representatives of an unincorporated association) had sued the Attorney General for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the Director of Personnel review and rectify salary structures. The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was also contended that the jurisdiction to give a declaratory judgment must be exercised "sparingly" with great care and jealously and "with extreme caution." (Emphasis added)

143] Also see **Hon. Kanini Kega vs. Okoa Kenya Movement & 6 Others HCCP No. 427 of 2014** where the justiciability doctrine as held in the court expressed itself as follows:

> **"[82] Therefore whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If public officers fail to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.**

144] From the foregoing, it is my finding that the trial court had jurisdiction to entertain the consolidated petitions having scaled the walls of want of jurisdiction on account of justiciability, mootness, ripeness, *sub judice* and political question doctrine more particularly because the issues raised involved threat to breach of constitutional rights. Second, these did not require a political decision but a judicial decision to decide on the existence or otherwise of the breach.

11) **WHETHER IT WAS CONSTITUTIONAL FOR THE PROMOTERS OF THE AMENDMENT BILL TO CREATE 70 CONSTITUENCIES AND ALLOCATE THEM:**

145] On constituency apportionment and delimitation question in the impugned Bill, the Judges took into consideration the holding in the case of **Coalition for Reform and Democracy & 2 Others vs. Republic of Kenya & 10 Others (2015) eKLR**, for the holding *inter alia* that: a party

has a right to seek the court's intervention for a threatened violation of a right and declined the invitation to exercise **"judicial restraint"** or to apply the doctrine of **"constitutional avoidance"**.

146] On want of jurisdiction on account of the petitioners' failure to exhaust existing alternative avenues for redress of their grievance, the judges appreciated the holding in the case of **Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others [2015] eKLR** that: **"where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked"**, and declined to down tools for the appellants failure to demonstrate existence of any alternative dispute resolution mechanism created where the Petitioners could plead their case, save for the political route to persuade Members of the County Assemblies, Parliament and the Kenyan people at large in the event the questions go for a referendum which in the Judges' opinion did not fall into dispute resolution mechanism within the meaning of the doctrine of exhaustion. According to the judges, for the doctrine to apply there must exist a specific mechanism for resolution of declared disputes or controversy by a body specifically created or given the mandate to deal with such disputes or controversy. It was, therefore, not envisaged that the political process can serve as such an alternative dispute resolution mechanism for purposes of the exhaustion doctrine.

147] Turning to the merits of the issue, the Judges addressed the issue as to whether the impugned Bill could increase or decrease the number of constituencies specifically created by **Article 89(1)** of the **CoK, 2010**. Differently put, whether **Article 89(1)** of the Constitution is part of the Basic Structure and whether it is an unamendable clause of the **CoK, 2010** given the judges definition of the two concepts in **Part 4(1)** of their

judgment. Upon construction of **Article 89(1)** the Judges ruled and expressed themselves that: both the text and the history of the Article makes it clear that Kenyans were very particular about the criteria of the delimitation and apportionment of constituencies for reasons advanced in the judgment and concluded that whereas Kenyans were particular to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual number of constituencies. Basic structure can be amended by duly following and perfecting the amendment procedures outlined in **Articles 255** to **257** of the Constitution.

148] Turning to the second question as to whether it was lawful for the impugned Bill to directly allocate and apportion the constituencies it created without a delimitation exercise being conducted as set out in **Article 89** of the **CoK**, the Judges construed **Articles 88, 89** and **249** of the Constitution and considered these in light of their construction of **section 36** of the **IEBC Act** in so far as it purported to: impermissibly direct IEBC on the execution of its constitutional functions; set a criterion for the delimitation and distribution of constituencies which is at variance with that created by the **CoK, 2010** at **Article 89(5)**; ignored a key due process of constitutional consideration in delimiting and distributing constituencies namely the public participation requirement; imposed timelines for the delimitation exercise which are at variance with those in the Constitution; impermissibly take away the rights of individuals who are aggrieved by the delimitation decisions of IEBC to seek judicial review of those decisions; and lastly, by tucking in the apportionment and delimitation of the seventy (70) newly created constituencies in the Second Schedule using a pre-set criteria which is not within the constitutional standard enshrined in **Articles 89(4); 89(5); 89(6); 89(7); 89(10);** and

89(12) of the **CoK, 2010**, the new provisions have the effect of extra-textually amending or suspending the intended impacts of **Article 89** of the Constitution which forms part of the Basic Structure of the Constitution and are, therefore, unamendable.

149] Turning to the mode of operation of IEBC, the judges faulted the impugned Bill for purporting to: create its own criterion for delimitation; referred to a nonexistent criterion in the form of **Article 87(7);** reduce the consideration listed in **Article 89(5), 6** and **7** to a single one of population quota; offends **Article 89** of the Constitution by apportioning the newly created constituencies to specific counties in addition to directing IEBC to delimit the constituencies using only one criterion; create a process of delimitation which ignores public participation, stakeholders' engagement and consultation of interested parties not only during the process of delimitation itself but also after IEBC had published its preliminary report and before publishing the final one contrary to **Articles 89(7)(9)** as read with **section 36(4)** to **(11)** of IEBC Act; stipulates a timeline for the delimitation which is in conflict with the one created in the Constitution, namely, within 6 months of the commencement of the intended Act contrary to **Article 89(2)** which gives the timelines for the review of boundaries among other things of not more than twelve months to the next General Elections if the new boundaries would take effect for purposes of those General Elections. **Section 1(6)** of the Second Schedule of the Impugned Constitution Amendment Bill, was also faulted for purporting to suspend the operation of **Article 89(4)** of the **CoK, 2010** meant to permit IEBC to begin and complete the delimitation exercise outside the timelines expressly provided in the Constitution by providing for a timeline within 6 months from the date of commencement of the Act as opposed to the 12 months prior to the General Elections.

150] My position with regard to the assessment and reasoning of the Judges on this issues is that **Section 10** of the impugned Bill proposes to amend **Article 89** of the Constitution (on delimitation of electoral units), first, to increase the number of constituencies from two hundred and ninety to three hundred and sixty; and second, to delimit the extra 70 constituencies which respondents argue that such a move will not only be in violation of **Article 89** of the **CoK, 2010**, violates the principles, procedures and safeguards for the delimitation of electoral units set out in the said **Article**. **Section 10** of the impugned Bill (as read with the Second Schedule thereof) seeks to defeat **Article 89 (2)** of the Constitution by compelling IEBC to delimit boundaries before the time set by the Constitution, and without going through the procedures and safeguards set out in the Constitution. I have revisited both the thorough assessment and reasoning of the Judges as ably expounded in paragraphs 694 – 698 of the impugned judgment and find no reason to differ. These Judges conclusions were in my view therefore arrived at based on a sound and proper interpretation of the applicable constitutional provisions. I therefore affirm the Judges conclusion on their decision.

12) **WHETHER THERE WAS NECESSITY FOR NATIONAL LAW ON REFERENDUM AND STATUTORY FRAMEWORK BEFORE THE ENVISAGED REFERENDUM:**

151] I adopt my assessment on the reasoning and conclusions reached by the High Court on the readiness of IEBC to conduct the referendum in the determination of this issue as I have particularly set out above and then proceed to render myself as hereunder. **Article 82(1)(d)** explicitly provides as follows:

82.(1) Parliament shall enact legislation to provide for-

(a) the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies;
(b) the nomination of candidates;
(c) the continuous registration of citizens as voters; 52 Constitution of Kenya, 2010;
(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; and
(e) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote.

while **Article 257(10)** provides as follows:

> **"If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum."**

152] The requirement under **Article 82(1)(d)** is mandatory signified by the use of the word "shall". It was therefore correctly appreciated by the judges in the impugned judgment at paragraphs 734, 735, 736, 737, 738, 739, 750, 751 and 752 that the requirement is mandatory. As also correctly observed by the Judges, going by IEBC's own admission, it only has a framework that guides it in the process of voter verification in terms of **Section 6A** of the **Elections Act** and **Rules 27A** of the **Election (Voter Registration) Rules, 2012** already highlighted above. May I reiterate what I have already alluded to above with regard to the application of those provisions that these regulations are for purposes of elections. There is therefore nothing in the said provision to suggest that those procedures would suffice for purposes of **Article 257(4)** of the Constitution.

153] The Judges also correctly appreciated Muhuri's submission that IEBCs response to its challenge that there was no legal framework to guide IEBC for purposes of **Article 257(4)** and **(5)** procedures was that it had in place administrative procedures to guide it in the discharge of that mandate and that they can also have recourse to procedures provided for under the Elections Act namely, **Sections 49 – 55** of the **Elections Act**. They have also relied on the case of **Titus Alila & 2 Others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR** for the holding that the Constitution had set up a framework for holding a referenda, that notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still be undertaken as long as the constitutional expectations, values and principles and objectives were met. It is the position of Muhuri and correctly so in my view that the judges correctly appreciated the above provision in light of both the IEBC's mandate under the **Article 257** of the Constitution procedures and the rival pleadings and submissions before them and arrived at the correct conclusion that the procedures under the **Elections Act** do not suffice for procedures envisaged under **Article 257** of the constitution for the holding of a referenda. Further, that without a statutory framework actualizing the **Article 257** procedures there was no basis upon which IEBC could make regulations or guidelines for the discharge of its constitutional mandate under the said constitutional powers.

154] My take on the above two constitutional provisions is that the duty to enact a legal and regulatory framework for purposes of undertaking verification and certification processes stipulated in **Article 257(4)** and **(5)** falls within the mandate of parliament as provided in **Article 82(1)** of the

CoK, 2010 and that a legal and regulatory framework is required to operationalize and give effect to the provisions of **Article 257(4)** and **(5)** of the Constitution. Elections law strictly speaking applies to matters of elections and in the absence of a constitutional provision stating that these may be applied in a constitutional referenda for purposes of an amendment to the Constitution they cannot be imported to facilitate conduct of referenda touching on issues to do with amending the Constitution in the wake of a constitutional requirement that a law will be put in place to actualize that specific provision, namely the constitutional provision on referenda. I therefore, find no basis to fault the judges on the conclusions reached on this issue.

13) **WHETHER CIVIL PROCEEDINGS CAN BE INSTITUTED AGAINST A SITTING PRESIDENT:**

155] The High Court expressed itself thereon as follows on whether the President could be sued in his personal capacity in Petition No. E426 of 2020, the judges construed **Article 143(2)** and **(3)** of the **CoK, 2010** and drew out elements on presidential immunity on the basis of which they concluded that a proper construction of **Article 143(3**) of the **CoK, 2010** was a clear indication that a person holding that office is only protected from such action in respect of anything done or not done in the exercise of his powers under the Constitution and depending on the nature of the violation or threatened violation and circumstances of each particular case. **Article 143(2**) of the **CoK, 2010** reads as follows:

> **143(1) Criminal proceedings shall not be instituted or continued in any Court against the President or a person performing the functions of that office, during their tenure of office.**
>
> **(2) <u>Civil proceedings shall not be instituted in any Court against the President or the person performing the</u>**

functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

156] The A.G. arguments on this issue are that the President cannot be held to account for his actions while in office as he enjoys presidential immunity. They submitted that the judges erred in holding at Paragraph 546 of the impugned judgement that the President can be sued in his personal capacity during his tenure. They submitted that this was an erroneous finding based on **Article 143** of the Constitution.

157] The appellant has cited the case of **Nixon vs. Fitzgerald 457 U.S. 731** for holding *inter alia* that: lawsuits would raise unique risks to the effective functioning of the office of the President and should therefore be discouraged; **Deynes Muriithi & 4 Others vs. Law Society of Kenya & Another [2016] eKLR** that a constitutional petition is in the form of a law suit (civil suit); and **Julius Nyarotho vs. Attorney General & 3 Others [2013] eKLR** that Article 143 of the Constitution protects a sitting President from legal proceedings and submits that presidential immunity is embedded in the constitutional theory that the person elected by the people directly as its Chief Executive must be protected from daily vagaries of intrusion and interference in his or her work; that **Article 143** gives the

President immunity while **Articles 144** and **145** providing the necessary checks in the discharge of the Presidential mandate. That the Judges therefore stand faulted on the conclusion reached at paragraphs 46 of the impugned judgment that H.E the President of the Republic of Kenya can be sued in his personal capacity during his tenure, which appellant contends is contrary to the text of **Article 143** of the Constitution which stipulates that the President cannot be sued in his personal capacity in criminal and civil proceedings except as contemplated under clause (4) where the immunity of the President will not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits immunity.

158] In rebuttal, the respondent relies on the Supreme Court case in the **In the Matter of the Kenya National Human Rights Commission [2014] eKLR**, **Final Report of the Constitution of Kenya Review Commission**, **Katiba Institute vs. President of Republic of Kenya & 2 others; Judicial Service Commission & 3 Others (Interested Parties) [2020] eKLR**, **Justice Kalpana H. Rawal vs. Judicial Service Commission** [supra]; **Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR** among numerous others and submits that the court is bound by the rule of harmony, completeness, exhaustiveness, and paramountcy to interpret **Article 143** in conjunction with other provisions touching on the president's discharge of his constitutional mandate namely, **Articles 1, 2, 10, 73, 129, 130** which all go to demonstrate that the president does not enjoy absolute immunity in the discharge of his constitutional mandate as he is bound by **Article 10** of the Constitution.

159] It is also his position that the Kenyan position is therefore distinguishable from the position represented by the American jurisprudence relied upon by appellants on this issue (**Marbury vs. Madison 5 U.S. (1 Cr.) 137 (1803)** and **Fitzgerald cases**) hence his position that the intention of the framers of the **CoK, 2010** was to limit the extent of the President's immunity in civil proceedings only to those instituted while he or she was in office, meant to counter the culture of presidential impunity characterized under the old constitutional arrangement.

160] The position I take on this issue is that a purposive construction of the above provision of the Constitution is that: Criminal proceedings cannot be taken out against the President of the Republic of Kenya during his tenure as President. As far as civil proceedings are concerned, the President cannot be sued during his tenure of office if whatever he is sued for is something done or not done in the exercise of the powers he is clothed with by the Constitution.

161] Proceedings, whether criminal or civil, that may be taken against the President after his tenure are subject to limitation period. Time does not run until the expiration of his tenure. The President may however be prosecuted during his tenure if the crime for which he is prosecuted is defined by a treaty to which Kenya is a party and which prohibits immunity from prosecution. In so far as the litigation resulting in this appeal resulted from the handshake between the President and **Hon. Raila** culminating into the now vitiated BBI process, whatever the President did with regard thereto in my view was pursuant to his official function as the President. He could not therefore be sued in his personal capacity. The petition rightly stood vitiated.

15) **WHETHER THE PROCEEDINGS AGAINST UHURU MUIGAI KENYATTA WERE *RES JUDICATA:***

162] The High Court expressed itself thereon as follows; the judges construed **section 7** of the **CPA**, that the threshold for application of the doctrine as variously expounded in Halsbury's Laws of England in relation to the Attorney General's complaint that the specific question concerning the legality or constitutionality and the mandate of the Steering Committee had been resolved by **Mativo, J.** in **Thirdway Alliance Kenya & Another vs. Head of Public Service & 2 Others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR**.

163] The Judges made observations on the pleadings in the above cases and those in Petition No. E400 of 2020 namely:; a **declaration that the body being referred to as the Building Bridges to Unity Advisory Taskforce established vide gazette notice No.5154 dated 24th May 2018 was unconstitutional, illegal, null and void"** on issues in controversy before them and declined to uphold the objection because what was before **Mativo, J.** did not involve complaints triggered by the inclusion of the constitutional amendment mandate of the Steering Committee.

164] The appellant has relied on **section 7** of the **Civil Procedure Act** (CPA) as construed and applied numerously among others in the following authorities; **John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**; **Africa Oil Turkana Limited (previously Known as Turkana Drilling Consortium Ltd) & 3 Others vs. Permanent Secretary, Ministry of Energy & 17 Others [2016] eKLR**; **Muchanga Investments Ltd vs. Safaris Unlimited (4frica) Ltd & 2 Others [2009] eKLR**; **Peter Mbogo**

Njogu vs. Joyce Wambui Njogu & Another [2005] eKLR; **Pop-In (Kenya) Ltd & 3 Others vs. Habib Bank AG Zurich [1990] eKLR** and **E.T. vs. Attorney General & Another [2012] eKLR,** cumulatively for the proposition/holdings that res judicata being a fundamental principle of law may be raised as a valid defence as it is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature and urged for the appeal to be allowed and the partially impugned judgment set aside in so far as it revolves around the issues in controversy in the appeal.

165] The issue of *res judicata* in this context was raised in respect to the legality and mandate of the Steering Committee having been determined by the High Court, in **Nairobi Constitutional Petition No. 451 of 2018; Third Way Alliance vs The Hon. Attorney General & Others [2020] eKLR**. In that case, the **Third Way Alliance Kenya**, a political party registered under the Political Parties Act, No. 11 of 2011, which was the Petitioner in **Petition No. E400 of 2020**, sued **Mr. Joseph Kinyua**, the Head of Public Service, the Building Bridges to Unity Advisory Taskforce and the A.G. Amongst the prayers sought in that petition was a prayer framed as follows:

> **"a. A declaration that the body being referred to as the Building Bridges to Unity Advisory Taskforce established vide gazette notice No.5154 dated 24th May 2018 is unconstitutional, illegal, null and void**."

The High Court in rendition of the impugned judgement held as follows

> **"529. Of the several questions that we have been asked in these Consolidated Petitions, one question that was not asked in the *Third Way Alliance case* is whether the President can establish a committee, or any other entity for that matter, to initiate the change or amendment of the Constitution outside the means prescribed by the Constitution itself. To**

be precise, can the amendment of the Constitution be initiated in any way other than those envisaged in Article 256 and 257? As we understand it, the Petitioner's case in *Petition No. E426 of 2020* is that the BBI Steering Committee impermissibly initiated the amendment of the Constitution in the guise of an amendment by popular initiative under Article 257 when, in fact, it is an initiative by the President hiding behind the BBI Steering Committee. The question we are faced with is whether BBI Steering Committee which, in the Petitioner's view, was established with the sole purpose of undertaking an assignment which is contrary to the provisions of the Constitution, is constitutional and, by the same token, whether anything done by such a committee is constitutional.

530. In our humble view, the answer to this question cannot be found in the judgment in the *Third Way Alliance Party case* not because the Court in that case was incapable of answering it but because it is a question that was not asked and interrogated. In the words of explanation 3 of section 7 of the Act, it is not a matter '*alleged by one party and either denied or admitted, expressly or impliedly, by the other*'. What is before us is a more specific question that narrows down from the question whether the President can generally form any committee, of whatever form or shape, on any matter to a more specific question whether he can form such a committee to initiate changes or amendment to the Constitution. This was a question not before the Learned Judge in the *Thirdway Alliance Case*. This is because, in the *Thirdway Alliance Case*, the BBI Taskforce did not have the mandate to initiate constitutional amendments. However, the BBI Steering Committee has, as one of its terms of reference, the mandate to initiate constitutional changes which is the exact reason the Petitioner in *Petition E426 of 2020* – is challenging its legality.

531. It is for the foregoing reason that we are or of the firm view that we are not estopped from discussing the constitutionality of the BBI Steering Committee and its mandate in so far as the amendment of the Constitution is concerned. In other words, this issue is not *res judicata*.

166] My take on the above rival position is that I agree with the position taken by the Judges summarized above with regard to the invocation and application of the doctrine of *res judicata*. The doctrine is provided for in our jurisprudence by dint of **section 7** of the **Civil Procedure Act** which provides;

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

167] The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit;

a. **The suit or issue was directly and substantially in issue in the former suit.**
b. **That former suit was between the same parties or parties under whom they or any of them claim.**
c. **Those parties were litigating under the same title.**
d. **The issue was heard and finally determined in the former suit.**
e. **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

168] See **Mulla, Procedure Code Act of 1908 16th Edition**. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others (2017) eKLR,**

> **"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and**

respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

See also **William Koros (Legal Personal Representative of Elijah, C.A. Koross v. Hezekiah Kiptoo Komen & 4 others (2015) eKLR**.

169] In **Henderson vs Henderson (1843) 67 ER 313**, *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of **Mburu Kinyua vs. Gachini Tutu (1978) KLR 69 Madan, J.** Quoting with approval **Wilgram V.C.** in **Henderson vs. Henderson** [supra] stated:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time"

170] In **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] eKLR**, this Court in determining yet another application in the above case stated thus:

> **"In Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Pte Ltd[2009] S GHC 234, the Court of Appeal (of Singapore) examined the doctrine of res judicata in relation to decided cases and observed that the policy reasons underlying the doctrine of res judicata as a substantive principle of law are first "the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" and second, "the rights of the individual to be protected from vexatious multiplication of suits and prosecutions."**

The Court went on to state that:

> **"the courts have never accepted res judicata as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the Court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the Court's erroneous decision were to form the basis of an estoppel against the aggrieved party.... In such a case, the tension between justice principle and the finality principle is resolved in favour of the former."**
>
> **"... the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."**

171] From the above exposition of the invocation and application of the doctrine of res judicata, it is my position that there are instances where the

public interest is given prominence over parties' interests in a suit. Such an instance, in my view, would be like in the instant appeal where great burden of litigation has been placed upon a party necessitating such a party to seek protection from the court. The Supreme Court of India in the case of **State of UP vs. Nawab Hussain, AIR 1977 SC 1680**, considered the doctrine of constructive *res judicata* and delivered itself thus,

> "**This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon."**

Further that,

> **But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could; have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle."**

See also **John Njue Nyaga vs. Attorney General & 6 others [2016] eKLR** and **John Florence Maritime Services Limited & Another vs. Cabinet**

Secretary for Transport and Infrastructure& 3 Others [2015] eKLR to the effect that:-

> **"It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3 (8) (emphasis ours) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions".**

172] On the totality of the above assessment and reasoning, I find no reason to interfere with the conclusions reached.

16) WHETHER PRESIDENT UHURU MUIGAI KENYATTA CONTRAVENED CHAPTER 6 OF THE CONSTITUTION

173] I adopt submission, assessment and reasoning of the Judges when dealing with the issue as to whether the President can initiate a constitutional amendment through a popular initiative under **Article 257** of the **CoK, 2010** already highlighted above. The appellants fault the Judges both on the reasoning and conclusions reached on this at paragraphs 485 – 499 and 582 to 588 of the impugned judgment that pursuant to the provisions of **Articles 131** and **132** of the Constitution the President does not have power to initiate the amendment of the Constitution by a popular initiative; and without any constitutional basis;

that the only pathway the President can use to amend the Constitution is the Parliamentary route initiative.

174] It is also contended that the judges fell into error when they restricted the popular initiative process to ordinary citizens (Wanjiku) based on the erroneous reasoning that Wanjiku cannot access and make use of the parliamentary initiative route and consequently ruled that the President breached **Article 73(1)** of the Constitution. The Appellant relies on the High Court decision of **Thirdway Alliance Kenya & Another vs. Head of the Public Service - Joseph Kinyua Building Bridges to Unity Advisory Taskforce & 2 Others; Martin Kimani & 15 Others (Interested Parties) [2020] eKLR** and submits that it is common ground that it is the President who caused both the TaskForce and the BBI Steering Committee to be gazetted pursuant to the function and obligation conferred upon him by **Articles 131** and **132** of the Constitution.

175] The conclusion reached above are termed erroneous by the appellant because the judges failed to appreciate that in as much as it is undisputable that the appellant is a President of the Republic of Kenya, he is a registered voter and he is entitled to participate in the amendment of the Constitution by popular initiative under **Article 257** of the Constitution. Likewise, as a citizen and leaders of a political party, he is entitled to the enjoyment of political rights guaranteed under **Article 38** of the Constitution including the right to participate in the activities of a political party such as to campaign for a political party or case. It is also the appellants position that the judges impugned conclusion are erroneous because according to them there is no such a person as an **"initiator"** with regard to a popular initiative under **Article 257** of the Constitution.

176] The appellant was therefore not an initiator of the Amendment Bill notwithstanding that there is nothing in law that bars him from being a promoter or in any way participating in the amendment of the Constitution by popular initiative in his capacity as a registered voter. To hold otherwise in the appellants' opinion would be tantamount to violation of the President's right to equal protection and equal benefit of the law under **Article 27** of the Constitution. The Judges conclusion also failed to appreciate that unlike under the old constitutional arrangement, the President under the current constitutional arrangement is not a member of Parliament. It was also erroneous for the judges to assume that Wanjiku cannot initiate a constitutional amendment through the Parliamentary route when she can do so through duly elected Parliamentary representatives. Second, the fact that the President assents to a Bill for it to become law is not per se sufficient reason to bar the President from enjoyment of constitutional rights guaranteed to an individual.

177] The appellants have also faulted the judges on their assessment and conclusion reached in paragraph 485 – 499 and 582 – 588 firstly, because the conclusion reached therein are riddled with irresolvable problems/ tensions and sporadic findings because the learned trial judges failed to interpret the entire Constitution conjunctively in a manner that creates harmony. To buttress the above assertion, appellant has relied on the case of **Olum vs. Attorney General of Uganda [2002] 2 EA 508** for the holding *inter alia* that the entire Constitution should be read as an integrated whole and no one particular provision destroying the other but each sustaining the other.

178] Constitutional provisions must be construed as a whole in harmony with each other without insubordination of any one provision; **Major**

General David Tinyefuza vs. Attorney General Const. Pet. No 1 of 1996 (1997 UGCC 3) for the reiteration that the need for the Constitution to be interpreted harmoniously is a rule of harmony, completeness, and exhaustiveness; the holding of **Mutunga CJ.** (as he then was) in the **Supreme Court Advisory Opinion No. 2 of 2013 Speaker of the Senate & Another vs. Hon. Attorney General & 3 Others [2013] eKLR** for the holding *inter alia* that the Constitution does not subvert itself hence their conclusion that it is a peremptory rule of Constitutional construction that no provision of the Constitution is to be segregated from the others.

179] In light of the above submission, appellants argue that it would be extremely restrictive to argue that because in **Article 131** and **132** of the Constitution, the President cannot exercise other rights and enjoy other freedoms that other parts of the Constitution guarantee him. It would also be unjust to exclude the President from actively participating in discussion geared towards bringing change to the Constitution.

180] Further that without any proper legal underpinning for the finding, that the President cannot articulate on a popular initiative under **Article 257** of the Constitution it can only be assumed that the judges were expressing their personal opinions hence appellants' contention that in reaching the conclusion reached the judges only interpreted the nature and context of a popular initiative. Second, that the finding that **Articles 131** and **132** of the Constitution prohibits the President from supporting a popular initiative is premised on the wrong interpretation of **Article 257** of the Constitution and is an unjustified fetter of rights granted in **Articles 33, 36** and **38(1)(c)** of the Constitution and prays that the finding that the

President breached **Article 73(1)(a**) of the Constitution ought to be set aside.

181] The respondents' reaction is as has been highlighted earlier on when dealing with popular initiative and I find no need to rehash it but will bear them in mind as I proceed to determine this issue. As already expressed earlier on in a similar issue, **Article 257** of the CoK, 2010 constitutional procedures are reserved for those who cannot constitutionally have recourse to **Article 256** procedures. As also earlier alluded, when dealing with the functions of the President under **Articles 131** and **132** of the Constitution, once sworn he becomes the President until his term ends. In fact, **Article 131(3)** is explicit that once sworn in as President, he cannot hold any other office. Going by this **"dogma"** or **"penumbra"** according to me, there is no way the President can constitutionally change his status as and when he feels like say this, now as a President, and next as a Wanjiku.

182] Yes, I agree the President is a Kenya citizen like all of us. Yes, he is entitled to enjoy rights like all other persons without discrimination. However, those rights are tainted with his office. He can only enjoy them on terms of those prescriptions. The Judges were right and I would uphold their finding. He flouted the provisions in so far as he sanctioned the inclusion of an item on constitutional amendment in the mandate of the Steering Committee which had not formed basis for the Taskforce mandate and resulting recommendations. Second, when it is not in dispute that the Steering Committee was formed to come up with modalities on how to fruition the recommendations of the Taskforce and which Taskforce recommendations did not include constitutional amendments. The

President therefore overstepped his boundary as correctly held by the Judges.

17) WHETHER THE CONSTITUTION (AMENDMENT) BILL, 2020 VIOLATED ARTICLE 43(1)(A) IN VIEW OF THE COVID-19 PANDEMIC

183] On the alleged violation of the rights in **Article 43** in relation to the Covid-19 pandemic raised in Petition No. E416 of 2020, the Judges reviewed the case of **William Ramogi & 3 Others vs. The Attorney General and 4 Others [2019] eKLR** and rejected the complaint holding that the issues raised by the petitioner in Petition No. E416 of 2020 though novel was not properly supported by sufficient evidence.

184] In **Petition No. E416 of 2020** by **Morara Omoke**, who described himself as an adult Kenya citizen and a patriot. He anchored his petition on numerous Articles of the Constitution of Kenya, 2010 cited in its heading and directed against the **Hon. Raila Amolo Odinga**, the AG, the Steering Committee, the National Assembly, the Senate and IEBC. His complaints were substantively that organizing massive rallies for signature collection during Covid-19 pandemic was in breach of the Covid-19 regulations; the Amendment Bill proposing constitutional changes was drafted without mandate; there was a failure to advise the President to use his authority and perform his functions in a constitutional manner; and there was a violation on the principle of public finance under **Article 201** of the Constitution by use of public funds to pursue a private arrangement.

185] The petitioner also argued that there was failure to appreciate that: there was no legislation operationalizing **Article 257** of the Constitution,

through which the impugned Bill could be processed. Lastly, that following the advice by the Chief Justice under **Article 261(7)** of the Constitution, the current Parliament was unconstitutional and could not therefore process the Amendment Bill. There was therefore need to give the public the Taskforce and Final Steering Committee reports and impugned Bill in Kiswahili, indigenous languages, braille and sign language before the referendum and that the collection of a single set of signatures to endorse all the contemplated constitutional amendments was in violation of the Constitution.

186] On Covid-19 pandemic, the judges are faulted for the failure to take judicial notice of the surge in the incidences of Covid-19 associated with political rallies led by the President and Hon. Raila to popularize the impugned Bill which in their opinion was a threat to the right to the highest attainable standard of health. Also relies on the **South African decision of Minister of Health and Others vs. Treatment Action Campaign and Others (No. 2) (CCF8/02) [2002] ZACC 15; 2002(5) SA 721; 2002 (10) BCLR 1013** on State obligation attendant to the right to health namely, respect, protect and fulfil and submits that **Article 43(1)(a**) of the Constitution was violated in addition to breach of **Article 201** by reason of prioritizing the amendment of the impugned Bill is opposed to the health of Kenya.

187] The respondents to the cross-appeal have taken the position that the Judges cannot be faulted on the conclusion reached on the issue in the absence of sufficient material being placed before them; that the judges were right in declining the cross-appellants' invitation for them to go on a fishing expedition to get that information. The burden was on the cross-

appellant to lay basis for his assertion which he failed to do. They therefore urged the court to dismiss the cross appeal.

188] It is not disputed that issue to do with the proposed referendum, Covid-19 pandemic and the rights in **Article 43** were raised in Petition No. E416 of 2020 in which the Judges reviewed the rival position in the said petition as already highlighted above and considered this in light of the construction of **Article 43(1)(a)** which guarantees every person the right to the highest attainable standard of health, which includes the right to health care services and reproductive health.

189] They made observations that **Sub-Article (3)** obligates the State to provide appropriate social security to persons who are unable to support themselves and their dependants, made observation therein and considering these in light of the decision in the case of **William Ramogi & 3 Others vs. The Attorney General and 4 Others [2019] eKLR**, drew out conclusion *inter alia* that: *the issue raised by the Petitioner in Petition No. E416 of 2020 though novel was not properly supported by sufficient evidence, without which they were unable to make the findings the Petitioner craved and as such, dismissed the petition.*

190] In light of what has been summarized above, I find no basis for faulting the Judges. The cross-appellant only put forth newspaper cuttings and invited the court to take judicial notice of these. As already observed above, the burden was on the cross-appellant to provide supportive material. I have no reason to interfere with the conclusions reached by the judges on the issue.

18) **WERE BOTH OR EITHER OF THE HOUSES OF PARLIAMENT INFIRMED FROM CONSIDERING THE CONSTITUTIONAL AMENDMENT BILL IN VIEW OF THE CHIEF JUSTICE'S ADVISORY FOR THE DISSOLUTION OF PARLIAMENT:**

191] On the alleged parliamentary infirmity arising from the Chief Justices Advisory for the dissolution of Parliament, also raised by the Petitioner in Petition No. E.416 of 2020, the Judges considered the rival position before them on this issue and rejected the complaint arguing that the same issue was alive in **Milimani High Court Petition No. 302 of 2020 Third way Alliance vs. Speaker of the National Assembly & Another (consolidated with JR No. 1108 of 2020 and Petition Nos. E291 of 2020 and 300 of 2020.)** and advised the petitioner therein to apply to join those Petitions and urge his reliefs jointly with the other Petitioners in the same.

192] On the validity of Parliament as currently constituted, the judges are faulted, firstly for declining to grant the request which in the cross-appellants' opinion was well founded especially when the wording of **Article 261 (7)** of the Constitution compels the President to dissolve Parliament and his failure to do so cannot validate any business transacted after the opinion on dissolution of parliament was rendered. Second, that issues raised by the cross appellant were distinct from those under consideration in **Milimani High Court Petition No. 302 of 2020 Third way Alliance vs. Speaker of the National Assembly & Another (consolidated with JR No. 1108 of 2020 and Petition Nos. E291 of 2020 and 300 of 2020**. Third, that under **Article 261(7)** of the Constitution of Kenya, no further court action is required to be undertaken after the opinion on dissolution of Parliament is rendered.

193] My take on this issue is that the Judges gave sound reasoning as to why they declined the cross-appellants' petition. I find no reason to differ.

19) **WHETHER THE HIGH COURT ERRED IN FINDING THAT THE BBI TASKFORCE DID NOT CREATE A LEGITIMATE EXPECTATION THAT THE SUBMISSIONS BY KNUN WOULD BE INCORPORATED IN THE CONSTITUTION AMENDMENT BILL;**

194] On the import of omitting to make provision for an Independent Constitutional Health Services Commission in the impugned Bill, the Judges considered the rival position before them in light of the exposition on the subject in **De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609** that legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage; the case of **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016] eKLR** for the proposition *inter alia* that, the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question; the Court of Appeal decision in **British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR** for the holding *inter alia* that, public participation does not necessarily mean that the views given must prevail; the Supreme Court decision in the case of **Communication Commission of Kenya vs. Royal Media Services Ltd & 5 Others [2014] eKLR** for the exposition *inter alia* that: *"…there must be clear and unambiguous promise given by a public authority, the expectation must be clear, the representation must be one which it was competent and lawful for the decision maker to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution".*

195] Lastly, decision in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** for the holding *inter alia*

that: *"…unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."*; and concluded in a summary that: the mere fact that an entity is required to take into account public views does not necessarily mean that those views must find their way into the final decision; there was no demonstration to show that either the Steering Committee made representation to the Kenya National Union of Nurses and the nature of such representation; there was no demonstration that there was any representation, if any, that those views would be incorporated in the impugned Bill nor that the Steering Committee, had it been found by the court to be a lawful entity, was bound by such representation; and lastly, the Kenya National Union of Nurses would only have been justified in contending that it ought to have been afforded an opportunity of being heard before a final decision was arrived at on the matter if there had been a demonstration that there was representation by the Steering Committee that the views of the Kenya National Union of Nurses would be incorporated in the impugned Bill and on that account disallowed the Petition.

196] The approach I take in resolving this issue is that it is common ground that the cross-appellant herein in answer to the Taskforce's invitation to file memoranda on policy issues falling into its mandate, did in fact file a memoranda seeking provision for a constitutional entrenched outfit firstly to enjoy the status of a constitutional commission. Second, to represent the welfare of all health workers hither to neglected. It is also common ground that upon assessing the rival position on the issue, the Judges rendered a verdict I have already highlighted above hence this cross-appeal.

197] As was held in **Republic vs. Kenya Revenue Authority Ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012**:

> **"...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."**

Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.

198] It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. This was the view adopted in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** where it was held that:

> **"...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."**

199] In other words since the doctrine of legitimate expectation is based on considerations of fairness, even where the benefit claimed is not

procedural, it should not be invoked to confer an unmerited or improper benefit. **See R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241.** Similarly, in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** it was held that:

> **"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."**

See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67]**. The three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

> **"In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."**

In **De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609** it is stated that:

> **"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."**

200] In **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

> **"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."**

201] The rationale for this doctrine was restated in **R vs. Devon County Council Ex parte P Baker [1955] 1 All ER** where it was held:

> **"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."**

202] The principle of legitimate expectation was elaborated upon in the case of **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR** where the Court held *inter alia* that:

"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

Similar reliance was placed on **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was held that:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The

strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

203] As was held in **Republic vs. Kenya Revenue Authority Ex parte Shake Distributors Limited HC Misc. Civil Application No. 359 of 2012**:

> **"...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."**

204] It is also a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. This was the view adopted in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** where it was held that:

> *"...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."*
>
> *My view is that the aspect of legitimate expectation did not arise in this aspect as the Taskforce cannot be necessarily referred to as a public body that would ensure that all the views of stakeholders would necessarily be considered as binding and mandatorily included in the impugned bill.*

205] I have considered the above exposition in light of the rival position herein on this issue. My take thereon is that, it is common ground that

BBI's invitation for public input on the policy issues involved no mention that any requests or recommendations by any participating entity would be taken on its face value. Lack of such an assurance prima facie donated discretion in both the Taskforce and the Steering Committee to choose what to include in the end product action plan and what to leave out. Stated simply, legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. There is no demonstration by the cross-appellant that this was the position. Their claim was rightly rejected by the Judges. The cross-appeal is dismissed.

20) WHETHER THE PETITIONERS HAD MADE OUT A CASE FOR DISCLOSURE AND PUBLICATION OF THE BBI STEERING COMMITTEE'S FINANCIAL INFORMATION

206] On this issue, the Judges appreciated the petitioners complaint that the President had flouted **Article 73(1)(9)(i)** of the Constitution on the exercise of authority entrusted to a State officer, notwithstanding that no evidence had been presented before them on whether the Steering Committee spent any public funds on its operation and if so how much, the judges construed **Articles 73(1)(9)(i)** and ruled that the authority of the President and the functions attendant to his office are matters covered in **Articles 131** and **132** of the Constitution, none of which stipulates that the President can initiate a proposal to amend the Constitution. In their opinion, this was a clear attempt to stretch the authority of the President under **Article 131(2)(c)** to include the power to initiate the amendment of the Constitution.

207] On the request for disclosure and publication of the Steering Committees financial information as sought for by the petitioner in Petition No. E416 of 2020, the judges construed **Article 35** and **sections 4(2)(8)** and **9** of the **Access to Information Act**, the case of **Nairobi Law Monthly vs. Kenya electricity Generating Company & 2 Others [2013] eKLR**, and **Trusted Society of Human Rights Alliance & 3 Others vs. Judicial Service Commission [2016] eKLR** and rejected the complaint for failure to follow the inbuilt procedures for seeking information which has to be supplied within twenty-one (21) days. It is only in default of the above process that a party can seek the court's intervention and faulted Petition No. E416 of 2020 for the petitioner's failure to exhaust the above process before seeking the court's intervention.

208] Mr. Morara in his cross appeal, decried that the learned judges declined to order the President, **Hon. Raila** and the Steering Committee to publish or cause to be published details of the budget and public funds allocated and utilized in promoting the impugned Bill.

209] The Judges held that as much as the petitioner's prayer was anchored under **Article 35** of the Constitution, the Petitioner failed to demonstrate that he had sought for the information he wanted the court to order its publication and the same was denied; if that was the case, then **Mr. Morara** would have moved the court for a determination whether his right of access to information had been infringed, in which case he would have been at liberty to seek appropriate orders. In the circumstances, the learned judges held, the prayer for disclosure as sought was premature. **Article 35** provides for access to information and states as follows:

> **"35. (1) Every citizen has the right of access to -**
> **(a) information held by the State; and**

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation."

210] From that provision, it is clear that information held by the State is accessible by citizens and the information ought to be availed upon request. **Access to Information Act, 2016**, that was enacted by Parliament in actualization of **Article 35** of the Constitution elaborates the citizens right of access to information. See the Supreme Court decision in **Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR**. **Section 4** of the Act provides that:

"4(1) Subject to this Act and any other written law, every citizen has the right of access to information held by -

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen's right to access information is not affected by -

(b) any reason the person gives for seeking access; or

(c) the public entity's belief as to what are the person's reasons for seeking access.

3 Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4. This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

5. Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information."

Section 8 of the **Act** provides for the mode of making an application for access to information and states as follows: -

> **"8. (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested."**

211] Further, **section 9** requires a public officer to decide on the application and communicate the same within twenty-one days of receipt of the information. Under **subsection (4)** the officer is required to communicate the decision to the requester indicating whether the public entity or private body holds the information sought and whether the request for information is approved. If the same is not communicated, then it will be deemed that the application is rejected. In **Njonjo Mue case** (supra) the Supreme Court held as follows:

> **"[13] Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd Respondent. In addressing that issue, the Court in Petition No. 479 of 2013, Rev. Timothy Njoya vs. Attorney General & Another; [2014] eKLR, it was held; "A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In Nairobi Law Monthly v. Kengen** (supra) **the Court dealt with the applicability of the right to information as follows:**
>
> *"The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on*

the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the state."

[14] This right of access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically, procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity."

212] This Court also made an observation on the same in the case of **Okiya Omutatah Okoiti & 2 others vs Attorney General & 4 others [2020] eKLR** where it held that:

> **"83. ...Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution..."**

213] According to the foregoing and the relevant applicable provision of law, the correct procedure was for the petitioner to request for information, interrogate these, identify faults and then raise specific complaints with regard to the identified faults. The complaints vitiated by the judges were in general form. They were asking the particular appellants to provide the information through litigation. I thus find no reason to upset the findings of the learned judges.

21) **WHETHER THE HIGH COURT ERRED IN LAW IN ADMITTING AMICI CURIAE WHO WERE PARTISAN**

214] The answer is in the negative as it is a process accepted in law. All that the court was enjoined to do after admitting the Amici was to distil their briefs and only take into consideration that which in their (judges) view was nonpartisan and reject that which was partisan as in law an Amici is a friend of not only the court but also the participating parties. The only course open to an *amicus* is to aid the Court in arriving at a determination based on the law, and/or upon uncontroverted, scientific and verifiable facts.

215] The legal principles applicable to the admission and participation of a friend of the court in proceedings were stated by the Supreme Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 others [2015] eKLR** as follows:

> **"[41] From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:**
>
> **i. An amicus brief should be limited to legal arguments.**
>
> **ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.**
>
> **iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.**

iv. **An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.**

v. **The Court may call upon the Attorney-General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.**

vi. **Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: Raila Odinga & Others vs. IEBC & Others; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus).**

vii. **An amicus curia is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.**

viii. **The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.**

ix. **In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.**

x. **An amicus curia shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.**

216] As observed by the Constitutional Court of South Africa in the case of **Children's Institute vs. Presiding Officer of the Children's Court, District of Krugersdorp and Others** (CCT 69/12) [2012]:

> **"...the role of a friend of the court can, therefore, be characterized as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution."**

217] Rule 3 of the **Supreme Court Rules, 2012** defines *"amicus curiae"* as *"a person who is not party to a suit, but* ***has been allowed*** *by the Court to appear as a friend of the Court."* **Rule 54(1)** vests the Court with the power to appoint *amicus curiae* in any proceedings, while ***sub-rule 2*** sets out the criteria:

> **"The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public Interest, or any other relevant factor"** [emphasis supplied].

218] Rule 25 on the other hand outlines the admission of interested parties into the Court's proceedings.

> **"25. (1)** A person may **at any time in any proceedings before the Court** apply for leave **to be joined as an** interested party**.**
>
> **(2) An application under this rule shall include–**
>
> **(a) a description of the interested party;**
>
> **(b) any** prejudice **that the interested party would suffer if the intervention was denied; and**
>
> **(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties." [emphasis supplied].**

D. <u>CONCLUSION</u>:

219] On totality of the above assessment and reasoning, the positions I take on the issues determined above is that:

1) **The basic structure doctrine applies to the Constitution of Kenya, 2010. There are no eternity clauses in the Constitution. Neither were they anticipated hence their lack of inclusion in the CoK, 2010 by Wanjiku.**

2) **The initiators of the BBI process are the two dignitaries that is, the President and Hon. Raila.**

3) **The Taskforce and Steering Committees reports are only tainted and therefore illegal, unlawful, null, void and unconstitutional only to the extent that there is provision in the Steering Committee's mandate for an item on constitutional amendment not provided for in the Taskforce's report that the Steering Committee was tasked to come up with modalities for implementation.**

4) **The proposed constitutional amendments in the impugned Bill were not originated by popular initiative. Neither did they receive public participation in the manner provided for in the Constitution.**

5) **The President has no mandate to initiative constitutional amendments by way of popular initiative in his capacity as a sitting President as constitutional provisions guiding the exercise of his mandate make no provision that would allow him to change position with Wanjiku as deemed fit.**

6) **IEBC is not quorate. Neither was it ready or properly tooled and or capacitated to carry out the then impending referenda. IEBC has also failed in its mandate with regard to continuous voter registration.**

7) **The proposals in the impugned Bill were mandatorily required to be presented to Wanjiku as separate and distinct questions for ease of digestion by Wanjiku.**

8) **The High Court was properly seized of the consolidated petitions and rightly declined to down tools as erroneously invited to do so by the appellants.**

9) **The proposed creation of the seventy (70) extra constituencies and their purported direct allocation were all unconstitutional.**

10) **Both legal and regulatory frameworks for purposes of constitutional amendments under Article 257 which are currently nonexistent are a must.**

11) **No civil proceedings can be instituted against the President as a sitting President. Those instituted in relation to the BBI process stand vitiated.**

12) **The President was never served with court processes. The court proceedings against him stand vitiated with no attendant order for retrial for reasons given in the assessment.**

13) **The President did not contravene the Constitution with regard to alleged mounting of political rallies in the wake of Covid-19 pandemic. Nor for failure to account for public funds allegedly spent towards the BBI exercise.**

14) **Parliament is properly constituted notwithstanding the former Chief Justice's advisory opinion on dissolution for reasons given in the assessment.**

15) **No legitimate expectation was created by the Taskforce in favour of the KNUN.**

16) **The Amici were properly admitted.**

D. FINAL ORDERS:

220] The final orders of the court are as contained in the lead judgment of the President of the Court.

E. ACKNOWLEDGEMENT:

221] May I join the President of the Court and my colleagues' members of this bench to most sincerely appreciate the industry and quality of both the material submitted for consideration in the determination of the consolidated appeals and the manner of conduct and respect exhibited both to the court and amongst senior counsel and learned counsel themselves during the proceedings which should be encouraged as it is a show of mature professionalism expected of legal fraternity.

222] May I also appreciate all Court of Appeal staff attached to me and who have been very instrumental in assisting me to come up with this judgment. First I wish to thank my legal researcher, Ms. Edith Gathara, for her well done research in preparation of this judgment. My secretary, Ms. Triza Abala, I appreciate her patience and hard work in the preparation of this judgment. Last but not least, I appreciate my court assistant, Ms. Justine Cherop who assembled and made available all the pleadings and the reading materials needed in hard copies.

DATED AND **DELIVERED** AT **NAIROBI** THIS **20TH DAY OF AUGUST 2021.**

R. N. NAMBUYE

.....
JUDGE OF APPEAL

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE,

GATEMBU, SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....APPELLANT

AND

DAVID NDII .....1ST RESPONDENT
JEROTICH SEII.....2ND RESPONDENT
JAMES GONDI.....3RD RESPONDENT
WANJIRU GIKONYO.....4TH RESPONDENT
IKAL ANGELEI.....5TH RESPONDENT
ATTORNEY GENERAL.....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....7TH RESPONDENT
SPEAKER OF THE SENATE.....8TH RESPONDENT
KITUO CHA SHERIA.....9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT
DR. DUNCAN OJWANG.....11TH RESPONDENT
OSOGO AMBANI.....12TH RESPONDENT
LINDA MUSUMBA.....13TH RESPONDENT
JACK MWIMALI.....14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT
THE STEERING COMMITTEE ON THE
IMPLEMENTATION OF THE BUILDING BRIDGES
TO A UNITED KENYA TASKFORCE.....16TH RESPONDENT
BUILDING BRIDGES NATIONAL SECRETARIAT.....17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE.....18TH RESPONDENT
THIRDWAY ALLIANCE.....19TH RESPONDENT
MIRURU WAWERU.....20TH RESPONDENT
ANGELA MWIKALI.....21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY.....22ND RESPONDENT
THE SPEAKER OF THE SENATE.....23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA.....24TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....26TH RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER.....27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU.....28TH RESPONDENT

COUNTY ASSEMBLY OF TAITA TAVETA.....29TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA.....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....34TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI.....36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU.....37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI.....38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA.....41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI.....42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU.....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI.....52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET.....59TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA.....63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY.....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....67TH RESPONDENT
COUNTY ASSEMBLY OF KISII.....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY.....70TH RESPONDENT
PHYLISTER WAKESHO.....71ST RESPONDENT
254 HOPE.....72ND RESPONDENT
THE NATIONAL EXECUTIVE OF
THE REPUBLIC OF KENYA.....73RD RESPONDENT
JUSTUS JUMA.....74TH RESPONDENT
ISAAC OGOLA.....75TH RESPONDENT

MORARA OMOKE.....76TH RESPONDENT
RTD. HON. RAILA ODINGA.....77TH RESPONDENT
ISAAC ALUOCHIER.....78TH RESPONDENT
UHURU MUIGAI KENYATTA.....79TH RESPONDENT
PUBLIC SERVICE COMMISSION.....80TH RESPONDENT
THE AUDITOR GENERAL.....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI).....82ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT)...1ST APPELLANT
HON. RAILA AMOLO ODINGA.....2ND APPELLANT

AND

DAVID NDII & 76 OTHERS .....RESPONDENTS

KENYA HUMAN RIGHTS COMMISSSION.....1ST AMICUS CURIAE
DR. DUNCAN OJWANG.....2ND AMICUS CURIAE
OSOGO AMBANI.....3RD AMICUS CURIAE
LINDA MUSUMBA.....4TH AMICUS CURIAE
JACK MWIMALI .....5TH AMICUS CURIAE

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT

AND

DAVID NDII & 73 OTHERS .....RESPONDENTS

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA.....APPELLANT

AND

DAVID NDII & 82 OTHERS .....RESPONDENTS

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

JUDGMENT OF OKWENGU, J.A.

INTRODUCTION

[**1**] 27th August 2010 was a great day in the history of the nation of Kenya. Finally, the constitution review process had successfully culminated in the promulgation of the Constitution of Kenya, 2010. The people of Kenya were ecstatic that in the Constitution they exercised their sovereign power and determined their present and future. It was hailed as one of the most progressive and transformative Constitutions. However, the acid test is in the implementation of the Constitution. This is demonstrated in the consolidated appeals before us where we are called upon to interrogate the implementation of the amendment provisions in the Constitution as provided under Chapter 16 of the Constitution. The consolidated appeals before us arise from consolidated petitions that were filed in the High Court challenging the exercise of these provisions.

[**2**] I do not find it necessary to set out in detail the background to the consolidated appeals, the grounds of appeals or the issues raised, as Musinga, (P) has done so comprehensively in his judgment. The issues raised in the consolidated appeals are many and since I concur with my brother and sister judges in most of the issues, I will only add my voice on a few select issues. These are:

(i) The Basic structure doctrine and its applicability to Kenya

(ii) The remit of a popular initiative under Article 257 of the Constitution

(iii) Legality of the BBI process and the President's involvement.

(iv) Propriety of the Proceedings against the President.

A. THE BASIC STRUCTURE AND THE BASIC STRUCTURE DOCTRINE

[**3**] Issues surrounding the basic structure doctrine were at the core of the consolidated appeal. I wish to make some remarks on what the basic structure is in the Kenya Constitution; whether the basic structure is amendable or has eternal clauses; and the effect of Chapter 16 of the Constitution on the application of the basic structure doctrine to the Constitution of Kenya.

[**4**] The learned Judges of the High Court made findings at paragraph 474 of the judgment on this issue as follows:

> **"a) The text, structure, history and context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by the Constitution yield the conclusion that the Basic Structure Doctrine is applicable in Kenya.**
>
> **b) As applied in Kenya, the Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either Secondary Constituent Power or Constituted Power.**
>
> **c) The sovereignty of the People in constitution-making is exercised at three levels:**
>
> **Primary constituent power ...**

Secondary constituent power..
The constituted power...

d) The essential features of the Constitution forming the Basic Structure can only be altered or modified by the People using their Primary Constituent Power.

e) The Primary Constituent Power is only exercisable after four sequential processes have been followed:

i. **Civic education ....**
ii. **Public participation and collation of views ....**
iii. **Constituent Assembly Debate, consultations and public discourse..**
iv. **Referendum ...”**

[**5**] In short, the learned Judges made findings that can be split into three specific findings: first, that the basic structure doctrine is applicable in Kenya; secondly, that the basic structure of the Constitution can only be amended by the people exercising their primary constituent power; and thirdly, that the exercise of the primary constituent power involves four consequential processes, i.e. civic education, public participation and collection of views, constituent assembly debate, consultations and public discourse, and referendum, to endorse or ratify the draft Constitution.

[**6**] The learned Judges of the High Court identified at paragraph 474 (f) of their judgment what, in their view, was the basic structure of the Constitution as:

“(f)... the Basic Structure of the Constitution consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and

the six schedules of the Constitution. This structure outlines the system of government Kenyans chose – including the design of the Judiciary; Parliament; the Executive; the Independent Commissions and Offices; and the devolved system of government. It also includes the specific substantive areas Kenyans thought were important enough to pronounce themselves through constitutional entrenchment including land and environment; Leadership and Integrity; Public Finance; and National Security. Read as a whole, these chapters, schedules and the Preamble form the fundamental core structure, values and principles of the Constitution. This fundamental core, the constitutional edifice, thus, cannot be amended without recalling the Primary Constituent Power of the people."

[**7**] In addition, the learned Judges stated that:

"While the basic structure of the Constitution cannot be altered using the amendment power it is *not* every clause in each of the eighteen chapters and six schedules which is inoculated from non-substantive changes by the Basic Structure Doctrine. Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, *unamendable*: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as *eternity clauses*. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an "unamendable clause" or

not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our Canon of constitutional interpretation principles."

[**8**] In his 31 grounds of appeal, the Hon. The Attorney General (appellant in E293 of 2021) in 7 of the grounds, faulted the findings of the learned Judges maintaining, *inter alia*, that the learned Judges erred in their findings regarding the application of the basic structure doctrine to Kenya by improperly interpreting the Constitution and applying the basic structure doctrine to Kenya. In addition, that the learned Judges misapprehended and misinterpreted Articles 255 to 257 of the Constitution. Likewise, the BBI secretariat and Hon. Raila Amolo Odinga (appellants in E292 of 2021), faulted the judgment on similar grounds.

[**9**] The written submissions that were filed by the parties and highlighted in Court were voluminous. They have already been adverted to in the lead judgment of Musinga (P). For the purpose of addressing the issue of basic structure doctrine and its application in Kenya, I wish to briefly highlight the salient submissions that were made on behalf of the appellants, Attorney General, BBI Secretariat, and Hon. Raila Amolo Odinga in regard to this issue. I have also considered submissions filed by other parties but do not

find it necessary to highlight the same as they are generally covered by the submissions that were made by the 3 sets of appellants and the respondents who were supporting the appeal.

(i) <u>The submissions made by appellants on the Basic Structure</u>

[**10**] The Attorney General faulted the learned Judges for failing to define the basic structure doctrine and applying the doctrine without explaining its context and legal basis. He relied on a definition by ***Prof. Yaniv Roznai***, that the basic structure doctrine is **"a judicial principle according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basic structure or identity,".**[1] The Attorney General urged that the basic structure doctrine has been rejected by courts in different countries, primarily on the grounds that if the framers of the Constitution intended to limit the people's power of amendment, they would have expressly provided for such limitation in the text of the Constitution; that scholars have cautioned that giving courts unfettered powers to invalidate amendments for incompatibility

[1] Prof. Yaniv Roznai and Constitutional Amendments: The Limits of Amendment Power 42-43 (Oxford University Press 2017)

with their own preferred reading of a constitution, will create a clear democratic danger.

[**11**] The Attorney General submitted that a comprehensive analysis of the history culminating in the 2010 Constitution, shows that the framers of the Constitution were confronted with the issue of balancing between flexibility and rigidity in amending the constitution with a view to attaining and maintaining constitutional stability, and that in regard to amendability of the constitution, the framers of the Constitution in Chapter 16 struck a balance between the two extremes, bearing in mind the imperatives for change and adaptation.

[**12**] The Attorney General noted that in Article 255(1) of the Constitution, certain provisions of the Constitution were entrenched such that they could not be amended or changed without a referendum, and in this manner, the provisions guarded the culture of hyper amendability associated with the 1963 Constitution. The Attorney General maintained that contrary to the finding of the learned Judges in the impugned judgment, the framers of the Constitution did not intend to make any provisions of the Constitution unamendable, and the basic structure doctrine is inconsistent with Chapter 16 of the Constitution to the extent that it limits the amendment power.

[**13**] The Attorney General faulted the finding by the High Court that the Constitution could only be amended through the exercise of primary constituent power (civic education, public participation, constituent assembly and referendum), pointing out that even the constitutional review process that resulted in the Constitution of Kenya, 2010 did not strictly go through that process, as the people did not deliberate on the draft in a constituent assembly before the referendum. In addition, the learned Judges ignored the significance of political settlements in the constitutional review process, and the fact that the Constitution was a product of development, reflection and endorsement by the people through a referendum.

[**14**] The Attorney General faulted the learned Judges of the High Court for applying the Indian Supreme Court decision of **Kesavananda Bharati vs State of Kerala [1973] 4 SCC 225: AIR 1973 SC 1461** (the Kesavananda case), in which that Court invalidated amendments to the Indian Constitution that had been made by parliament on the grounds that the power to amend the constitution does not include the power to alter the basic structure or framework of the Constitution; and that the amendments made by Parliament were unconstitutional because they destroyed the basic structure or identity of the Constitution. The Attorney General

distinguished the Kesavananda case, maintaining that it could not be applicable in Kenya because the power to amend the Constitution in India is constituted power that vests exclusively in Parliament, and unlike Kenya, does not give the Indian people the right of altering the Constitution through a referendum. Secondly, the rationale of the decision in the Kesavananda case was to curb abuse of the amendment power by India's Parliament, while the current Kenya Constitution has inbuilt mechanism which limits Parliament's power to amend certain Articles of the Constitution, and such amendments require approval of the people through a referendum.

[**15**] In regard to Articles 255, 256 and 257 of the Constitution, the Attorney General was of the firm view that these are comprehensive and unambiguous on the exercise of the amendment power. That all provisions of the Constitution are amendable subject only to the limitations prescribed in those Articles in order to curb abuse. Where the popular initiative is the approach used, Article 255 provides for County Assemblies, National Assemblies, the Senate and the people as veto players, and where the amendments are brought by way of a parliamentary initiative, the veto players are the National Assembly, the Senate and the people. In so doing, the Constitution safeguards against hyper

amendability, as well as strikes an appropriate balance between preserving its value and content, and permitting its adaption to social, economic and political change. Thus, the Attorney General submitted there is no need to apply canons of interpretation of foreign nations to explain the meaning of the amendment provisions in Articles 255 -257 of the Constitution.

[**16**] On the finding that an amendment of the Constitution that affects its basic structure can only be effected by the people, through exercising their primary constituent power that must include four sequential processes, that is, civic education, public participation, constituent assembly debates and a referendum, the Attorney General faulted the reliance by the learned Judges on **Timothy Njoya & 6 others v Attorney –General & 3 others [2004] eKLR** (**the Njoya case**), maintaining that the learned Judges in the Njoya case were considering constituent power in the context of constitutional making and not amendment; and that in regard to amendment, the learned Judges in the Njoya case considered Section 47 of the former Constitution that granted Parliament the power to amend, repeal and replace the provisions of the Constitution, but not to create a new Constitution. That provision is not similar to Articles 255, 256 and 257 of the current Constitution. The Attorney General reiterated that the people of Kenya in exercise

of secondary constituent power, are at liberty to amend the Constitution without resorting to their primary constituent power, provided that such amendments are done in accordance with the provisions of Chapter 16 of the Constitution. Relying on the South African case, **Premier of Kwazulu Natal vs President of South Africa [1995] CCT 36/95 Constitutional Court of South Africa, Case No. CCT 36/1995,** the Attorney General submitted that where there is "**a procedure which is prescribed for amendment to the Constitution"** and this procedure has been properly followed, the amendment is constitutionally unassailable.

[**17**] With regard to the finding of the learned Judges at paragraph 474 (g) that certain provisions of the Constitution were inoculated from any form of amendment because they are deemed to express categorical core values, and are therefore unamendable and could not be changed by the exercise of secondary constituent power or constituted power, the Attorney General pointed out that the finding was contradictory as at paragraph 473 of the Judgment, the learned Judges had pointed out that there is no clause in the Constitution that explicitly makes any Article in the Constitution unamendable.

[**18**] Moreover, the clear wording of Chapter 16 of the Constitution did not provide any room for eternity clauses, and if the intention of

the framers of the Constitution was to provide for eternity clauses, they would have expressly provided for such provisions. The Attorney General pointed out examples of Constitutions from countries such as Germany, Italy, France, Senegal, Gabon, Madagascar, Mali and Morocco that had specific eternity clauses in their Constitution. The Attorney General also relied on a scholarly article by Prof. Charles Fombad[2], who in reviewing Constitutions of African countries, concluded that the Constitution of Kenya, 2010 does not have any unamendable clause. The Attorney General pointed out that the learned Judges failed to identify any eternity clause in the Constitution, nor did they provide any objective criteria for such identification. This absence of clarity means that going by the High Court judgment, no amendment can be made to the Constitution without the courts deciding whether the provision sought to be amended was amendable or whether it was an eternity/unamendable clause.

[**19**] The Attorney General also faulted the learned Judges for failing to analyse the Constitution of Kenya Amendment Bill, 2020 in order to ascertain whether they destroy the purported basic structure of the Constitution, and if so, how. He argued that the

[2] Charles Manga Fombad, "Some Perspectives on Durability and Change under Modern African Constitutions" 11(2) International Journal of Constitutional Law, 382 (2013)

learned Judges ought to have inquired whether each of the provisions of the Amendment Bill offended the basic structure. This required a clause-by-clause analysis of the various provisions of the Amendment Bill and its accompanying memorandum, and specific findings made on how each of the said provisions destroy the purported basic structure of the Constitution.

[**20**] The Attorney General cautioned on the danger of mechanistic approaches to adoption of foreign jurisprudence and foreign principles, as we have our own needs and circumstances, and our circumstances are different. He noted that the Kenyan Constitution is predicated on amendments through a referendum, and this was the first time the basic structure doctrine would be applied in such a situation.

(ii) Submissions by BBI Secretariat and Hon. Raila on Basic Structure

[**21**] The BBI Secretariat and Hon. Raila in a nutshell discussed the origins and philosophical underpinnings of the basic structure doctrines, and concluded that considering the correct interpretation and methodology of the Constitution of Kenya, the doctrine is not applicable to Kenya. These appellants relied on scholarly writing by **Prof. Dietrich Conrad**, who states as follows on basic structures:

"Any amending body organised within the statutory scheme, howsoever verbally unlimited its powers, cannot by its very structure change the fundamental pillars supporting its constitutional authority." [3]

[**22**] Referring to Article 1(1) of the Constitution, which in the view of these appellants forms the framework with which the basic structure has to be read, they submitted that even with the sovereign power and the sovereign will, the people have to obey and comply with the Constitution, and can therefore only exercise their sovereign power within the Constitution and in accordance with the Constitution, which, as per Article 2(1) is supreme law. The High Court was faulted for imagining that the sovereign people exist outside the Constitution as the Constitution is the supreme law and binds all persons; and therefore, the sovereign people cannot exist outside the Constitution. It was submitted that the existence of the basic structure was not in question, but the question was its applicability, that is, the amendability of the Constitution. It was submitted that the learned Judges of the High Court adopted an erroneous approach by looking at the text without an objective analysis of the context, the history referred to being skewed.

[**23**] In regard to the application of the basic structure doctrine in India, these appellants submitted that in the Kesavananda case, the

[3] Dietrich Conrad – Theory of 'Implied Limitations' on Amending power

learned Judges of the Supreme Court of India, did not have a common opinion on what constitutes the basic structure in the Indian Constitution. The Chief Justice and four other judges identified different aspects as constituting the basic structure of the India Constitution. This list has been expanded further in **Indira Gandhi vs Rajnarain AIR 1975 AC 2299,** in which the Supreme Court of India added that:

> **"*Democracy and the Preamble to the Indian Constitution, guarantee equality of status and opportunity and that the rule of law is the basic structure of the Constitution.*"**

[**24**] These appellants were of the view that in the Kesavananda case, the Supreme Court invoked the doctrine to usurp a jurisdiction and power that Article 368(4) of the Constitution of India expressly divested them of. Article 368 had given the Parliament power to amend the Constitution, but Article 368(4) provided an ouster clause restricting the court from questioning any amendments of the Constitution made under that Article. These appellants submitted that the amendment power in the Indian Constitution is not comparable to that in the Kenya Constitution, as Parliament has the exclusive and final power to amend the Indian Constitution and there is no requirement for approval of an amendment through a referendum, nor is there any provision for a

popular initiative approach to amendment of the Constitution. It was submitted that the Kesavananda case did not have a clear *ratio decidendi* as the decision on whether or not the power of constitutional amendment was limited or unlimited, did not have an outright majority, and was determined on a very narrow margin of one judge.

[**25**] These appellants drew the Court's attention to decisions from Uganda, Tanzania, South Africa and Zambia, in which the apex courts in those countries rejected the basic structure doctrine, and the Njoya case, in which the Kenya High Court declined the invitation to discuss and apply the doctrine. They urged that the basic structure doctrine is of highly questionable credibility and founded on very shaky grounds.

[**26**] These appellants further faulted the characterisation of civic education, public participation and constituent assembly, as necessary for constitutional amendment, contending that the same were essential subsets of public participation exercise in Kenya's Constitution making, and that if they were intended for constitutional amendment, they would have been clearly provided for.

[**27**] On eternity clauses and the unamendability doctrine, BBI Secretariat and Hon. Raila submitted that an eternity clause is an

actual constitutional provision expressly made in the text of the Constitution, declaring some provisions unalterable and irrevocable. The eternity clauses normally have a history and are there to provide solutions to practical problems. They gave examples of several countries that have expressly provided eternity clauses in their Constitution, and argued that the Constitution of Kenya has not provided any express provision that is an eternity clause. These appellants found support in scholarly article by Prof. Charles Fombad.[4] These appellants therefore urged that every clause of the Constitution of Kenya 2010 is amendable except matters relating to Article 255(1) of the Constitution, which can only be amended with the sanction of the people at a referendum. Thus, through the referendum, the supreme powers of the sovereign people which is stated in Article 1(1) of the Constitution, has been asserted.

[**28**] These appellants argued that eternity clauses and unamendability doctrines have no universal acceptability, and that where they have been applied, the peculiar circumstances of the said jurisdictions rendered their application permissible, and not by judicial craft. These appellants posited that philosophical, jurisprudential and constitutional theories are often made and/or

[4] See footnote No. 2 above

developed in the context of academic or scholarly research to enrich debate and perspective. They are not intended to be prescriptive or to be immediately implemented on constitutional amendments. On the other hand, these appellants cautioned that eternity and unamendability doctrines can sometimes bear unintended consequences on the stability of a country, because if it is too difficult to effect change, political actors often resort to extra constitutional means for amendments including revolutions, coups and sudden changes. Kenya had opted for constitutional stability through the entrenchment of Articles 255 to 257 of the people's reserved power to amend any provision of the Constitution through a tiered process, and the basic structure doctrine, eternity clause, and unamendability are incompatible with the Kenya Constitution.

[**29**] The BBI Secretariat and Hon. Raila, faulted the learned Judges for adopting a methodology of interpretation of the Constitution that gave disproportionate importance to context, rather than a proportional balance between text and context. They argued that the balance is necessary as the context builds into the descriptive aspect of the Constitution, while the text builds into its prescriptive aspect; that because of the wrong approach adopted, the learned Judges of the High Court ascribed greater weight to the history of the making of the Constitution and thereby came to a

wrong decision that the basic structure applies to Kenya. Furthermore, these appellants posited the learned Judges were selective in their consideration of the history, and failed to take into account that the Constitution was a product of several political compromises; that there was no evidence that the basic structure doctrine was contemplated during the Constitution making process; and that in identifying the basic structure in the Constitution as covering several chapters, the preamble, and the schedule, the learned Judges created confusion particularly when they asserted that not all the clauses in the chapters identified were unamendable, and that such conclusion could only be drawn consideration of particular clauses.

(iii) Submissions by 1st to 5th Respondent on Basic structure

[**30**] In regard to the basic structure doctrine and its applicability to Kenya, the 1st to 5th respondents who supported the judgment of the High Court, submitted that in accordance with Article 259 of the Constitution, the learned Judges of the High Court interpreted the Constitution transformatively, purposively and holistically, taking into account its spirit and letter, and came to the right conclusion that the basic structure doctrine was applicable in Kenya, as this is consistent with the nature of amendment power as provided in Chapter 16 of the Constitution. These respondents

anchored this conclusion on the Njoya case; **In the matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application No. 2 of 2012) [2012] eKLR**; a Supreme Court advisory opinion; and authoritative published works by notable law scholars including John Locke and Prof. Ben Nwabueze. They argued that there was a clear dichotomy between the power of amendment and dismemberment of the Constitution.

[**31**] In regard to Chapter 16 of the Constitution, the 1st to 5th respondents submitted that there are three features to the amendment rule stipulated therein. First, the rule entrenches certain provisions of the Constitution so that they can only be amended upon approval by the people through a referendum; secondly, the amendment rules codify a dual track to amending the Constitution which is the parliamentary initiative and the popular initiative pathways, each pathway with clear conditions that must be satisfied; and thirdly, Chapter 16 contains only provisions for amendment of the Constitution and not dismemberment.

[**32**] These respondents argue that applying the definition of a constitutional scholar, Prof. Walter Murphy that "**an amendment is an alteration to a Constitution that corrects or modifies the system without fundamentally changing its nature**", the

provisions of Article 255-257 yield an interpretation that the amendment rules envisages only such revisions to the constitutional text that are coherent with the existing framework correcting present implementation constraints, without derogating from the principles, values and institutional integrity of the current Constitution. Conversely, an amendment that alters constitutional fundamental values, norms and institutions, is not an amendment, but is in the nature of dismemberment, and therefore the High Court acted reasonably in applying the basic structure doctrine, as it was consistent with its authority to interpret the Constitution in a manner that develops the law, and contributes to good governance. The 1st to 5th respondents urged that the doctrine was a democracy enhancing device that maintains the ultimate power of the people over their elected representatives.

[**33**] In addition, the 1st to 5th respondents urged that the distinction between constitutional amendment and dismemberment aligns with the distinction that was made between constituent power and constituted power, and applied by the High Court at paragraph 472 of the judgment, as primary constituent power and secondary constituent power. The 1st to 5th respondents argued that constituent power does not cease by the creation of a new Constitution, but continues to exist as an inherent power. The

Njoya case and a legal scholar Wolfgang[5], were cited in support. These respondents urged the Court that the four-step approach to fundamental constitutional dismemberment adopted in the judgment of the High Court providing for civic education, public participation, constituent assembly and referendum, characterised the exercise of primary constituent power and should be upheld by this Court.

[**34**] The 1st to 5th respondents cited Prof. Nwabueze[6] for the proposition that the President is not part of the constituent power, and that any alteration to the basic structure of the Constitution is to be undertaken by a repeal and replacement of the Constitution, instead of amendment. The 1st to 5th respondents posited that the Amendment Bill sought to create a hybrid presidential-parliamentary system thereby altering the parliamentary system that was in place, and altering the basic structure of the Constitution without resulting to the constituent power or the amendment/repeal process pertaining thereto. Furthermore, the Amendment Bill sought to abrogate the essence of separation of powers, checks and balances amongst the three arms of

[5] Mirjam Kunkler and Tine Stein (eds) 'The Constituent Power of the People: A liminal concept of Constitutional Law' in Constitutional and Political Theory Selected Writings of Ernst-Wolfgang Blockenforde; (2017 OUP) 169-185 at p 175

[6] B. O. Nwabueze, *Presidentialism in Commonwealth Africa* (Rutherford Madison Teaneck Fairleigh Dickson University 1974

government by domiciling the cabinet in parliament and, therefore, the amendments were unconstitutional and intended to undermine democracy.

[**35**] In further support of their arguments, the 1st to 5th respondents relied on writings of a Kenyan constitutional lawyer **Dr. Mutakha Kangu**[7], who reiterates that the basic structure of the constitution should include the sovereignty of the people, the supremacy of the constitution, the principle of sharing and devolution of power, democracy, rule of law, the Bill of Rights, separation of powers and the independence of the Judiciary. Regarding the failure to textualize the basic structure doctrine, the 1st to 5th respondents urged that textualization of the basic structure doctrine is not necessary, as the constitution is not a slave to textualism and the non-textualization of the principle is not prejudicial to its application in aid of constitutionalism.

(iv) <u>Submissions of Amici curiae on Basic Structure</u>

[**36**] During the trial in the High Court, Dr. Duncan Oburu Ojwang, Dr. Linda Andisi Musumba, Dr. John Osogo Ambani and Jack Busalile Mwimali were admitted as amici curiae to assist the court because of their expertise in constitutional law, being

[7] Mutakha Kangu, "*Constitutional Law of Kenya on Devolution*" (Strathmore University Press 2015), pp1268-1276

constitutional law practitioners and academicians, within various Kenyan universities. They made submissions on the basic structure and unconstitutional constitutional amendments; the constitutional nature and remit of a popular initiative; the implication of having an inadequate legal framework to guide the amendment process; and the question about the scope and content of amendment contemplated under Article 257 of the Constitution.

[**37**] One of the grounds of appeal raised by IEBC (appellant in E293 of 2021), is that the High Court erred in admitting and relying heavily on the brief submitted by the purported amici who, in the view of IEBC, were demonstrably partisan and offended the principle that governed the admission and scope of amicus curiae brief. The amici having been made respondents to the appeal, filed written submissions in which they reiterated the position they took in the High Court and maintained that their opinion was based on a reasoned and studied professional judgment. These submissions were orally highlighted by their counsel. For purposes of addressing the issue of basic structure and its applicability, the written and oral submissions of the amici are important, and I wish to highlight them briefly.

[**38**] Dr. Duncan Oburu, Dr. Linda Musumba and Dr. John Ambani made written submissions jointly. The amici maintained

that the High Court finding that the Constitution has a basic structure, was informed by and grounded on a uniquely Kenyan experience or historical justification, particularly the hyper amendment culture which reduced the former Constitution to a mere Statute. They argued that from a holistic reading of the Constitution, its history and the context of the constitution making, it can be derived that the basic structure of the Constitution is as provided in the preamble, the eighteen chapters and the six schedules of the Constitution, and that the core or DNA of the Constitution is identified and given expression through the preamble, Article 1 on sovereignty of the people, Article 2 on supremacy of the Constitution, Article 3 on the defence of the Constitution and Article 10 on the national values and governance principles.

[**39**] These amici maintained that in the absence of explicit limitations of the constitutional amendment powers, there are implied constitutional limitations to the nature and scope of constitutional amendments by which the Constitution should not be amended in a way that changes the basic structure and features of the Constitution. The rationale behind this lies on the distinction between the original constituent primary power to make the Constitution, vis-à-vis the secondary power to amend the

Constitution, and that the amendment power may be exercised through secondary constituent power by the people, or through constituted power by the elected representatives. The amici asserted that the decision to make fundamental changes to the Constitution is a matter solely reserved for the constituent assembly, that is the people, and judges may invalidate any exercise of the derivative amendment power that purport to violate the Constitution's basic feature.

[**40**] In the amici's view, "amendment" connotes minimal change as opposed to fundamental or radical change to the text of the constitution. Constitutional amendment may also be found to be invalid because of failing to comply with the procedural and substantive requirements of the constitution for enacting laws, or amendment of the constitution, or because the content of the proposed amendment will replace the constitution and not just emend it. The power to destroy the basic structure is not power to amend the constitution, and therefore, a proposed constitutional amendment cannot be so drastic as to constitute the destruction, repeal, or abrogation of the constitution's basic structure. That is to say, that where the proposed content of the amendment has the effect of radically altering or replacing the constitution as opposed to merely amending it, it may be found invalid.

[**41**] On eternity clauses or unamendable constitutional provisions, these amici posited that the notion of unamendable constitutional provisions may arise explicitly where the Constitution specifically provides "formal constitutional unamendability" or "entrenched constitutional provisions" by specifically stating that the provisions cannot be amended. It may also arise implicitly from judicial interpretation on the limits of amendment powers of the constitution.

[**42**] As far as these amici are concerned, the settled law from the Supreme Court of India, is that the basic structure of the Constitution, whatever its content, is inviolable and immune to the legislative or amendment process, and that our Constitution has acknowledged similarities with other constitutions such as the South African Constitution, and the doctrine of basic structure is therefore well entrenched, and neither foreign nor borrowed.

[**43**] On the role of the amici, the Court was referred to **Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 others [2015] eKLR**, as the law governing the admission and scope of amici curiae briefs. The amici maintained that they had conducted themselves within the confines of the law and have dispensed their duty according to the guidelines provided in that case.

[**44**] Written submissions were also filed separately and highlighted before us on behalf of another amicus curia, **Jack Busalile Mwimali**. The submissions were detailed but I focus on the issue of whether the basic structure doctrine applies to Kenya. Like his three colleagues, amicus Mwimali supported the judgment of the High Court, contending that the basic structure doctrine applies to Kenya, and that the doctrine is sound as it blocks constitutional dismemberment or replacement disguised as amendment. Amicus Mwimali commended the holistic interpretation adopted by the learned Judges of the High Court, contending that they considered the constitutional text, structure, nature, history, context and guiding precedent. On the other hand, amicus Mwimali criticised the appellants' textualistic interpretation approach, citing constitutional expert **Yaniv Roznai**, for the proposition that the language of the Constitution is not merely the explicit one, but also the implicit one.[8]

[**45**] On amendment of the basic structure, this amicus found the High Court's finding that the basic structure can only be altered through the constituent or constitution making power, consistent with Article 1 of the Constitution because the decision to make

[8] **Yaniv Roznai,** *Unconstitutional Constitutional Amendments*: The Limits of Constitutional Powers (Oxford University Press; 2017) at p215

fundamental changes to the Constitution is a matter solely reserved for the constituent assembly; and the forces wielding constituent power stand above the constituent power that they created, and have the power to remake them, potentially without following the procedures found in existing constitutional text. He agreed with the view that the doctrine defends popular sovereignty because it limits the amendment power wielded by political institutions, while preserving certain fundamental changes amounting to replacement of the Constitution to the "people" acting as constituent power[9].

[**46**] Contrary to the submission made by the Attorney General that the doctrine has been rejected by an overwhelming number of scholars and many courts around the world, amicus Mwimali cited several decisions from Kenya in which in his view, the courts alluded to the constitution's basic structure and to the judiciary's role to protect the structure from erosion. He urged that the doctrine has also been accepted in many other countries, citing cases from Singapore, Bangladesh, Pakistan and South Africa.

[**47**] On the High Court's finding that whether a particular feature is part of the basic structure must be worked out on a case-by-case basis, amicus Mwimali concurred that determining what in a

[9] **Rosalind Dixon and David Landau**, "Transnational Constitutionalism and a Limited Doctrine of Constitutional Amendment" (2015) 13 International Journal of Constitutional Law, 606-638

proposed amendment forms part of the basic structure is a fact-intensive inquiry. He found support for this opinion in a statement by a legal scholar and law professor **Mark Tushnet** that the doctrine only comes into play when the political system has generated a specific constitutional amendment, and the question for the court is whether that specific amendment is inconsistent with the basic structure[10]. Amicus Mwimali maintained that in making a conclusion that legal scholars have rejected the doctrine of basic structure, the Attorney General failed to properly analyse the writings and opinions of these scholars. The amicus submitted that there was nothing wrong with the constitutional borrowing of the basic structure doctrine, as constitutional borrowing to develop the law on the basic structure doctrine is legitimate, the court having a duty under Articles 20(3)(a) and 259 to develop the law.

[**48**] Quoting an explanation by a scholar and jurist **Hans Kelsen**, that **"the Constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws. Hence, a change in the Constitution is made more difficult than the enactment or amendment of ordinary laws"**[11], the amicus submitted that amendment rules

[10] Mark Tushnet, "Amendment Theory and Constituent Power" in Gary Jacobsohn and Miguel Schor (eds), in ***Comparative Constitutional Theory*** (Edward Elgar Publishing, 2018) at p331

[11] Hans Kelsen, "***General Theory of Law and State***" (Anders Wedberg tr, 2009) at p259

whether explicit as in Articles 255-257, or implicit as in the basic structure doctrine, are crucial as the implicit rules specifically serve to distinguish between amendment and dismemberment. He reiterated that the basic structure doctrine safeguards the Constitution from dismemberment or replacement disguised as amendment, and that each amendment must be presented at all stages as a standalone, so that the Constitution is not dismembered or replaced without the Constitution making power. Thus, the power to amend the Constitution is only to modify it, and does not imply the power to replace it, and distinction must therefore be made between a mere amendment that may be subject of delegated constituent power and a complete replacement that can only be done with constituent power in Article 1. He relied on Yaniv Roznai for the proposition that the constituent power can only truthfully manifest popular will, if it is exercised following a participatory process that facilitates actual, well deliberated and thoughtful free choice by society's members[12].

[**49**] Following an application made before this Court, two more amici were granted leave to file appropriate authorities to assist the Court. These were; Charles Manga Fombad, a South African law

[12] Yaniv Roznai "We the People", "Qui, the People" and the Collective Body: Perceptions of Constituent Power in Gary Jacobsohn and Miguel Schor (eds) Comparative Constitutional Theory (Edward Elgar, 2018) p312

professor, and Migai Aketch, a Kenyan law professor. Prof. Fombad submitted a brief titled: **"The Basic Structure Doctrine: A Judicial Panacea or a Judicial Conundrum in checking Arbitrary Amendments of African Constitutions?"** A brief highlight of these submissions is necessary to appreciate the view of this amicus on the issue of the applicability of the basic structure doctrine in Kenya.

[**50**] Prof. Fombad started from the premises that constitutions become obsolete with time, and there is need for an effective and efficient process to ensure that these constitutions can be regularly updated to avoid the twin dangers of extra-legal or revolutionary methods of change on one hand, and arbitrary hasty opportunistic changes on the other. There is a general recognition that a constitution that is not vulnerable to the governmental or transient majoritarian manipulation through indiscriminate amendments, is critical to enhancing the prospects for democracy, constitutionalism and political stability. Consequently, procedural and substantive limitations on the powers to amend constitutions may be stated explicitly in special provisions for amending the constitution, or in eternity or unamendable provisions; or implicitly inferred by the courts, from the wording of the constitution. Prof. Fombad referred to a study undertaken of African constitutions and the approach to

checking abusive amendments of constitutions in post-1990 African Constitutions[13]. His conclusion is that the importation of the Indian basic structure doctrine in Africa is likely to create more problems than it would solve.

[**51**] Prof. Fombad explains the doctrine of basic structure as providing that, "**even in the absence of explicit limitations on constitutional amendment powers, parliament's amendment powers are not unlimited. There are as a result, implied constitutional limitations that render an amendment unconstitutional, if it infringes, negates or substitutes the basic structure of the Constitution regardless of whether all the formal or procedural requirements of amendment have been met**".

[**52**] Having analysed the Ugandan Supreme Court decision, **Male H. Mabirizi K. Kiwanuka & Others vs Attorney General & Others, Consolidated Constitutional Appeal No. 2, 3 & 4 of 2018 (the Mabirizi appeal)**, and the impugned decision of the learned Judges in this appeal, Prof. Fombad argues that there is no sound legal or political basis for importing the Indian basic structure doctrine. In his view, the doctrine is ill defined and

[13] Charles M. Fombad, "Limits on the power to amend Constitutions: Recent trends in Africa and their impact on constitutionalism, "6 University of Botswana Law Journal" (2007) pp. 27-60; and Charles M. Fombad, "Some Perspectives on durability and change under modern African Constitutions 11(2) International Journal of Constitutional Law (2013) pp 382-413

uncertain. In addition, the reliance on the doctrine anchored on the historical context of the present African constitutions, the text of the constitutions, the theoretical considerations and the potential practical and political implications, do not justify the application of the doctrine. He noted that the Indian judiciary and the Indian society as a whole were in the midst of a political storm when the basic structure doctrine was applied, and India was still dealing with the independence Constitution of the 1950s which was fairly easy to amend at the time it adopted the basic structure doctrine. In contradistinction, in both the Mabirizi judgment and the impugned judgment of the High Court, the learned Judges acknowledged that the constitutional making process that took place in the respective countries, took place in an atmosphere dominated by the desire to banish the high handed and reckless amendments to constitutions to further the narrow interest of self-seeking politicians; and the Judges in Kenya and Uganda were dealing with constitutions made in the 21st century, which clearly provided procedures which entailed multi-stage inclusive participatory, deliberative and time consuming processes, designed to limit the scope for abuse.

[**53**] In answer to the question whether it was possible that the framers of the modern constitutions in Kenya and Uganda

overlooked the need to deal with the problem of abusive and manipulative changing of constitutions, and left it for the court to infer and apply the basic structure doctrine to changes which they consider as a threat to the basic structure of the constitution, Prof. Fombad examined the textual context of the constitutions, the theoretical problems with the approach adopted by the learned Judges in the impugned decision and the practical problems in applying the basic structure doctrine.

[**54**] He noted that in both Mabirizi appeal and the impugned judgment of the High Court of Kenya, the learned Judges carefully analysed and took note of the experiences during the long era of dictatorship, as well as the protected constitutional making processes that culminated in the adoption of the 1995 Constitution of Uganda, and the 2010 Constitution of Kenya, and this pointed towards the framers of the constitutions deliberately including provisions designed to ensure that the process of constitutional amendment is strictly regulated and controlled to prevent the abuses of the past. Thus, unlike the 1963 amended Constitution, the 2010 Kenya Constitution does not make any clear distinction between the alteration of the Constitution and its replacement. Instead, it provides three distinctive procedures for amendment of the Constitution in Articles 255-257, the first being an amendment

by parliament with a special majority, the second being an amendment by parliament subject to approval at a national referendum, and the third being an amendment by popular initiative subject to approval at the national referendum.

[**55**] Prof. Fombad found the rigorous procedures for amendment provided under Articles 255(1), for matters classified by the learned Judges of the High Court as protected against amendments by the basic structure significant. He expressed the view that, given the concern relating to the culture of hyper amendment associated with the previous Constitution, the framers of the 2010 Kenya Constitution could easily have made certain provisions of the constitution unamendable or subject to the basic structure doctrine, including those specified at Article 255(1), but they did not do so, as they were satisfied with the amendment provisions provided, which in Prof. Fombad's view were more elaborate and rigorous than those provided in the transformative constitutions of South Africa and Zambia.

[**56**] Comparing the judgment of the High Court with the decision in the Mabirizi appeal, Prof. Fombad found the approach by the High Court judges in invoking the basic structure doctrine puzzling, as they did not identify any particular provision in the Constitution that explicitly or impliedly warrant the invocation of the doctrine.

This was unlike the justices in the Ugandan Supreme Court who stuck to what the framers of the Constitution had set out and were guided only by it, being cognizance of the fact that if the framers had wanted to declare certain provisions as unamendable, nothing would have stopped them from doing so. He argued that the inclusion of specific procedures and processes to be followed in amending the Constitution, clearly means that any omissions were intentional and the maxim, "*expressio unius exclusio alterius*" (***that the expression of one thing excludes others***), can therefore be invoked to argue that there is no basis for implicit application of the basic structure doctrine. He urged that the framers of the Kenyan and Ugandan Constitutions were conscious of the need to protect the Constitutions from abusive changes, and left no room for judges to fill what they may perceive as a lacuna, or even attempt to rewrite the Constitution.

[**57**] Prof. Fombad also identified a number of theoretical problems that arises from the approach adopted by the learned Judges of the High Court in applying the basic structure doctrine. He argued that each generation has, and should have its cherished values and political principles reflecting its current predicament and pre-occupation, and no generation has the right to impose its own values and political principles on a latter generation. In addition,

Prof. Fombad faulted the learned Judges of the High Court for failing to define the precise scope of the core values that the court felt were unprotected by the basic structure doctrine. Although the learned Judges declared eighteen chapters and six schedules of the Constitution as inoculated from non-substantive changes by the basic structure doctrine, it did not provide an exhaustive list of these provisions, nor did the learned Judges identify the unamendable provisions and eternity clauses that can only be changed through the exercise of primary constituent power. The matter is complicated further by the vague criteria of fundamental core structure, values, principles, text, history and non-legal considerations. Further, Prof. Fombad noted that neither the judges in the Kesavananda decision nor the judges in the Mabirizi decision are agreed on the precise elements of scope of the basic structure doctrine. Prof. Fombad cautioned that the basic structure doctrine has opened a route to excessive activism which may create a risk of legal authoritarianism and judicial dictatorship with far reaching practical implications.

[**58**] On the practical problems, Prof. Fombad criticised the High Court judgment as setting a dangerous precedent to constitutionalism and the rule of law, by giving unelected judges sweeping ill-defined powers, while tying the hands of both the

executive and legislative branches, as this is a clear recipe for conflict between the three arms of government. In addition, the application of the basic structure doctrine will make it cumbersome and near impossible for any change to be effected through the institutional and democratic route, leaving a breeding ground for political uncertainty, constitutional stagnation and instability, that may lead to revolutionary change. Drawing from the experience in Francophone Africa and studies on unamendable constitutional provisions, Prof. Fombad posited that, unamendable constitutional provisions have a poor record of effectiveness globally and in Africa, studies have shown that in many instances, the existence of unamendable provisions did not necessarily lead to their judicial enforcement.

[**59**] Prof. Fombad concluded that there are substantial and contextual differences between the modern African Constitution and the Indian Constitution to which the basic structure doctrine was applied. In addition, in providing Articles 255-257 for amending the Constitution, the framers of the Constitution were aware of the past culture of abusive hyper-amendment. Courts must thus exercise restraint and resist the temptation to impute on the part of the framers, an intention to make certain parts of the Constitution unamendable or subject to the basic structure doctrine, when this

is not explicitly and implicitly warranted by the language and spirit of the Constitution; that given the fragility of Africa's post authoritarian transition, courts should focus on strategies to enhance the constitutional amendment procedure provided for in the Constitution, rather than taking a leap into the unknown by applying the unclear basic structure doctrine; and that the application of the doctrine could create a gridlock which may provoke unnecessary conflict and temptation to alter the constitution through extra constitutional means.

[**60**] The Kenya Human Rights Commission (KHRC) was also joined as amicus curiae in the High Court and was cited in this appeal as a respondent. KHRC also filed written submissions that were orally highlighted by their advocates. KHRC submitted that the basic structure doctrine is a concept which exists with and beyond the reduction of written form; that it is a common law legal doctrine that is inherent in most constitutions; is a concept that applies to constitutional amendments; and that parliament cannot destroy or alter the basic features of a constitution.

[**61**] KHRC defined the basic structure doctrine as: "**a concept of implied limitations on parliament's power to amend the constitution**". It argued that the theory of restrictive competence of parliament is part of the basic structure theory, and that this

theory confirms the democratic mandate of separation of powers between the various arms of government as entrenched in Kenya's modern governance principles. KHRC urged that the basic structure doctrine is applicable in Kenya together with the theory of unamendability of eternal clauses, and protects certain fundamental aspects of the Kenya Constitution from amendment through either the use of secondary constituent power or constituted power.

[**62**] KHRC pointed out that Article 255 of the Constitution has provided for matters that form the basic structure of the Constitution, and which can only be amended by the people exercising their sovereign right directly in a referendum. KHRC argued that the Kenyan Constitution is a living Constitution that needs a transition from time to time due to developments in society. "We, the people" and parliament can modify, mould, change, vary or abolish any provisions of the Constitution under its legislative capacity, provided that the prescribed rules, which themselves constitute the framework and context for reformation are complied with, so that constitutional change does not crop up from a vacuum.

[**63**] KHRC maintained that one can identify the basic structure doctrine through a holistic interpretation of the text, spirit,

structure and history of the constitution; that in the context of constitutional law theory of originalism, the various provisions of the Constitution must be construed and interpreted so as to discover the true meaning that was given to the provisions by the framers of the Constitution. It was submitted that the basic structure doctrine stems from a theory of originalism of fundamental rights and freedoms, *jus cogens,* the necessity for bare minimums and the need for insulation from 'facile' amendments. It was submitted that the proposed radical changes to the Constitution in the BBI offend the basic structure.

(v) <u>Analysis of Basic Structure and Basic Structure Doctrine</u>

[**64**] What is the basic structure doctrine? Drawing from the definitions of Prof. Yaniv Roznai, Prof. Dietrich Conrad, Prof. Ben Nwabueze and the Kesavananda case that I have adverted to above, it is evident that simply put, the basic structure doctrine is a principle according to which the power to amend a constitution is expressly or impliedly limited to constitutional amendments that do not alter or change the basic structure of a constitution. In India, the doctrine has been applied as limiting the amendment power of parliament to alter or change the basic structure of the Constitution. Dietrich Conrad made reference to "any amending

body organized within the statutory scheme", Prof. Yaniv Roznai extends the limitation to the exercise of constitutional legislative power, and expresses the view that amendment power is *sui generis* as it is neither a pure constitutional power nor an expression of original constituent power, and that it is an exceptional authority yet limited.

[**65**] There are two propositions from these definitions. First, that a constitution has a basic structure, and second, that amendment of that basic structure by any amending body under the constitution is not permissible if it will substantially alter or destroy the basic structure or identity of that constitution, and consequently a limitation on the power to amend the basic structure will be inferred. The latter is the basic structure doctrine. The challenge in considering whether the basic structure doctrine applies to a constitution, is to unpack the basic structure. In other words, what is the basic structure in reference to a constitution? Or differently put, how does one identify the basic structure of a constitution so as to come to the conclusion that the intended amendment will alter or change that basic structure such as to bring the basic structure doctrine into play?

[**66**] The basic structure has been variously described as the foundation, the core, or the pillar of a constitution. These are all

descriptive adjectives. However, when it boils down to a particular constitution, these descriptions appear too general as parties may not be agreed on what the foundation, the core or the pillar of that constitution is. This was evident in the Kesavananda case from which the basic structure doctrine has gained its popularity. Although the judges were agreed that the Indian Constitution has a basic structure, they were not agreed on what exactly the basic structure is. Each judges identified a different aspect. Dietrich Conrad used the metaphor of *pillars* and describes the basic structure of the constitution as the fundamental pillars supporting its constitutional authority.

[**67**] **Katureebe, CJ** in the Mabirizi appeal has given a good illustration of a basic structure using the pillar metaphor:

> ***"To my understanding, the basic structure doctrine may be equated to a family house. It must have a strong foundation, strong pillars, strong weight-bearing walls, strong trusses to support the roof. The roof could be grass thatched, as happens in many of our homesteads. The roof could be iron sheets of particular gauge. The iron sheets could be of different colours. If the wind blew away part or all of the roof, the basic structure should remain and the next day the family can put the roof back. But if the weight bearing pillars were undermined or removed, the whole structure will collapse. It would not be a dwelling house anymore."***

[**68**] The general complaint that has been levelled against the judgment of the High Court in regard to the finding at paragraph 474(f), is that the foundational structure described by the judges as covering; "preamble, the eighteen chapters and the six schedules of the Constitution" essentially means that the basic structure covers the whole Constitution. To use Katureebe CJ's illustration, the description of the High Court would not only include the foundation, the pillars, the walls and the trusses, but even the roof, the doors and the windows. A strict interpretation of the basic structure doctrine with this understanding of the basic structure, would mean that the basic structure of the Kenya Constitution which literally consists of the whole Constitution, cannot be amended in a way that alters or changes the Constitution. Indeed, the Honourable Judges of the High Court were of the view that such an amendment can only be done through the exercise of the peoples' primary constituent power.

[**69**] This is what the learned Judges said:

> ***"472... Kenyans intended that the constitutional order that they so painstakingly made would only be fundamentally altered or re-made through a similarly informed and participatory process. It is clear that Kenyans intended that each of the four steps in constitution-making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010. Differently put,***

Kenyans intended that the essence of the constitutional order they were bequeathing themselves in 2010 would only be changed in the exercise of Primary Constituent Power (civic education; public participation; Constituent Assembly plus referendum) and not through Secondary Constituent Power (public participation plus referendum only) or Constituted Power (Parliament only). Paraphrased, there are substantive limits on the constitutional Petition No. E282 of 2020 (Consolidated). Page 176 power to amend the Constitution by the Secondary Constituent Power and the Constituted Power.

473. To be sure, there is no clause in the Constitution that explicitly makes any article in the Constitution un-amendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited. The structure and history of this Constitution makes it plain that it was the desire of Kenyans to barricade it against destruction by political and other elites. As has been said before, the Kenyan Constitution was one in which Kenyans bequeathed themselves in spite of, and, at times, against the Political and other elites. Kenyans, therefore, were keen to ensure that their bequest to themselves would not be abrogated through either incompatible interpretation, technical subterfuge, or by the power of amendment unleashed by stealth."

[**70**] Prof. Nwabueze,[14] describes constituent power as **"the power to constitute a frame of government for a community**," and explains that the constitution is the means by which this power is exercised. In addition, that it is a primordial power, which is the

[14] Prof. Nwabueze, "***Presidentialism in Commonwealth Africa***" L. Hurst & Co. 1974 at p292

ultimate mark of a people's sovereignty. Prof. Roznai[15] describes constituent power as the power to establish the constitutional order of a nation and terms it, "the extra ordinary power" to form a constitution. He identifies the primary constituent power as the initial action of exercising the extra ordinary power to form the Constitution, and distinguishes this from the secondary constituent power, which is the power to amend the constitution after the constitution making process, and is power which is subordinate to the primary constituent power. Prof. Roznai also distinguishes constituent power from constituted power, explaining that constituted powers are legal delegated powers derived from the Constitution. They are subordinate to constituent powers and owe their existence to the constituent power.

[**71**] In the Njoya case, **Ringera, J**. (as he then was) considered the constitutional status of constituent power, and having considered the description by **Prof. Nwabueze**, stated as follows:

> ***"With respect to the juridical status of the concept of the constituent power to the people, the point of departure must be an acknowledgment that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within***

[15] Prof. Roznai "a theory of constitutional amendability on the nature and scope of constitutional amendment powers"

its territory. All governmental power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed, it is not expressly textualised by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognise the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* ***(out of an excessiveness of caution). ... I accept that the declaration of Kenya as a sovereign Republic and a democratic multi party state are pregnant with both meaning than ascribed by the respondents. A sovereign Republic is a sovereign people and a democratic state is one where sovereignty is reposed in the people. In the immortal words of Abraham Lincoln, it is the government of the people, by the people, and for the people. The most important attribute of a sovereign people is their possession of the constituent power..... Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves.... In short, I am of the persuasion that the constituent power of the people has a juridical status within the Constitution of Kenya and is not an extra-constitutional notion without import in constitutional adjudication."***

[**72**] I have quoted the learned Judge extensively on this issue, because he made fundamental propositions. The appellants and the

respondents all relied on this authority, each interpreting it in their favour. With respect, the learned Judge was considering the issue of constituent power in relation to the case before him, which required him to interrogate the constitutional review process, leading to the making of a new Constitution. It is for this reason that the learned Judge states in considering the exercise of constituent power as follows:

> ***"With regard to how such power is to be exercised to make and adopt a new Constitution, I agree that it may be exercised directly and/or indirectly depending on what is to be done. It cannot be exercised directly in the process of Constitution making. In that regard, the generation of views by the people is not an act of Constitution making. It is their expression of opinion. Constitution making involves the collation of those views, their processing into constitutional proposals, the debate of those proposals and their concretisation as the text of a document which bears the form and name of a Constitution. That function cannot be done by the people directly as there is neither a stadium large enough to accommodate them nor expertise on the part of their body as a whole to process a Constitution. The act of Constitution making can only be performed by representation. That is where a constituent assembly comes in. The people are represented by those they have elected to make the Constitution. The thing having been made, faithful recognition of the sovereignty of the people requires that they check and verify that what has been done for them and in their name is to their satisfaction. That process is the adoption or ratification of the Constitution. It is where a referendum or plebiscite comes in. The sting of the applicants in this case is that they, alongside with other Kenyans, have not been***

afforded the vehicle of a constituent assembly and a referendum."

[**73**] I am in agreement that the people in exercise of constituent power can abrogate their Constitution or make a new Constitution, and that the exercise of that constituent power demands the participation of the people through civic education, public participation, constituent assembly debate, consultation and public discourse, and finally a referendum in which the people endorse the new Constitution or the abrogated Constitution. This is the exercise of the primary constituent power as explained by Prof. Nwabueze and Prof. Roznai, and applied by Ringera, J.

[**74**] As defined by Prof. Roznai, primary constituent power is distinct from secondary constituent power. The latter is what Ringera J. addressed in considering whether parliament had powers under section 47 of the former Constitution to make amendments that would result in the repeal or abrogation of the Constitution, or the enactment of a new Constitution. In this regard, Ringera J. was categorical that parliament has no such powers, stating that:

"It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered. Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark therefore is the power to constitute or

reconstitute the framework of government, in other words, make a new constitution. That being so, it follows *ipso facto* ***that Parliament being one of the creatures of the Constitution cannot make a new constitution. Its power is limited to the alteration of the existing constitution only. Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the peoples' sovereignty; (ii) constitutionalism betokens limited powers on the part of any organ of government; and (iii) the principle of the supremacy of the constitution precludes the notion of unlimited powers on the part of any organ, it follows that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution: no more and no less."***

[**75**] Ringera J. concurred with the position in the Kesavananda case that parliament has no power to amend or change the basic features of the Constitution, or abrogate and enact a new one, and I am in agreement with this position which is the position that was adopted by the learned Judges in the High Court. However, it is important to note that Ringera J. did not address the exercise of secondary constituent power in regard to an amendment initiated by public initiative as the Constitution (as it was then) did not provide for it.

[**76**] In my view, the people can exercise their sovereignty in constitution making through their secondary constituent power, by either delegating to parliament or reserving to themselves the power

to amend the Constitution. This is what the framers of the Constitution did in Articles 255 to 257 by delegating the power to parliament to amend the Constitution under Article 256(1)-(5), through a parliamentary initiative, and allowing the people to exercise their reserved powers to amend the Constitution through a popular initiative under Article 257. This means that the popular initiative is a citizen driven process. In both instances, the people remain involved in both the popular initiative and parliamentary initiative through public participation, and are the ultimate determinant through the referendum process on whether the amendment is carried.

[**77**] The Constitution of Kenya, 2010 also empowers parliament to exercise constituted power under Article 94(3) of the Constitution in regard to amendment of constitutional provisions other than those mentioned in Article 255. It is necessary to interrogate the express constitutional provisions that donate amendment power so as to determine the extent of the powers provided, especially as relates to amendment of the basic structure.

[**78**] The starting point for such an interrogation must be an understanding of "amendment" of the Constitution and the distinction between amendment and dismemberment or change and remaking of a constitution. **Prof. Walter Murphy** is cited by the 1st

to 5th respondents as defining amendment to be alteration to a constitution that "**corrects or modifies the system without fundamentally changing its nature**" and continues that "**an amendment operates within the operating parameters of the existing Constitution**." Prof. Richard Albert defines amendment "**as a change whose content is consistent with the existing design, framework and fundamental presuppositions of the Constitution, and which entails unbroken unity with the Constitution being amended**."[16] These two definitions are consistent with the definition in **Black's Law Dictionary 10th edition** that defines amendment as: **"a formal and usually minor revision or addition proposed or made to a statute or constitution, a change made by addition, deletion or correction especially an alteration in wording; and secondly, the process of making such a revision."**

[**79**] From these definitions it is clear that an amendment is an alteration of the constitution that is carried out within the confines of the existing constitution. Secondly, it alters the constitution in a way that does not radically change the nature of the constitution, which means it must remain consistent with the objectives and

[16] Richard Albert, "Constitutional Amendments: Making, Breaking and Changing Constitutions. (Oxford University Press, 2019) p79

purpose of the Constitution. This is to be contrasted with change or remaking of the Constitution which involves a complete review and/or substitution of the former constitution with a new one, and this can only be done through the exercise of primary constituent power. Dismemberment on the other hand, according to Black's Law Dictionary 10th edition is: **"(1) to cut a body into pieces and tear it apart by detaching all limbs; (2) to divide a country or organization into smaller parts**." Concise Oxford Dictionary, 12th edition similarly defines dismember as "**to cut the limbs from, (2) partition or divide up (a territory or organization)."** Thus, dismemberment in regard to the Constitution would mean completely tearing the constitution apart by removing its significant parts so that it no longer has the same identity. Thus, it is more drastic than amendment. I bear in mind these definitions and distinctions as I proceed to consider the amendment power.

[**80**] As noted in the judgment of the High Court and the respective submissions that were made before us, the history of Kenya in regard to amendment of the Constitution is replete with abuse of the amendment provisions and a hyper-amendment culture that resulted in the mutilation of the former Constitutions. In truth, the amendments culminated in dismemberment of the original Constitution. It is in that context that Chapter 16 of the

Constitution was made and must be understood. The framers of the Constitution, no doubt, wanted to make sure that a situation does not arise where the amendment provisions are abused in a way that results in dismemberment of the Constitution or negates the spirit and purpose of the Constitution. Nonetheless, they incorporated a specific chapter in the Constitution dealing with amendment of the Constitution, leaving no doubt that they accepted the fact that there will be situations in which there will be need to amend the Constitution.

[**81**] The amendment provisions in Chapter 16 were made with abundant caution, as Article 255 provides not only for amendment of the Constitution to be made either through parliament or through a popular initiative, but also provides a higher threshold for amendments relating to certain thematic areas of the Constitution. The thematic areas identified in Article 255 are:

(a) the supremacy of the Constitution
(b) the territory of Kenya
(c) the sovereignty of the people
(d) the national values and principles of governance
(e) the Bill of Rights
(f) the term of office of the president
(g) the independence of the Judiciary and the commissions and independent offices to which Chapter 15 applies
(h) the functions of parliament
(i) the objects, principles and structures of devolved government
(j) the provisions of Chapter 16.

[**82**] It appears to me that the framers of the Constitution either consciously or unwittingly identified the basic structure of our Constitution through Article 255. In my view, the thematic areas that have been identified are crucial and form the pillars of the Constitution. For example, without the thematic areas on the supremacy of the Constitution, the territory of Kenya and the sovereignty of the people, the document would not have its identity and would be a completely different document from what was envisaged by the people and the framers of the Constitution. Without the national values and principles of governance, the Bill of Rights, and the independence of the Judiciary, the Constitution would be a hollow document, not protecting the rights of the people or serving the interest of the people of Kenya, as was intended. That is to say that the framers of the Constitution of Kenya, 2010 conscious of these thematic areas as the main pillars forming the basic structure of the Constitution, nonetheless provided a leeway for amendment of these thematic areas, putting in place appropriate safeguards including the peoples' participation and final decision on the amendment. This is a clear indication that in regard to amendments, the Constitution of Kenya, 2010 is explicit and self-sufficient.

[**83**] The key question in considering whether the basic structure doctrine applies in Kenya, is whether notwithstanding the express provisions for constitutional amendment contained in Chapter 16 of the Constitution and the limitations imposed therein, additional implied conditions that limit the amendment power, can be inferred relying on the basic structure doctrine, and whether there are any eternity clauses or provisions of the Constitution that are unamendable?

[**84**] The concept of a basic structure is not a new concept in our jurisdiction. As already noted, in Njoya's case that I have already adverted to, Ringera, J addressed the concept in considering the limitation of the constitutional amendment power of Parliament. **Lenaola J**. (as he then was) also had occasion to address the concept of basic structure in **Commission for the Implementation of the Constitution vs. National Assembly of Kenya & 2 others [2013] eKLR,** where the learned Judge rendered himself as follows:

> ***'To my mind the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the judiciary is tasked with the responsibility of ensuring constitutional integrity the Executive, the tasks of its implementation while Independent Commissions serve as the "peoples' watchdog" in a constitutional democracy. The basic structure***

of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses <u>an internal</u> consistency, deriving from certain unalterable constitutional values and principles ...One must also remember our peculiar history, and the reason why it was necessary to limit the power of Parliament to amend the Constitution or rather make it extremely difficult to do so. I am also alive to the fact that the Independence Constitution was amended very soon after its promulgation and many times thereafter. Successive safeguards for democracy and accountability were thereafter casually removed. The call for a new Constitution was key to the demands for a return of a true constitutional democracy since nothing good was left of our Independence Constitution due to its piecemeal amendments."

[**85**] **<u>Priscilla Ndululu Kivuitu & another (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 others v Attorney General & 2 others</u> [2015] eKLR** (the Kivuitu case), is another case in which a three Judge Bench of the High Court addressed the question of the applicability of the basic structure. The Judges stated in part as follows:

"We agree with the sentiments expressed by Ringera, J in Njoya 2, <u>that an amendment that upsets the basic structure of the Constitution could not be effected by Parliament without involving the people</u>...

160. It is clear from the above-cited provision that there are amendments that can only be done with

the involvement of the citizens by way of a referendum (Article 255 (1)) or popular initiative involving at least one million registered voters (Article 257 (1)). Even where Parliament has been mandated to amend the Constitution, it can only do so after the amendment Bill has been subjected to public discussion (Article 256 (2)). The voice of the people is a voice that cannot be ignored when it comes to the amendment of the 2010 Constitution."

[**86**] Four years later, in **Senate and 48 others vs Council of County Governors and 54 others [2019] eKLR,** a five Judge-bench of this Court stated as follows regarding the Constitution:

"In this matter, Article 255 (1) (i) of the Constitution expressly states that any alteration to the objects, principles and structure of devolved governments can only be done by way of referendum. If a finding is made that the Amendment Act alters the structure of devolved government, it would follow that the alteration is unconstitutional as no referendum was conducted prior to enactment of the Amendment Act".

[**87**] From the submissions that were made before us, it is clear that the issue of constitutional amendments is a topical issue that has elicited opinions, debates and scholarly writings from jurists and academicians. It has also been subject of litigation in several jurisdictions. In discussing constitutional amendments, the paradox of "unconstitutional constitutional amendments" has come to the fore. Like the opinion of doctors, the opinion of the legal experts is divided, some in agreement, others in disagreement. Legal and academic writers in their academic discourse give us

theory of what the ideal constitution should look like, and what should be the aspiration in making the constitution. But constitutions are like human beings, they are never perfect.

[**88**] Each constitution responds to different circumstances in a social set up that is not necessarily the same as another. Constitutions cannot therefore be the same. Many times as happened during the constitutional review process in Kenya, compromises and concessions have to be made in order to arrive at an agreement. Furthermore, although the people make the Constitution with assistance from experts, the views of experts important as they are, are not always followed. These are all important factors in the interpretation of the constitution.

[**89**] Amendments of constitutions are often necessary to respond to situations, or changing circumstances in the particular society. Likewise, the framers of the Constitution of Kenya, 2010 recognized the need for development of the Constitution, and provided for it in Article 259. This Article obligates an interpretation of the Constitution in a manner that not only promotes its purposes, values and principles; but also advances the rule of law, the human rights and fundamental freedoms; permits the development of the law; and contributes to good governance. Thus, the Constitution must be interpreted in a balanced way that achieves all these aims.

[**90**] As already noted, Article 255 provides a limitation to the amendment power in the identified thematic areas. It provides a higher threshold for alteration of any part of the basic structure identified in Article 255. Such amendments can only be done within the constitutional boundaries so that the amendment does not distort or deviate from the original purport of the Constitution. Under Article 257, the people can call in their reserved secondary constituent amendment powers through a popular initiative. But, the exercise of that power must remain subservient to the Constitution because it is a power that unlike the primary constituent power emanates from the Constitution. The amendment must serve the Constitution to the extent of developing it without deviating from its original purport. The amendment must therefore remain faithful to the Constitution.

[**91**] The exercise of the secondary constituent power under Article 257 of the Constitution through an amendment by a popular initiative, is not inconsistent with the basic structure doctrine though slightly different from the application in India to the extent that the power is expressly provided for in the Constitution, and the amendment initiative neither originates from parliament, nor does parliament have the final say. The amendment process provided under Articles 257 is inclusive as it not only involves the people in

its initial stages, but also provides room for participation of parliament and the national assembly, and the people retain the power of approving the final product at the referendum. It is therefore an amendment that is done by the people but with a limitation that being a secondary constituent power, it is subservient to the primary constituent power and must remain true to the original purport of the Constitution.

[**92**] At paragraph 474(g) the High Court stated:

> ***"474(g)...Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, unamendable: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations***

permitted by our Canon of constitutional interpretation principles." (Emphasis added).

[**93**] The learned Judges go on to give Article 2(1) and 2(5) as examples of unamendable clauses or an eternity clause. According to Prof. Roznai, unamendable provisions limit the holder of the constitutional amendment power, in exercising its power to certain constitutional subjects, principles or institutions. Prof. Roznai also posits that unamendable provisions may also generally protect the spirit of the Constitution, spirit of the preamble, fundamental structure of the constitution or nature and constitutional elements of the State. The Constitution has not specifically identified any particular clause as an unamendable clause or an eternity clause. Therefore, as admitted by the learned Judges, there are no express eternity clauses or unamendable provision in the Constitution. However, as already noted there is restriction of amendment power in Chapter 16 of the Constitution, such that under Article 255 to 257, there are procedural and substantive limitation to the amendment power so that amendments involving the specified thematic areas can only be done if there is compliance with the strict procedure provided. It cannot be said that the provisions in the thematic areas are unamendable because, the Constitution has

provided for amendability subject to the limitation indicated in Chapter 16.

[**94**] The question is whether as contended by the learned Judges there are certain provisions in the Constitution that are inoculated from this amendment power because they express core categorical values. As there is no express provision for unamendability, is there justification for the conclusion by the learned Judges that some provisions of the Constitution are unamendable? The High Court was of the view that:

> ***"Whether a particular clause in the Constitution consists of "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our canons of constitutional interpretation principles."***

[**95**] I find the following passage from Prof. Roznai[17] in regard to implicit limits on amendment power useful:

> ***"…****the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution.* ***The constitution, in that respect, is not the mere formal existence of the document, but rather it includes the constitution's essential features. Each constitution has certain fundamental core values or principles, which form the 'the spirit of the constitution'. This is what I***

[17] **Prof Roznai - "*Towards a Theory of Unamendability*"** An article in the **New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper No. 15-12 at p28-29**

term the *foundational structuralist* ***perception of constitutions. According to this perception, constitutions are not merely 'power maps' that reflect the political power distribution within the polity. They are more than instruments of empowerment and restrictions. They reflect certain basic political philosophical principles, which form the constitution's foundational substance, its essence the constitution is structured upon these basic principles and it is no longer the same without them. That is, when the amendment power alters the basic essential principles of the constitution, it 'substantially varies' from the purpose for which it was originated. It no longer*** *amends* ***the constitution but*** *constitutes* ***a new one."***

[**96**] While I disagree with the learned Judges' position, that there are unamendable clauses in the Constitution, I find the argument by Prof. Roznai, that there may be a general implicit unamendability that runs through the constitution to protect the original purport and spirit of the constitution, persuasive. This is consistent with the sentiments expressed by the learned Judges in the two cases that were relied upon by the Judges of the High Court, and which I reproduce herein for purposes of clarity. The Constitutional Court of South Africa in **United Democratic Movement vs Speaker of National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017)** stated thus:

"The Preamble to our Constitution is a characteristically terse but profound recordal of

where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approached to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution."

[**97**] Similar sentiments were expressed by the Tanzania Court of Appeal in **Ndyanabo vs Attorney General [2001] 2 EA 485 at 493**:

"The Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endevour to avoid crippling it, by construing it technically, or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it."

[**98**] In interrogating the original purport and spirit of our Constitution, my first port of call is the Preamble to the Constitution, which I reproduce herein:

"PREAMBLE

We, the people of Kenya –

ACKNOWLEDGING the supremacy of the Almighty God of all creation:

HONOURING those who heroically struggled to bring freedom and justice to our land:

PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:

RESPECTFUL of the environment, which is our heritage and determined to sustain it for the benefit of future generations:

COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:

ADOPT, ENACT and give this Constitution to ourselves and to our future generations.

GOD BLESS KENYA"

[**99**] The preamble indicates that the Constitution is the exercise of the sovereignty of the people of Kenya in determining their form of governance to meet: their aspirations for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law; their commitment to nurturing

and protecting the wellbeing of the individual, the family, communities and the nation; the sustainment of their heritage and environment for their benefit and that of future generations; and the fostering of peace and unity as one indivisible sovereign nation. These aspirations and objectives are the purport and spirit of the Constitution that must remain alive in its implementation. The exercise of any legislative power to enact an amendment that is contrary to the purport and spirit of the Constitution, will not pass muster.

[**100**] That is to say that although all the core parts of the Constitution are amendable under Chapter 16 of the Constitution, there is an implied limitation that amendment of the Constitution will only be permissible if compliant with the purport and spirit of the Constitution. In this regard I respectfully disagree with the position taken in the decision in the South Africa case of **Kwa Zulu – Natal & others vs President of the Republic of South Africa and others** (supra) that the reliance upon the spirit of the Constitution is misconceived and that once the procedure in the amendment process is adhered to the amendment is constitutionally unassailable.

[**101**] In my view any proposed constitutional amendment must pass both the procedural and the substantive test. Accordingly, the

fact-intensive determination adverted to by the High Court, should not be one to determine the unamendability of any particular constitutional clause, or core parts of the Constitution, but a substantive examination of the purported amendment, in order to determine whether the amendment meets the substantive test in regard to the spirit and purport of the Constitution as revealed in the Preamble. This is the threshold of the general implied unamendability that would render an amendment an "unconstitutional constitutional amendment" if it does not meet the substantive test.

[**102**] This can well be illustrated by the examples that were given by the 1st to 5th respondent at Paragraph 282 of their petition that was filed in the High Court. For instance an amendment to Chapter 2 of the Constitution to divide Kenya into two would fall into the thematic area of supremacy of the Constitution and would be contrary to the people's determination as espoused in the preamble to live in peace and unity as one undivided nation; an amendment of Chapter 10 to abolish the Judiciary would be contrary to the aspirations of Kenyans for a government based on essential values of justice and the Rule of law; an amendment of chapter four to abolish the right of an accused person to a hearing would be contrary to human rights, justice and the Rule of Law; and

amendment of chapter one to relinquishing control over Kenya to Uganda or a foreign power would be contrary to the people's sovereign power and their determination to live in unity as one indivisible foreign nation.

[**103**] The examples are purported amendments that touch on the basic structure of the Constitution as identified through the thematic areas stated in Article 255(1) of the Constitution. The purported amendments may meet the procedural strictures provided under Chapter 16 of the Constitution, but would not meet the threshold of the general implied unamendability in regard to the spirit and purport of the Constitution, as revealed in the Preamble. It is also instructive that the preamble to the Constitution is not a constitutional clause that can be amended. It is an introductory statement which remains the reference point in terms of the Constitution's aims and objectives. It is therefore the GPS from which each constitutional clause gets direction and any amendment must be measured accordingly.

(vi) Finding on the Basic Structure

[**104**] My conclusion on the basic structure is, first, that the Constitution of Kenya has a basic structure which has been identified by way of thematic areas in Article 255(1) of the

Constitution; secondly, Chapter 16 of the Constitution provides for amendment of any part of the Constitution including the basic structure and no express unamendable constitutional provisions or eternity clauses have been provided in the Constitution; and finally, the basic structure doctrine is applicable in Kenya to the extent that the exercise of secondary constituent power and constituted power to amend the Constitution is impliedly limited by the Constitution as evident in its spirit and purport, and therefore the exercise of amendment powers under Chapter 16 (Articles 255-257) of the Constitution is impliedly limited as such amendment must conform to the spirit and purport of the Constitution.

B. MEANING AND PURPORT OF A POPULAR INITIATIVE UNDER ARTICLE 257 AND ITS CONSTITUTIONAL REMIT

(i) Analysis on Amendment by Popular Initiative

[**105**] Turning to the Constitutional Remit of a popular initiative, Article 257 of the Constitution provides for an amendment by a popular imitative as follows:

> ***"(257(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
>
> ***(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.***

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).”

[**106**] In addressing the power to amend the Constitution through a popular initiative under Article 257, the first question that arises is 'what is an initiative, and who is a promoter in regard to a Bill under this Article?' The High Court was criticised for relying on the definition from Wikipedia, a free online encyclopaedia created and edited by volunteers. On my part, I have sourced the definition from **Black's Law Dictionary, 11th edition** in which "**initiative**" is defined as:

> **"An electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate. Recognised in some state constitutions, the initiative is one of the few methods on direct democracy in an otherwise representative system. Cf Plebiscite 1; Referendum**."

[**107**] That definition concurs with the Wikipedia definition that the High Court adopted. From the above definition, it is apparent that an initiative is a process through which voters take control by compelling a vote on a specific legislation. This means that the process must be a process initiated by a voter or voters as opposed to their representatives. The definition is consistent with Article 257 that requires a promoter of the Bill to galvanize support for it, and establish that it is supported by at least 1 million registered voters. The definition is also consistent with Article 1(2) of the Constitution that provides that:

> **"The people may exercise their sovereign power either directly or through their democratically elected representative."**

[**108**] I am further fortified in my understanding of a popular initiative by **Prof Albert L Sturn** who describes constitutional initiative (the American equivalent of a popular initiative), as follows:

> ***"The constitutional initiative is a technique of constitutional reform which affords a means of supplementing amendment by legislative proposal. It is not intended to replace the older method of altering state constitutions, but merely to provide an instrument whereby the people acting directly, may inaugurate change.....It is regarded more as an expedient which may be utilized in situations where the legislature has failed to act. Substantially this device amounts to a reservation by the people of the power to alter the basic law in their sovereign capacity, without resort to the usual process of legislation through representation."*** [18]

[**109**] The following extract from the **"Final Report of the Technical Working Group "K" of the Constitution of Kenya Review Commission on Constitutional Commissions and Amendments to the Constitution"** that was quoted by the Attorney General on the historical background, reveals the same thinking:

> ***"...committee introduced a novel idea called popular initiative. This is an innovation where the***

[18] Albert L sturm "Methods of State Constitutional Reform" University of Michigan Government Studies No 28 Ann Abbor University of Michigan 1954

> ***citizens can on their own motion initiate amendment to the Constitution by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. The committee explained that their intention was a starting point towards curbing dictatorship by Parliament."***

[**110**] The framers of the constitution having provided under Article 256 for a parliamentary initiative, it follows that the second avenue of popular initiative was intended for the people, and not their representatives such as members of parliament or the President. Prof. Charles Fombad[19] also embraces this idea when he states as follows:

> **"The Burkina Faso, Kenya, and DR Congo constitutional provisions provide an important way of dealing with one of the major obstacles to constitutional change; a refusal by the government to bring a request for change before the legislature, which in constitutional theory, represent the sovereign will. Allowing petitions by a specified number of citizens is certainly good for ensuring that governments do not have the absolute discretion to determine whether or not a proposed constitutional amendment should go before the legislature..."**

[**111**] The word promoter has been used in Article 257(3) & (4) where the promoter is obligated respectively to formulate a general suggestion into a draft Bill and to deliver the draft Bill and the one million supporting signatures to the IEBC. Black's Law Dictionary

[19]Prof. Fombad, "Some Perspective on durability and change under Morden African constitutions".

11th Ed. defines promoter as: **"(i) someone who encourages or incites; (ii) corporations, a founder or an organiser of corporation or business venture, one who takes the entrepreneurial initiative in founding or organizing a business or enterprise**". Using this definition, a promoter of a popular initiative under Article 257(3) may not necessarily be the originator of the idea of a popular initiative, but one who takes the lead in putting the idea together in the form of a Bill and encouraging other voters to support the idea. In line with the objective of a popular initiative such a promoter must be an ordinary citizen and not a parliamentarian or state officer.

(ii) <u>Finding on the Popular Initiative</u>

[**112**] For the reasons that I have given, I concur with the learned Judges of the High Court that a popular initiative is an initiative of the ordinary citizenry as opposed to the law-making bodies and that it is intended to be used where the law making bodies are unable or unwilling to act. Neither the President nor any state organ can initiate an amendment through a popular initiative under Article 257.

(iii) Public Participation in a Popular Initiative

[**113**] The learned Judges made a finding that the BBI Steering Committee as the Promoter of the Constitution of Kenya Amendment Bill failed to comply with a key constitutional requirement of giving the people information and sensitizing them prior to embarking on the collection of signatures thereby rendering the process constitutionally unsustainable. Faulting this finding the appellants in CA 292/2021 submitted that participation of the people in a constitutional amendment by popular initiative, is a process in continuum and the parameters in each and every stage varies. For instance, there was public participation by the County Assemblies, National Assembly, Senate and the people at the referendum, and therefore participation could not be assessed on the basis of a single stage in the said sequence of events.

[**114**] In support of the appellants' submission reliance was placed on **Republic vs County Assembly of Kirinyaga and another Exparte Kenda Muriuki & Others, [2019] eKLR** in which Nyamweya, J made the following comments on public participation in a constitutional amendment process:

> ***"...[56] The effect of lack of public participation can however only be determined upon the conclusion of the process envisaged in Article 257 of the Constitution, given the double decision-making processes that are***

required to take place at the county assemblies and Parliament, and indeed, will be dependent on whether the majorities required in the county assemblies is met. The prevalence or lack of public participation as a contributing factor to the attainment of such majority. It is therefore premature to make a decision as to the effect of such lack of public participation at this stage and in the circumstances of this application. In addition, given the different actors in the promotion and passage of a bill to amend the Constitution by popular initiative, it may be necessary to consider the cumulative efforts at public participation before deciding on its sufficiency or otherwise..."

[**115**] The appellants further argued that the collection of the 1 million signatures in support of the popular initiative was part of the public participation; that to insist that the promoter must carry out public participation in the manner contended by the High Court does not make sense; that every case is based on peculiar circumstances, and the mode, degree, scope, and extent of public participation varying accordingly; and that it is imperative that the quality and scope of public participation be assessed cumulatively in each of the processes envisaged under Article 257 of the Constitution, starting from the point where the promoters solicit for supporters for the amendment initiative, up to the referendum. **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** was cited in support.

[**116**] Counsel for the 43rd respondent who supported the appeals, pointed out that the concept of public participation is intended to enhance participatory democracy and this can interface with either Parliament or the county assemblies as *Article 118* of the *Constitution* provides for public participation as an obligation for Parliament and *Article 196(1(a)&(b)* obligates the County Assemblies to facilitate public participation.

[**117**] The respondents who opposed this ground of appeal countered that a constitutional amendment by popular initiative, has the effect of possible fundamental alterations to the Constitution, and this required sequential compliance of four conditions, that is: civic education; public participation; debate, consultations and public disclosure; and referendum; that the appellants had deliberately tried to disguise a parliamentary initiative as a popular initiative; and that an analysis of Articles 93 and 94 of the Constitution which establish Parliament as a legislative organ, and Article 257 on the constitutional amendment processes for a popular initiative, reveals that Parliament has no legislative role in the constitutional amendment process through a popular initiative.

[**118**] On the issue of public participation, the 1st - 5th respondents submitted that the Amendment Bill, 2020 was not formulated through a consultative process but was a populist enterprise by the President and Hon. Raila Odinga; that IEBC admitted that no public participation was conducted by itself before the submission of the Amendment Bill, 2020 to County Assemblies; that by holding that it had no legal obligation to ensure public participation, IEBC was merely trying to run away from their admissions; and that entrenched in the Preamble, pronounced and reiterated in numerous provisions of the Constitution is the statement that all power resides in '**the People of Kenya**' and public participation is the common and ultimate denominator. The respondents asserted that meaningful public participation required citizens to have access to information that is relevant to policy-making.

[**119**] It was submitted that Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation; that the steering committee held 93 stakeholder meetings all of which were held in Nairobi; and that the difficulty the respondent faced in

serving the Committee shows how inaccessible it was to the common man which confirmed that “wanjiku” was not involved in the meetings, and consequently, there was no public participation.

[**120**] In addition, these respondents posited that authentic public participation occurs when the promoter of a constitutional amendment by a public initiative comes up with a problem, formulates a solution for that problem, then goes ahead and invites the public to give in their input to this initiative; and that the BBI constitutional amendment bill process failed in the threshold of authentic effective public participation as there was no dissemination of information, and the proposers secured the bare minimum votes.

[**121**] The matter in issue is whether a constitutional amendment through popular initiative calls for public participation, if so, what is the nature of public participation? and at what stage?. As I have already stated elsewhere, a constitutional amendment by a popular initiative is a citizen driven process. While a promoter may come up with a proposed amendment, he/she cannot move without the support of citizens. The Constitution has put the initial threshold at 1 million registered voters. Therefore, the public participation cannot await the participation provided for during legislation in the

County Assemblies or the two houses of parliament. It must start at the very commencement of the initiative.

[**122**] A popular initiative is anchored on the exercise of the people's sovereign power. The initiative must therefore start with sensitization and engagement with the people. This is important because the people must know what the initiative entails before they can support it. As **Katureebe, CJ** stated in the Mabirizi appeal:

> ***"The basis for the requirement for consultation of and participation of the public in the conduct of legislation is based on recognition of the sovereignty of the people as enshrined in Article 1 of the Constitution."***

[**123**] The learned Judges of the High Court properly directed themselves using appropriate authorities, including this Court's decision in **Kiambu County Government and 3 Others vs Robert N. Gakuru & Others [2017] eKLR**, where this Court asserted that:

> ***"The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation."***

[**124**] I am in agreement with the learned Judges, that public participation is one of the principles of good governance and that it is a constitutional right that must be complied with at every stage of a constitutional amendment process. This is apparent from Article 10(2) that provides for public participation as one of the national

values and principles of governance; as well as Articles 118 and 196 that provides for public participation in regard to legislation and other business of Parliament and its committees.

[**125**] In regard to a constitutional amendment through a popular initiative, public participation is particularly crucial at the commencement of the initiative, because, the people must have appropriate information regarding the initiative to enable them make an informed choice on whether to support it or not. The adequacy of public participation at the outset is therefore very crucial. For if at the outset the people are not well informed and properly engaged, then the initiative is not a citizen process. The issue is, how do the citizens get enlisted in the public initiative process, and how much information should they be given?

[**126**] As was stated in **Law Society of Kenya vs Attorney General, Constitutional Petition No. 3 of 2016**, public participation must be real and not elusory. I cannot therefore fault the learned Judges in holding that to facilitate proper public participation of the Constitutional Amendment Bill, 2020:

> ***"...the voters were entitled at a minimum to copies of the Constitution of Kenya Amendment Bill to read and understand what the promoters were proposing to amend. At the very least, the copies ought to have been in the constitutionally - required languages namely, English, Kiswahili, and Braille. The copies also ought to have been made available in other communication formats and***

technologies accessible to persons with disabilities including Kenya Sign language as required under Article 7(3)(b) of the Constitution. Only then would the voters be deemed to have been given sufficient information to enable them to make informed decisions on whether or not to append their signatures in support of the proposed constitutional amendments."

[**127**] The appellants argued that it was for the respondents who were alleging that there was no public participation, to prove this fact. However, under **Section 112 of the Evidence Act**, it is provided that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon that party. If there was public participation carried out in regard to the popular initiative, this was a fact that was within the special knowledge of the appellants who were promoting the Amendment Bill, 2020. The appellants cannot therefore, shift the blame on to the respondents. No evidence was laid before the court to prove that there was any meaningful public participation before the collection of signatures in support of the proposed Constitutional Amendment Bill, 2020. To the contrary there was evidence that the public administration through the chiefs were involved in the collection of signatures without any program for civic education or sensitization on the Bill. I therefore uphold the finding of the learned Judges that the BBI Steering Committee as the promoter of Kenya Constitutional

Amendment Bill failed to comply with the key constitutional requirement of giving people information and sensitizing them prior to the collection of signatures, and this rendered the process constitutionally unsustainable.

(iv) Procedure for Popular Initiative Bills in County Assemblies and Parliament

[**128**] As regards the procedure for a popular initiative in the County Assemblies and Parliament, Article 257(5) & (6) provides that IEBC should submit the draft Bill to the County Assembly for consideration, and that if the County Assembly approves the draft Bill, it is submitted to the two houses of Parliament. For reasons that have been given by brother Musinga, (P), I concur that the mandate of the county assembly at this stage is only to consider and either approve or reject the draft Bill. It has no mandate to make any alterations to the draft Bill.

C. THE LEGALITY OF THE BBI PROCESS AND THE PRESIDENT'S INVOLVEMENT

[**129**] The learned Judges of the High Court made declarations *inter alia*, that: the President does not have authority under the Constitution to initiate changes to the Constitution through a popular initiative under Article 257 of the Constitution; the BBI Steering Committee established by the President was unconstitutional and an unlawful entity which had no legal

capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution; and that the entire BBI process culminating with the launch of Constitution of Kenya (Amendment) Bill 2020 was unconstitutional, null and void, and done in usurpation of the people's exercise of sovereign power

(i) Attorney-Generals' Submissions on the legality of the BBI Process and the President's involvement

[**130**] The Attorney General faulted the finding of the learned Judges of the High Court in regard to the involvement of the President in the popular initiative, contending that the finding was based on a false premise that a popular initiative will always be commenced in opposition to the government of the day. He urged that Article 257 of the Constitution has inbuilt mechanisms that ensures that the popular initiative route remains people-centric regardless of how it is initiated. He gave an example of Sweden where political parties and interest groups have launched popular initiatives, with members of parliament being at the forefront in the collection of signatures. The Attorney General maintained that the President was not one of the promoters of the Amendment Bill, as the same was promoted by the BBI Secretariat, which is a voluntary political alliance for various political players in Kenya, distinct from the BBI Taskforce and the BBI Steering Committee.

(ii) <u>The President's Submissions</u>

[**131**] For the President, it was argued that the President is a person with rights under the Constitution that includes being a citizen, a politician and a political party leader; that as a registered voter, he is entitled to participate in the amendment of the Constitution by popular initiative under Article 257 of the Constitution; that as a citizen and leader of a political party, the President is entitled to the enjoyment of the political rights guaranteed under Article 38 of the Constitution, including the right to participate in the activities of a political party and "to campaign for a political party or cause".

[**132**] The Judges of the High Court were faulted for ignoring the clear separation of powers between the executive and the legislature, and the fact that the President is not a member of Parliament, and cannot therefore initiate amendment of the Constitution by parliamentary initiative. The Judges did not also take into account that a President could come from a minority party or even be an independent candidate, without members of Parliament. It was asserted that the President's ministerial function in assenting to a Bill, cannot render him incapable of participating in the enjoyment of his rights under the Constitution; that he can politically support and express an opinion about an amendment of

the Constitution through a popular initiative; and that under Article 257(1) of the Constitution, all that a popular initiative requires is approval by at least 1 million voters to initiate the process and it is immaterial where the promoter comes from.

(iii) <u>The Submissions of 1st -5th Respondents</u>

[**133**] The 1st to 5th respondents addressed this issue substantially in their written and oral submissions. These respondents argued that the process of formulating the Amendment Bill was neither a voter driven initiative, nor a parliamentary effort, or a popular initiative as provided under Article 257. Instead, it was an initiative that was unstructured, non-transparent, non-participatory and executive driven. Relying on the constitution making history, the respondents pointed out that during the constitution review process, Article 257 was originally Clause 302 – 304 in the Bomas Draft wherein the side note indicated that it was an "**Amendment by the People**". Although the side note was subsequently removed in the final version of the Constitution, the content of Article 257 did not change and therefore, it is clear that Article 257 was intended for use by the people and not the State.

[**134**] The 1st -5th respondents reiterated that the President could not constitute the constituent power acting through the Head of

Public Service or the Presidential Taskforce for BBI, or the BBI Steering Committee, nor could the President or any holder of State office originate a popular initiative. They accused the appellants of attempting to disguise a parliamentary initiative as a popular initiative and urged that the President cannot perform the dual role of initiating a Bill by popular initiative and finally assenting to it, nor can the President take on the role of a private citizen in initiating or promoting a popular initiative.

(iv) <u>Analysis of the legality of the BBI Process and the President's involvement</u>

[**135**] The popular initiative leading to the publication of the Constitution of Kenya (Amendment) Bill, 2020 (**the Amendment Bill, 2020**) originated from a process that has become commonly known as **Building Bridges Initiative (BBI**). This process commenced through the appointment of the Building Bridges to Unity Advisory Task Force (**BBI Advisory Taskforce**) by His Excellency the President Uhuru Muigai Kenyatta (**the President).** The appointment was published in Gazette Notice No 5154 of 24th May 2018, signed by Mr. Joseph Kinyua, in his capacity as Head of the Public Service. The BBI Advisory Taskforce submitted a report to the President in response to which, the President appointed a "Steering Committee on the Implementation of the Building Bridges

to a United Kenya Task Force Report" (**BBI Steering Committee**). The appointment of the Steering Committee was gazetted through Gazette Notice No. 264 dated 3rd January 2020 that was signed once again by the Head of Public Service, Mr Joseph Kinyua. The Steering Committee submitted a report to the President in October, 2020 making, *inter alia*, proposals for constitutional and legislative amendment including a draft Constitutional Amendment Bill. Subsequently, the Amendment Bill, 2020 was drafted and forwarded to IEBC as a public initiative amendment. The issue as to who promoted and forwarded the Bill to IEBC has remained controversial, and I shall revert to it.

[**136**] It is apparent that the President was at the forefront in the facilitation of the BBI process including the appointment of the BBI Advisory Taskforce and the BBI Steering Committee. The gazette notices were duly signed by the Head of Public Service confirming that the appointments were made by the President in his official capacity. While the respondents submitted that the President abused his powers in engaging in the BBI process, the appellants asserted that in facilitating the BBI process, the President was exercising his authority under Article 131(1)(e) as read with 131(2)(c) of the Constitution in promoting and enhancing the unity of the nation.

[**137**] Article 131 provides for the authority of the president as follows:

> **"131(1) The President –**
> **(a) is the head of State and Government;**
> **(b) exercises the executive authority of the Republic with the assistance of the Deputy President and Cabinet Secretaries;**
> **(c) is the Commander-in-Chief of the Kenya Defence Forces;**
> **(d) is the chairperson of the National Security Council; and**
> **(e) is a symbol of national unity.**
>
> **131 (2) The President shall-**
> **(a) respect, uphold and safeguard this Constitution;**
> **(b) safeguard the sovereignty of the Republic;**
> **(c) promote and enhance the unity of the nation;**
> **(d) ....."**

[**138**] The process leading to the handshake between the President and Hon. Raila Odinga, the formation of the BBI Advisory Taskforce, the BBI Steering Committee and the consequent Amendment Bill, 2020, is akin to the National Accord or peace initiative that was signed on 25th February 2008 between former President Mwai Kibaki and his erstwhile rival Hon. Raila Odinga, with a view to implementation of a reform agenda to bring peace and address the recurrent conflict in the country.

[**139**] As explained in the Kivuitu case, the signing of the National Accord, resulted in the former President appointing an Independent

Review Commission under the Commission of Inquiry Act (Cap 102) whose mandate included examining the constitutional and legal framework for the conduct of elections, the organizational and management structure of the Election Commission of Kenya, and its capacity to conduct electoral operations with a view to recommending electoral reforms. The Commission presented its report to President Mwai Kibaki on 17th September, 2008 in which it recommended fundamental amendments to laws governing conduct and management of elections. The report commonly known as the Kriegler report resulted in the enactment of the **Constitution of Kenya (Amendment) Act No. 10 of 2008** which disbanded and replaced the Election Commission with an Interim Independent Electoral Commission.

[**140**] In the Kivuitu case, the Judges were called upon to determine the constitutionality of the **Constitution of Kenya (Amendment) Act No. 10 of 2008** and interpret the meaning and import of the security of tenure of the commissioners of Electoral Commission, the independence of the Electoral Commission of Kenya, and the scope and legislative power of the National Assembly. The following extract from the judgment in the Kivuitu case in regard to Article 255 of the Constitution, is instructive:

"60. It is clear from the above-cited provision that there are amendments that can only be done with the involvement of the citizens by way of a referendum (Article 255 (1)) or popular initiative involving at least one million registered voters (Article 257 (1)). Even where Parliament has been mandated to amend the Constitution, it can only do so after the amendment Bill has been subjected to public discussion (Article 256 (2)). The voice of the people is a voice that cannot be ignored when it comes to the amendment of the 2010 Constitution."

[**141**] The learned Judges in the judgment under appeal rejected the plea of res *judicata* and plea of *sub judice* in regard to the legality of the appointment of the BBI Advisory Task Force, and the BBI Steering Committee. The learned Judges were of the view that the consolidated petitions before them covered a wider range of issues than those covered in High Court Petition No. 12 of 2020 (the Omtata case), and that although the matters covered in the Omtata case were directly and substantially in issue in the consolidated petitions, the matters in issue in the consolidated petitions cannot be said to be directly and substantially in issue in the Omtata case. In addition, the parties in the two suits were different. For the reasons that have been stated by Musinga (P), I am in agreement with the learned Judges that the doctrine of *sub judice* did not apply.

[**142**] As regards the issue of *res judicata*, the learned Judges found that the objection raised in regard to *res judicata,* was in effect an issue estoppel on the ground that the specific question concerning the legality or constitutionality and the mandate of BBI Steering Committee had been resolved in **Thirdway Alliance Kenya and Anor vs Head of the Public Service, Joseph Kinyua & 2 others; Martin Kimani & 15 Others [2020] eKLR,** (the Thirdway Alliance case). The learned Judges distinguished the Thirdway Alliance case as follows:

> ***"530. What is before us is a more specific question that narrows down from the question whether the President can generally form any committee, of whatever form or shape, or any matter to a more specific question whether he can form such a committee to initiate changes or amendment to the Constitution. This was a question not before the learned Judge in the Thirdway Alliance case. This is because in the Thirdway Alliance case the BBI Taskforce did not have the mandate to initiate constitutional amendments. However, the BBI Steering Committee has, as one of its terms of reference, the mandate to initiate constitutional changes which is the exact reason the petitioner in petition E426 of 2020 is challenging its legality."***

[**143**] In the Thirdway Alliance case, the High Court (**Mativo, J.**), held *inter alia,* that the President had a special power to appoint the BBI Advisory Taskforce and that the President's authority under Article 131 and 132 of the Constitution, is conferred upon him to

give him room to fulfil his executive functions, and should not be constrained through the principle of legality and rationality, provided the President has acted in good faith and has not misconstrued his powers.

[**144**] A perusal of the Thirdway Alliance judgment reveals that the learned Judge understood the issue before him as follows:

> ***"75. It is by now trite that the issue raised in this case is an invitation to this court to interpret the scope and the manner of the exercise of executive powers conferred upon the President by the Constitution. As we do so, we must seek to promote the spirit, purport and object of the Constitution.... In searching for the purpose, it is legitimate to seek to identity the mischief sought in limine.***
>
> ***....***
> ***88. First I will consider the President's powers and functions under Article 131 of the Constitution. Then second, I will set out the means by which we should assess the nature of the power in question. Third, I will apply the principles that emerge to the facts of this case.***
> ***....***
> ***110. It appears the real question in this court is not whether the impugned decision is administrative in nature, but whether a clear abuse of public power has taken place or an irrational decision has been made."***

[**145**] From these extracts of the judgment, it is obvious that Mativo, J. was concerned with the exercise of powers conferred upon the President by the Constitution in regard to the

appointment of the BBI Advisory Taskforce. The learned Judges of the High Court, distinguished the appointment of the BBI Advisory Taskforce from the BBI Steering Committee, on the basis that unlike the BBI Advisory Taskforce, one of the mandates of the BBI Steering Committee was to propose the initiation of constitutional changes. Unfortunately, this was not supported by the facts before the learned Judges.

[**146**] One of the terms of reference of the BBI Steering Committee published in Gazette Notice No. 264 as 1(b), and reproduced at paragraph 549 of the impugned judgment, was **"to <u>propose</u> administrative, policy, statutory, <u>or</u> constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report..."** (*underlining added).* The mandate of the BBI Steering Committee in this regard was first to 'propose' changes. In other words, the Committee was to make proposal for change. Black's Law Dictionary, 11th edition defines 'proposal' as "**(1) something offered for consideration or acceptance, a suggestion. (2) the act of putting something forward for consideration**." Secondly, the proposed changes were to be "administrative, policy, statutory, **<u>or</u>** constitutional changes." Hence, the mandate was not to make constitutional change, but to make recommendations on whatever

changes that were necessary. The use of the word "**or**" indicated that the changes did not necessarily have to include constitutional changes. Thirdly, it was not part of the mandate of the BBI Steering Committee to implement the constitutional changes, if proposed, but to give advice on how such changes should be implemented.

[**147**] Thus the purported distinction between the BBI Advisory Taskforce and the BBI Steering Committee did not exist as the BBI Steering Committee was not established for the sole purpose of initiating and promoting constitutional changes. Although the Thirdway Alliance case related only to the appointment of the BBI Advisory Taskforce, the issue raised in that case substantially related to the President's powers to appoint a taskforce or committee. In that regard, the finding on that issue relates to the appointment of the BBI Steering Committee which was appointed before the judgment, as much as it relates to the BBI Advisory Taskforce. More so, because the mandate of the BBI Steering Committee as appointed, did not include initiating and promoting constitutional changes. In short, the matter before the High Court regarding the legality of the appointment of the BBI Steering Committee was *res judicata* and not open for consideration by the learned Judges of the High Court.

[**148**] In the impugned judgment, the learned Judges of the High Court found that the appointment of the BBI Steering Committee was unconstitutional as there was no evidence that the President had complied with the provisions of Article 132(4)(a). I have considered these findings against the rival contention that the President was exercising his authority to engender peace pursuant to Article 131. Given the background to the BBI process as I have already set out, the initiative leading to the BBI process was not any different from the peace accord that resulted in the **Constitution of Kenya (Amendment) Act No. 10 of 2008.** The formation of the BBI Advisory Taskforce and the BBI Steering Committee, all appear to have been done in good faith to achieve that purpose.

[**149**] I appreciate that President Kibaki was operating under a different constitutional dispensation from that of President Uhuru. While President Kibaki was operating under the repealed Constitution which provided for presidential supremacy, the Constitution of Kenya, 2010 that provides for constitutional supremacy, and is very clear on the process of legislation and the role of the President. Under Article 131(1)(e) and 2(c) of the Constitution, the President is the symbol of national unity and has the authority to promote and enhance the unity of the nation.

[**150**] No evidence was produced to show that the appointment of the BBI Advisory Taskforce and the BBI Steering Committee was approved by the Public Service Commission as required under Article 132(4)(a). However, both committees were *ad hoc* committees appointed to advise the President. The appointments were actually officially gazetted under the hand of the Head of Public Service. I am in agreement with the position stated by Mativo, J. in the Thirdway Alliance case that the authority of the President in Articles 131 and 132 of the Constitution ought not to be constrained as long as the exercise of that power is rationally related to the purpose for which the power was given. The President cannot therefore be faulted for initiating the BBI process, appointing the BBI Advisory Taskforce and the BBI Steering Committee, in an effort to foster unity which is an initiative that was within his constitutional mandate.

[**151**] Furthermore, Article 256 and 257 provide for amendments by way of a parliamentary initiative and a popular initiative respectively. These Articles provide for the constitutional procedures that has to be followed in procuring the constitutional amendment. They do not provide for proposals for making an amendment by a parliamentary or popular initiative. Obviously, before the drafting and promotion of a parliamentary or popular

initiative, a lot of preliminary work has to be done. There is nothing that prevents the procurement and consideration of proposals for amendment by any person. The President was therefore free to obtain proposals for constitutional change from any quarters including the BBI Steering Committee. Such proposals could have been used in lodging a parliamentary initiative or even a popular initiative by appropriate persons, following the procedures provided under Articles 255 – 257. The BBI Steering Committee having given its proposals on changes which included a proposed Constitutional Amendment Bill, its mandate was expended at that stage. For these reasons, I find that the learned Judges not only erred in considering the legality of the BBI Steering Committee as the issue was *res judicata*, but also erred in finding that the BBI Steering Committee was an unconstitutional and an illegal entity created to perpetuate an unconstitutional purpose.

[**152**] Constitutional changes by means of an amendment to the Constitution falls under Article 255 - 257 of the Constitution, and there is no provision for the President to initiate proposals for amendment of the Constitution in the name of a popular initiative. While I do appreciate and commend the President's efforts in fostering the unity of the nation, the President is not an ordinary citizen. He remains the President in the political arena throughout

his tenure. He cannot temporarily remove his executive mantle in order to engage in a popular initiative, which is a process that has been reserved for citizens. His role in amendment of the Constitution is at the tail end of the process, as provided under Article 256(5) and 257(9) of the Constitution, and this is, in his capacity as President, to assent to an Amendment Bill once passed by parliament or the people through a referendum. It was all well for the President to appoint the BBI Steering Committee and receive the recommendations for legislative and constitutional changes, but having done so, the President ought to have engaged the government machinery or his party in pursuing these changes through a parliamentary initiative.

[**153**] As already indicated, BBI was a peace initiative by the President. The appointment of the Advisory Taskforce and the Steering Committee, including the experts and the drafting team that backed these committees all confirm that BBI was an executive driven process and not a citizen driven process. Although I disagree with the finding of the learned Judges that the BBI Advisory Taskforce and the Steering Committee were unlawful, I find that the BBI Steering Committee had no capacity to promote a Bill under Article 257.

[**154**] The Bill which was published as the Constitution of Kenya (Amendment) Bill 2020, was dated 25th November 2020, and the promoters indicated as "Building Bridges Initiative." Under Article 257 the promoter of a popular initiative is the one required to formulate it into a draft Bill and thereafter deliver it to the IEBC with supporting signatures. Dennis Waweru who described himself as co-chairperson of the "Building Bridges to a United Kenya National Secretariat" (**BBI Secretariat**), swore an affidavit dated 8th January, 2021 in support of an application for BBI Secretariat, to be joined in the petition that was filed by Muslims for Human Rights (**Muhuri**), on grounds, *inter alia,* that the BBI Secretariat was the mover of the Amendment Bill and the process intended to amend the Constitution through a popular initiative.

[**155**] Dennis Waweru attached to his affidavit a letter from BBI Secretariat duly signed by himself and another co-chairperson, Junet Mohammed. The letter addressed to IEBC was expressing their intention to collect one million signatures in support of the proposed Constitution of Kenya (Amendment) Bill 2020. Also attached was a response from IEBC approving their proposed format for collection of signatures for the popular initiative. Although it was contended that the BBI Secretariat is a voluntary political alliance, there was nothing that was laid before the High

Court to confirm this or to establish the existence of the BBI Secretariat or connect it to "Building Bridges Initiative" that was indicated on the Bill as the promoter.

[**156**] As found by the High Court, the drafting of the Amendment Bill, 2020 was done by the BBI Steering Committee and was the culmination of the BBI process initiated by the President. While Dennis Waweru and Junet Mohamed may have been the agents who communicated with the IEBC regarding the collection of signatures in support of the intended popular initiative, there was no nexus established between them and the BBI process such as to confirm that the two were the promoters of the constitutional Amendment Bill, 2020. In any case, Junet Mohammed, who is a current sitting Member of Parliament, did not qualify to use the popular initiative route. Both the President and Hon. Raila continued popularising the BBI process and encouraged the collection of signatures in support of the constitutional change proposed through the BBI process. The attempt to distinguish the BBI Secretariat as a separate entity from the BBI Steering Committee was therefore, not convincing.

(v) Finding on the legality of the BBI Process and the President's involvement

[**157**] The BBI process remained executive driven and the promoter of the Amendment Bill, 2020 was the President through the BBI Steering Committee. As a popular initiative is a citizen initiative, the attempt by the President to pursue a popular initiative through the BBI Steering Committee was unconstitutional and unlawful, and to that extent, neither the BBI nor the BBI Steering Committee had the competence to promote the draft Amendment Bill, 2020.

[**158**] I would therefore uphold the declaration at paragraph 784(iii) that the President does not have authority under the Constitution to promote a constitutional amendment through a popular initiative, and that a constitutional amendment can only be made through a parliamentary initiative under Article 256, or through a popular initiative under Article 257 of the Constitution. I would set aside the declaration at paragraph 784(iv) and declare that the BBI Advisory Taskforce and the BBI Steering Committee, established by the President were not unconstitutional or unlawful entities. I would partly uphold the declarations at paragraphs 784(v), (vi) and (viii) to the extent that the BBI Steering Committee, though not unconstitutional or an unlawful entity, had no legal capacity to promote constitutional changes under Article 257 of the

Constitution, and consequently, the promotion and launch of the Constitution of Kenya (Amendment) Bill, 2020 was done unconstitutionally and in usurpation of the people's exercise of sovereign power.

D. PROCEEDINGS AGAINST THE PRESIDENT

[**159**] In their impugned judgment, the learned Judges made two key declarations against the President. First, that civil court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. Second, that the President had contravened Chapter 6 of the Constitution and specifically Article 73(1)(a)(i) by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution. The learned Judges declined to make a declaration that the President should make good public funds used in the unconstitutional constitutional change process promoted by the BBI Steering Committee on the implementation of the BBI Taskforce report. Similarly, the learned Judges declined to grant the prayer that other public officers who have directed or authorized the use of public funds in the unconstitutional constitutional change process

promoted by the BBI Steering Committee on the implementation of the BBI Taskforce report make good the said funds.

[**160**] The President has appealed against the declarations made against him, while **Morara Omoke** (76th respondent), **254 Hope** (72nd respondents) and **Kenya National Union of Nurses** (15th respondent), have cross appealed against the decision in regard to the orders declining to give declarations against the President and the other public officers. **Isaac Polo Aluochier** (78th respondent) who had sued the President in his personal capacity, also strenuously opposed the President's appeal.

[**161**] The President raised 17 grounds of appeal that were argued in four thematic areas. First, that he was condemned without a fair hearing; secondly, that the learned Judges erred in the interpretation and finding on the presidential authority and immunity under the Constitution; thirdly, that it was wrong for the High Court to make a finding that the President had contravened Chapter 6 of the Constitution; and finally, that the learned Judges erred in proceeding to hear and determine issues that had already been determined by a competent court of concurrent jurisdiction.

[**162**] At paragraph 536-538 of the impugned judgment, the learned Judges found that the President was sued by the 78th respondent in his personal capacity, and that although both the

President and the Attorney General were named as respondents to the petition, the Attorney General could not represent the President when sued in his personal capacity. The learned Judges also noted that the President did not enter appearance nor did he file any grounds of objection or a replying affidavit to contest the proceedings, and that although the Attorney General had purported to come to his defence, the grounds of objection and the submissions made by the Attorney General could not apply to the President.

(i) <u>Submissions by the President on Proceedings against him</u>

[**163**] It was submitted on behalf of the President, that the High Court having found that the President was sued in his personal capacity, did not address the issue of personal service of the petition upon the President; that the issue of the President's personal liability was not originally an issue, and was only brought up as such in the judgment; that the President was therefore denied the opportunity to raise an objection to the proceedings based on his immunity from civil proceedings under Article 143 of the Constitution; that there was no evidence on record confirming personal service of the petition upon the President; and that the 78th respondent had admitted in a sworn affidavit that the President was not served.

[**164**] It was further argued by the President's counsel, that no issue was framed or determined between the President in his personal capacity and the 78th respondent or any of the other respondents; that the learned Judges having held that the Attorney General could not represent the President, they ought to have ensured that the President was served with the petition before proceeding any further with the hearing of the petition; and that the learned Judges acted contrary to Article 50 and Article 27 of the Constitution in denying the President a fair hearing, equal protection and benefit of the law. In this regard, **Onyango Oloo vs Attorney General [1986-89] EA 456** and "**Dakar Declaration and Recommendation on the Right to a Fair Trial in Africa**," were relied upon.

[**165**] Counsel contended that where a party who has initiated an action elects not to serve proceedings on any of the parties he has sued, the only logical conclusion is that he has withdrawn or abandoned the claim against the party who was not served. Likewise, the President not having been served, it must be deemed that the petition against him was withdrawn or abandoned. Therefore, the learned Judges had no basis for making orders against him.

[**166**] Further, the President's counsel argued that the Attorney General was entitled under Article 156 to represent the President as the Attorney General is entitled to appear for the Government, and the President is the head of government; and that the High Court proceeded on that premise, until they made a finding in their judgment that the President was sued in his personal capacity. It was argued that the learned Judges ought to have made a preliminary finding on the issue before the hearing. The prejudice to the President was further compounded by the fact that the President was not served with the petition or the hearing notice. In addition, it was pointed out that the issue of the President's personal liability was not one of the issues framed by the Judges for determination.

[**167**] In regard to the personal liability of the President, counsel for the President submitted that the alleged grievances refer to official actions of the President, which the learned Judges at paragraph 494 of their judgment, had found were done in his official capacity. It was argued that Article 143(2) of the Constitution confers absolute immunity upon the President and no civil proceedings can be instituted against him in respect of anything done in exercise of his powers under the Constitution. Consequently, the declaration by the learned Judges violated Article

143(2) of the Constitution by defeating the presidential immunity. Using a comparative analysis of the position in several other jurisdictions, counsel argued that presidential immunity is not a concept unique to Kenya, even though the extent of immunity differs from jurisdiction to jurisdiction. In support of these submissions, **Katiba Institute vs President of Republic of Kenya & 2 Others, Judicial Service Commission & 3 Others (interested parties) [2020] eKLR;** and **Julius Nyarotho vs Attorney General & 3 others [2013] eKLR,** were cited.

[**168**] In regard to the President's alleged violation of Article 73(1) of the Constitution, counsel for the President argued that, first, the President did not violate Article 73(1)(a) of the Constitution, and secondly, that the President has presidential power to promote national unity. That apart from being the President of the Republic of Kenya, the President is also a person with rights under the Constitution and is a registered voter entitled to participate in the amendment by popular initiative under Article 257 of the Constitution. He is also a citizen and leader of a political party, entitled to the enjoyment of political rights including the right to campaign for a political party or cause and nothing barred the President from being a promoter in regard to the popular initiative in his capacity as a registered voter. In regard to the question

whether the President was acting in his personal or official capacity, counsel submitted that the Mativo decision, confirmed that the President was indeed acting in his official capacity, and the respondents could not purport to resurrect the question in a different form as they ought to have pleaded the entire case in the matter that was determined in the High Court. The learned Judges therefore ought to have applied the doctrine of *res judicata*.

(ii) <u>Submissions by the Attorney-General on Proceedings Against the President</u>

[**169**] The Attorney General supported the President's appeal arguing that the presidential immunity is embedded in the constitutional theory that the person elected by the people directly as its Chief Executive, must be protected from intrusion and interference in his or her work, and that this immunity allows the President to exercise his or her duties without looking over his shoulders for litigation and parliamentary processes that seek to counter his actions. In the Attorney General's view, the finding of the learned Judges regarding the President's personal liability during his tenure was contrary to the clear text of Article 143 of the Constitution. He urged that the petitions before the learned Judges were civil in nature, and covered by the presidential immunity provided under Article 143(2) of the Constitution.

[**170**] The Attorney General relied on **Deynes Murithi & 4 Others vs Law Society of Kenya & Anor [2016] eKLR;** and **Julius Nyarotho vs Attorney General & 3 others (supra)**. The Attorney General also faulted the learned Judges for finding that he could not make any representations in the proceedings on behalf of the President as this was a misdirection of Article 156(4)(b) of the Constitution as read with section 12(1) of the Government Proceedings Act.

(iii) Submissions by the 78th Respondent on Proceedings Against the President

[**171**] The 78th respondent who is the one who had sued the President in his personal capacity, strenuously opposed the President's appeal. He made oral and written submissions, urging that the President was properly served, and that the issue of the President's personal liability was properly considered as it was raised in his petition. He maintained that he served the President electronically, with his petition and filed an appropriate affidavit dated 16th January, 2021. He also explained that further service was effected through an email list set up by the Deputy Registrar of the High Court. He argued that although in establishing the BBI Steering Committee the President purported to act in his official capacity, it was not one of the constitutionally specified functions of

the President, nor did he have any constitutional authority to initiate the process of constitutional amendment through that committee.

[**172**] The 78th respondent urged that the President's conduct was an abuse of his presidential office contrary to Article 73(1)(a)(i) of the Constitution, and there was no constitutional prohibition against proceedings in his personal capacity. This respondent drew a distinction between Article 143(2) which deals with presidential immunity, and Article 145 which is concerned with removal of the President from office by way of impeachment by parliament. He maintained that the President does not have absolute immunity and distinguished the case of **Bellevue Development Company Limited vs. Francis Gikonyo & 3 Others [2020] eKLR** that was relied upon by the President. Referring to section 14 of the former Constitution, the 78th respondent argued that in Article 143, the people of Kenya decided to move away from absolute immunity, as they wanted a more accountable President subject to the rule of law.

(iv) Analysis on Presidential Immunity

[**173**] The first issue that I wish to address in regard to the orders made against the President is whether under Article 143 of the Constitution civil proceedings can be instituted against a President

in office, or a person performing the functions of the President during their tenure in office in regard to anything done or not done contrary to the Constitution. In this regard Article 143 of the Constitution states as follows:

> **"143. Protection from legal proceedings –**
>
> **(1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.**
>
> **(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.**
>
> **(3) ....**
>
> **(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."** *(Underlining added)*

[**174**] A reading of Article 143(1) & (2) shows that the President is protected from criminal and civil proceedings during his tenure as President except for a crime provided for under a treaty which prohibits immunity, However the immunity in regard to civil proceedings is qualified in that it is only available where the action subject of the proceedings, has been done or not done in the

exercise of the President's constitutional powers. It is clear that the immunity is limited to the President's term in office, and only applies in regard to acts done in pursuance of the President's constitutional powers. This means that the President can be sued during his tenure for acts which are not done in pursuance of his constitutional duties. This is a departure from section 14 of the repealed Constitution that provided for presidential immunity as follows:

> **"(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.**
> **(2) No civil proceedings in which relief is claimed in respect of <u>anything done or omitted to be done</u> shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of President."**

[**175**] A comparison of Article 143 of the current Constitution and Section 14 of the repealed Constitution, reveals that whereas the repealed Constitution provided immunity for "anything done or omitted to be done" by the President which would include official and unofficial acts, the current Constitution only provides immunity for anything done or not done by the President "in exercise of constitutional powers" thereby covering only official acts or omission leaving the President open to civil proceedings during the term of his office for unofficial acts or acts not consistent with

the exercise of his constitutional powers. This distinction is deliberate and well considered as it is consistent with Article 2 on the supremacy of the Constitution and Article 1(2) of the Constitution that delegates powers to the President and requires him to perform his functions in accordance with the Constitution. It is also consistent with the obligation bestowed upon the President as a state officer under section 73(1) in regard to leadership and integrity.

(v) Finding on Presidential Immunity

[**176**] For the aforestated reasons, I am in agreement with the findings of the learned Judges that the President is subject to civil proceedings during the tenure of his office whenever he acts outside the parameters of the Constitution or omits to do that which he is bound to do under the Constitution. I would therefore uphold the declaration at paragraph 784(ii) of the judgment.

(vi) Analysis on Personal Service on the President

[**177**] The second issue in regard to the President is the issue of personal service. It is trite that a party can only be able to enjoy the benefit of a fair trial, first, if he is served with a petition so that he is made aware of the allegations against him to enable him respond to the petition. Secondly, he must be served with a hearing notice so

that he is able to prepare himself for the hearing and either attend or ensure the presence of his counsel on the date of the hearing.

[**178**] I have carefully perused the proceedings and do note that the issue of personal service on the President was not addressed by the learned Judges during the hearing of the petition, even though they noted that the President was unrepresented. At paragraph 536 and 537 the learned Judges rendered themselves as follows:

> ***"536. In these proceedings, both the President and the Attorney General have been named as respondents and therefore the question of non-joinder should not arise. The issue that has been raised by the Hon. Attorney General is that of a misjoinder that the President ought not to have been made party to these proceedings.***
>
> ***537. To begin with, it is worth noting that Mr. Uhuru Muigai Kenyatta did not enter appearance in these proceedings and neither did he file any grounds of objection or a replying affidavit to contest these proceedings on the ground of misjoinder, or any other ground for that matter. As much as the Hon. Attorney General has come to his defence, the grounds of objection and the submissions filed by the Hon. Attorney General are clearly stated to have been filed on behalf of the Hon. Attorney General himself and not Mr. Uhuru Muigai Kenyatta. It could be that the Hon. Attorney General has proceeded on the understanding that since Mr. Uhuru Muigai Kenyatta ought not to have been sued in his personal capacity he need not have responded or participated in these proceedings. However, since this is the very question in dispute, we are of the humble view that Mr. Uhuru Muigai Kenyatta ought to have responded to the petition either by himself or by his duly appointed representative***

and contested his inclusion in the petition on any of the grounds that would be available to him. We find it a bit intriguing that the Hon. Attorney General can file documents for the Hon. Attorney General and proceed to argue Mr. Uhuru Muigai Kenyatta's case.

539 ...”

[**179**] An examination of the consolidated petitions reveal that the President was sued in his official capacity as President in Petition No 401 of 2020 filed by 254 Hope, and in his private capacity in petition No 426 of 2020 filed by the 78th respondent. It would appear that the Attorney General appeared in his own capacity and also on behalf of the President where he was sued in his official capacity. The dispute concerns the petition where the President was sued in his personal capacity. While I concur with the learned Judges that the President ought to have been represented in his personal capacity by his own personal counsel and not the Attorney General, I find nothing odd with the Attorney General attempting to defend or explain the non-appearance of the President in Court. He was simply trying to be helpful to the Court, being the principal legal adviser of the Government of which the President is the Chief Executive.

[**180**] In response to the President's contention that he was not served with the petition in which he was sued personally, the 78th

respondent filed a supplementary record of appeal containing an affidavit of service sworn on 16th January 2021 in which he deposed that he served the petition through email on 21st December 2020, addressed to all the respondents to his petition, including the President whom he served through email address: cos@president.go.ke that he obtained from the Judiciary e-filing portal. Attached to the 78th respondent's affidavit of service is a notice of empanelment of the Bench and virtual mention, signed by the Deputy Registrar of the High Court and served on the parties in the consolidated petitions through email dated 15th January 2021. Of concern is that the purported email of the President is not among the list of the parties served with the notice. If the Deputy Registrar of the High Court did not use the email address purported to be that of the President, how was the email address procured by the court when the President did not enter any appearance? How was it established if it was in actual fact the President's personal email address, or an address in regard to which mail would reach the President? These questions remain unanswered. In an affidavit sworn by the 78th respondent on 31st May 2021 in reply to an affidavit sworn by Joseph Kinyua, the 78th respondent reiterated that he used an email list created by the Court for service of all parties, but once again this has not been demonstrated.

(vii) Finding on Service upon the President

[**181**] For the above stated reasons, I find that the President was not served with the petition filed by the 78th respondent nor was he personally served with a hearing notice. Without service the President could neither enter appearance nor file a reply to the petition, nor could he participate at the hearing. His right to a fair trial and right to natural justice were therefore contravened, and the learned Judges were wrong in making adverse orders against him and the orders cannot stand.

E. CONTRAVENTION OF ARTICLE 73(1)(a)(i) OF THE CONSTITUTION

[**182**] The learned Judges of the High Court made a finding on this issue as follows:

> ***"588. In taking initiatives to amend the Constitution other than through the prescribed means, the President has, without doubt, failed to respect, uphold and safeguard the Constitution and, to that extent, he has fallen short of the leadership and integrity threshold set in Article 73 of the Constitution and, in particular, Article 73(1)(a) thereof. We so find."***

[**183**] The finding made by the learned Judges that the President violated Article 73(1)(a)(i) of the Constitution was anchored on the petition that was filed against the President in his personal capacity by the 78th respondent. As the President was not served with this petition the President was condemned unheard and the finding of

the learned Judges cannot stand. Similarly, the cross- appeal regarding the orders of the learned Judges declining to order the President and unnamed public officers to pay back the public funds spent on the constitutional review process must also fail. I therefore allow the appeal and set aside the adverse orders made against the President in regard to contravention of Article 73(1)(a)(i) of the Constitution.

F. FINDING AND ORDERS

[**184**] Following my above analysis and the reasons that I have given, I come to the following conclusions.

(i) On the basic structure:

- That the Constitution of Kenya has a basic structure which has been identified by way of thematic areas in Article 255(1) of the Constitution;
- Chapter 16 of the Constitution provides for amendment of any part of the Constitution including the basic structure and no express unamendable constitutional provisions or eternity clauses have been provided in the Constitution; (dissent)
- The basic structure doctrine is applicable in Kenya to the extent that that the exercise of secondary constituent power and constituted power to amend the Constitution is impliedly limited by the Constitution as evident in its spirit and purport, and therefore the exercise of amendment powers under Chapter 16 (Articles 255-257) of the Constitution is impliedly limited as such amendment must conform to the spirit and

purport of the Constitution. (Same conclusion but different reasons)

(ii) <u>On the Remit of a Popular Initiative:</u>

- I concur with the learned Judges of the High Court and would uphold their finding that a popular initiative is an initiative of the ordinary citizenry and neither the President nor any state organ can initiate an amendment through a popular initiative under Article 257.

(iii) <u>On the legality of the BBI Process and the President's involvement</u>

- Uphold the declaration that the BBI process remained executive driven and the promoter of the Amendment Bill, 2020 was the President through the BBI Steering Committee.
- Uphold the declaration that as a popular initiative is a citizen initiative, the attempt by the President to pursue a popular initiative through the BBI Steering Committee was unconstitutional and unlawful, and to that extent, neither the BBI nor the BBI Steering Committee had the competence to promote the draft Amendment Bill, 2020.
- I would uphold the declaration at paragraph 784(iii) that the President does not have authority under the Constitution to promote a constitutional amendment through a popular initiative, and that a constitutional amendment can only be made through a parliamentary initiative under Article 256, or through a popular initiative under Article 257 of the Constitution.
- I would set aside the declaration at paragraph 784(iv) and declare that the BBI Advisory Taskforce and the BBI Steering

Committee, established by the President were not unconstitutional or unlawful entities.

- I would partly uphold the declarations at paragraphs 784(v), (vi) and (viii) to the extent that the BBI Steering Committee, though not unconstitutional or an unlawful entity, had no legal capacity to promote constitutional changes under Article 257 of the Constitution, and consequently, the promotion and launch of the Constitution of Kenya (Amendment) Bill, 2020 was done unconstitutionally and in usurpation of the people's exercise of sovereign power.

(v) <u>Finding on Presidential Immunity</u>

- I would uphold the declaration at paragraph 784(ii) of the judgment and the findings of the learned Judges that the President is subject to civil proceedings during the tenure of his office whenever he acts outside the parameters of the constitution or omits to do that which he is bound to do under the constitution.

(vii) <u>Finding on Service upon the President</u>

- I find that the President was not served with the petition filed by the 78th respondent nor was he personally served with a hearing notice. His right to a fair trial and right to natural justice were contravened, and the learned Judges were wrong in making adverse orders against him personally. I would accordingly allow Civil Appeal No. E294/2021 and set aside the adverse orders made against the President in his personal capacity.

(viii) <u>Other Issues</u>

[**185**] I am in agreement with the majority view in regard to each of the issues that I have not fully addressed in this judgment. For the avoidance of doubt, I specifically adopt the reasoning and conclusion of the majority in regard to each of the following:

(i) That the Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum in the absence of evidence of continuous voter registration by the Independent Electoral and Boundaries Commission.

(ii) That the Independent Electoral and Boundaries Commission does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat.

(iii) That at the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor an adequate legal/regulatory framework to govern the conduct of referenda.

(iv) That the "Administrative Procedures for the Verification of Signatures in Support of the Constitution Amendment Referendum" made by the Independent Electoral & Boundaries Commission are illegal, null and void because they were made without quorum and in violation of sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

(v) That County Assemblies and Parliament cannot, as part of their constitutional mandate change the contents of the

Constitution of Kenya Amendment Bill initiated through a Popular Initiative under Article 257 of the Constitution.

(vi) That the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to: predetermine the allocation of proposed additional seventy constituencies; and to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation, is unconstitutional.

(vii) That a permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill, 2020.

(viii) That the petitions filed by the respondents in the High Court were neither moot nor justiciable, and therefore properly heard by the High Court.

(ix) That the amici curiae were properly admitted by the High Court and their respective briefs were not biased, but of great assistance to the learned Judges of the High Court and this Court.

(x) I also adopt the findings and reasoning of the majority on the cross appeals, and concur that these should be dismissed.

[**186**] On the issue whether Article 257(10) of the Constitution requires that all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the people, I concur with the reasoning and conclusion of **Kiage, JA** that Article 257(10) of the Constitution requires that the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People.

CONCLUSION

[**187**] I join my brother and sister Judges in appreciating the Senior counsel, and all counsel who appeared before us. The wealth of knowledge, high level of professionalism, and commitment that was displayed by all, was prodigious and is commendable. I also recognise the invaluable support that I have received from Irene Chege my legal researcher and Harriet Gaceri my secretary who worked tirelessly behind the scene. The issues that were raised in this appeal have led to a significant conclusion because it is a practical demonstration of Kenyans commitment to the Constitution. "We the people" protecting our heritage, and determining our future, and that of future generation. As custodians of the Constitution, we Judges have also risen to the challenge to protect the Constitution from unconstitutional amendments. Ultimately, regardless of the outcome of this appeal, all the parties have won because the Constitution has won. The spirit and purport of the Constitution remains alive. The final orders shall be as stated by Musinga, (P).

Dated and delivered at Nairobi this 20th day of August, 2021.

HANNAH OKWENGU

.....
JUDGE OF APPEAL

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE,

GATEMBU, SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....APPELLANT

AND

DAVID NDII .....1ST RESPONDENT
JEROTICH SEII.....2ND RESPONDENT
JAMES GONDI.....3RD RESPONDENT
WANJIRU GIKONYO.....4TH RESPONDENT
IKAL ANGELEI.....5TH RESPONDENT
ATTORNEY GENERAL.....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....7TH RESPONDENT
SPEAKER OF THE SENATE.....8TH RESPONDENT
KITUO CHA SHERIA.....9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT
DR. DUNCAN OJWANG.....11TH RESPONDENT
OSOGO AMBANI.....12TH RESPONDENT
LINDA MUSUMBA.....13TH RESPONDENT
JACK MWIMALI.....14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT
THE STEERING COMMITTEE ON THE
IMPLEMENTATION OF THE BUILDING BRIDGES
TO A UNITED KENYA TASKFORCE.....16TH RESPONDENT
BUILDING BRIDGES NATIONAL SECRETARIAT.....17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE.....18TH RESPONDENT
THIRDWAY ALLIANCE.....19TH RESPONDENT
MIRURU WAWERU.....20TH RESPONDENT
ANGELA MWIKALI.....21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY.....22ND RESPONDENT
THE SPEAKER OF THE SENATE.....23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA.....24TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....26TH RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER.....27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU.....28TH RESPONDENT

COUNTY ASSEMBLY OF TAITA TAVETA.....29TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA.....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....34TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI.....36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU.....37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI.....38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA.....41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI.....42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU.....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI.....52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET.....59TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA.....63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY.....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....67TH RESPONDENT
COUNTY ASSEMBLY OF KISII.....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY.....70TH RESPONDENT
PHYLISTER WAKESHO.....71ST RESPONDENT
254 HOPE.....72ND RESPONDENT
THE NATIONAL EXECUTIVE OF
THE REPUBLIC OF KENYA.....73RD RESPONDENT
JUSTUS JUMA.....74TH RESPONDENT
ISAAC OGOLA.....75TH RESPONDENT
MORARA OMOKE.....76TH RESPONDENT
RTD. HON. RAILA ODINGA.....77TH RESPONDENT

ISAAC ALUOCHIER.....78TH RESPONDENT
UHURU MUIGAI KENYATTA.....79TH RESPONDENT
PUBLIC SERVICE COMMISSION.....80TH RESPONDENT
THE AUDITOR GENERAL.....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI).....82ND RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitution Petition No. E282 of 2020
****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT)..... 1ST APPELLANT
HON. RAILA AMOLO ONDINGA ..... 2ND APPELLANT

AND

DAVID NDII & 76 OTHERS .....RESPONDENTS
KENYA HUMAN RIGHTS COMMISSSION.....1ST AMICUS CURIAE
DR. DUNCAN OJWANG.....2ND AMICUS CURIAE
OSOGO AMBANI.....3RD AMICUS CURIAE
LINDA MUSUMBA.....4TH AMICUS CURIAE
JACK MWIMALI .....5TH AMICUS CURIAE

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitution Petition No. E282 of 2020
****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT

AND

DAVID NDII & 73 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitution Petition No. E282 of 2020
****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA.....APPELLANT

AND

DAVID NDII & 82 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitution Petition No. E282 of 2020
****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

JUDGMENT OF KIAGE, J.A.

I have had the advantage of reading in draft the judgment of my learned brother, Musinga, P. for which I am grateful. My Lord President has undertaken a thorough account of the pleadings and procedural history of the Petitions that were before the High Court, as well as of the consolidated appeals together with the submissions made by the parties. I will thus not rehash much of what he has so helpfully delved into and will only refer to some of the arguments made before us where necessary for contextual or illustrative purposes.

Having given due consideration to the comprehensive and complete manner in which the Hon. President has treated of all the appeals and cross-appeals, I do agree with his reasoning and conclusions, save for where I have expressly stated a contrary view. The themes I consider it necessary to pronounce and give my particular opinion on, in varying degrees of depth and breadth, are the following:

(a) **Basic Structure Doctrine**
(b) **Popular Initiative**
(c) **Jurisdictional Objections**
(d) **Legality of BBI process**
(e) **Public Participation**
(f) **Presidential Immunity**

(g) Legal Regulatory Framework for Constitutional Amendments by Popular Initiative
(h) IEBC Quorum
(i) Voter Registration
(j) Format of the Referendum Question
(k) Constituency Apportionment & Delimitation
(l) The Cross Appeals
(m) Costs

I shall now address the themes sequentially.

A. BASIC STRUCTURE DOCTRINE

Of all the holdings of the High Court, none have come under furious and sustained attack by the appellants aggrieved thereby as those relating to the Basic Structure Doctrine. Hours of argument were added to the thousands of pages of scholarly and judicial authority marshalled by opposing parties in an attempt to cast as blatant, unmitigated error or, for their defenders, pure genius, the first of learned the judges' dispositive pronouncement that;

> ***"(i) A declaration hereby issues:***
>
> ***(a) That the basic structure doctrine is applicable in Kenya.***
> ***(b) That the basic Structure Doctrine limits the amendment power set out in Articles 255-257 of the Constitution. In particular, the Basic Structure Doctrine limits the power to amend the Basic Structure of the Constitution and eternity clauses.***

(c) That the Basic Structure of the Constitution and eternity clauses can only be amended through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum."

Supplementing their written submissions with eloquent and passionate addresses, the aggrieved appellants were categorical that the triple declaration amounted to a re-writing of our Constitution and was wholly antithetical to settled jurisprudence both local and regional which, to their mind, wholly repudiates and rejects the applicability of this strange doctrine from foreign jurisdictions far removed from our particular circumstances.

In his opening address, the learned Solicitor-General **Mr. Kennedy Ogetto** took the view that our Constitution has no place for the doctrine and all its provisions are amendable in accordance with clearly set out procedures for various aspects of it. The Constitution has no eternity clauses and Kenyans consciously avoided the basic structure by making no mention of it. They struck a proper balance between hyper-amendability and rigidity by including chapter 16 which entrenched provisions with special amendment procedures. They, however, did not instal unamendabiltiy. He lauded the success of the scheme in Chapter

16 as evidenced by *"22 failed attempts"* to amend the Constitution. To the learned S.G, the learned judges' main error lay in their purporting to amend the Constitution under the guise of interpreting it.

That theme was taken up by **Mr. Oraro**, learned Senior Counsel, who posited that unamendable or eternity clauses cannot be recognized unless they are stated expressly in the Constitution itself. He asserted further that Kenyans rejected such clauses as is reported in the Report by the Committee of Experts. When pressed to point out where such rejection is to be found in the report, Senior Counsel responded, apparently with no intended irony, that *"entrenchment was implicitly rejected."* Answering another question on what he made of the Colombia experience where the doctrine has been upheld in the absence of express provision of it in that country's Constitution, **Mr. Oraro's** response was that the Colombian case is an outlier as it is a divided country and we should not follow its example by acknowledging an implicit existence of a basic structure and unamendability in our own Constitution. He next made the curious submission that the case at bar was *the first time* the basic structure doctrine was applied in our jurisdiction. The doctrine was adopted by the Indian Supreme Court in ***KESAVANANDA BHARATI vs. STATE OF KERALA &***

ANOTHER ***[1973]*** **SC 225** and was accepted in Bangladesh but, according to him, it was rejected elsewhere and *"it is inconceivable that we can introduce it in Kenya."* Senior Counsel's reading of the High Court decision of ***TIMOTHY NJOYA & OTHERS vs. ATTORNEY GENERAL & OTHERS*** ***[2004] eKLR*** is that the court considered the doctrine and found that in view of **section 47** of the retired Constitution, *"there was no necessity of importing it."* In short, it was Senior Counsel's position that the learned judges in the impugned judgment were introducing the basic structure doctrine into our jurisprudence for the very first time.

Mr. Oraro was emphatic that our Constitution provides for its alteration and that as such the people can make any amendment they deign including, should they so desire, an amendment to abolish Parliament. That being the case, it is not open for judges to unilaterally come up with standards not provided for in the Constitution thereby raising the bar for amendability. He fervently lamented that the High Court "wants us to be subject to an academic doctrine invented by the Indian Supreme Court." Moreover, the Judiciary must concede to the people's decision, so that it is improper for courts to stop the people from making a decision to amend the Constitution, as happened in the present case.

Also opposed to the doctrine was learned Senior Counsel **Mr. Orengo,** whose opening salvo was that it presupposed that the people as sovereign do exist without or outside the Constitution, which he considered fallacious. He was emphatic that the people exist only within the Constitution, and can only exercise sovereign power in accordance with the Constitution which is supreme and binding on all persons. He was rather dismissive of the learned judges, charging that *"they were so anxious to apply the basic structure doctrine that they invented it,"* which he termed a "*trip to Wonderland."* He accused them of putting the Constitution aside and not referring to its provisions before commenting on the same, yet the starting point must always be the text. In his view, the learned judges went to history and context to arrive at the basic structure in a skewed manner. In particular, they allegedly failed to consider and do any analysis of post 2010 history.

Moreover, the learned judges were accused of being *'merely ideological'* and failed to notice that even the Indian judges were not agreed on what constitutes basic structure. He asserted that *every article of the Constitution is amendable so long as it is done constitutionally.* To him, this is consistent with the fact that the question of having a basic structure never arose during the entire constitution-making process. It was not one of the contentious

issues the settlement of which gave way to the referendum that approved the Constitution in what was a political settlement.

The narrative that the learned judges undertook a skewed analysis of history was taken up by **Mr. Paul Mwangi**, learned counsel for the BBI Secretariat and the Rt. Hon. Amolo Odinga. Such analysis, according to counsel, was deliberately undertaken with the aim of justifying the basic structure doctrine. It placed undue reliance on articles by Yash Pal Ghai and Gill Cottrell; Alicia Vernon and James Gathii and made scant mention of the Report on the Constitution of Kenya Review Commission, which is the official history of constitution-making.

It was Mr. Mwangi's view that the presidential system in the Constitution came from politicians and cannot possibly be part of the basic structure. As for *'eternity clauses,'* he urged that they can only exist in actual text. Where they exist such as in France or in Turkey, there is a history behind their express inclusion, but the bottom line is that they do not exist in our Constitution. He went on to charge that the learned judges mixed up various concepts and treated them as if they meant the same thing. He sought to distinguish the ***KESAVANANDA*** case which he stated has 'a dark past' as posited in the book "The Indian Supreme Court and Politics." On the whole counsel was derisive of the unamendability

doctrine as *"the product of new Age Scholars"* whose concepts *"are not employed elsewhere in Africa."* He urged us to follow the example of Uganda which rejected it and rued what he saw as *"foreign ideas being tried on us."*

Turning to theology, counsel pleaded that to accept the notion that certain parts of the Constitution cannot be changed would amount to idolatry under which we would have hoisted the Constitution to a positon that is higher than man. Thereby we will have made ourselves its servants, yet law is made for man, not the other way round. He urged caution lest the spirit of the Constitution should create a legal theology.

Going next, learned senior counsel **Dr. Otiende Amollo** was equally adamant that on the entire record of the constitutional review process leading to the 2010 Constitution, there was no mention, less still any discussion, of the basic structure doctrine. Seeming to make so slight a concession that the doctrine applies, learned senior counsel asserted that even then, the learned judges treated it in a wholly unsatisfactory manner that left it in *"utter confusion."* It was not logical that they omitted chapters 1, 2 and 3 of the Constitution which he considered to be most fundamental, from the listing of what constituted the basic structure. Worse, they made the content of it dependent on judicial green light

without a determination of which court would have the competence to make it as only the Supreme Court can give advisory opinions.

He rested on the issue by faulting the learned judge for *"indiscriminately referring to bits and pieces of the constitutionally process"* and in the process not only ignoring its plain text, but also intentionally diminishing the role of the political process. Thus, they did not as much as mention the Parliamentary Select Committee and the fact that the Presidential system of government has arrived at against the wish of Kenyans.

Even though IEBC whom he represents did not directly appeal against the basic structure doctrine, learned senior counsel **Prof. Githu-Muigai** still made submissions germane to the issue when he addressed the jurisdiction of the High Court under **Article 153**. He made the bold assertion that *"the [2010] Constitution did not rewrite the foundations of the law of Kenya [which] remain the same as they have been since 1897."* He then complained that the learned judges adopted an approach that supports the view that nowadays *"all political, social and economic grievances are being taken before the Court,"* yet *"the High Court has limited jurisdiction to entertain constitutional grievances where a clear cause of action exists and brought by people who have standing."* To entertain such grievances and "make such orders at large" leads to an erosion of

the dignity and sanctity of the court. He then asserted that *"nine out of ten of the learned judges' orders are opinions borne of their acceptance of an invitation to act as a philosophical tribunal."*

Mr. Kuyioni, learned counsel for the National Assembly also urged a rejection of the doctrine. To him, the historical analysis that led the learned judges to settle for the doctrine was the reason chapter 16 was included in the Constitution. He thus contended that in the current constitutional dispensation hyper-amendment of the Constitution is not possible. In the present case he conceded, as he had to, that the 74 amendments proposed in the BBI bill were numerous. He nonetheless invited us to reject the doctrine unless we should find that there is a threat of hyper amendment of the Constitution.

For the Senate, learned counsel **Mr. Job Wambulwa** was also against the doctrine. He asserted that the doctrine was not universally accepted, even in jurisdictions where it is Parliament that has power to amend the constitution. He urged us not to follow Indian jurisprudence on the subject given the fundamental textual and contextual differences between our constitutions with the Indian one reposing amendment powers with parliament by a simple majority. He saw the higher majorities and the requirement for a referendum prescribed in Kenya as decisive differentiators. He

rejected eternity clauses, asserting that the people can amend any provision of the Constitution so long as the procedure was followed.

That view was shared by learned counsel for the county of Kiambu, **Ms. Njoki Mboce** who, in support of the appeals, declared that nobody can legally, by eternity clauses, oust **Wanjiku's** sovereign right to self-determination. She emphasized that the basic structure has no place in **Articles 255** and **257** of the Constitution. She sought to distinguish the ***NJOYA*** decision (supra) on the basis that, according to her, it was dealing with a Parliamentary attempt to amend the Constitution, which is the same reason she repudiated ***KESAVANANDA*** (supra). She urged us to exercise abundant caution in borrowing foreign jurisprudence.

For the County Assembly of Kirinyaga, learned counsel **Mr. Ndegwa Njiru** was equally opposed to the doctrine. Citing ***PRISCILLA NDULULU KIVUITU & ANOTHER (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 OTHERS vs. THE ATTORNEY GENERAL & 2 OTHERS [2015] eKLR*** (Per W. Korir, Mumbi Ngugi & G.V. Odunga, JJ.), he contended that the High Court had limited its applicability to amendments by Parliament that that Odunga, J. doubted its applicability to the 2010 Constitution. He posited that in ***KESAVANANDA*** the judges crafted a solution to protect the

Constitution from mutilation and sought to distinguish it by stating that in our Constitution, the citizens of Kenya reserved their right to amend vide **Article 257.** Returning to ***KIVUITU*** (supra), he conceded that the court there *did* recognize the basic structure doctrine but added that once the people were involved through a referendum it was within their rights to alter the basic structure.

Learned counsel **Mr. George Albert** while supporting the appeals indicated that **Article 255(1) (a)-(j)** of the Constitution encompasses all of the chapters in the declaration on basic structure that were sought and granted. To him, Kenyans *"chose ten articles"* to protect from amendment by requiring that any proposed amendments thereto be subjected to a referendum, and this was in appreciation of the country's historical context. He pointed out, very usefully in my view, and I shall return to this, that the terms "basic structure," "eternity clauses" and "unamendable clauses" are used interchangeably.

Against those attacks on the learned judge's acceptance and endorsement of the basic structure doctrine was an equally eloquent and impassioned battery of counsel. **Mr. Havi** appearing with **Miss Angawa** as learned counsel for first to fifth respondents, started by extolling the 2010 Constitution as a perfect charter. He took grave issue with the BBI proponents who proposed *"74*

amendments by a single stroke of the pen" thereby dwarfing the 38 amendments of the independence Constitution carried out between 1963 and 1991. He asserted that the Constitution does have a basic structure, its core edifice comprising its essential features, which is identifiable from both its text and history. The doctrine is implicit. It does not prohibit amendments to the core structure but requires that they be effected only through the exercise of constituent power with four features namely civic education, public participation, debate and referendum. He was quick to add that the constituent power is not textualized in the Constitution but is definitely applicable. He placed reliance on the ***NJOYA*** case (supra) for that assertion. There, Ringera, J., recognized its non-textualization but held that it did not require texualization.

Pointing out that constituent power did not originate with Ringera, J., counsel made reference to John Locke's *Two Treaties of Government* and Baron De Montesquieu's *The Spirit of the Laws* to assert that it is neither emergent nor alien being rooted in antiquity as a feature of democratic governance. Citing **Prof. B.O. Nwabueze's** PRESIDENTIALISM IN COMMONWEALTH AFRICA in which the learned author deals with *"Constituent Power and Popular Sovereignty,"* counsel located constituent power squarely

within the concept of *constitutionalism* which is concerned with limitation of governmental power.

Pointing out that the basic structure is already part of Kenyan jurisprudence having made it first entry with the ***NJOYA*** decision, he asserted that there are limits to amendability. Reverting to a question I had specifically asked **Oraro, S.C**., whether the people could by a majority abrogate Parliament, which had been answered in the affirmative, **Mr. Havi's** response was a firm repudiation of such a power, pointing for its absurdity to Adolf Hitler's attempt to do just that in Germany in 1933. Citing Nwabueze and referring to the preamble to the Constitution, he urged that the Constitution is indeed intended to endure for ages to come. It thus did not matter whether or not the basic structure was texualized as such, and he called in aid other doctrines such as the *Separation of Powers, Checks* and *Balances and Independence of the Judiciary* which, though not spelt out in the constitutional text, are nonetheless an integral part of the Constitution.

Asserting that a strict scheme of amendment did not justify repeal of the Constitution and that the two are in fact dichotomous, **Mr. Havi** made an appeal to history stating that amendment powers had led to effective repeal of the independence Constitution. He pointed out that Ringera, J. did not acknowledge that the

amendments effected to the retired Constitution did in fact alter its basic structure, but there was no challenge to them. Such fate should not befall the 2010 Constitution on account of the *'fortunate'* successful challenge mounted by his clients against *"the 74 proposed eviscerations of our permanent charter."*

Positing that the constituent power is traceable back in time "almost to God Himself," **Mr. Havi** asked us to affirm the 4-elements of its exercise identified by Ringera, J., in ***NJOYA***. To him, the inclusion of referendum expressly in the 2010 Constitution was out of abundance caution because had it not been mentioned, it, alongside a constituent assembly, is an integral part of its exercise and need not be texualized. He recalled that England does have a Constitution notwithstanding that it does not exist in written text.

Citing the writings of various jurists including professors Richard Albert and Yaniv Roznai, counsel warned of the dangers of populist constitutionalism characterized by constitutional capture. He also referred to Dr. Mutakha Kangu's *Constitutional Law of Kenya on Devolution* in which he accepts the basic structure as applicable in Kenya and concludes that one cannot exhaustively list the articles that constitute it and the attendant unamendability, but they can be identified.

He completed his submissions on the issue by affirming the courts' position as the final arbiter on the interpretation of the Constitution and asked us to be true to the role in the face of failure of other players to be true to the Constitution. He gave the example of Parliament, which, according to him, passed and endorsed the proposed amendments despite noting at least three areas of unconstitutionality.

To him, the BBI proposed amendments destroy, eviscerate and dismember the Constitution's basic structure by; creating an impure Presidential and Parliamentary system; domiciling the cabinet in the legislature thereby obfuscating legislative and executive functions contrary to separation of powers; and, interfering with judicial independence by creating and installing an "executive prefect" over it in the name of an Ombudsman.

Recalling the slide to autocracy in Commonwealth Africa recorded by Prof. Nwabueze, and invoking the words of Justice Kriegler on the need for all Kenyans from President to peasant to have an agonizing stock take on where our country stands, he asked us to uphold the rule of law in tandem with our oath of office.

Learned counsel **Mr. Mutuma's** submissions on the basic structure doctrine were prefaced by an assertion that his clients

saw a threat to the Constitution and moved to court under obligation to defend it. He added that courts bear more than obligation to defend the Constitution as they are invested with the *authority* to defend it. To him, the existing constitutional structure can be changed by two different methods. The first, *amendment*, as can be gleaned from *Black's Law Dictionary* involves making right, correcting or rectifying it but otherwise leaving it intact, while the second; *repeal*, involve rescinding or abrogating of the existing law. To him, the Constitution contemplates its amendment but not its repeal. He went on to state that there can be implied repeal of the law including the Constitution when a new law is introduced that is in irreconcilable conflict with the existing law. So stating, he posited that the BBI initiative and Constitution amendment bill was an attempt to repeal the 2010 Constitution by implication. This is impermissible because the said Constitution is for eternity which he explained to mean *"for as long as we have it."* Thus, if we have to replace the 2010 Constitution by repeal as we did the retired Constitution, we would have to resort to a place beyond and outside **Articles 255**, **256** and **257** so as to create a totally new norm.

Also defending the doctrine was learned counsel **Prof. Kithure Kindiki**. To him, the question is easily answerable by

posing whether there is a hierarchy of constitutional norms, which he answered in the affirmative. To him **Article 255** itself speaks to this by requiring that some 10 or so matters, which even the appellants conceded are entrenched, can only be changed by reference to the people directly. To demonstrate the basic structure, he posed the question whether one can amend the Constitution to change Kenya from a multi-party democracy into a constitutional monarchy or alter its territory by hiving of part of it and donating it to another state, as had happened elsewhere in history. Such fundamental changes require a direct involvement of the people.

Counsel went on to offer clarification that the learned judges did not hold that the basic structure cannot be altered, as the complaining appellants seem to project, but rather that such changes must be subject to a deeper process involving the sovereignty of the people. The people need not exercise their sovereignty within the Constitution which is their creation. They are above and can, if they so choose, abolish it. Appealing to us to dismiss the appeals with costs, he turned spiritual, submitting that the *"BBI process was a botched attempt to overthrow the people and the Constitution but by the mercy of Almighty God, the High Court intervened and declared it a nullity."*

On his part, learned counsel **Dr. Muthomi Thiankolu** invited us to consider a quartet of questions, namely; What kind of precedent do we wish to create? What incentives [for constitutional compliance] will we to put in place? How will future Presidents treat the Constitution should we lend to this illegality judicial imprimatur? and, how will politicians behave in the future? Resorting to Greek mythology, counsel implored us to recall the Hydra of Lerna, that multi-headed sea monster which he likened to the impunity that has stalked this land and urged the Judiciary to be as steady at the sword as was the hero Heracles, and so slay it by upholding the judgment of the High Court.

Learned Senior Counsel **Dr. Khaminwa** was categorical that the 2010 Constitution came about *"in answer to our rotten history"* and *"in response to global jurisprudence"* and he urged us to consider that history as set out in such works as Kenya: *Between Hope and Despair and Kenya; A History since Independence.* To him, the 2010 Constitution was Kenyan's way to sending a *Never Again* message to all that had gone wrong with us before. Referring to Roznai's seminal work on *Unconstitutional Constitutional Amendments*, **Dr. Khaminwa** declared that this Constitution is unamendable by the methods proposed in the BBI initiative and bill. The basic structure doctrine is not confined to India but has

spread worldwide. He thus castigated the positions advanced by counsel for one of the appellants as propounding submissions they did not believe in and are contrary to what they actually stood for. He was categorical that the problem in this country is not with the Constitution, but with ourselves, and especially with the politicians *"most of whom are mere job seekers who stand for absolutely nothing."* He urged us to "throw out this appeal as unmeritorious and based on submissions that were pedestrian and in bad faith."

Equally scathing was **Ms. Martha Karua**, learned Senior Counsel for the Professors of law who had been admitted as *amici curiae* before the High Court. Positing that constitutions exist to limit the exercise of authority, she lamented that in Kenya the Executive, state entities and state officers ignore this fact. She added that modern dictators use constitutional amendments as special purpose vehicles to meet their ends such as the extension of their stay in office by removal of term limits. While pretending to respect the Constitution, they will use amendments thereto to concentrate power in themselves and this is what the 2010 Constitution recognized and sought to avoid. Stating that, she too, like **Dr. Khaminwa** and **Mr. Orengo** her colleagues on the Senior Bar, has lived Kenya's constitutional history and was even Minister for Justice and Constitutional Affairs, she asserted that the

Constitution was not just a political settlement but a refletion of the wishes and aspirations of the people of Kenya. Stating that under **Article 165** the courts can make determination whether anything done is constitutional, she pleaded with us to hold that the Constitution is yet to be fully implemented and, as the final word on its interpretation, she asked us to mark the beacons for exercise of power by the Executive and to *"uphold and protect the basic structure which is part of the DNA of the Constitution."*

Joining Ms. Karua was learned counsel **Ms. Nyanguto** who argued that the basic structure is inherent in the Constitution and is not an invention of the courts. She urged us to uphold it and thus protect the Constitution from the BBI bill *"which portends the death of the 2010 Constitution by a thousand deadly cuts."*

Coming next, learned counsel **Mr. Zebedeo Ongoya** affirmed that there definitely is a basic structure to the Constitution and the learned judges were right to identify it. They did not merely import the doctrine from Indian's case law but rather found it in the history, text and structure of the Constitution. In doing so, they developed a rich, indigenous jurisprudence in a manner that was praiseworthy and not objectionable to deserve of the attacks directed at them. He pointed out that the learned judges were inspired by ***COMMISSION FOR THE IMPLEMENTATION OF THE***

CONSTITUTION vs. NATIONAL ASSEMBLY [2013] eKLR where Lenaola, J. (as he then was) found emphatically that, the Constitution has a basic structure. He did so upon the invitation of none but **Mr. Oraro**, Senior Counsel and **Mr. Nyamodi,** who now urge the opposite.

Urging that the proper obligation of the High Court judges was to interpret and enforce the Constitution, Mr. Ongoya submitted that under **Article 20**, Kenyans have the right to enjoy their rights to the greatest extent and that, read together with the need for a purposive interpretation of the Constitution, the learned judges were correct to delineate 3 types of sovereign power namely primary constituent power; secondary constituent power and constituted power germane to a determination of the question at bar. This was echoed by learned counsel **Mr. Evans Ogada** who alluded to the 3-step graduated scheme of power as he posited that sovereignty is understood as residing in the people exclusively. When the learned judges pronounced themselves on the basic structure doctrine, they were declaring a legitimate reality and were not merely engaging in lofty theory. He urged courage of principle to uphold the finding of the High Court.

Learned counsel **Mr. Ochiel Dudley** distilled "three strange positions" that this Court would have to "simultaneously adopt" in

order for it to overturn the learned judges' findings on basic structure namely; adopt textualism; elevate the political elite above the people and; finally, upset a settled theory of constitutional change. He contended that the power to amend the Constitution is not and cannot mean the power to annihilate the Constitution. Recalling that in adopting the basic structure doctrine in ***KESAVANANDA***, India was faced with Prime Minister Indira Gandhi's attempts to effect far-reaching attempts to amend the Constitution, counsel argued that our position is no less perilous with "74 missiles" being trained at our Constitution. To him, changing the Constitution is not a normal state function but an extraordinary authority to be undertaken by an exercise of the people's constituent power, which need not be written in the Constitution. In so far as **Prof. Charles Manga Fombad**, amicus curiae suggests the contrary, it was counsel's view that the scholar is wrong. He pointed out that the power to amend is not authority to annihilate the Constitution which, he warned, could easily be abrogated by gradual amendments. While agreeing that the Constitution needs to be flexible, it should not be amenable to amendment with the ease of statutory amendments. He referred to the writings of Hans Kelsen to assert that as the Constitution is the *ground norm*, it has to be accorded a more stable character. The

rule for such stability may be written or implicit but is nonetheless discernible by a holistic reading of the Constitution. Thus, it is not enough for those intent on altering the Constitution to just marshall the numbers, he added, recalling that such formally complaint machinations have happened before.

Counsel referred to Roznai's observation that there was a growing trend towards a universal adoption of the basic structure doctrine which is consistent with what Richard Albert concluded upon a study of its application in countries as varied and diverse as Belize and the Czech Republic, and Upendras' recent conclusion that it is a legitimate doctrine which is meant to be a barricade against the destruction of the Constitution as held by our apex Court in ***COMMUNICATIONS COMMISSION OF KENYA & 5 OTHERS vs. ROYAL MEDIA SERVICES LTD & 5 OTHERS [2014] KLR.***

Learned Counsel **Mr. Mathenge** took the view that the text of the 2010 Constitution in fact supports the basic structure doctrine because the Constitution has a core content and contains fundamental prior principles that are immutable in character. To illustrate, he mentioned **Article 4(1)** that describes Kenya as sovereign republic and a multiparty democracy founded on national

values and principles. To change these would entail a change to the basic structure of the Constitution.

Making reply, learned Counsel **Mr. Nyamodi** contended that basic structure, and basic structure doctrine are not synonymous. The former refers to fundamental, entrenched provisions which the Constitution contains, while the latter restricts amendability of the Constitution, a notion he rejects, as all provisions are amendable albeit by use of a different procedures where entrenched provisions are involved. He defended the position taken by Oraro S.C and himself in the ***CIC*** case before Lenaola, J. affirming that the decision contains a correct exposition of the basic structure doctrine. He sought to draw a distinction between that case and the present one on the basis that the former involved an attempt by Parliament to amend the Constitution while before us is a popular initiative. He also accepted as correct the decision in ***COUNCIL OF GOVERNORS & 5 OTHERS vs. THE SENATE & ANOTHER*** ***[2019] eKLR*** on the restrictability of amendment to the matters set out in Chapter 16 of the Constitution. Finally, he conceded that **Prof. Roznai** is undoubtedly an authority on the basic structure doctrine but invited us to find that the intensity of judicial review of

proposed amendments depends on the amendment process involved.

In a brief submission along the same lines, learned counsel **Mr. Donald Kipkorir** maintained that the basic structure doctrine was inapplicable in Kenya. He also faulted the learned judges for adopting the constituent assembly as an essential step in the exercise of constituent power. He seemed to suggest that it would be archaic and anachronistic to insist on a phenomenon from classical Greece where constituent power was exercised directly. He rested by expressing the view that Roznai demurs that constituent power need not abide by the Constitution.

Prof. Muigai S.C. in reply characterized this a strange case in which there seemed to be no agreement on anything. He labelled it a case about theory and not a live one about live people. Insisting that there can be no constitutional legitimacy outside the Constitution, he posited that the spirit of the Constitution, to which he equated the basic structure doctrine, cannot be superior to the Constitution so as to surplant the constitutionally-expressed methodology of amendment. He repudiated the idea that a constituent assembly is any more effective an exercise of power and authority than the people's exercise of sovereign power to effect or

ratify radical changes to the Constitution at a referendum. He urged that the BBI amendment bill was not trying to re-enact the Constitution as *"it left 90% of it intact."* He dismissed ***KESAVANANDA*** as an irrelevancy because, unlike India where a simple majority in Parliament could alter the Constitution, Kenya has entrenched provisions and has protected, indeed super-protected the basic structure. Amendments proposed in the bill are therefore legitimate as the people of Kenya never wrote any eternity clauses into their Constitution. He was joined in that view by **Mr. Orengo, SC** who insisted that the people are bound by the Constitution and the entrenched provisions are amendable.

I have taken the trouble to set out only the oral submissions made on this fundamental issue of great significance, even though I have painstakingly read and pondered over the copious written submissions filed as well as the numerous authorities cited. Due of the many parties, most of whom addressed us, there was a measure of repetition or in some cases varied emphases but on the whole a clear divide does emerge between the pro- and anti-BBI teams. The former posit that whereas the Constitution does contain a basic structure identifiable by reference to the entrenched provisions set out in Chapter 16 of the Constitution, the doctrine propounded by Prof. Roznai and other academics and

given its most famous judicial pronouncement in ***KESAVANANDA*** that the power to amend the Constitution is by definition limited, and that therefore some amendments can be judicially struck down for being unconstitutional, does not apply in Kenya. They gave various reasons ranging from the need to assert our judicial independence by not latching onto every new-fangled pronouncement from foreign jurisdictions, through the fact that the amendments proposed herein are by popular initiative and will involve the people themselves in a referendum so that there is no room for Parliamentary mischief leading to hyper amendments, to the fact that the text of the Constitution does not clothe any of its provisions with the cloak of unamendability nor declare any to be eternity clauses.

Before I go into a detailed analysis of the arguments and specifically the case law and academic writing presented to support the rival positions, I must confess that hearing the positions taken by some of the parties before us had an air of the surreal about them. Some counsel spoke of the basic structure doctrine as if it was a novel and unheard of idea that had just set foot on our jurisprudential shores for the very first time. It was projected as a thing of pure theory, a hypothetical chimera, never before applied to real situations. Moreover, the manner in which this country's

long and painful search for a new Constitution was projected by opposing parties left me wondering whether we had facts and alternative facts. The clash of narratives saw the learned judges being criticized in a manner that at times seemed to go a wee overboard. Worse, the authorities cited in some instances were said to contain holdings which, upon proper engagement with the authorities themselves, seemed to say quite the opposite. I will refrain from drawing any inference that any of the learned counsel before us were out to mislead the Court and give it the most charitable interpretation that texts sometimes speak differently to different readers. Counsel should nonetheless endeavour to apply their best mind to extract the true meaning of the constitutional text as well as the judgments and academic writings on a subject. Only then can they be truly said to have assisted the Court and shown themselves honest guides as required of advocacy at the bar.

I do not consider it necessary to go a detailed the history of the making of the 2010 Constitution. Suffice to say that its promulgation, which is seen as the birth of the Second Republic, was the culmination of many years of struggle and pain, sweat and tears, in which liberty, limb and life were harmed and lost so Kenyans could have a better life of freedom and dignity, and in

particular that they could have a government that is answerable to them and leaders who serve them, not lord it over them. The Constitution is a charter of liberty, the embodiment of a new deal and a break from a past characterized by oppression and suppression of freedoms as simple and essential as expression, association and assembly. The one party-state, first *de facto* then by the instrumentality of the rushed amendment that bought in the infamous **section 2A** of the retired Constitution installing the Kenya Africa National Union (KANU) as the sole political party, *de jure*, brooked no opposition. Treason, sedition, public order, foreign exchange restrictions and a motley other laws were used to beat the populace into submission. Detention without trial, torture, prosecutions on trumped up charges, confiscation of passports and many other misdeeds marked the darkest days of independent Kenya.

The spirit of our nation is a resilient one however, and, buoyed and inspired by happenings elsewhere including the collapse of the Berlin Wall, and the reforms occurring in the former Soviet Union through the policy of *Glasnost* and *Perestroika*, there was sustained agitation for more democratic space. In time, **section 2A** was repealed re-introducing multi-partyism and, through false starts and faltering steps, the new Constitution was

born. It was the product of phenomenal public participation and driven by bold Kenyans represented as the ordinary 'Wanjiku,' who might as well have been Auma, Amina, Chela, Mwende or Moraa and all their male equivalents. Kenyans gave their views on what ailed their land and their institutions of governmental power. Their cry was for a more equitable share of resources. And they ensured that their voices were heard before they declared in a detailed preamble, that they were *inter alia*;

> ***"HONOURING those who heroically struggled to bring freedom and Justice to our land***
>
> ***PROUD of our ethnic, cultural and religion diversity and determined to live in peace and unity as one indivisible sovereign nation.***
> ***...***
>
> ***RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.***
> ***EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution."***
>
> (My emphasis)

To my mind, this preamble provides the context and setting, the background and canvas, against which an analysis or interpretation of the Constitution must be undertaken. The Constitution was not the product of an immaculate conception. Rather, it was the product of a rich experiential milieu of legal,

social and political interaction more particularly captured in numerous historical accounts of trial and ultimate triumph, including in the Final Reports of the Constitutional Review Committee and the Committee of Experts. Any court interpreting the Constitution must perforce be alive to the historical background if it is to do justice to the text of the Constitution. Anything short of that would be drab, dry and skeletal at best, lacking the pulsating animation of a living document possessed of a spirit and ethos.

As if fully aware of the easy slide to dry formalism in construction, an obsession with text and lexical renderings, oblivious to history and context, the Constitution itself provided the keys to its construction in explicit terms;

"Article 259(1) This Constitution shall be interpreted 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

...

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

It seems to me plain beyond argument that fealty to the constitutional text itself throws open the pathways of interpretation to the end that one must look at what the Constitution provides in a manner that is wide and imaginative so that it should be given the fullest amplitude of meaning and intent. The interpreter must have the purposes, values and principles of the Constitution ever in mind as he undertakes the task. What is called for is a purposive, value-laden and principled approach to constitutional interpretation as opposed to a narrow, neutral and ultimately neutered formalism.

Moreover, those charged with interpreting and giving effect to the Constitution cannot shut their eyes to, or be indifferent to or, worse, evince a hostility towards the rule of law, human rights and fundamental rights. The Constitution commands judges to be active participants in those causes and it behoves us to constantly introspect and deliberately push forward the rule of law and human rights project. It would be a serious dereliction of duty, productive of deleterious results, were those charged with the solemn duty of advancing these causes to be found wanting through carelessness or inattention, thereby either stalling or reversing them. To me, stringent urgings for judicial restraint

where the rule of law is under threat and human rights are abused are totally antithetical and anathema to the plain constitutional interdict. Where these matters are concerned, fealty to the judicial oath demands, nay commands, conscious activism. We do not become judges to subvert the plain and uncompromising edict to advance the rule of law and human rights. To my mind, that the Constitution very deliberately calls me to be warrior for the rule of law and human rights and to be both faithful and fearless in the cause.

Precisely because the law, as with all life, is not static, the Constitution calls upon those who interpret it to do so in a manner that permits the development of the law. This is an acknowledgement that our knowledge of law is not at its zenith and none can boast of having attained the acme of legal omniscience. This is where we are called upon to be open-minded enough to receive with a sufficiency of intellectual curiosity even those concepts that may at first blush seem strange or challenge our long-held beliefs. We live in a globalized world and courts will always be part of a continuing conversation on comparative constitutional law and practice. We are part of a global community of courts and we definitely can and do benefit from a cross-pollination of ideas. We receive and consider those that have

migrated to us, being careful to accept and incorporate those that can be said to be markers of positive development, even as we should think that our own progressive jurisprudence is solid enough and sufficiently persuasive to other jurisdictions.

That to me is the constitutionally-ordained interpretative prism and lens through which I must approach and decide the applicability of the basic structure doctrine to our Constitution. I proceed from the appreciation that the Constitution is laden with normative fecundity which should vivify all persons who are charged with its application or interpretation. It declares its supremacy and binding force on all persons and all state organs at both levels of government **(Article 2(1))** and declares its validity or legality to be beyond question or challenge in or before any court or other State organ. It then imposes an obligation on every person to respect, uphold and defend it (**Article 3**). Those provisions are couched in plain and peremptory terms, requiring no further exposition. I need only state the obvious fact that this obligation, unquestionly binding as it stands, takes on a more solemn aspect, sacred even, in the case of those who occupy certain state offices by first swearing allegiance to the Constitution. Such oaths are of the gravest import and not to be lightly taken or regarded as mere formal incantations, empty rituals bereft of meaning or substance,

to be violated with no consequence. Those who swear by the Constitution must be prepared to live by it and defend it as commanded, or else give the offices that come with such burdensome demands on their loyalties and consciences, a wide berth.

It should be plain by now that the approach to constitutional interpretation that persuades, indeed binds me, is a purposive and holistic one which repudiates the text as the Alpha and Omega on the divination of the meaning and intent of the Constitution. One needs only cast a glance at our history of constitutional jurisprudence to see the long shadow cast by a texualist obsession as exemplified by ***REPUBLIC vs. EL MANN [1969] EA 357***. That approach, thankfully long interred, although every once in a while we hear its ghost clanging its chains seeking a place at the interpretative table, declared that the Constitution was to be interpreted in the same way as any other statute and frowned upon any resort to the *'Spirit of the Constitution'* in derisive and near epithetical terms. The fortunes of the 'El Mann doctrine' are traced in Muthomi Thiankolu's *"Landmarks from El Mann to the Saitoti Ruling; Searching for a Philosophy of Constitutional Interpretation in Kenya"* [2017] 1 Kenya Law Review 188-213. It is no wonder that for long periods of Kenya's post-independence history

constitutional guarantees of freedom and fundamental rights remained for the large part mere pious platitudes. And I see this as an object lesson for those of us on whom falls the obligation to give meaning to what the Constitution provides. We must learn from the mistakes of history lest we be doomed to repeat them. It only takes a restrictive, minimalist interpretation here, and a textualist formalist approach there, for the spirit of the Constitution to be stymied and its lofty ideals to haemorrage towards barrenness by a drip-drop of near-imperceptible claw backs and innocuous-seeming small steps of mark-time, slide and reverse.

A faithful embrace of the purposive-holistic-contextual approach to constitutional interpretation, which I have found is a straight command of the Constitution, has been declared by the Supreme Court as the proper approach, and the apex court is binding upon this Court and all the other courts below us. I need only add that the Supreme Court has recognized that the 2010 Constitution is a transformative charter to be understood and interpreted as such. In much the same way as new wine cannot be stored in old wine skins, it would be totally illogical to try and squeeze a transformative Constitution within the suffocating strait jacket strictures of formalistic or positivistic interpretation. I have no difficulty whatsoever following the fresh and expansive

interpretive path blazed for us by the apex court in several pronouncements. In **RE *INTERIM INDEPENDENT ELECTORAL COMMISISON [2010] eKLR*** it stated;

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal, Petition No. E282 of 2020 (Consolidated). Page 145 considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."***

IN THE MATTER OF THE SPEAKER OF THE SENATE & ANOR [2013] eKLR, the Supreme Court characterized the 2010 Constitution as having gone beyond the usual parameters of liberal constitutions with its deliberate aim of attaining social change and reform as spelt out in the preamble, part of which I have already adverted to. The aim of that transformative approach is to recognize and reset the interplay of majoritarian and non-majoritarian institutions of the state so as to reach the desired governance goals. One of the signal aspects of the post-2010 transformative

constitutionalism is the deliberate enumeration of social and economic rights, with a view that they should be fully justiciable and robustly enforced so as to radically change, for the better, the living conditions of the people. It is not difficult to see that such a Constitution can ill-afford a mean-spirited or narrow-minded interpretive approach, as that would totally negate and defeat its transformative aims of facilitating the social, economic and political growth of the country. This is identified in the Supreme Court Act but flows from the Constitution itself and must guide all courts in interpreting the Constitution.

I think, with respect, that the deeply reflective words of Mutunga, CJ., regarding the proper interpretative framework for the Constitution (as well as the Supreme Court Act) are germane to any interpretation of the Constitution and are worth bearing in mind. ***IN RE SPEAKER OF THE SENATE & ANORTHER vs. ATTORNEY GENERAL & 4 OTHERS*** ***[2013] eKLR***, while concurring with his Court's advisory opinion, he stated as follows;

> ***"[155] In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and Jasbir Singh Rai& 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid***

foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core Petition No. E282 of 2020 (Consolidated). Page 146 provisions of our Constitution, understand its content, and determine its intended effect.

[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, 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 Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be Petition No. E282 of 2020 (Consolidated). Page 147 invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

From my analysis of their judgment, the learned judges were faithful to an interpretative scheme that was holistic, cognizant of the transformative character of the 2010 Constitution, purposive and properly contextual. That approach accords with my own understanding of what the mental orientation of a court undertaking interpretation of our Constitution ought to be, and I would accordingly reject the criticism levelled against the learned judges. I do not accept the attempted denigration of their acknowledgment of the spirit of the Constitution, as if recognition of the spirit of the Constitution were some spiritist-animist retreat to a dark and ignorant or superstitious past. To the contrary, every legal instrument does have a spirit and soul that animates it.

The learned authors of Black's Law Dictionary, 11th Edition, trace it to 1802, more than two centuries ago, and explain that it is also termed as the *'Spirit of the law'* and means *"the putative intention of the creator or creators of a legal instrument … as opposed to its literal content."* It is to be contradistinguished from the letter of the law. They also treat of the 'Spirit-over-letter conception' of much recent birth, in 2014, which they define as *"the notion that the spirit of the legal text should prevail over its letter."*

As far the spirit of the Constitution is concerned, we had this to say in ***INDEPENDENT ELECTORAL BOUNDARIES COMMISSION vs. MAINA KIAI & 5 OTHERS*** ***[2017] eKLR***;

> ***But that is not all. In pursuance of constitutional interpretation, yet another dynamic is constantly at play and requires consideration: the spirit of the Constitution.***
>
> ***The Supreme Court, In Re The Matter of the Interim Independent Electoral Commission (supra) at para. 51 cited Mohamed A J in the Namibian case of State v. Acheson 1991 (20 SA 805, 813) where in reference to the spirit of the constitution the judge observed*** that;
>
> > ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion."*** *(Emphasis supplied)*
>
> ***See also William Hard, The Spirit of the Constitution at page 11.***
>
> ***We dare say that in the context of the Constitution, there is an ever-present spirit that relentlessly pervades its provisions. As a consequence, that spirit which "... is always speaking..." must be discerned as an integral part of interpreting the provisions of the Constitution.***

Turning now to the crux of the matter, which the learned judges styled *"the transcendental question"* posed by the

consolidated petitions that were before them, which I shall paraphrase thus: *Does the basic structure doctrine apply to the Constitution of Kenya 2010 thereby limiting its amendability*? It is noteworthy that in seeking to answer that question the learned judges delved into a detailed narration of the historical journey taken in the country's search for a new Constitution. Having myself stated in broad abridged terms what that journey entailed, I need not rehash what the judges addressed in some 50 paragraphs running into a score pages of their judgment. Suffice to highlight a few aspects of that historical account;

- The 1963 Constitution was amended many times [stripping it] of most of its initial democratic and social justice protections
- By the end of 1980 Kenya had become an authoritarian State.
- This turn towards autocracy was facilitated through a culture of hyper-amendment (per law scholars Professors Dince Ojwang, John Osogo Ambani, Dindi Musumba and Jack Mwimali), the "curiosity of constitutions without constitunalism" as famously put by Prof. Okoth Ogendo, and a culture of misuse of constitutional politics that degrades the Constitution into something more akin to a statute. It "underwent changes so profound and so rapid as to alter its value,

content and significance beyond repair" (Per Okoth Ogendo).

- Agitation for a comprehensive, participatory citizen-centric push towards concrete constitutional reform from the 1980's through the 1990's started yielding fruit with enactment of the Constitution Review Act 1997 which provided for the Constitution of Kenya Review Commission (CKRC), District Constitutional Forums and the National Consultative Forum and laid great emphasis on broad public participation at every stage of the process.
- Kenyans wanted an even more Participatory process than the Act provided and various groups coalesced under the alternative Ufungamano Initiative. The two processes were eventually merged.
- The CKRC Draft Constitution, a true reflection of the will of the people of Kenya emerged in October 2002 but the National Conference to debate the draft began in April 2003 and a Draft Constitution out of the process was delivered in 2004 but was not presented to the people in a referendum. Instead, it was tinkered with by the Kibaki Government to emerge as the Wako Draft. It was defeated in the ensuing referendum of 2005.
- The general election of 2007 was highly contentious with the Presidential race being disputed and igniting post-election violence that claimed more than 1,100 lives and displaced 600,000 more. The crisis was mediated by the African Union appointed Panel of Eminent African

Personalities headed by former UN Secretary General Kofi Annan. The brokered peace took the form of a Government of National Unity and the appointment of the Krieglar and Waki Commissions as part of the National Accord.

- Agenda 4 for developing long-term strategies for durable peace saw constitutional reform identified as a critical desideratum for lasting peace and in time the Constitutional Review Act 2008 set up organs for review namely; the Committee of Experts; Parliamentary Select Committee; the National Assembly and the Referendum.
- Despite some acknowledged shortcomings, the Committee of Experts successfully completed the dozen stage process leading to the promulgation of the 2010 Constitution. The penultimate stage was the presentation of the Revised Harmonized Draft to the people in a referendum which passed the new Constitution by an overwhelming majority of nearly 70% before it was promulgated on 4th August 2010.

The High Court's engagement with the basic structure doctrine was with that history firmly in view. The case made before them was that, *"the 2010 Constitution contains essential features and critical characters and fundamental values that enjoy transcendental existence, whose derogation is not contemplated in the Constitution by way of constitutional amendments … It thus forms eternity clauses of unamendable provisions."* It was presented as deriving

directly from the sovereignty of the people as exercised in constitution making.

The learned judges referred to the arguments made and authorities cited for and against the basic structure doctrine, which are essentially the same ones made before us, and I need not repeat them. Upon intense analysis, the learned judges pegged their conclusions partly on the people's demand for, insistence upon and direct involvement through conscious and informed participation in the Constitution-making processes as follows;

> ***"These principles of interpretation, applied to the question at hand, yield the conclusion that Kenyans intended to protect the Basic Structure of the Constitution they bequeathed to themselves in 2010 from destruction through gradual amendments. We can discern this doctrinal illumination by correctly interpreting both the history of Constitution-making and the structure of the Constitution Kenyans made for themselves. At every step of the way, Kenyans were clear that they wanted a Constitution in which the ordinary mwananchi, Wanjiku, took centre-stage in debating and designing. So clear were Kenyans about the need for informed public participation in constitution-making, that they ensured that the laws regulating constitution-making contained very detailed and specific requirements for four distinct processes: a) Civic education to equip people with sufficient information to meaningfully participate in the constitution-making process; b) Public participation in which the people – after civic education – give their views about the issues; c) Debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making in a Constituent Assembly; and***

d) Referendum to endorse or ratify the Draft Constitution."

Indubitably, the people were not mere observers or peripheral players in the making of the 2010 Constitution. They were wielders and shapers of destiny, not mere instrumentalities for the formal adoption of a document conceived, gestated and birthed by the political-power elites of the day only for them to attend and vote at a referendum that would be no more than a ritual naming of a product not their own. The recorded history is crystal clear that the people of Kenya conceived, composed and constituted their Constitution which they birthed in 2010.

And it is only natural, in the way the Swahili saying *"Uchungu wa Mwana Aujuae ni Mzazi"* (It's the mother who knows the pain of childbirth) as contrasted with the Gusii saying that *"Mwana Obande 'Mamiria Makendu"* (another's child is but cold phlegm) that the people of Kenya were very particular that the child of their own making, in which resided their hopes, dreams and aspirations as well as a clear statement and architecture of how they wished to be governed, should not suffer the fate of the previous Constitution. That other had been amended many times in a deliberate and systematic scheme to quarter it, water it down, dismember and all

but obliterate the promise of freedom for the citizens and limited government that it once had.

They expressed to the CKRC, which first understood its *raison d'etre* and mandate through the eyes of the people thus;

> ***"The mandate of the Commission***
>
> ***The primary reason that the people of Kenya want to review the current Constitution is that they feel it no longer protects them. In view of the numerous amendments it has undergone since 1963, it has operated more like ordinary legislation than as the supreme law of the land. An important goal of the review, therefore, was no re-establish the constitutive character and supremacy of the Constitution. Consequently, various issues were put to the public debate, namely constitutional supremacy, constitutional interpretation, sovereignty of the people, nationality and citizenship, the nature of the republican state, state values and goals and the legal system."***

The concerns about constitutional dilution, abrogation or capture through amendments were captured thus;

> ***"The extent to which a constitution is regarded as supreme law depends on the ease with which its provisions may be amended. Experience in Africa and elsewhere shows that, while it may not be so difficult to make a good constitution, it is very difficult to implement and observe it and all too easy to alter or even overthrow it. This was an important concern during the public hearings, during which the following issues were frequently raised;***
>
> - *Considering how quickly and fundamentally the independence Constitution was amended, how can we protect the new constitution from a similar fate?*

- *How can we prevent the decay of constitutional institutions and state organs, as has happened with the institutions of the present Constitution?"*

It is a sad blight on Africa's post-independence experience that no sooner did the nations gain independence than the power elites embarked on diluting and dissolving all restraints on power and authority, a blurring and final obliteration of checks and balances and a concertation of power in the Presidency. They did this principally through facially legal and constitutionally compliant changes to their constitutions. I have immersed myself in the writings of Prof. Nwabueze relevant to this subject and taken account of his description, in excruciating and depressing detail, of the manner in which power became so concentrated in the hands of the founding fathers, the heroes of independence, to the detriment of good governance and the rule of law and the liberty of citizens. In Presidentalism in Commonwealth Africa, for instance, he dedicates chapter V to the Office of President and starts off under the head *'The Extent and Reality of Presidential Power'* by pointing out that the most striking feature of the presidency in Africa is its tremendous powers. He goes on to state, which I consider germane to quote *in extenso* for a full appreciation of the reality that informed Kenyans' search for a new constitutional paradigm;

"The 'Africanness' of the presidency in Africa refers to the fact that it is largely free from such limiting constitutional devices, particularly those of a rigid separation of powers and federalism. It is the universal absence of such restraint mechanisms that is implied in the qualifying word 'African.' A feature of the presidency in Africa is what has been called 'democratic centralism.' From its inception in Ghana in 1960, centralism in the organization of governmental powers, in the administration of government and in the organization of politics has come to characterise every presidential regime in Commonwealth Africa. Furthermore, one is deeply struck by the way in which almost every step in Ghana's post-independence constitutional development has been closed followed, almost in its precise sequence, in many of the other Commonwealth African countries.

Every kind of separation or division in governmental authority is rejected. Starting with the abolition – for good reason – of the separation of the Head of State from the Head of Government and the diffusion of executive power among cabinet members, the whole apparatus of power has been concentrated in the executive. The legislature is subordinated to the executive; bicameralism where it existed before is replaced by unicameralism, and federalism or regionalism by unitarism. The judiciary is subordinated to the executive as regards appointment, and sometimes even as regards dismissal too. All this is but a foundation for the emergence of that political monolith, the one-party state, which itself finally consummates the personalization of rule – ie the centralization, within the single party, of all power in the hands of the leader. In many cases the constitution still guarantees individual rights, but two countries in Commonwealth Africa, Tanzania and Malawi, have since followed the example of Ghana in rejecting a constitutional guarantee. The whole concept of 'checks and balances' is largely abandoned. 'Our Constitution', Julius Nyerere explained in an article

on 1962 constitutional proposals of Tanganyika, 'differs from the American system in that it avoids any blurring of the lines of responsibility and enables the executive to function without being checked at every turn. For we recognize that the system of 'checks and balances" is an admirable way of applying the brakes to social change. Our need is not for brakes – our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies', Thus, for example the power of the President to appoint ministers, judges and other public servants and to enter into treaties with foreign countries is not limited, as in America, by the necessity of obtaining the approval of the legislature. The departure from the system inherited at independence is even more marked. The President mostly replaces the various service commissions as the authority for the appointment, dismissal and disciplinary control of members of the civil and police services."

That aggregation and concentration of power with the attendant creation of imperial presidency, was achieved mainly by constitutional amendments. To achieve them, the restrictions to the amending powers built into the independence constitutions were assaulted and successfully abolished or attenuated. Ghana, the first country to attain independence in 1957 was quick to abolish all the restrictions to amendability even, and especially, of entrenched provisions, the very next year *"by the Constitution (Repeal of Restrictions) Act of 1958 which was passed strictly in accordance with the prescribed procedure. Thereafter, a simple*

majority sufficed for every constitutional amendment" (P.399) The proponents of the abolition of restrictions to the amendment power including Nkrumah himself "castigated them as a colonialist imposition, an affront to the sovereignty of the new state and a perversion of the democratic state." I must confess it did give me an uneasy sense of *déjà vu* when I heard similar arguments made before us in condemnation of the learned judges for deigning to find that there is a limitation to amendment of the 2010 Constitution.

Nwabueze recounts the Kenyan experience under which the provisions relating to entrenchment and thus restriction of the amendment power were systematically removed or watered down until;

> ***"In 1965 the remaining restrictions were all but swept away. The majority was reduced from three-fourths to 65 per cent, the referendum requirement, and the special entrenchment with its nine-tenths majority in the senate, were repealed. With the virtual reduction of the regional structure into a system of local government in 1965 (the regions were then re-named provinces), the senate – and hence its participation in the amending process – was abolished in 1967. In 1968 the establishment of provinces, their organs, functions, powers and every other provision relating to the provincial structure, including the new provision (substituted in 1964) for the alteration of provincial boundaries, were excised from the Constitution. The final stage had thus been reached where any amendment could be made by a unicameral national assembly with a 65 per cent majority (less than the usual two-thirds).***

After detailing the same trend in Uganda, Tanzania, Malawi and Zambia, the author observed, quite correctly in my view, that whereas amendments *per se* may not be objectionable;

> ***"too frequent amendment may tend to reduce the Constitution to the level of an ordinary law, depriving it of any claim to respectability and devotion, which might in time earn for it a status akin to sanctity"*** at page 405**.**

Kenyans were keen to ensure that 2010 Constitution did not suffer the same ignominious fate as its predecessors and they told the CKRC that its amendment had to be restricted. What they said is summarized thus;

> ***"What the people Said:***
>
> ***What the people told the Commission may be summarized as follows;***
>
> ***(i) a constitutional amendment should require 75% of the vote in Parliament;***
>
> ***(ii) the power of Parliament to amend the Constitution should be limited e.g. where it cannot get the 75%, a referendum organized by the Judiciary should be called to decide; this should be done only after a thorough awareness creation;***
>
> ***(iii) the public should be involved in changing certain provisions of the Constitution through referenda, especially as concerns religions, marriages, divorce and inheritance;***
>
> ***(iv) a distinction should be made between entrenched and non-entrenched provisions of the Constitution, with a stringent mechanism being set up for amending the former entrenched***

provisions which should include supremacy of the Constitution, the Bill of Rights, land, the Judiciary, security, finance, the system of government."

This invited a commentary by CKRC in the following terms;

"Commentary

The large number of Kenyans who made submissions to the Commission proves that the Constitution lies at the very heart of Kenyans. Generally, it was submitted that the Constitution should remain supreme. This immediately raised the issue of amending the Constitution and how this should be done. Many Kenyans expressed fears that even after a comprehensive review of the Constitution, Parliament may thereafter sit and make substantial amendments that would water down all their efforts. In addition, it was generally felt that the current provision for amending the Constitution was too simple and had, therefore, been used to consolidate power in the Executive.

The people, therefore, wanted a fairly rigid arrangement, the amendment of which would require their participation in some form. In their view, the new Constitution should only be amended in the same way in which it is made." (My emphasis)

I have laid emphasis on the last part of the commentary because, to my mind, the people of Kenya were quite clear that they were not going to cede the Constitution to the vicissitudes and vagaries of political expediency. Having birthed it, they were prepared to nurture it and protect it from mutilation or dismemberment. They desired to be involved in its fate and fortune

and were essentially saying that only as they made it could it be substantively altered –with their full and informed participation.

It is clear to see, therefore, that the people as creators of the Constitution were exercising a power that was *without* and *above* the Constitution. They could not have been creating it pursuant to any of its provisions for the rather commonsensical reason that it was not existing at the time, not having been constituted. The power to constitute a constitution pre-dates the Constitution and it is, with great respect, quite absurd to seek constituent power within the Constitution. The power is original, a priori, primordial and is inherent in the sovereignty of the people. It is not subject to the Constitution, which is but an emanation of it. This is the constituent power with which the people themselves, acting directly, can both make, unmake and replace a Constitution. Nwabueze renders it thus;

> ***"The nature and importance of the constituent power need to be emphasized. It is a power to constitute a frame of government for a community, and a constitution is the means by which this is done. It is a primordial power, the ultimate mark of the people's sovereignty.***
>
> ***Sovereignty has three elements: the power to constitute a frame of government, the power to choose those to run the government, and the powers involved in governing. It is by means of the first, the constituent power, that the last are conferred. Implementing a community's constituent power, a***

constitution not only confers powers of government, but also defines the extent of those powers, and therefore their limits, in relation to the individual members of the community. This fact at once establishes the relation between a constitution and the powers of government; it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the constitution's supremacy."

It is noteworthy that the passage I have quoted was relied upon by Ringera, J. when he rendered what I believe has been the most authoritative pronouncement on the constituent power and the basic structure doctrine in our jurisprudence. The ***NJOYA*** decision was never appealed against and has remained the law on this subject, followed and re-affirmed on many occasions over the last fifteen years. I have gone over Ringera, J's ruminations on the subject of constituent power, its being an expression of the sovereignty of the people, its existence outside of the Constitution, yet having implicit recognition in it, with a cognizable juridical status. Having done so, I think that I can do no better than set out at some length what he had to say, with which I fully concur and apply *mutatis mutandis* to the 2010 Constitution;

"***With respect to the judicial status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people***

not its mountains, rivers, plains its *flora* ***and*** *fauna* ***or other things and resources within its territory. All governmental power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their frame work of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed, it is not expressly textualised by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would do so only*** *ex abundanti cautela* ***(out of an excessiveness of caution). Lack of its express texualisation is not however conclusive of its want of judicial status. On the contrary, its power, presence and validity is writ large by implication it he framework of the Constitution itself as set out in sections 1, 1A, 3 and 47. In that regard I accept the broad and purposive construction of the Constitution canvassed by counsel for the applicants. I accept that the declaration of Kenya as a sovereign Republic and a democratic multi party state are pregnant with more meaning than ascribed by the respondents. A sovereign Republic is a sovereign people and a democratic state is one where sovereignty is reposed in the people. In the immortal words of Abraham Lincoln, it is the government of the people, by the people, and for the people. The most important attribute of a sovereign people is their possession of the constituent power. And lest somebody wonder why, the supremacy of the Constitution proclaimed in section 3 is not explicable only on the basis that the Constitution is the supreme law, the*** *grundnorm* ***in*** *Kelsenian dictum****; nay, the Constitution is not supreme because it says so; its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the***

people themselves. And as I shall in due course demonstrate the powers of Parliament under section 47 of the Constitution are a further recognition that the constituent power reposes in the people themselves. In short, I am of the persuasion that the constituent power of the people has a juridical status within the Constitution of Kenya and is not an extra-constitutional notion without import in constitutional adjudication."

The relevance of the constituent power to a discussion of the basic structure doctrine is that it is presented as the only authority that can effect a legitimate alteration to an aspect of the Constitution that lies at its core or relates to its essential character. The argument is that amendments or alterations of that kind are not amendments properly-so-called but have the effect of abrogating it by destroying the very foundations or pillars upon which it rests. John Rawls in Political Liberalism (1993) gives an example from the United States Constitution that *"[A]n amendment to repeal the First Amendment [that guarantees freedom of expression and religion] and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime."* Such a move would amount to *"a constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the Constitution."*

Prof. Robert Albert in an article titled "Constitutional Amendment and Dismemberment" in the Yale Journal of

International Law states that *"This Rawlsian view reflects the conventional understanding in the field of constitutional change: either a constitution is amended consistently with the constitution; or the alteration is so transformative that we cannot call it an amendment and we must instead recognize that conceptually it creates a new constitution."*

Under that view, this would be the case even if the old Constitution is not formally replaced with a new one: It can safely be argued that any amendments that alter the core aspects of a constitution, changing its character and ethos in a radical manner essentially change its basic structure and in all but word abrogate or dismember the constitution. The basic structure doctrine and the notion of constitutional dismemberment have the same effect of positing that such constitutional amendments are in fact unconstitutional.

In his concurring opinion, H. R. Khanna, J. one of the judges comprising the majority in ***KESAVANANDA*** (supra) gave the concept of the basic structure, which every constitution is possessed of, full judicial expression thus;

> ***"Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in***

my opinion, should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution is not to be abrogated but only changes have to be made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern."

It is important to note that as the Indian Constitution, just like ours, did not then, and does not now, contain unamendable provisions in its text, it lacks express limitations to its amendability. This is in contrast to some other jurisdictions in which the constitutions contain provisions prohibiting amendment of certain subjects leading to the terminology, as Roznai notes in his PhD thesis, 'immutable', 'unalterable' 'irrevocable', 'perpetual' or 'eternal' all of which he considers, and I readily agree, to be inaccurate because;

> ***". [they] imply everlasting provisions, [but] are neither eternal nor unchangeable. While they serve as a mechanism for limiting the amendment power, they do not - and cannot – limit the primary constituent power. Moreover, their content can also 'change' through judicial interpretation. The Brazilian terminology – which refers to these provisions as 'petrous clauses' [which I understand to mean founded on rock] to express their rigidity – is more accurate on that respect since even rocks cannot withstand the volcanic outburst of the primary constituent power. Therefore, in order to describe the legal situation more accurately, I refer to these provisions throughout this thesis as 'unamendable."***
>
> (Emphasis his).

The scholar notes that the technique of expressly prohibiting the amendment of certain state features, be they the form of government, separation of powers or the like, spread like a fire in a thistle field (or, if you like, in the *Gikomba* clothes market) and was impelled in part to protect the Constitution by guarding against- *"popular levity and legislative caprice."* He then concluded that just as having a formal Constitution virtually became a symbol of modernism following the American and French revolutions, so too, nowadays having an unamendable provision is becoming a universal fashion. Those unamendable provisions in terms of content show several common components which seek to protect the state's form and system of government, its political structure, basic rights or its integrity.

On the express unamendable clauses, he concludes, and I would think on the basis of sound comparative evidence, that;

> "***Moreover, as the Venice Commission maintained, explicit limits on constitutional amendments are not a necessary element of constitutionalism. Nonetheless the 'core notion' Richard Kay correctly notes, that there is something wrong with the idea that an amendment might alter the essential character of a constitution while simultaneously invoking its authority - has been embraced by many modern constitution- makers; Indeed, an increasing number of constitutions contain explicit material limitations on the constitutional amendment power in order,*** *inter alia****, to protect essential characteristics of the constitutional order or principles perceived as being at great risk of repeal via the democratic process, in light of historical circumstances."***

But, importantly, he also points out, which is germane to the analysis whether the learned judges were wrong in arriving at the conclusions they did, that *"the amendment power must be conceived as implicitly limited even in the absence of any explicit limits,"* (p.57) the genesis whereof he traces to the United States back at the dawn of the 19th Century. He points to the works of John Calhoun, Discourse on the Constitution and Government of the United States (1851 p300-301) and Thomas Cooley (4th Edn. to Story's Commentaries in 1893) in which they argued that an amendment that is inconsistent with or radically changes the character of the Constitution and the ends for which it was

established, transcends its limits since amendments cannot be revolutionary but must be harmonious with the body of the Constitution. Indeed, according to another scholar Author Machen, an amendment must be real amendment, and not the substitution of a new constitution because such a new constitution can only be adopted by the same authority that adopted the present constitution. This speaks to the notion of intrinsic limitation to the amendment power and is not much different from the basic desire of Kenyans, I referred to earlier, that their Constitution be altered only by the same means by which they made it.

Roznai next refers to the near contemporaneous development of the idea of *"supra constitutionality"* in France whereby its scholars posited that above the written constitution there must be certain fundamental principles which, though not written, would nonetheless invalidate any amendment to the constitution in conflict with constitutional legitimacy. In Germany, the Scholar Carl Schmitt was of the same view that no revision to the Constitution could provide for the destruction of its legitimacy. Thus, its basic substantive principles cannot be set aside by the constituted powers because the amending procedure at their disposal is designed to effectuate the essence of the constitution. In short, the Constitution does contain a core of implicitly

unamendable principles that embody its identity. See, Constitutional Theory Duke University Press 2008 (p. 150-153). According to Roznai, the argument in favour of implicit limitations on amendment powers did not remain in the realm of theory but *"migrated from Germany to India in the 1960's where, due to stormy political events, it was applied practically and most notably elaborated."* (p554)

In India, the development of the basic structure doctrine, which is to the effect that amendment power is implicitly limited and does not include the power to abrogate or change the identity of the Constitution or its basic features, was an incremental one. The Supreme Court in 1951 unanimously rejected it in ***SHANKARI PRASAD vs. INDIA AIR 1051 SC 458,*** holding that fundamental rights were not beyond the amendment power. A majority of that court (with 2 dissents) rejected it again in 1965 refusing to accept the argument that amendments cannot violate fundamental rights in ***SINGH vs. RAJASTHAN AIR [1965]SC 845.***

The doctrine's first foothold was in 1967 when a narrow majority of 6:5 of an expanded bench in ***GOLAKNATH vs. STATE OF PUNJAB AIR 1967 SC 1643*** reversed those earlier holdings without invalidating the amendments in question. This great break was contributed to by the writings of Dietrich Conrad, a German

Professor of Asian Law that were placed before the court by one of the petitioners' lawyers, one M.K. Mambyor. This to me speaks to the great value that deep and innovative legal research brings to the development of jurisprudence. We have seen the benefits of expansive engagement with scholarly works, all speaking to intellectual rigour and industry attested to by the wealth of seminal material laid before us by counsel. And it behooves us to do justice to all that effort by full engagement therewith, which I have endeavoured to achieve.

The ***GOLAKNATH*** decision unleashed the wrath of a furious Prime Minister **Indira Gandhi** and *"signified the opening shot of a great war … over Parliamentary versus judicial supremacy"* as Roznai puts it, recalling Granville Austin's Working a Democratic Constitution: The Indian Experience (Oxford University Press 1999 at p. 198. The Prime Minister, seeking to establish parliamentary sovereignty, and while riding on a crest of political popularity that gave her Congress Party a two third parliamentary majority, saw the passage of the 24th and 25th Amendments. The latter sought the contested property reform while the former was to the effect that Parliament could amend any provision of the Constitution, including those protective of fundamental rights.

Those amendments were the subject of challenge in ***KESAVANANDA***, heard by an extraordinary bench of 13 Supreme Court Judges. A narrow majority of 7:6 held that the amendment power does not include the power to alter the basic structure or framework of the Constitution so as to change its identity. This is the kernel of the basic structure doctrine. The dissenting 6 Judges were of the view, expressed strongly before us by the aggrieved appellants, that all parts of the Constitution have equal status and are amendable. The majority faced reprisals from Gandhi, most notable being her breaking with custom to appoint Justice Ray, the senior most of the dissenting Judges, as the Chief Justice instead of the senior most judge on the Court, who happened to have been in the majority.

The inter-branch war did not end and was only exercabated by the High Court's nullification of Gandhi's 1971 election an account of electoral fraud for which it also barred her for 6 years. In return, she declared a state of emergency. Parliament then passed the 38th Amendment immunizing the Proclamation of Emergency and other laws passed during it from judicial review, while the next Amendment retrospectively invalidated the law under which Gandhi was convicted, and ousted the court's jurisdiction to enquire into any electoral matter. When her appeal

came to the Supreme Court on appeal in ***INDIRA NEHRU GANDHI vs. RAJ NARAM AIR 1975 SC 2299***, the 5 Judges *unanimously* confirmed the basic structure doctrine and held the 39th Amendment to be invalid for violating three essential features of the constitutional system, namely fair democratic elections, equality and separation of powers.

In response, Parliament enacted the 42nd Amendment which had **59 sections**. **Section 55** sought to forever bar judicial intervention by providing that *"No amendment of this Constitution shall be called in question in any court on any ground … for the removal of doubts; it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provision of this Constitution …."*. The Amendment provision was challenged in ***MINERVA MILLS vs. UNION OF INDIA AIR [1980] SC 1789*** and the 5 Judges unanimously held that in so far as S.55 removed all limitations on Parliaments' amendment power, it conferred on it the power to destroy the Constitution's essential features or basic structure. This was beyond its amendment power and thus void.

Roznai concludes his discussion of the basic structure doctrine in India by showing that were Parliament to have unlimited power of amendment, it would cease to be a power under

the Constitution, becoming supreme over it, able to alter it entirely, including its basic structure, or totally alter its identity which is impermissible. Contrary to **Mr. Paul Mwangi's** submissions, the basic structure doctrine from my reading of the cases subsequent to ***KESAVANANDA*** demonstrates an ascendant trajectory to the point that it is a firmly settled doctrine in India. The split majorities at its inception gave way to consistent unanimous decisions of the Supreme Court so that the so-called compelling case by R. Dhavan, said to be a respected Advocate and leading India scholar, that the [***KESAVANDA***] decision ought to be set aside would seem to have no solid foundation, in my respectful view.

I also find it curious that the submission was made that the doctrine *"has been roundly rejected in many contexts and jurisdictions".* The Hon. Attorney General is, with respect, not right in submitting that the basic structure doctrine has been "rejected by a vast majority of courts around the world." I have carefully and painstakingly read through the numerous cases, books and articles cited by the parties before us, and I find no factual basis for so bold and rather fallacious an assertion. In the case of Malaysia, I am satisfied, from a reading of ***SIVARASA RASIAH vs. BANDAN PEGUAM MALAYSIA & ANOR [2010] 3 CLJ*** and ***INDIRA GANDHI a/p MUTHO vs. PENGARAH JABATAN AGAMA ISLAM PERAK &***

OTHERS [2018] that the basic structure doctrine is more accepted than rejected. To be fair, these cases are admittedly later developments, the Malaysia Federal Court having previously rejected it as had the Sri Lankan Supreme Court.

It is instructive that other Asian countries such as Bangladesh and Pakistan have embraced and fully affirmed the basic structure doctrine. See ***BANGLADESH ITALIAN MARBLE WORKS LTD vs. BANGLADESH [2006] 14 BLT*** (special) HCDI a decision made on 29th August 2005; and **DARVESH M. ARBEY vs. FEDERATION OF PAKISTAN PLD *1980 Lah. 846.***

Citing various cases from far away Central and South America (Specifically Argentina, Belize, Colombia and Peru), Roznai comes to the conclusion that the basic structure doctrine has migrated far and wide across the globe. The Supreme Court of Belize, a country in the Caribbean, adopted and applied the doctrine in ***BOWEN vs. ATTORNEY GENERAL*** claim No. 445 of 2008 BZ 2009 SC 2. An argument was made by that country's Attorney-General, similar to the one made before us by our own, that since the impugned amendment was adopted according to the procedure prescribed by **section 69** of their constitution, its constitutionality could not be impeached. It was firmly rejected, however, as it amounted to subjecting constitutional supremacy to Parliamentary supremacy.

Its law-making powers were limited and it could not go against the basic structure of the constitution. In response, the Eighth Amendment was passed trying to reverse that decision by removing procedurally complaint constitutional amendments from the purview of the constitutional supremacy clause that renders every inconsistent law void. To make doubly sure, the Parliament rendered the amendment to be *"all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, in the power of the National Assembly to alter the Constitution."*

Upholding a challenge to the said amendment, the Supreme Court in ***BRITISH CARIBBEAN BANK LTD vs. AG BELIZ*** claim No. 597 of 2011 (Oswell Legall, J.) referred to the India basic structure doctrine: *"Though the Constitution of India is different in several respects from the Indian Constitution, both Constitutions have basic features such as the Judiciary, Rule of Law, fundamental rights and separation of powers."* He emphatically stated that he had no doubt that the basic structure doctrine is a feature and a part of the Constitution of Belize. I think, with respect, that the reasoning of that court is sound and persuasive. Moreover, it provides the answer, at any rate part of the answer, to the argument against our adoption of Indian jurisprudence noting, as I do, that there is much commonality between the Indian constitutional law and our own,

and we have borrowed a great deal from that common law country's legal traditions. As I have stated before in this judgment, constitutional borrowing, cross-pollination and interpenetration of notions is perfectly legitimate and is the proper way to develop the law, while ensuring that whatever is borrowed is relevant, useful and fitted to suit our particular circumstances. I need only add that legal scholars have recognized and encouraged constitutional borrowing by courts for persuasive purposes. See for instance Mathew A. Adler; "Can Constitutional Borrowing be justified? A Comment on Tushnet' (1998), in University of Pennsylvania Journal of Constitutional Law 350-357 and Nelson Tebbe and Robert L. Tsai; *"Constitutional Borrowing"* (2010) 108 Michigan Law Review p. 462.

I note with a measure of bemusement that while castigating the learned judges for relying on foreign jurisprudence, the aggrieved appellants have laid before us numerous decisions of foreign courts. I can only take it that they intended that we would consider the said decision and authorities and hopefully be persuaded by them. And consider them I have, for many hours, days and weeks. I need to point out, however, that I have had serious difficulties with the commentaries and submissions by counsel that have accompanied the cases cited. I have already

termed some of those submissions to be exaggerated or fallacious. I was at first minded to treat them as a case of honest misapprehension of the judgments referred to in the part of counsel but, considering the regularity, consistency, and repetition of some of those wholly inaccurate comments and submissions, I cannot but wonder whether they were calculated to mislead the Court. They may have been made in the hope, alas vain, that we would not take the trouble to read the authorities ourselves - bulky and numerous as they are. But read them I have.

At page 7 of the submissions by Paul Mwangi & Co. for BBI, National Secretariat and Hon. Raila, for instance, it is submitted at paragraph (f) that;

> ***"In Uganda, the Supreme Court in the case of <u>Paul K. Ssemogerere and Others vs. Attorney General</u>, Supreme Court Constitutional Appeal No. 1 of 2002, equally dismissed the Kesavananda doctrine. The court (per Tsekooko, J.) pointed out thus;***
>
> *'…Those who frame the Constitution also know that new and unforeseen problems may emerge; that problems once considered important may lose their importance because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of Government to another …. The framers of the Constitution did not put any limitations on the amending power because the end of a Constitution is the safety, the greatness and well-being of the people.*

Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution (Para 959.)

This passage indicates that written Constitutions are not static and are liable to be amended. There is an obvious implication in this passage that courts have to interpret Constitutional provisions to bring the Constitution in line with current trends.'"

Now, from a reading of that passage quoted by counsel, the impression is that all those words were by Tsekooko, J. In truth, only the last paragraph contains his words. Having read the ***SSEMOGERERE*** judgment myself, which was usefully, if ironically, supplied by counsel in volume 8 of his record of appeal, I cannot but respectfully conclude that the case does not at all advance the appellants' particular argument or case. First of all, it turns out that the bulk of the excerpt attributed to Judge Tsekooko are not his words. They are actually words apparently found in a ***KESAVANANDA*** dissent which the judge quotes, not directly from that judgment, but as said to be quoted in a Singaporean case. The judge himself puts it thus at page 7 of his judgment;

"***No copy of the judgment of Kesavananda case was availed to us. I have not been able to lay my hands on the full judgment. But passages of it are quoted in the Singaporean case of Teo Soh Lung vs. Minister for Home Affairs and Others (1990) LRC (Const) 490. At page 504, Chua, J., quotes a passage from a judgment from one of the judges in Kesavananda case as follows; ...."*** (My emphasis)

With great respect, I cannot see how it is possible for ***SSEMOGERERE*** to have ***"dismissed the KESAVANANDA doctrine"*** as we are urged, when the judges deciding it had not even engaged with the doctrine and had not even read the judgment. In fact, nowhere in ***SSEMOGERERE*** is there a whiff of *rejection* of the basic structure doctrine which is the heart and essence of ***KESAVANANDA***. To the contrary, Tsekooko, J. indicated that in his "considered opinion … ***KESAVANANDA*** case was misunderstood and therefore misapplied to the petition" that was before the Constitutional Court. According to the judge;

> ***"The issue which was in the Kesavananda case appears to have been whether an Act of Parliament had become part and parcel of the Constitution. That was and is not the issue in the petition giving rise to the appeal before us. Indeed nobody can dispute the fact that Constitutional Provision introduced by an amendment of the Constitution forms part and parcel of the Constitution."***

I need not say anything on the judge's understanding of the issue in ***KESAVANANDA***, which I, unlike he, have read in full, but it should be obvious that given the infirmities I have pointed out, ***SSEMOGERERE*** as presented before us cannot be a basis for the contention that the basic structure doctrine was rejected in Uganda on that occasion.

With respect, I would also reject as factually incorrect, and wholly unpersuasive, the passage cited from ***MALE MABIRIZI & OTHERS vs. ATTORNEY GENERAL OF UGANDA*** ***[2018] UGCC 4*** in so far as it asserts that the basic structure *"is still in at a nascent stage of development"* and has not gained universal appeal; ***"even in India ...the matter has not been authoritatively settled" as manifested by the ambivalence discernible in the decisions of the Indian Supreme Court on the matter; and, the narrowness of the margin ... of the India Supreme Court ...pointing to the fact that the Court's decisions could have gone either way."*** Having herein undertaken so detailed an account and analysis of the Indian experience with the basic structure doctrine and its migration across the globe, I have no difficulty discounting those conclusions as untenable.

I would also reject, as not in keeping with the progressive-purposive interpretive imperative imposed on us by the Constitution, the approach taken by the Tanzanian Court of Appeal in ***HON. ATTORNEY GENERAL OF TANZANIA vs. REV. CHRISTOPHER MTILIKA***, Civil Appeal No. 45 of 2009. That decision, rendered on 17th June 2010 was prior to our Constitution and the view propounded therein that courts must eschew *"a loosening of judicial discipline in interpreting the explicit provisions of*

the Constitution …" and that *"tightening of judicial scrutiny would be necessary,"* is the very antithesis of what the Constitution requires of our courts. I cannot accept as a correct reading of the Constitution, less still as persuasive enough for me to follow, the conclusion reached there that everything is amendable once the procedure for amendment is followed and that the basic structure doctrine does not apply.

The conclusion I have arrived at out of my forays into all the jurisprudence and learning I have referred to, and much more besides, is that the basic structure doctrine is legitimate and sound. I would think it strange that anyone would doubt the existence of a basic, fundamental, essential core being the pillar upon which our Constitution stands, and from which its character, ethos and identity flows. There is a certain undeniable simplicity to the notion. I thought of it as a house. Any and every house, be it simple or complex and elaborate, must have some structure with its bare essentials. Even as some houses may have fewer items than others going into their basic structure than others, so would different Constitutions differ in complexity. I was pleasantly surprised to find that Joseph Raz, in Between Authority and Interpretation (Oxford University Press 2009) at page 370 uses the analogy of a house to differentiate between minor changes to the

Constitution like redecorating a house, and major ones that alter its character.

Commenting on this, Roznai, makes the following critical observations;

> ***An analogy between a constitution and a house is indeed convenient to explain this. Just as a house does not lose its identity so long as you are decorating and repairing it on the same foundations on which it was built, so a Constitution does not lose its identity if it changed according to the requirements of changing times so long as its basic foundations are maintained.***
>
> ***One may again wonder, why it is not the prerogative of the amendment power to change even the basic foundations of the systems? James McClellan, for example, poses the following assertion:***
>
> > *Strictly speaking, an amendment to the Constitution is part of the Constitution itself. It is therefore inherently incapable of being unconstitutional. An amendment may nevertheless violate the spirit of the Constitution, overthrow established principles of the system, and so drastically alter the structure as to create a new form of government. Thus an amendment abolishing the States or the separation of powers, though constitutional in a legal sense, would in reality be destructive of the American constitutional system as we know it. Even foolish amendments, however, are constitutional, and it is the prerogative of the American people under Article V to make fools of themselves and to abolish their form of government and replace it with a new system if that is their wish.*
>
> ***McClellan is correct that it is the prerogative of the people to change their system of government, but this cannot be made through the amendment procedure. This should be "the people's exercising their constituent power, not the old constitution's benediction, that validates the new order." This is***

precisely the distinction between the primary and secondary constituent power, to use Jacques Baguenard's metaphor; the primary constituent power is the power to build a new structure and the secondary constituent power is the power to make alterations to an existing building. As the constitution's core cannot be altered without destroying the whole constitution, the delegated amendment power cannot use the power entrusted to it for quashing the constitution or its fundamentals so that it loses its identity. Constitutional amendments 'that tough upon the identity-engendering norms of the constitution, Ulrich Preuss writes, '... are unconstitutional because they destroy the constitution altogether by destroying the founding myth of its constituent power; Amending the essential and pivotal principles to the constitution's identity may be viewed as a 'constitutional breakdown.'"

I consider those sentiments to be of great relevance because they tie together the whole notion of the basic structure which is not open to amendment and the constituent power in its primary and secondary foundations. I cite the passage at length to signify my full agreement with the learned judges that the amendments proposed by the BBI initiative and Bill were so far-reaching in character, scope and content as to shake the foundation and alter the identity and character of the Constitution. They were effectively dismembering the Constitution, blasting so huge a hole in it as to pulverize its foundations and essentially create a new constitutional order. To do so would not be to amend the existing

Constitution and therefore, there was need to resort to and summon the primary constituent power.

The mere invitation of the people to vote on the radical, transformative proposals at a referendum was not an effective summons of the correct authority because the people acting on the amendment plane constitute the secondary constituent power only and are limited to amendment. They are in no position, while acting in that capacity and space, to endorse and effect a constitutional replacement. This latter they can only do in primary constituent mode. I accept the views of Prof. Dieter in his article titled *"Constituent Power and Limits of Constitutional Amendment"* in which he makes clear that the people's constituent power properly so called *"is at the same time established and consumed"* once the constitution comes into legal force. It does not become relevant under the existing constitution during which only amendments are possible, and amendments always presuppose the existence of the constitution with which they must be consistent, and which they cannot abolish. Whatever role the people have at the amendment stage, it is not the sovereign constituent power but a constituted power. The amendment power is not identical with the constituent power and can therefore be limited whether procedurally or substantively and, I dare add, whether the limitations be explicit or

implicit. He then asserts, crucially that *"the amendment power is a constituted power even if exercised by the people."* Moreover, no constituted power should be entitled to abolish the democratic system.

To my mind, that is the cognitive posture that we should adopt in answering the question whether the notion of limitations to the amendment power discussed by so many courts loses any of its logical force by the fact the amendments proposed in the case at bar, and contemplated by **Articles 255** to **257** of the Constitution, require approval by the people in a referendum. The conclusion appears to me inescapable that as long as what is contemplated is an amendment, it will *ipso facto* be limited. The limitation in this case stems from the fact that-certain aspects of the proposed amendments unquestionably go the essential core, and fundamental fabric of the Constitution, thereby purporting to alter irredeemably its character and identity. Such radical alterations are not amendments in the real sense of the word, for there has to be a limitation to what amendments can achieve. And I would think that dismemberment is dismemberment, whether effected through surgical amputation or through rough mutilation. It matters not whether you carve Ceasar as a dish fit for the gods, or hew him as a carcass fit for hounds: the cuts are mortal either way.

Prof. Grimm provides a germane response to a suggestion made before us to the effect that in so far as our amendment procedure even of entrenched provisions as listed in **Articles 255(1)(a)-(j)**, (which I think either coincides or nearly coincides with what may be considered to be the basic structure of our Constitution) we should follow the example of France and not interfere, since the people will have had their say with finality in a referendum;

> ***"A special argument can be found in the jurisprudence of the French Council Constitutionnel. In France the constitution can be amended either by a vote of parliament or by a referendum. The Counseil refuses to review amendments adopted by way of referendum because the people are the holders of it the constituent power. The court did not take into account, however, that the referendum is created by the constitution and thus puts the people into the position of a constituted power."***
>
> (My emphasis)

I think, with respect, that the reasoning encapsulated in the last sentence is unassailable and applies with equal force to our situation.

I have said enough, perhaps more than enough, to show that I do not think a sufficiently compelling or even persuasive case has been made to warrant our interference with the conclusion that the learned judges reached with regard to the basic structure doctrine

and its applicability in Kenya. Their finding on the point is inevitably correct from all that I have journeyed through in this judgment. Moreover, it is on all fours and perfectly consistent with prior decisions of the High Court which engaged with the doctrine at varying depths. They include the decision of Lenaola, J. in ***COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION vs. NATIONAL ASSEMBLY OF KENYA & 2 OTHERS*** (supra). He agreed with Oraro S.C and Mr. Nyamodi who on that occasion eloquently espoused a pro-basic structure stance that would have delighted the respondents herein. I am of the view that Lenaola, J.'s reasoning is worthy of acceptation and puts to rest the arguments made before us suggesting that the learned judges somehow, and erroneously so, latched on a strange or novel foreign concept. Said Lenaola, J;

> ***"62. To my mind the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the judiciary is tasked with the responsibility of ensuring constitutional integrity and the Executive, the tasks of its implementation while Independent Commissions serve as the "peoples watchdog" in a constitutional democracy. The basic structure of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency, deriving from certain unalterable constitutional values and principles. Richard Albert, in his Article, "Non-constitutional Amendments" Canadian Journal of Law and Jurisprudence 22,***

(2009) 5, states as follows with regard to constitutional amendments;

> *'Whereas the textual model of constitutional amendments demands only that a constitutional amendment meet the procedural requirements enshrined in the constitutional text, the substantive model requires not only that a constitutional amendment meet those constitutional textual procedures but it also imposes an additional hurdle that a successful constitutional amendment must clear; conformity with the existing constitution. The vision of constitutionalism contemplates the possibility of an unconstitutional amendment. The substantive model of constitutional amendment authorizes a designated branch of the government, commonly known as the judiciary to invalidate a constitutional amendment that runs counter to the spirit of the constitution even if that amendment meets all of the procedural conditions that the constitutional text requires political actors to satisfy in order to consummate a constitutional amendment....the substantive model instead sets the constitution itself as the limiting reagent for subsequent constitutional revision.'*

True to Richard Albert's sentiments, the concept of substantive constitutional amendment has been experienced in three constitutional States; India, Germany and South Africa. Before I proceed to examine the concept of substantive amendments in those Countries, I must pause here to make three observations; Firstly, the constitutional texts of those States do not expressly authorize their respective Courts to strike down constitutional amendments. Secondly, the Judiciaries in those States have taken broad steps to assert themselves within the constitutional order. Finally, the Courts in each of these States have invoked the structure and or spirit of the Constitution as a higher law above other laws."

I am so fully in concord with the reasoning of Lenaola, J. that I will not add a single jot nor tittle.

See also ***THIRDWAY ALLIANCE KENYA & ANOR vs. HEAD OF THE PUBLIC SERVICE JOSEPH KINYUA & 2 OTHERS***; ***MARTIN KIMANI & 15 OTHERS (INTERSTED PARTIES) [2020] eKLR*** and ***MARTHA KERUBO MORACHA vs. UNIVERSITY OF NAIROBI [2021] eKLR.***

Having come to the conclusion that the basic structure doctrine is applicable, the conclusion is also inescapable that the amendment power set out in **Article 255** to **257** of the Constitution is limited and that the basic structure can only be amended through the constituent power. That constituent power can only be properly summoned and exercised in accordance with the four sequence process of civic education, public participation and collation of views; constituent assembly debate precoding a referendum. This accords with the holding in **NJOYA** that the constituent assembly is a critical and integral part of the exercise of the people's constituent power.

I would hold without hesitation that a referendum cannot be effective as contemplated by the constituent power unless the initial three steps have been involved and engaged in real and substantive, as opposed to a ritualist and minimalist manner akin

to a mere token ticking of boxes. I shall return to this but at this point I would endorse as logically sound and doctrinally correct the conclusions arrived at by the learned judges as follows;

> ***"472. What we can glean from the insistence on these four processes in the history of our constitution-making is that Kenyans intended that the constitutional order that they so painstakingly made would only be fundamentally altered or re-made through a similarly informed and participatory process. It is clear that Kenyans intended that each of the four steps in constitution-making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010. Differently put, Kenyans intended that the essence of the constitutional order they were bequeathing themselves in 2010 would only be changed in the exercise of Primary Constituent Power (civic education; public participation; Constituent Assembly plus referendum) and not through Secondary Constituent Power (public participation plus referendum only) or Constituted Power (Parliament only). Paraphrased, there are substantive limits on the constitutional Petition No. E282 of 2020 (Consolidated). Page 176 power to amend the Constitution by the Secondary Constituent Power and the Constituted Power.***
>
> ***473. To be sure, there is no clause in the Constitution that explicitly makes any article in the Constitution un-amendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited. The structure and history of this Constitution makes it plain that it was the desire of Kenyans to barricade it against destruction by political and other elites. As has been said before, the Kenyan Constitution was one in which Kenyans bequeathed themselves***

in spite of, and, at times, against the Political and other elites. Kenyans, therefore, were keen to ensure that their bequest to themselves would not be abrogated through either incompatible interpretation, technical subterfuge, or by the power of amendment unleashed by stealth."

Before I move on to other aspects of this appeal, I think it to be of great importance to express my full agreement with Ringera, J. when he, fully aware of the importance of the matter he was dealing with, delivered himself thus;

***"All in all, I completely concur with the** dicta **in the kessevananda case that Parliament has no power to and cannot in the guise or garb of amendment either change the basic structures of the Constitution or abrogate and enact a new constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle. It would be tantamount to an affirmation, for example, that Parliament could enact that Kenya could cease to be a sovereign Republic and become an absolute monarchy, or that all the legislative, executive and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be co-optional, or that all fundamental rights could stand suspended and such other absurdities which would result in there being no "this Constitution of Kenya." In my judgment, the framers of the Constitution could not have contemplated or intended such an absurdity. And it would not be an answer to that concern to say, as was said by counsel for the Second Respondent, that people can change their Parliament, for if Parliament had a totally free hand, it could even perpetuate itself. All in all, the limitation of Parliament's power was a very wise ordination by the framers of the Constitution which is worthy of eternal preservation.*

Before I leave this aspect of the matter let me comment on the previous amendments of the Constitution of Kenya. Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution.

...

Be that as it may, it is evident that in none of the various amendments did Parliament purport to or in fact abrogate the Constitution or make a new one. Everything was done within the text and structure of the existing Constitution.

....

As regards alterations to the basic structure of the Constitution, that had manifestly been affected, all I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our Constitution."

I think, with respect, that the amendments to the Constitution contemplated and proposed by the BBI amendment bill have the potential to alter by one fell swoop, the fundamental pillars that define and undergirth our Constitution. They are truly no less than a ballistic attack on our Constitution's foundations including Separation of Powers, Independence of the Judiciary, and chapter Fifteen Commissions and Independent offices, not to mention Supremacy of the Constitution, Sovereignty of the people and the national values and principles of governance. I accept that this is not exhaustive and should be dealt with on a case by case

basis. Ringera, J. indicated that we had been down this road before but without judicial challenge. I surmise that a cowed populace probably did not have the courage to seek redress. Nor was the Judiciary back then particularly famous for the defense of the Constitution. For the superior courts of this country at this time, there is no luxury of indifference or neutrality. Where in former times no challenge to the manifest alteration to the Constitution's basic structure was made thus sparing the courts the burden of decision, we are today summoned to the valley of decision. Civic-minded constitution-defending citizens have raised alarm at the threatened dismemberment of the 2010 Constitution.

The High Court has, with crystal clarity of reasoning and felicity of dictum, raised a barricade against such a scheme and it is upon this Court to either raise the bulwarks of defence even higher and place around the Constitution a wall high and impregnable against such machinations or, as we are urged by the appellants, disable the brakes, uproot the ramparts and usher in an open season for the systematic and unbridled dismemberment of the Constitution. To me, there is only one path that commends itself consistently with conscience and fealty to the constitutional command: I must defend it and keep its fortifications firm and

effective. I must stand up for the Constitution heeding the words of the hymn: *"where duty calls or danger, be never wanting there."*

The matter assumes a particular urgency in the present times which have seen the steady ascendancy of authoritarianism, the erosion of the rule of law, and the rise of illiberal democracy. Many legal scholars have addressed this worrying trend and have in particular identified the invocation of constitutional amendment procedures by political elites *"to undermine commitments to constitutional democracy – or a constitutional system based on free and fair elections, and respect for the rule of law and basic human rights,"* as Professors Rosalind Dixon and David Landad express it in *'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment.'* ICON (2015) Vol 13 No 3 606 – 638. They point out that the unconstitutional constitutional amendments/basic structure doctrine, though at times attacked as being anti-majoritarian and making courts *"too powerful,"* is in fact a useful tool to help preserve so called fragile democracies against the democratic erosion that is inherent in abusive constitutionalism. Beyond textually-stated eternity clauses, they point out that many scholars and courts have argued that;

> ***"the doctrine may be defended as a way of defending popular sovereignty, because it limits the amendment***

power wielded by political institutions while reserving certain fundamental changes amounting to replacement of the constitution to the people acting as constituent power. Under this theory, use of the doctrine is democracy-enhancing because it maintains the ultimate power of the people over their elected representatives."

See also Joel Colon-Rios, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America,* 44 VICTORIA U. WELLINGTON L. REV. 521 (2013); Samwel Issa Charoff, *Fragile Democracies* 120 HARV.L.REV. 1405 [2007]

There is much to commend the higher, more demanding amendment procedure in **Articles 255** to **257** of the Constitution whereby entrenched provisions must meet specified thresholds and more hurdles in what Richard Albert calls a tiered amendment procedure in *Constitutional Handcuffs*, 42 AR1Z.ST. L.J. 663, 709 (2010). However, given I am persuaded that the referendum requirement is at best an exercise of the people's *secondary constituent* power or, as argued by some, an aspect of *constitutive* power contemplated by the Constitution itself as part of its amendment procedure, I am better persuaded by the Unconstitutional Constitutional Amendments/basic structure doctrine. I am justified in this view by my appreciation that even

referendum procedure can be made of no effect by a deficit of prior civic education and substantial public participation.

In an article titled "*Democratic Erosion; Populist Constitutionalism and the Unconstitutional Constitutional Amendments Doctrine*," Yaniv Roznai and Tamer Hostovsky Brandes argue articulately that the UCA/basic structure doctrine *"is a truly democratic mechanism that aims to preserve the people's constituent power as manifested in the constitutional fundamentals"* and also address the peril that the democratic processes, including referenda, are exposed to by populists;

> "***The populist alleged commitment to democracy, however, can easily be dismantled. In addition to anti-institutionalism, the rejection of pluralism is an essential element of populism. Populists reject pluralism because, under the friend/enemy distinction, there is no room for opinions competing with those presented. There is thus no need for market-place of ideas, or a process of deliberation in which different opinions and views are pitted against each other in order to reveal and form the' people's will.' With respect to referenda, for example, Miller explains that for populists, 'a referendum isn't meant to start an open-ended process of deliberation among actual citizens to generate a range of well-considered popular judgment, rather, the referendum serves to verify what the populist leader has already discerned to be the genuine popular interest as a matter of identity.'*** *(My emphasis)*

See, also Marc F. Platter, *Populism, Pluralism and Liberal Democracy* 21(1) J. DEMOCRACY 81 [2010].

An effective bulwark against abusive constitutionalism therefore seems to me to be, on the authorities, one that entails ***more*** as opposed to ***less*** people involvement. I think, therefore, that there is nothing anti-majoritarian or doctrinally abhorrent about the 4-step process the learned judges held to be indispensable for effectuation of *'amendments'* of the kind proposed in the BBI bill.

In so holding I am expressing non-persuasion by the argument that the learned judges imposed a higher amendment procedure than the people settled for in chapter 16 of the Constitution. It has to be recalled that the restriction to amendment need not be in express text. It is generally accepted that in keeping with the interpretive posture addressed earlier in this judgment and on a proper understanding of the basic structure doctrine, the limitation can be implicit. Moreover, it is the people themselves who preferred rigidity over flexibility. They were bothered by hyper-amendability, and for me the numerous amendments proposed are no less offensive because they are presented in one bill at once and not through staggered instalments over time. True, what the learned judges held, and which I accept as correct, renders amendment of the Constitution *more difficult* but it does not make it *impossible*. And then that is

only in so far as amendments aimed at altering the basic structure are concerned.

Those who seek to amend the Constitution are at liberty to effect what changes they wish but, as Justice Chandrachund stated in ***KESAVANANDA***, ***"the basic structures theme song is amend as you may, even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage, therefore you cannot destroy its identity."*** That word of caution resonates with what Ringera, J. observed in ***NJOYA*** above that ***"the limitation of Parliament's [amendment] power was a very wise ordination by the framers of the Constitution which is worthy of eternal preservation."***

Ultimately, I come to the inescapable conclusion that the basic structure doctrine is a vital tool for the preservation of the integrity of the Constitution and a strong barricade against the ever-present threat to the rule of law and democratic governance. The learning in this area is plentiful, inexhaustible even, and it is enough to say that having seen the deployment of the doctrine and its utility in stopping or slowing down, thus containing democratic erosion in Taiwan, (J.W. Interpretation No. 499 24 March 2000); Uganda (Constitutional Petition No. 491 of 2017 delivered on

26.7.2018) and Colombia (*Corte Constitucional* [C.C.], February 26, 2010, Setencia C – 141/10, Pt. VI, *Gaceta de la Corte Constitucional* [G.C.C.], it is undeniable that by using the basic structure doctrine, the judiciary does play an important role against democratic erosion, I would unhesitatingly affirm the learned judges.

B. POPULAR INITIATIVE

The appellants have taken issue with the learned judges' finding on the constitutional remit of the popular initiative and specifically their conclusion that only *Wanjiku*, the ordinary *Mwananchi* or citizen, and not the President or any State organ can utilize the Popular Initiative for constitutional change. The complaint is that the learned judges misapprehended the constitutional provision on the concept, failed to appreciate that all Kenyan voters could make use of the popular initiative and thereby discriminated against and denied the President his right to make use of it. Both the Attorney-General and the BBI Secretariat were quick to add that the President did not in fact play any role as promoter of the initiative, which he was not, and that it was improper for the learned judges to have coined and attached to him the appellation of "*Initiator,"* just to tie him to the process.

As it is germane for the determination of this and other issues to follow, it is necessary to set out in full **Article 257** of the Constitution which is on popular initiative;

> ***"257. (1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
>
> ***(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.***
>
> ***(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.***
>
> ***(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.***
>
> ***(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.***
>
> ***(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.***
>
> ***(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.***
>
> ***(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.***

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Petition No. E282 of 2020 (Consolidated). Page 186 Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum. (11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).”

It is instructive that the Article on popular initiative comes third in a sequence of provisions on amendments to the Constitution which comprise chapter 16. **Article 255(1),** on amendments generally, decrees that they shall be effected in accordance with **Article 256** or **257** but proceeds to add some ten matters, the amendment of which, in addition, require approval by a referendum as provided under **sub-article 2**. Those ten matters have already been referred to as *entrenched provisions* in my treatment of the basic structure doctrine above. They definitely are part of the basic structure of the Constitution and are listed as;

(a) the supremacy of this Constitution;

(b) the territory of Kenya;

(c) the sovereignty of the people;

(d) the national values and principles of governance referred to in Article 10(2)(a) to (d);

(e) the Bill of Rights;

(f) the term of office of the President;

(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(h) the functions of Parliament;

(i) the objects, principles and structure of devolved government; or

(j) the provisions of this Chapter.

In the amendment scheme of the Constitution, it is clear beyond peradventure that as far as the characterization of the amendments to the Constitution go, there is a binary reality with two distinct, dichotomous and disjunctive initiatives; Parliamentary or Popular, each providing a distinctive methodology or procedure.

The role of Parliament in constitutional amendments has always subsisted in the Kenyan experience save that the Constitution now provides for a differentiated procedure with tiered majorities depending on the subject of the amendments. What is novel is the amendment by popular initiative and, whereas the text is clear as to what it entails, it is apposite for a full appreciation of the matter to make reference to the antecedents leading to its inclusion in the Constitution.

I find the following passage in the impugned judgment to be an accurate enough summary of the manner in which the popular initiative was initiated and eventually captured up to the Zero Draft

of the Constitution as one of the methods for its amendment. Said the learned judges;

> ***"477. In the CKRC Final Report, it was acknowledged that apart from Parliament, there was a need for the people to exercise their constituent power in any matter relating to the amendment of the Constitution. It was therefore recommended that citizens and the Civil Society be enabled to initiate Constitutional Amendments Petition No. E282 of 2020 (Consolidated). Page 187 through a process called "popular initiative". Accordingly, it was recommended that Parliament enacts a 'Referendum Act' to govern the conduct of referenda in the country. However, in The Ghai Draft, no provision was made for amendment by popular initiative and only the provision for amendment by Parliament was made. Due to some contradictions and duplications noted in the Ghai Draft, the same was revised and the Zero Draft was generated. This was similarly revised to give way to Revised Zero Draft to remove duplications and inconsistencies, standardize language, present material in a logical order and supply necessary provisions to bridge gaps while at the same time maintaining the principles on which the 'Zero Draft' was based. The issue of amendment of the Constitution appeared as Article 346 in Chapter 19 of this draft titled 'Amendment by the People' and of importance was clause (1) which stated that:***
>
> > *An amendment to this Constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote.*
>
> ***478. The said clause was retained almost verbatim in the subsequent Bomas Draft. Article 304 of the Bomas Draft was also entitled "Amendment by the People". However, in the subsequent revision in the Wako Draft, though the provision on Popular Initiative was maintained, this time, under Article 283 entitled 'Amendment through referendum',***

clause 1 thereof was reworded as follows: An amendment to this Constitution may be proposed by a popular initiative supported by the signatures of at least one million registered voters. 479.

Despite the defeat of the *Wako Draft* in the 2005 Referendum, the clause was retained in the '*Revised Harmonized Draft'* prepared by the Committee of Experts and finally appeared in the Constitution in the manner I have already quoted.

What appears clear from the Kenyan experience is that the popular initiative was introduced as a response to citizens' frustrations that Parliament, to whom the law-making power is delegated, was not always acting in a citizen-centric manner and often acted in a manner quite inimical to the interests of the public. The popular initiative is therefore a mechanism for the people to exercise direct authority in the amendment of the Constitution. It is a power reserved to them as the sovereign to do that which Parliament may have defaulted in doing. This is consistent with **Article 1(2)** which provides that *"the people may exercise their sovereign power either directly or through their democratically elected representatives."* To my mind it is a vehicle by which the people move from being mere passive observers of the constitutional amendment process into an active, agenda-driving force for change.

Admittedly, this form of active, direct and deliberative democracy is quite new in the African experience, but it has been around for quite a while in other parts of the world. Referred to variously as *constitutional initiative* (mainly in America), or *citizens' initiative* in Europe, it does have certain discernible characteristics. In his Methods of State Constitutional Reform, (Ann Arbor, University of Michigan Press 1954,) Prof. Albert L. Sturm explained its purpose and development in the American context as follows;

> ***"The Constitutional initiative is a technique of constitutional reform which affords a means of supplementing amendment by legislative proposal. It is not intended to replace the older method of altering state constitutions, but merely to provide an instrument whereby the people, acting directly, may inaugurate change. In practice the great majority of amendments are proposed by the procedure described in the preceding chapter, and the most ardent supporters of the constitutional initiative do not advocate replacement of older techniques by direct popular action in the amending process. It is regarded more as an expedient which may be utilized in situations where the legislature has failed to act. Substantially, this device amounts to a reservation by the people of the power to alter the basic law in their sovereign capacity, without resort to the usual process of legislation through representation.***
>
> ***The constitutional initiate dates from the beginning of the century when the revolt against entrenched political machines and interests gave rise to the Progressive movement in American politics. It reflected the conviction that the mass of electors possessed the ability and wisdom to express their views directly on fundamental issues and policies, as wisdom on candidates, in elections. Instruments of***

popular participation in the legislative process, including the constitutional initiative, are also evidential of distrust of the voters in legislatures resulting from widespread chicanery in law making bodies during the latter decades of the nineteenth century."

See also, Winston W. Crouch, *"The Constitutional Initiative in Operation"* 33 Amer Pol, Sci Rev; 634-45 (Aug. 1939).

Citizens initiatives have been a common feature of Swiss democracy right from 1894, a half a century after the modern state of Switzerland was formed in 1848. This form of direct democracy has been described as a measure to control the political agenda. See George Lutz; "*Switzerland*; *Citizens' Initiatives as a Measure to Control the Political Agenda'* in Maya Setale and Theo Schiller (Eds); Citizens Initiatives in Europe Procedures and Consequences of Agenda-Setting by Citizens. The author draws a valid and useful distinction between *"compulsory referendums [which] are for constitutional changes proposed by the government or the parliament and the popular initiative [which] allows for any other group outside of the parliament to put a proposal on the table."* (p20-21)

In the introduction to the book, the editors make the point that the initiatives are a form of democratic participation starting with a definition;

"By the term popular or citizens' initiatives we refer to procedures that allow citizens to bring new

issues to the political agenda through collective action, that is, through collecting a certain number of signatures in support of a policy proposal."

They point out that there has been a *'deliberative turn'* in democratic theory since the last decade of the last century, with more emphasis being laid on the contents and quality of political discourses with autonomous civil society organizations and associations playing a significant role. These associations and grass-roots organizations and now social movements are often behind popular initiatives. The role of these citizens' organizations outside of formal representation through Parliament is the answer to the political marginalization of the citizens, famously expressed thus by Jean Jacques Roussean in the *'Social Contract,'* which might have universal application;

"The English people think that they are free, but in this belief they are profoundly wrong. They are free only when electing members of Parliament. Once the election has been completed, they revert to a condition of slavery; they are nothing."

I note with some interest a paper by Miguel Sousa Ferro titled *"Popular Legislative Initiative in the E.U."* in which the author compares the formal instruments of participatory and/or direct democracy in accordance with their degree of commitment to those principles. I find it instructive that whereas the *Plebiscitary perspective*, in the form of a veto or mandatory referendum, does

contain a measure of trusting the people to *take a decision* directly, the approach is top-down. It includes in that perspective other optional plebiscites which are identified is *Presidential, Governmental* or *Parliamentary initiates*. These are contra distinguished from the direct democratic perspective that trusts the people to *initiate* the direct decision making process. In this range we have the *popular initiative*, *the popular referendum initiative* as well as the popular veto and recall.

From my reading of the literature on these subjects, I am fully fortified in my view, which coincides with that of the learned judges, that a popular initiative is a citizen-conceived, citizen-initiated and citizen-driven process. The citizens are the ordinary *Mwanachi* whether as individuals or as organized in civil groups. They are by definition non-governmental. That being the case, they necessarily exclude Parliament and the Presidency as the initiator of the process. If the initiative is born of presidential fiat, no matter how well intentioned, it ceases to be a popular initiative and must be recognized and named a State or Presidential initiative.

In the case before us there really can be no serious argument but that the President, while facially motivated by the most laudable nationalistic intention of fostering peace and inclusion by way of building bridges to a united Kenya, chose the wrong process

or mechanism for attaining the right ends. I doubt not that the President with his wide array of powers and influence could have used the Parliamentary initiative through his party and others with which he works or could work in a coalition of the willing to bring about the changes to the Constitution that he seeks.

The President's role in the conception and initiation of the Building Bridges Initiative is writ large, and with it the panoply of power and prestige of his office. First was the Handshake, then the BBI Taskforce which was appointed by **Notice No. 5154** in the Gazette**,** in an official government publication. The Taskforce prepared a report which it presented to the President *qua* President and Commander-in-Chief. Moreover, the President again appointed the *Steering Committee on the implementation of the BBI Report by way of a special issue of the Gazette* published on 10th January 2020. It is this Steering Committee that submitted its Report on 21st October 2020 to the President at a State Lodge. Everything about the process bore the imprimatur of State involvement. It was a Presidential Government Project. And this was wholly antithetical so the popular initiative.

During the entire process there was no suggestion that the President was acting in any capacity other than the usual official capacity. He was the embodiment of State and Government power

and authority. Not once was he acting as an ordinary citizen, which he was not and will not be, as long as he holds office. Like Machiavelli's Prince, the President's conduct is different from that of ordinary citizens. In acknowledging this plain and indisputable fact one does not thereby curtail the President's enjoyment, one might say *deployment*, of his political rights. All it means is that the space upon which he elected to exercise his rights is reserved for ordinary citizens, the common populace of the Republic of Kenya, and it is not open to the President. It is out of bounds to him.

That remains the position, in my opinion, and does not change by way of consideration of the hypothetical case of the President being unable to persuade an unfriendly Parliament to initiate constitutional changes. The question is first of all hypothetical but, more, to my mind, the President does not shoulder any obligation to initiate constitutional changes. He takes office under and in accordance with the Constitution and his duty is to obey and defend it in keeping with the oath of allegiance, not to change it.

I think the argument that ordinary Kenyans will never be able to amend the Constitution under **Article 257** due to the cost implication is neither here nor there. The history of our Constitution-making is lesson enough that as and when ordinary

Kenyans feel that the time is ripe to amend their Constitution, they are well able to organize and use the mechanism provided for precisely that purpose.

It follows from my reasoning that I agree with the learned judges that in so far as the President took certain actions at the inception of the BBI process including appointing the Taskforce and later the Steering Committee by Gazette Notices in his capacity as *"President of the Republic of Kenya and Commander in Chief of the Defences Forces,"* the Popular Initiative path, a preserve of the ordinary citizenry was not available to him for initiating any amendments to the Constitution. I would dismiss the grounds of appeal challenging that finding.

C. JURISDICTIONAL OBJECTIONS

It is complained before us that the learned judges were wrong to entertain the consolidated petitions before them on account of two legal principles that barred them from enquiring into the legality of the process, namely, that the question was both *sub-judice* and *res judicata*. Those procedural bars with a jurisdictional hue were raised by the Hon. Attorney-General and the learned judges considered them to be preliminary points of law which required to be determined *in limine*.

The *sub judice* rule which in Latin literally means that a matter is *"under a judge"* expressing that it is before a court or a judge for determination (See *Black's Law Dictionary* 11th Edn. P 724) It is used commonly to bar debate discussion or comment on matters pending before court. In this case it is raised as a bar to the consideration of the same matter by a different judge or court and requires that the subsequent judge defer to the jurisdictional engagement of the former by staying or deferring the latter case to allow the first-filed to be determined. This is a commonsensical and practical rule meant to avoid embarrassment due to duplication or multiplication of cases or forum shopping on the same dispute or issue, which amounts to abuse of process.

The rule finds expression in the **Civil Procedure Act,** 2010 (Rev 2012), which, at **section 6** provides thus;

> ***"6. Stay of suit***
>
> ***No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed."***

It is clear that for the *sub-judice* bar to operate, the following must be satisfied;

(i) The issue on which objection is raised must be directly and substantially in issue in a previously instituted suit or proceedings.

(ii) That previously instituted suit or proceeding must be between the same parties or parties under whom they or any of them claim.

(iii) The parties or those under whom they claim must be litigating under the same title.

(iv) That previously instituted suit or proceeding must be pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.

I read those conditions to be disjunctive and must all be present in order for a challenge to a suit to be mounted successfully on account of *sub-judice*. So understood, it becomes a rather simple matter to determine whether the learned judges erred in proceeding to hear the consolidated petitions in the face of the objections raised. In doing so, the learned judges took time to point out the similarities and differences between the petitions before them and the earlier case founding the Attorney General's objection namely, **High Court Petition No. 12 of 2020** between ***Okiya Omtatah Okoiti*** as Petitioner, and the National Executive of the Republic of Kenya, the National Treasury, The Presidential Task Force on Building Bridges to a United Kenya Advisory Committee, the Hon. Attorney General and the Steering Committee on the Implementation of the Building Bridges to a United Kenya Task

Force Report. I do not consider it necessary to juxtapose the separate pleadings in the petitions as they did. Having carefully considered them, however, it is plain to see that whereas they did have areas of commonality, they were not similar, less still identical in terms of the issues raised. The consolidated petitions may well have sub-sumed most of the **Omtatah Petition**, but they covered much wider ground than it did. I would say that in terms of subject matter, had the Omtatah petition been filed *after* the consolidated petitions, it would have been a perfect candidate for stay as the matters it raised could well be fully ventilated in the consolidated petitions. But it was not filed later.

More important, in so far as the matters raised in the consolidated petitions went far beyond the **Omtatah Petition**, its existence could not be used to bar their filing, hearing and determination for that would be a perversion of the intention of the rule, which was devised to avoid duplication or multiplication of suits and issues, not to be a bar to access to justice on a wide and indiscriminate sense, simply because some point of commonality with a previous suit might exist.

The matter is put beyond serious argument by the plain fact that there were many more parties, claiming in their different capacities, in the consolidated petitions than the relatively few

parties in the **Omtatah Petition**. Thus, the reality is that the learned judges had before them substantive parties wholly unrelated to Omtatah, himself absent before them, who had grievances far beyond his, and who were entitled to be heard. It will not have served any useful or logical purpose to stay the consolidated petitions to await conclusion of the Omtatah Petition when it would not have addressed the bulk of the issues they raised. There was no error in proceeding to hear the consolidated petitions notwithstanding the prior existence of the apparently-stalled **Omtatah Petition**, which may indeed have itself been resolved with the resolution of those consolidated petitions. I find it curious that given the publicity of the consolidated petitions and their hearings, neither Omtatah nor the respondents in his petition who were parties in the consolidated petition, not least the Attorney-General, as much as attempted to have a consolidation.

Turning now to the *res judicata* objection, its basis was that the specific question of the legality or the constitutionality of the BBI steering Committee had been decided by the High Court (Mativo, J.) in ***THIRDWAY ALLIANCE KENYA & ANOR vs. HEAD OF PUBLIC SERVICE- JOSEPH KINYUA & 2 OTHERS***; ***MARTIN KIMANI & 15 OTHERS (Interested Parties) 2020 eKLR***. It had been argued before the learned judge, without success, that the

appointment of the BBI Advisory Task force was unconstitutional in so far as it *"duplicated the functions and mandate of other constitutional commissions."* Mativo, J. found no conflict between the mandate of the Taskforce which he considered to flow from the President's mandate and executive powers, and the powers of independent commissions and other bodies established under the Constitution.

The learned judges took the view, however, that the judgment of Mativo, J. cited to them as having made a determination *in rem*, did not answer the specific question posed to them in the consolidated petitions, namely, whether the President can establish a committee or any other entity, to initiate an amendment to the Constitution in any manner outside what is envisaged under **Articles 456** and **257**. They then proceeded to hold that the said question not having been before Mativo, J, and considering that it involved the expanded mandate of the BBI Steering Committee, a body which was not in existence at the time the case decided by Mativo, J. was filed, and he not having made a finding on the issue of initiation of constitutional amendments in the manner it proposed, *res judicata* could not arise.

A reading of **section 7** of the **Civil Procedure Act** reveals that the learned judges were correct in finding that the issue of the

propriety of the BBI Steering Committee purporting to initiate constitutional amendments outside the clear provisions of **Articles 256** and **257** was not *res judicata*. The section is in these terms;

> ***"7. Res judicata***
>
> ***No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."***

For *res judicata* to be properly invoked and applied as a jurisdictional bar, it must be shown that;

(i) The matter directly and substantively in issue in the suit was directly and substantially in issue in a former suit.

(ii) The former suit was between the same parties or between parties under whom they claim.

(iii) The parties were litigating under the same title in a court competent to try the subsequent suit.

(iv) The matter has been heard and finally decided by such other court.

The learned judges addressed the rationale of the doctrine of *res judicata,* which may be pleaded as an estoppel by the record, be it by way of action or issue, and I need not repeat it. Courts have in numerous decisions explained why *res judicata* exists as a bar to subsequent litigation. I have myself spoken to this, alone or with

others, and I am of the same view as the one we expressed in ***WILLIAM KOROSS (LEGAL PERSONAL REPRESENTATIVE OF ELIJAH C. KOROSS) vs. HEZEKIAH KIPTOO KOMEN & 4 OTHERS*** *[2015] eKLR;*

> ***"The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***
>
> ***Speaking for the bench on the principles that underlie res judicata, Y.V. ChandraChud J in the Indian Supreme Court case of LAL CHAND vs. RADHA KISHAN, AIR 1977 SC 789 stated and we agree;***
>
> > *'The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.'"*

Given the obvious differences between consolidated petitions and the ***THIRD WAY ALLIANCE*** case, including the parties, and the issues that were directly and substantially in issue, there is no doubt in my mind that the learned judges arrived at the correct decision in finding that the matters before them were not res *judicata* and did not offend the philosophical and pragmatic

justification for the principle as I have set them out herein, and as they themselves advertised to. In the result, I find no merit in the complaint.

D. LEGALITY OF BBI PROCESS

Even though this aspect of the appeals could well stand answered by reference to the finding I have already come to that what was presented and publicized as a popular initiative for the change of the Constitution was in fact not so, and bore the handiwork of the President, making it a presidential initiative, certain aspects of it nonetheless call for specific answers. Foremost among these is what the learned judges themselves identified thus;

> ***"505. The overarching question that emerges out of these undisputed facts is whether the process adopted in the attempt to amend the Constitution is consistent with the means prescribed by the Constitution to amend it whenever such an amendment is necessary."***

The answer to that question is dependent on what one makes of the constitutionality or lawfulness and mandate of the BBI Steering Committee, the vehicle chosen by the President to midwife the proposed changes to the Constitution. The Steering Committee came into being by Presidential appointment notified to the general public vide **Gazette Notice No. 264** which was carried in a special

issue of the Kenya Gazette published on 10th January, 2020. The general public were, by that notice, notified that;

> ***"His Excellency Hon. Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces, has appointed the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, which shall comprise of:***

It proceeded to list some 15 persons who made up the Steering Committee. It had as its joint secretaries Amb. Martin Kimani and Paul Mwangi. The Steering Committee had but two Terms of Reference, namely to;

> ***"(a)conduct validation of the Taskforce Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and***
>
> ***(b)propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report, taking into account any relevant contributions made during the validation period."***

Tellingly, and relevant to this inquiry, the last paragraph of the Gazette Notice was that;

> ***"5. The Steering Committee shall submit its comprehensive advice to the Government by 30th June, 2020 or such a date as the President may, by notice in the Gazette, prescribe."***

A number of critical facts stand out in crystal clarity from that Gazette Notice regarding the Steering Committee which, taken

singly, together or wholly, go to declare that it was a presidential creation and a government project tasked with *inter alia*, proposing constitutional changes for the implementation of the report of that very team in its previous emanation as the BBI Advisory Committee. The facts include these;

> (i) It was appointed by the President of the Republic of Kenya in his official capacity.
> (ii) It was to submit a comprehensive advice to the Government by a given date unless the President prescribed otherwise by notice in the Gazette.

Given there was never any indication that citizens of this country had in, by and of themselves conceived of the idea to change the Constitution in a particular manner as the genesis of this process, but appear only to have been roped in to respond to what had already been given life and motion by the President when he appointed the Taskforce, the process that was being undertaken was not a popular initiative. And it matters not that it may eventually have gained the liking or admiration of many people. That sense of popular is not what is meant by the Constitution which uses 'popular' in the sense of pertaining to the general public or ordinary citizens. The BBI Steering Committee, by inception, composition and operationalization, was a Government Presidential project. The members were not ordinary citizens who came together

coalescing around an idea that the Constitution needed to be altered in particular respects. Instead, these were prominent personalities joined together by Presidential fiat. They had no mind or idea of their own to initiate, but were instead *tasked* to identify constitutional, among other changes. It was not open to them to purport to craft constitutional changes and even come up with the BBI Constitutional Amendment Bill purportedly as a People's Initiative. They were, without a doubt, a government project and it was impermissible and untenable for them to seek to camouflage their process as a popular initiative, which it was not. They were essentially seeking to hijack the people's initiative route under **Article 257** of the Constitution and this was clearly intolerable and indefensible. It was also contrary to the letter and intent for the Constitution.

Being of that view, I do not consider it relevant, one way or the other that the appointment of the Steering Committee did not have the prior recommendation of the Public Service Commission. I do not think that there could be contemplated an office in the Public Service for the initiation and prosecution of a popular initiative for the amendment of the Constitution. It is enough to hold, as I do, that the learned judges were correct in finding at paragraph 553 ***"that to the extent the BBI Steering Committee was created to***

perpetuate that [was] clearly an unconstitutional purpose, it [was] an unlawful, and at any rate, an unconstitutional outfit." I have no for basis in disturbing that holding.

It is not necessary for me to address the issue of the propriety of the BBI Steering Committee preparing and tabling relevant Bills in Parliament as had been argued by the petitioner in **Petition No. E416 of 2020**. The learned judges found that whereas Parliament has the preserve of legislation, the preparation of bills, being intended legislation, is not in its exclusive remit. They indeed pointed out that under **Article 257(2)** a popular initiative to amend the Constitution may be in the form of a general suggestion or a formulated draft bill, with which I agree. I would only bolster this by pointing out that under **sub-article (3),** *"if a popular initiative is in the form of a general suggestion, its promoters are required,"* in peremptory terms, *"to formulate it into a draft bill."* So the act of preparing bills *per se* was not an illegality on the apart of the Steering Committee. Its infirmity runs deeper, and is located elsewhere, as I have already found in affirming the learned judges.

E. PUBLIC PARTICIPATION

On the issue of public participation, this finding by the learned Judges has attracted round castigation principally from the

Hon. Attorney General and the BBI Secretariat together with Hon. Raila Odinga;

> ***"578. In the circumstances, we have no difficulty in agreeing with the Petitioner in Petition No. E416 of 2020, that the BBI Steering Committee, as the promoter of the Constitution of Kenya Amendment Bill, failed to comply with a key constitutional requirement at a very critical stage, to give people information and sensitize them, prior to embarking on the collection of signatures, thus rendering the process constitutionally unsustainable."***

The complaints raised by those appellants are that the allegations about want of public participation were not proved; the High Court prematurely engaged with the issue which was not yet ripe for consideration, and failed to appreciate that the mode, degree, scope and extent of public participation is to be determined on a case by case basis, keeping in mind the peculiar circumstances of each case as held by this Court in ***INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) vs. NATIONAL SUPER ALLIANCE (NASA) KENYA & 6 OTHERS [2017] eKLR.*** Further, the High Court failed to read the Constitution holistically and find that **Article 257** has in built stages that guide public participation, which the process of the BBI Amendment Bill complied with.

I have carefully considered these contentions and the submissions made by **Mr. Karori** and **Mr. Paul Mwangi** on the

same. The law on public participation on this country is settled. The Constitution, itself a product of super-participation on the part of the people of Kenya, recognizes participation of the people as one of the national values and principles of governance. It is listed in **Article 10(2) (a)** alongside *patriotism, national unity, sharing and devolution of power, the rule of law and democracy*. I have no hesitation holding that participation of the people is what gives meaning to and serves as the guarantor to the tangible realization of the other values and principles of governance. It is what gives substance and brings to life as a present reality the idea that democracy is a system of government *of the people*, *by the people*, *for the people* as famously put by U.S. President Abraham Lincoln in his Gettysburg Address of November 19, 1863, which he hoped shall not perish from the earth.

Participation by the people in the matters that concern them, when done in a deliberate, substantive manner, acknowledges the sovereignty of the people and treats them as master of their own destiny. Their autonomy, individually and as a collective, is mainstreamed even as the paternalistic State and its offices that so easily assume the position of *ex-cathedra* directives recede to a facilitative, as opposed to a command position. Once the people are involved in policy formulation, legislation and, in the greatest, most

solemn role of constitutional amendment, they get to own both the process and the product. They are no longer pawns on a political chess board. They are not mere voting machines at the beck and call of political operatives. They are not commodities for sale to the highest bidder. They retain ultimate control over government and are not at the control of government. The Constitution says so, and it is the duty of those who enforce or interpret the Constitution to give real meaning to the principle in its widest and fullest manifestation.

I am keenly aware that participation of the people as entrenched in the Constitution is almost counter-intuitive in a context where the views of the people have not always mattered, and where the wielders of power, from the lowest to the highest levels, have often revelled in its atrocious and rapacious exercise to the detriment of the people who are in fact its real owner. It is an express repudiation of the notion that leaders are always right and the people must always follow at pain of unpleasant consequences. The Constitution, in imposing responsibilities of leadership, is explicit that the authority assigned to a state officer is a *public trust* to be exercised in a manner that *demonstrates respect for the people* and vests on the officer the *responsibility* to *serve the people, rather than the power to rule them*. It is all about the people and, to

my mind, that acknowledgement must best be exemplified in involving them and encouraging their real and active participation in public affairs in broad, as opposed to narrow and token ways. They are the real and proper focus of government policies, programmes and proposed laws. They are not mere spectators, passive observers, in the process of governance.

Moreover, the law is this country is that the national values and principles of governance are not a mere, if ambitious, wish list. They are not aspirational aims to be attained at some indefinite date yet future. No, they are present entitlements to be enjoyed *now* because they are fully justiciable. The Supreme Court in ***COMMUNICATION COMMISSION OF KENYA vs. ROYAL MEDIA SERVICES & 5 OTHERS*** ***[2014] eKLR*** expressed in emphatic terms the total reorientation of governance towards the people-centric philosophy I have alluded to as follows;

> "***368. The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10 and media independence and freedom."***

This was echoed and given direct application by this Court in IEBC ***vs. NASA & 6 OTHERS,*** with which I am in full agreement, as follows;

> ***"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.***
>
> ***81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or statutes as appropriate."***

In the case at bar, the learned judges referred to this Court's decision in ***KIAMBU COUNTY GOVERNMENT & 3 OTHERS vs. ROBERT N. GAKURU & OTHERS [2017] eKLR*** to emphasize that

the legal requirement under **Article 10** is that voters must be supplied with adequate information to make informed decisions on the matter as hand as an integral part of public participation. Further, public participation is a principle of good governance and a constitutional right that must be observed at every stage of the constitutional amendment process. They also referred to two South African decisions ***MATALILE MUNICIPALITY & OTHERS vs. THE PRESIDENT OF SOUTH AFIRCA & OTHERS [2006] ZACC12*** *and* ***PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS vs. M&G MEDIA LTD [2011] ZACC 32*** to make the point that public involvement helps achieve a balanced relationship between representative and participatory democracy. I would call it *direct* democracy, with the latter more direct role being an additional development really meant to enrich governance. They affirmed that the right to vote is dependent on access to information without which *"the ability of the citizens to make responsible political decisions and participate meaningfully in public life is undermined,"* as stated by Ngcobo, CJ in the ***M&G MEDIA*** case. According to the learned judges, that ability to make political decisions is not limited to voting alone but extends to the decision to or to not append signatures in support of the Amendment Bill.

On the specific question of the kind of public participation required at the stage preceding collection of supporting signatures, the learned judges placed this rider;

> ***"We must state here though, that there is no legal requirement for the BBI Taskforce and BBI Steering Committee to provide the voters with copies of their reports before seeking support for the proposals to the constitutional amendment. The legal requirement under Article 10 of the Constitution is that in such an exercise, voters must be supplied with adequate information to make informed decisions on the matter at hand as an integral part of public participation."***

Other than exempting the reports of the BBI Taskforce and the BBI Steering Committee, the learned judges reasoned as follows, which deserves extended quotation;

> "***572. Applying the above principle, we easily conclude that the voters were entitled, at a minimum, to copies of the Constitution of Kenya Amendment Bill to read and understand what the Promoters were proposing to amend. At the very least, the copies ought to have been in the constitutionally-required languages namely, English, Kiswahili, and Braille. The copies also ought to have been made available in other communication formats and technologies accessible to persons with disabilities including Kenya Sign Language as required under Article 7(3)(b) of the Constitution. Only then would the voters be Petition No. E282 of 2020 (Consolidated). Page 231 deemed to have been given sufficient information to enable them to make informed decisions on whether or not to append their signatures in support of the proposed constitutional amendments.***
>
> ***573. We note, by way of emphasis, that Article 7 of the Constitution recognizes Kiswahili as the national***

language, while official languages are Kiswahili and English. The state is also required to encourage use of indigenous languages, sign language, Braille and other communication formats and technologies accessible to persons with disabilities. In such a consequential exercise as constitutional amendment, it would be ideal for the relevant information to be made available by those responsible in indigenous languages in addition to the official languages.

574. It is clear to us that the BBI Steering Committee did not print the Constitution of Kenya Amendment Bill in Kiswahili or any other languages. The only copy annexed to the pleadings is in English. Even in the case of the English Language version, no copies were distributed to the people to read. A copy of the Bill was only posted on the Internet. Even if they had been distributed, those who do not understand English and persons with disabilities would still not have been able to understand the contents of Bill. There can be no doubt, therefore, that there was no effort at all, on the part of the BBI Steering Committee to make copies of the Constitution of Kenya Amendment Bill available to the public

575. As we have said above, the principle of public participation is a founding value in our Constitution. Citizens now take a central role in determining the way they want to be governed, and must be involved in legislative and other processes that affect them at all times. In that regard, for meaningful public participation to be realized, citizens must be given information they require to make decisions that affect them. There is, therefore, an obligation on the part of the promoters of any constitutional amendment process, to produce and distribute copies of a Constitution of Kenya Amendment Petition No. E282 of 2020 (Consolidated). Page 232 Bill in the languages people understand to enable them to make informed decisions whether or not to support it.

576. In the absence of meaningful public participation and sensitization of the people prior to the collection of signatures in support of the Constitution of Kenya

Amendment Bill, the exercise of signature collection in support of the amendment bill was constitutionally flawed."

Whereas the above reasoning is perfectly in line with what public participation would require in a matter of such moment as constitutional amendment, I must express my unease, brought out quite poignantly by **Mr. Karori** in his address to us, that it would be to place an onerous, and well-nigh *impossible* burden on promoters of a constitutional amendment by popular initiative, to expect them to go the whole hog captured in the above excerpt before they can properly collect the signatures. It seems to me, with respect, that the requirements stated by the judges must be present before or as at the time the voters finally make their decision on the proposed amendments at the referendum failing which the mandatory requirement for public participation will not have been met, with fatal consequences to the proposed amendment. I am of the view, however, that the elements of public participation stated must per force be understood to form a spectrum or a continuum which is incremental in character. It would be way too expensive and onerous to expect that citizens seeking to introduce amendments, be it by way of a general suggestion or a formulated bill, must engage and involve the voters generally, by which the learned judges must be understood to

mean the national vote pool from whom the promoters would be seeking the 1 million supporters, to the broad and extensive elements of public participation enumerated by the learned judges. I would agree with the appellants that at the stage preceding signature collection, all that is required of promoters is the dissemination of information on the nature or gist of the proposed amendment to the Constitution and the rationale or justification for it. The duty they bear, in my way of thinking, is *one of sensitization with candour and disclosure* as opposed to one of *full broadcast by all means*, in all languages, to *all voters of the full particulars of the exact amendment* by way of the amendment bill. It is enough that a voter should know what is sought to be introduced by amendment in sufficient detail to be able to make a decision whether it is an initiative he would support by appending his signature at that stage, or not. To that extent, only, would I respectfully fault and reverse the learned judges, while leaving intact their reasoning and holding on public participation with regard to the totality of the process up to the referendum.

In taking this position, I find that I am more aligned, on the question of public participation pre-signature collection alone, to the reasoning of Nyamweya, J. (as she then was) in ***REPUBLIC vs.***

COUNTY ASSEMBLY OF KIRINYAGA & ANOR EX PARTE KENDA MURIUKI & OTHERS NBI J.R. NO. 271 of 2012;

> ***"... [56] The effect to lack of public participation can however only be determined upon the conclusion of the process envisaged in Article 257 of the Constitution, given the double decision-making processes that are required to take place at the county assemblies and Parliament, and indeed, will be dependent on whether the majorities required in the county assemblies is met. The prevalence or lack of public participation as a contributing factor to the attainment of such majority. It is therefore premature to make a decision as to the effect of such lack of public participation at this stage and in the circumstances of this application. In addition, given the different actors in the promotion and passage of a bill to amend the Constitution by popular initiative, it may be necessary to consider the cumulative efforts at public participation before deciding on its sufficiency or otherwise..."***

Unlike the position obtaining therein, where the judge thought it improper to pronounce herself on the adequacy of public education at a stage she considered to be premature, however, there was ample reason for the learned judges to step in and put a stop to a process that was clearly and demonstrably in violation of the principle of people's participation, as they were able to demonstrate from the passage I have already referred to. I am unable to agree with the Hon. Attorney-General's contention that lack of or inadequacy of public participation was not proved. I think, with respect, that once the petitioners complained about

that lack, it would be unrealistic to demand of them proof of that absence of public participation, as that would be to require them to prove a negative which is, with respect, a logical, notional and cognitive absurdity. It was upon the respondents to the petition to lay before the court evidence that, contrary to the complaint, they did in fact conduct real and meaningful public participation, as required by the Constitution. This they did not do as is evident from some of the uncontroverted acts recounted by the learned judges.

In a bid to show us that public participation is inescapably part and parcel of the popular initiative constitutional amendment, argument was made thus; before us by the Hon. Attorney-General's written submissions;

> "***74. The Attorney-General submits that Article 257 of the Constitution on constitutional amendment through popular initiative has inbuilt mechanisms to ensure participation of the people at various stages of the constitutional amendment process as follows: sub-article (1) requires the proposal to be signed by at least one million registered voters; sub-article (4) requires verification of signatures by IEBC; sub-article (5) requires consideration of the draft Bill by each County Assembly (which entails advertisement and seeking views from the public): sub-articles (6), (7) and (8) require consideration of the draft bill by Parliament (which also entails advertisements and seeking views from the public); sub-article (9) provides that if Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5); and sub-article (10)***

provides that if either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255(1). The proposed amendment shall be submitted to the people in a referendum. It follows that at every stage of the constitutional amendment process through popular initiative, the people are involved."

I think, with respect, that whereas on paper the argument does sound attractive, the reality on the ground, as became apparent during the hearing of the appeal is that there was a measure of cynical disregard for the very opportunities and timelines intended to facilitate public participation. Even for the signature collection for instance, it turns out that IEBC apparently published the list of the persons listed as supporters of the Initiative to facilitate confirmation by the people that the list was accurate, thereby seeming to involve them. This was in reality a mere show, devoid of substance, however, for the reason that the list was published on IEBC website only and then the public were informed of the fact on Thursday 21st January, 2021 and were required to have notified IEBC of any complaint about inaccuracy by the following Monday 24th January, 2021. With a weekend in between, it means the people of Kenya were given but two days to access information available only on a single platform. Under those circumstances, it sounds rather strange for IEBC to point at the apparent absence of complaint as demonstrative of accuracy or

satisfaction. It could well have been due to absence or, at the very least, insufficiency of access.

Another glaring and troubling example that was cited in argument before us was the lightning speed at which the Amendment Bill was rushed and passed through county assemblies. The Constitution deliberately indicates that they are to *consider* the Bill *within 90 days* and it is argued, and properly so, that the period is intended to facilitate public participation, which I take to take the form, at the minimum, of publication of the bill within the county followed by consultation, receipt of memoranda, debate in public forums organized for the purpose and on other platforms so as to involve the people and obtain their instructions thereby establishing whether or not to support or approve the Bill. What was witnessed in most counties, however, was a farcical disregard for the people and the Constitution. Many county assemblies made absolutely no pretense to involve the citizens resident in their counties. Spurred on no doubt by certain incentives beneficial to themselves, the most notorious of which was their demand for some Kshs. 2m car grant which was quickly granted by Government. The usually slow and tight-fisted Salaries and Remuneration Commission, despite well-known fiscal challenges and a raging global Pandemic, somehow managed to

prioritize approve and find funding for that particular incentive for MCAs, which seems to have attained the status of a national emergency. What in the end seems to have happened in county assemblies was a mad rush to demonstrate personal gratitude and party loyalty with some passing the Bill in but a couple of days. The people did not matter. They might as well not have existed. And no Superior Court in this country, properly directing itself on public participation, would in conscience accept as permissible such violation and negation of the constitutional scheme and command to put the people first and centre in public affairs, of which amendment to the Constitution is definitely the most solemn.

I would affirm as correct the holding of the learned judges that the county assemblies are under a duty to approve or reject a Constitution Amendment bill in a popular initiative *whole*, *without amendment*, so as to maintain and preserve its content and character inviolate as a popular initiative. It is also the more reason why they are under a clear duty, to be scrupulously and faithfully discharged, to involve the people so as to discern which way they should vote on the Amendment Bill.

F. PRESIDENTIAL IMMUNITY

The Hon. Attorney General dedicated four grounds of appeal to the judges' holding that the holding that the President can be sued in his personal capacity during his tenure in office. It was the Hon. Attorney General's argument before us, as it was in the court below, that by virtue **Article 143** of the Constitution, the President cannot be sued in his personal capacity in criminal and civil proceedings except as contemplated under **clause (4),** which exclude such immunity in the case of a treaty to which Kenya is a party and which prohibits such immunity. The cases of ***NIXON vs. FITZGERALD 457 U.S. 731,*** a decision of the Supreme Court, of the United States; ***DEYNES MURIITHI & 4 OTHERS vs. LAW SOCIETY OF KENYA & ANOR [2016] eKLR*** by our Supreme Court and ***JULIUS NYAROTHO vs. ATTORNEY GENERAL & 3 OTHERS*** decided by the High Court (Gikonyo, J.) were cited in support of that position.

This aspect of the Attorney-General's case was urged before us by **Mr. Nyaoga**, learned senior counsel. He took issue with the declaration that the learned judges made on the issue in these terms;

> ***"ii. A declaration is hereby made that civil Court proceedings can be instituted against the President***

or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution."

To learned senior counsel, the learned judges ought not to have so pronounced themselves as this was not one of the framed issues, and had in fact been addressed by the learned judges as a preliminary issue only. I would say off hand that this submission cannot be right as the matter was alive, having been raised by the Attorney-General as an objection to **Petition No. E426 of 2020** against the President in which he was named in his personal capacity. The learned judges were duty bound to pronounce themselves on the question which, by all accounts, is an important one. It is a curiosity that the said objection was raised by the Attorney-General notwithstanding that he did not place himself on record as acting for the President. It would have been neater had H.E. Uhuru Muigai Kenyatta himself joined the proceedings and raised objection to his having been sued in his personal capacity. I might as well state at this point that the learned judges ought, at the very minimum, to have first satisfied themselves that service had been effected on him by the petitioner before proceedings to hear and determine the matter and to even make pronouncements against him. This is a fundamental and basic tenet of natural

justice and the rules as to service of process are quite explicit as to what was required to have been done. I therefore agree with **Mr. Gatonye,** learned senior counsel, that any adverse orders made against the President in his personal capacity would be open to setting aside *ex debito justitiae*.

That does not however, invalidate the learned judges' finding on the extent of the President's immunity from civil suit as this is a matter of constitutional law not personal to the sitting President.

It was contended that the learned judges' were wrong to reject the submissions that the President could only be sued in his official capacity and by way of judicial review proceedings as opposed to petition or ordinary suit. Counsel was emphatic and insistent that **Article 143(2)** of the Constitution *"confers absolute immunity to the President,"* and that the High Court erred to hold otherwise thereby *"effectively re-pealing **Article 143** and rendering it of no effect."* To him, there exists a distinct mechanism for addressing Presidential impropriety which is by way of impeachment which he termed *"a quasi-political and legal process."* As an impeachment can be challenged in court, it was counsel's view that it was putting the cart before the horse for the courts to entertain suits against the President in his personal capacity before he gets impeached. When, seeking clarity, I asked counsel the

hypothetical question of what my neighbour out in the village of Karaus-Kesogon, Trans Nzoia County should do were I the President and my dog bit his child, it was counsel's confounding answer that the only recourse open to my neighbour was to seek my impeachment. He cannot be right, not least because there is nothing presidential about such a canine indiscretions that would invite tortious liability only.

Counsel drew attention to **Article 160(5)** of the Constitution that provides for immunity from action in respect of anything done or omitted be done in good faith in the lawful performance of a judicial junction to make the point that the President, too, is clothed with functional immunity. He cited our decision on judicial immunity in ***BELLEVUE DEVELOPMENT CO. LTD vs. FRANCIS GIKONYO & 7 OTHERS*** ***[2018] eKLR***.

The stance of absolute immunity for the President taken by the Attorney General in oral argument before us seems to be a drastic departure from the position taken in his written submissions and indeed before the High Court. At paragraphs **535, 542, 543** and **544** of the judgment, the learned judges speak of the Hon. Attorney-General having agreed, or conceded, and that it was common ground, that civil proceedings can be taken against the President during his tenure. The only qualifications the Attorney

General had to the fact that the President can be sued related to the form of such proceedings. This is how the judges understood his positon;

> ***"535. It is apparent, therefore, that the Honourable Attorney General is in agreement with the Petitioner in Petition No. E426 of 2020, at least to the extent that according to Article 143(2) of the Constitution, Mr. Uhuru Muigai Kenyatta is subject to civil proceedings during his tenure whenever he either acts outside the parameters of the Constitution or omits to do that which he is bound to do under the Constitution. The Honourable Attorney General's only concern is that it is the Honourable Attorney General himself, rather than the President, who should be named in those proceedings.***
>
> ***...***
>
> ***542. Of course, it has been conceded by the Honourable Attorney General that civil proceedings can be taken against the President during his tenure except that he need not be sued in his personal capacity for the reason the relief claimed against him would ordinarily be a public law remedy and therefore the appropriate proceedings would be Judicial Review proceedings in which the Honourable Attorney General, and not the President, is named as the Respondent. This is the point of departure between the Petitioner in Petition No. E426 of 2020 and the Honourable Attorney General; it is the petitioner's view that where the President acts or omits to act in contravention of the Constitution, then he can not only be personally sued but he should also be held personally responsible for any loss that may have ensued as a result of his action or inaction.***
>
> ***543. It is common ground between the parties that a plain reading of Article 143(2) of the Constitution reveals that civil proceedings can be taken against***

the President during his tenure. Both the Petitioner and the Honourable Attorney General are in agreement that if the President flouts the Constitution, in one way or the other, then civil proceedings against him, during his tenure, would be quite in order. Petition No. E282 of 2020 (Consolidated). Page 218 The only bar to such proceedings is if whatever the President is sued for having done or omitted to do was done or omitted in exercise of the powers conferred upon him by the Constitution."

It is instructive that **Article 143**, which is the provision of the Constitution that is engaged in this matter, is headed *"Protection from Legal proceedings"* and is in the following terms;

"143. (1) Criminal proceedings shall not be instituted or continued in any Court against the President or a person performing the functions of that office, during their tenure of office.

(2) Civil proceedings shall not be instituted in any Court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."

My reading of the article conveys these inescapable points with regard to the President, which also applies to an acting President during his tenure;

(a) The President is immunized completely against criminal proceedings in Kenya.

(b) The President is during his tenure immunized from civil proceedings in Kenya in respect of any act or omission in the exercise of his powers under the Constitution.

(c) The period of the President's tenure in office shall be excluded in reckoning the statutory limitation periods for filing suit against him.

(d) Presidential immunity under the Article does not extend to international crimes under a treaty prohibiting immunity.

From the foregoing it is possible to state the law on Presidential immunity to be this: the President is immune from criminal prosecution and from civil suit for any act or omission in exercise of his powers under the Constitution in Kenyan courts during his tenue of office, but may be sued for acts or omissions outside his constitutional duties and prosecuted for international crimes where the treaty establishing them does not recognize the defense of immunity. The statutory limitation period shall be extended to take account of any action or suit that could not be brought on account of the defendant's presidential tenure.

The learned judges captured the nature of the Attorney General's complaint respecting suits against the President as follows;

> ***"534. The bone of contention revolves around Article 143(2) on civil proceedings. Only the Honourable Attorney General submitted on this point and his argument is that, it is not that the President cannot be held to account for his actions while in office, but that whenever he has to be sued, the proper procedure to adopt is the judicial review proceedings in which the Honourable Attorney General, rather than the President, would be named in the proceedings as the respondent. The bulk of the Honourable Attorney General's submissions on this point came in the form of reproduction of the Court's decision in Julius Nyarotho vs. Attorney General & Petition No. E282 of 2020 (Consolidated). Page 213 3 others [2013] eKLR.***

That is the same argument in the Attorney-General's written submissions before us. Before I advert to them substantively, I need to dispose of counsel's contention that the President enjoys absolute immunity from suit. I am far from persuaded that the law supports that position. **Article 143** itself is couched in terms that leave no room for such a construction. I recall asking counsel whether there was a difference between immunity from criminal prosecution under **Article 147(1)** and immunity from civil proceedings under **Article 143(2).** His answer that there was no difference is easily falsified by the fact that the immunity from civil proceedings is qualified by the added words *"in respect of anything*

done or not done in the exercise of their powers under this Constitution" which means, without doubt, that the immunity under **Article 143(2)** extends only to acts or omissions in exercise of powers under the Constitution. That must mean, to my mind, that for any acts or omissions that are outside, inconsistent with or in violation of the powers spelt out in the Constitution, the President is, as it were, on his own and cannot benefit from the cloak of immunity that is designed to protect his constitutional functions.

Absolute immunity which existed under **section 14** of the retired Constitution, appears to me to be an anachronism and an oxymoron in the context of a constitutional democracy, such as we are, that upholds as part of its national values and principles of governance, the rule of law, good governance, integrity and accountability. Those values and principles, alongside constitutionalism, which denotes limited government, must mean that the office of President, being a creature of the Constitution, is and must be subordinate to the Constitution and its holder must be held to account for his acts and omissions. The President is not above the Constitution or the law and is not a law into himself or herself. In recognition of the pre-eminence and importance of the office of the President, the Constitution grants protection to the

holder thereof to the end that he should not be unduly impaired in the performance of his unique duties. That protection cannot, by any stretch of the imagination, be extended to cover any and every act or omission including those outside of or in violation of the Constitution. That seems to me to be the clear meaning to be discerned form **Article 143 (2).** The fact indeed that **Article 143(4)** expressly excludes international crimes from the purview of Presidential immunity provides ample proof of its limited conception, character and extent.

I think that a proper reading of the Constitution totally repudiates any notion of unaccountable power. Indeed, what is clear from the letter and spirit of the Constitution is that limited government, checks and balances, accountability and transparency are the principles that attend the exercise of all power. The President does not possess powers outside or beyond those donated to him by the Constitution and the law. He, as well as all holders of State and public office, must point to the Constitution or to a law to provide a basis or justification for the powers they wield and exercise. The rule of law demands, as Prof. Wade put it, that *"each act must be shown strictly to have legal pedigree."*

Having read the judgment of Gikonyo, J. in ***NYAROTHO***, it does not suggest that the President has unlimited absolute

immunity. To the contrary, the case posits that authority, including that of the President, is a public trust, the President is a creature of the Constitution and the courts must ensure that no violation of the Constitution goes without a remedy. It seems clear to me that when the learned judge held that judicial review is the proper avenue for holding the President to account and that the Attorney General is the proper party to be sued, he definitely had in mind those acts done by the President within his powers under the Constitution. The case is not authority for the submission that the President cannot be sued civilly in his personal capacity under any circumstances.

The American case of ***NIXON vs. FITZGERALD*** is also no authority for that proposition because from a reading of the judgment, the absolute immunity that former U.S President Richard Nixon was held to have was *"from damages liability predicated on his official acts."* The immunity was held to be *"a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by [U.S.] history."* (p16-17).

What is at issue before us is not the immunity that the President or the holder of that office enjoys with regard to official acts within the confines of his constitutional powers. Such acts are

immunized from civil suit against the President during tenure, and the learned judges acknowledged that. What are in issue, and had been alleged in **Petition No. E426 of 2020,** are those acts which are said to have been committed by the President outside his constitutional powers and, in fact, in contravention of the Constitution. The learned judges held, and I would respectfully affirm, that the President is not immune from suit in his personal capacity for such acts. I find the reasoning of the learned judges on his point to be unimpeachable, and I concur that;

> ***"547. The rationale for so holding is simple to see: Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff? We think that in such circumstances, any person may invoke the jurisdiction of this Court by suing the President, whether in his personal or in his official capacity; whichever capacity he is sued may very well depend on the nature of the violation or threatened violation and will certainly depend on the circumstances of each particular case."***

I need only add that the days of an unaccountable Presidency are long gone and are of only historical significance as a lesson and a warning for the citizens of the country to be vigilant and to demand accountability from the persons to whom they entrust the responsibility of leadership. Experience as recorded in many cases, both local and comparative, shows that in a democracy no office is

immune from accountability to the law as administered by the courts. See ***ISAAC POLO ALUOCHIER vs. UHURU MUIGAI KENYATTA & ANOR*** ***[2014] eKLR***, ***LAW SOCIETY OF KENYA vs. ATTORNEY GENERAL & ANOR***; ***MOHAMMED ABDULAHI WARSAME & ANOR*** ***(INTERESTED PARTIES) [2019] eKLR; KATIBA INSTITUTE vs. PRESIDENT OF REPUBLIC OF KENYA & 2 OTHERS; JUDICIAL SERVICE COMMISSION & 3 OTHERS (INTERESTED PARTIES) [2020] eKLR*** *and* ***PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS vs. SOUTH AFRICAN RUGBY FOOTBAL UNION & OTHERS*** ***[1999] ZACC 11.***

I hold that the appeal challenging the learned judges' holding on Presidential immunity from suit in personal capacity should fail.

G. LEGAL REGULATORY FRAMEWORK FOR CONSTITUTIONAL AMENDMENTS BY POPULAR INITIATIVE

There are two distinct yet related issues that fall for determination under this head namely; the general rubric of adequacy of the legal framework for constitutional amendments, including the referendum; and the specific one addressing the verification of voter support for a popular initiative. Even though the learned judges treated of these matters separately leading to a

measure of duplication, I propose to deal with them and briefly at that, together.

The Hon. Attorney General, IEBC and the BBI Secretariat take issue with the findings by the learned judges that in the absence of legislation making provision for the conduct of referenda for the amendment of the Constitution through popular initiative as envisaged under **Article 257**, there is a lacuna in need of filling by way of a national legislation comprehensively addressing the conduct of referenda. They had identified a number of substantial questions which remain unaddressed in the absence of such legislation, as follows;

> ***"598. It is our view that had such Legislation been enacted, probably some of the questions posed before us would have been unnecessary. The said Legislation would have dealt with the issues picked out by the Attorney General as forming the subject of the Petition before the Supreme Court in Reference No. 3 of 2020: In the Matter of an Application by the County Assemblies of Kericho and Nandi Counties for an Advisory Opinion Under Article 163(6) of the Constitution as consolidated with Reference No. 4 of 2020: In the Matter of an Application by the County Assemblies of Makueni County for an Advisory Opinion Under Article 163(6) of the Constitution. This includes the manner of Petition No. E282 of 2020 (Consolidated). Page 241 processing of a Constitution of Kenya Amendment Bill by the County Assemblies, including the number of times of reading of the Bill, the manner of public participation before approval, whether the County Assemblies can amend a Constitution of Kenya Amendment Bill to align with the contribution of by Members of the County***

Assembly as well as to incorporate relevant views received from the public during the process of public participation and whether such a Bill is to be passed by simple majority of all Members of County Assembly or only those present and whether its passage requires a special threshold.

599. Also to be addressed is the process envisaged by the Constitution in regard to Parliament for the consideration of a Constitution of Kenya Amendment Bill presented under Article 257 and specifically; if the procedure stipulated in Article 256(1) & (3) are the proper and correct procedures that Parliament must use in consideration and passage of the Constitution of Kenya Amendment Bill that relates to a popular initiative under Article 257 of the Constitution.

600. The Consolidated Petitions also seek a determination as regards Bills containing a mixture of matters/issues some requiring referendum under Article 255(1) and others not requiring referendum; the implication of the Amendment Bill partly succeeding in a referendum; the basis of a single Constitution of Kenya Amendment Bill proposing to amend numerous provisions of the Constitution; whether the Constitution permits only a single or multiplicity of questions to be presented for a vote at the referendum especially delineated on the basis of provisions sought to be amended; whether the provisions should be grouped on the basis of subject matter involved and other objectively articulable criteria that aligns with the constitutional amendment principle of "unity of content."

I think it is a matter too plain for argument that the country does need a Referendum Act and there is none at present. The learned judges were informed that there was a proposed Referendum Bill somewhere in the legislative pipeline, but there seems to be uncertainty as to its eventual fate. The questions and

uncertainty regarding the process of conducting a referendum on a constitutional amendment are so many and so important that it sounds odd that the Attorney-General, who should have been at the forefront in seeing that the legislation is in place, IEBC which needs it for its proper conduct of referenda, and the BBI secretariat which needed to be guided by it if it was to pull through the proposed amendments, all seem to speak the same strange language that the gaping lacuna is of no significance or moment. With great respect, I do not find such a stance by critical players in a national exercise of great importance to be particularly helpful. And I do hold the view that candour in public affairs, including in litigation, is a virtue to be embraced. It cannot be right for parties to propound in court positions they know to be so plainly untenable and to do so without batting an eyelid. That this country needs a Referendum Act is an urgent matter that should have been addressed years ago.

The learned judges rejected, and I also reject, the argument made that because legislation on referendum, or for that matter constitutional amendment by people's initiative, is not one of those required expressly in **Article 261** and the 5th Schedule, with timelines, and consequences, then, implicitly, there was no need for further legislation and it would be incorrect to question the

adequacy of the extant legal framework. The Hon. Attorney General framed the argument to us as follows;

> ***"134. The Attorney General submits that the applicability of Articles 257 off the constitution is not contingent on the enactment of further legislation. Whereas the framers of the constitution envisaged that the enactment of legislation was necessary to give full effect to any provision of the constitution they specifically provided for the same and gave set timelines for the said enactments at the pain of drastic constitutional sanctions against the legislature, viz. dissolution.***
> ***135. This can be gleaned from Article 126(1) of the constitution as read together with the provisions of the fifth schedule to the constitution where it is apparent that the applicability of Article 257 of the constitution was not hinged on any legislation to be enacted."***

The Attorney-General went on to assert that as all the motions involved in the furtherance of a popular initiative are an exercise of citizens' political rights as enshrined under **Article 38**, they *"cannot be limited on a flimsy excuse of lack of regulations, administrative procedures or statutory prescriptions not expressly provided for either under the Constitution or legislation."* This Court's ruling in ***JUDICIAL SERVICE COMMISISON & SECRETARY, JUDICIAL SERVICE COMMISION vs. KALPANA RAWAL [2015] eKLR*** was cited in aid, before an analogy from our uninspiring jurisprudential past was drawn as follows;

> ***"The Attorney-General submits that the Court fell into the very same error that the constitution***

sought to rectify where the enforcement of fundamental rights under section 84 of the former constitution was conditioned on the promulgation of rules by the Chief justice. It is impermissible under the current constitution to take away the right to amend the constitution on the basis that there is no or inadequate framework for the verification of such initiatives as having been supported by the requisite number of registered voters; such interpretation does untold violence to the exercise of the people's sovereignty."

Whereas the Hon. Attorney-General is quite right that the enjoyment of fundamental rights cannot be conditioned upon the enactment and promulgation of any statutory rules or regulations, with the absurd result adverted to where rights are held at ransom by official neglect, I do not think that the learned judges' decision was to that effect. I fear the Hon. Attorney General appears to have misapprehended the reasoning of the learned judges, which was quite the opposite of the meaning he ascribes to them. They expressed themselves thus;

"603. Though we have found that it is necessary to enact Referendum Act, we do not subscribe to the school of thought that absence of legislation implementing a provision of the Constitution, renders such a provision inoperative and unenforceable. On that finding we agree with the decision in Titus Alila & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR where it was held that the Constitution has set up a framework for holding a referendum.

604. However, while the Constitution has provided the framework, it requires legislative enactment for its orderly operationalisation as was originally contemplated by the framers of the Constitution.

605. We, therefore, respectfully, disagree that the legislature has already enacted statutes to address the issue of a referendum. As we have stated hereinabove the Elections Act does not meet the intention of the drafters of the Constitution when they recommended that Parliament enacts a Referendum Act to govern the conduct of referenda in the country. An examination of the history of Articles 255-257 of the Constitution as we have set out in this judgement leads us to the conclusion that the provisions of the Elections Act alluding to referendum is not a Referendum Act as historically contemplated....”

I think, with respect, that given the uncertainties, ambiguities and penumbras that are apparent in the manner in which one is to go about initiating, collecting signatures, forwarding, debating, involving the public, campaigning and voting on a popular initiative for the amendment of the Constitution together with the necessary timelines, this area is in a wholly unsatisfactory state and needs clarity by way of both a national Referendum Law and probably Rules and Regulations specific to the popular initiative. It is disingenuous for it to be argued otherwise, unless uncertainty in law should somehow have attained a utility I cannot discern and the status of a virtue.

I agree with the learned judges that the part of the **Elections Act** that deals with referendum is woefully inadequate to address a Constitution amendment referendum which stands in a class of its own. I agree with the learned judges that it;

> ***"does not adequately cover the processes contemplated in a referendum process. It does not, for example, address the issue of public participation which is a constitutional imperative under Article 10 of the Constitution. It also fails to address the manner in which a referendum Bill is to be handled by the County Assemblies in cases where the Constitution mandates the County Assemblies to debate the Bill. This lacuna, in our view, cannot be addressed by mere reference to the provisions of the Elections Act since a referendum is a very important process in the history of a nation as was contemplated by the drafters of the Constitution."***

I am firmly persuaded that a referendum in the context of proposed constitutional amendments by popular initiative must be governed by a specific, properly thought-out legislation. It cannot be left to the Elections Act which seem to contain a part of a referendum in some kind of by-the-way or after-thought, regard being had to the fact that referendums are not elections and they are no less important than elections. I would go as far as to state that whereas the provisions on referendum in the Elections Act may suffice to settle questions of various types and descriptions in an ordinary referendum, they are not sufficient in detail, and

clearly were not formulated to meet the full requirements of Article **257**. That Article needs a statute deliberately designed to effectuate it, and it matters not that it is not expressly listed in the Fifth Schedule which, at any rate does stipulate that *"any other legislation required by this Constitution"* be enacted within 5 years.

I should think, with respect, that it speaks to a national malaise of inattention to duty, a satisfaction with dilatoriness, and being reactive instead of proactive on the part of officialdom, that the Referendum Law has never been passed notwithstanding that some two years ago Nyamweya, J. had spoken to its glaring need in ***REPUBLIC vs. COUNTRY ASSEMBLY OF KIRINYAGA & ANOR EX PARTE KENDA MURIUKI & ANOR*** (supra) as follows;

> ***"While it is not the place of this Court to prescribe what procedures should be adopted by the legislative bodies, it in this regard considers it prudent to recommend that since the passage of a constitutional amendment by popular initiative is a national exercise that affects the Independent Electoral and Boundaries Commission, all County Assemblies, and Parliament, the national Parliament needs to develop and enact a law to ensure uniformity in the procedures of consideration and approval by County Assemblies of bills to amend the Constitution by popular initiative, and to ensure the inclusion and insulation of key constitutional and democratic requirements and thresholds in the said procedures. This law should also address the other Petition No. E282 of 2020 (Consolidated). Page 243 procedural aspects demanded by Article 257 of the Constitution."***

What I have said so far ought to be wholly dispositive of the question of verification of voter support for a popular initiative, the latter being a specific subset of the general broader rubric of inadequacy of the legal framework. However, certain arguments made with regard to voter verification make it necessary that I should deliver myself on the matter. The learned judges agreed with the petitioner in **Petition No. E02 of 2021** that IEBC did not have the requisite legal regulatory framework for verification of signatures under **Article 257(4)** of the Constitution and the *Administrative Procedures for Verification of Signatures in Support of Constitutional Amendment Referendum* it approved on 15th April 2019 and revised in 2020 were invalid for reasons stated.

In its appeal, IEBC is aggrieved and charges that the learned judges erred in finding that the verification of signatures required a special legal framework and that the administrative procedures were invalid and/or that the process it adopted was flawed. The Hon. Attorney General had similar complaints and took the view that IEBC is mandated to verify one million registered voters do support a popular initiative and not to verify their signatures. To him, it is not *"logical for IEBC or indeed any institution in Kenya or elsewhere to verify millions of signatures" as there is no "human[or]*

*artificial capacity" t*o do so and the learned judges arrived at their conclusion with no *"constitutional, legal* or *practical basis."*

As with the Referendum Bill that was mentioned but seems not to have been passed into law, there was information before the leaned judges that two related bills were pending in Parliament on **Article 257,** which was proof enough that there was a lacuna in the legal framework, but they seem not to have seen the light of day. IEBC took the position, both before the High Court and before us, that **Article 257** was *"self-executing"* and there was no need for further legislative or regulatory provisions for the implementation of its provisions, including those on verification, and so it did not stand in any way handicapped in the performance of its mandate.

In resolving this issue, the learned judges reasoned, correctly in my view, that it all depends on how the role of IEBC under **Article 257(4)** is to be perceived. If it is merely to *count* the signatures, to confirm they have reached one million, there would be no need for further legislative or regulatory framework. If, however, its role was broader to include *verification* of those signatures, then there would certainly be need for more than the bare provisions of **Article 247(4).** It is fortuitous that the answer to the seeming conundrum is supplied by a document authored by IEBC itself. Dated 22nd March 2016 and titled *The Findings of The*

Commission On The Process of the Verification of Signatures For the Proposed Amendment To the Constitution of Kenya 2010 Through A Popular Initiative (Okoa Kenya Initiative) the said report, having regard to the exact formulation of IEBC's role in **Article 257(4)** and acknowledging that the verifying goes beyond casual engagement to include active steps to affirm *'even under oath'* the accuracy, fruitfulness or exactness of the information provided, was explicit;

> ***"The Commission's view is that the verification entails confirming that the initiative is supported by registered voters as evidenced by their signatures. After reviewing practices in other jurisdictions... it was clear that a person mandated to verify signatures must satisfy herself or himself that the said signatures belong to the persons whose names appear against them."***

The report was even more emphatic on the process of verification which must entail ascertainment that the status of the supporters as voters and of the authenticity of the signatures as theirs. It sated at paragraph 13;

> ***"In the case of Article 257(4) of the Constitution of Kenya it would follow that the Commission has to verify that at least one million registered voters support the initiative. Once the Commission is satisfied that one million registered voters support the initiative it would then proceed to the next step of verifying that the signatures appended thereto are valid signatures of the registered voters. This is the process that the Commission followed in the Okoa Kenya Initiative."***

Given that clearest of enunciations by IEBC on its role under **Article 257(4),** it is hardly surprising that the learned judges were compelled to make the observation that;

> ***"742. It is, therefore, plainly startling that in the present Petition, IEBC has taken the clearly disingenuous position that its role is limited to merely ascertaining the numbers of registered voters in support of the Popular Initiative. This position is belied by its own report analysed above. It is also belied by the text and spirit of the Constitution. As IEBC Verification Report plainly acknowledged, the only reasonable meaning of the term "verify" as used in Article 257(4) of the Constitution includes both the ascertainment of numbers and confirming the authenticity of the signatures submitted."***

I agree entirely with those sentiments, save to say that the learned judges were perhaps too magnanimous in being merely 'startled' by IEBC's flip-flopping on this rather straight forward matter of what it means of verify. I should think that such shifting of goalposts probably smacked of candour economy calling for reprobrium and stern rebuke. It is a matter of utmost importance that all persons and institutions that appear before court be careful to be entirely forthright. Any other contrary stance brings the administration of justice to disrepute and must not be condoned or normalized. It boggles the mind that with regard to the BBI proposed amendments IEBC sees its role as different from what it stated with regard to the *Okoa Kenya Initiative*.

I need not refer to the process of voter verification that is provided for under **section 6A** of the **Elections Act** which the learned judges went into in detail. Suffice to say that verification there is covered extensively by statute with the said section dealing with verification of biometric data, and the **Elections (Voter Registration) Rules, 2012**, which set out guidelines on IEBC's obligations and process of verification as well as provisions for the inspection of the register. In sum, there does exist, with regard to the counterpart electoral process, full-fledged legal and regulatory framework and it cannot fall from the mouth of IEBC that a like framework for signature verification for a popular initiative is a superfluity. It is not.

This is precisely the reason IEBC, keenly aware of the lacuna, came up with the Administrative Procedures I mentioned earlier. The problem, plain to see, is that those administrate procedures were neither gazetted nor subjected to Parliamentary approval in accordance with **sections 10** and **11** of the **Statutory Instruments Act, No. 23 of 2013**. Moreover, they were not subjected to public participation, as ought. The Administrative Procedures viewed as a whole, even had they been otherwise valid, also have a deficit of content for failing to provide for the

authentication of signatures, which is a critical element of the popular initiative process.

All of these deficiencies are worsened by the fact that IEBC, even were it to be lauded for at least coming up with administrative procedures, and even were they to be merely internal in the nature of standard operating procedures (which they were not) ignored and breached them thereby making nonsense of them by arbitrarily reducing the period for information and verification from a fortnight to effectively a couple of days.

Given that state of things, I am convinced that the conclusions reached that IEBC lacked the requisite legal and regulatory framework in the specific issue of signature verification, and that the stop gap Administrative Procedures were invalid, were unassailable and I would not interfere therewith.

H. IEBC QUORUM

One of the reasons advanced for the learned judges' finding that IEBC could not properly handle the popular initiative constitutional amendment process is that it did not have the requisite quorum. Both the Attorney General and IEBC itself maintain that in so finding the learned judges misdirected themselves. According to these appellants, IEBC as currently constituted with three Commissioners, down from the seven that

they once were, in accordance with the provisions of IEBC Act, nonetheless meets the constitutional composition. The Attorney General goes further to boldly assert that;

> ***"It was a contravention of the supremacy of the constitution for the learned judges to rely on section 5(1) of IEBC Act which provides that IEBC shall consist of the chairperson and six other commissioners, and section 8 as read with paragraph 5 of the second schedule to the Act which provides that the quorum for the conduct of business at a meeting of IEBC is at least five members."***

Much reliance is also placed on the decision of Okwany, J. In ***ISAIAH BIWOT KANGWONY vs. INDEPENDENT ELECTORAL & BOUNDARIES COMMISISON & ANOR*** (supra) as having decided, without appeal, that IEBC is quorate notwithstanding the resignation of four of its commissioners, leaving it depleted with only a chairman and two commissioners. It was argued before the learned judges that the matter of IEBC's quorum was *res judicata* by dint of that decision. Okwany, J. had in ***KIBIWOTT*** held that the quorum of IEBC, placed at *five* members in the Second Schedule to its eponymous statute, was required only when it was making *policy decisions*. The learned judges disagreed with that distinction thus;

> ***"714. In our view, the statute is clear: IEBC requires five commissioners in order to conduct any business. The statute does not distinguish between "policy" and other business. We, therefore, respectfully***

depart from the holding in the Isaiah Bitwott Kangwony Case that IEBC can conduct business other than making "policy decisions" when its membership is below the minimum five stipulated in paragraph 5 of the Second Schedule. The Petition No. E282 of 2020 (Consolidated). Page 286 statute requires IEBC to have the minimum of five commissioners in order to conduct any business. Period."

The ***KIBIWOTT*** decision was of course not binding on the learned judges, being by a court of concurrent jurisdiction, and they could depart from it freely if they considered it to be wrongly decided. And it was. IEBC Act put the quorum at five, period. There was no justifiable basis for the artificial distinction created to circumvent an express statutory provision. The learned judges went on to reason, though it was not necessary for their decision on the point, that the task of signature verification and other roles related to presiding over a popular initiative to amend the Constitution were a policy role and required a quorate IEBC. I agree with that reasoning and add that the role of IEBC in the exercise is not merely administrative or mechanical; it involves under **Article 257(5)** a *determination* whether the popular initiative proposed is constitutionally compliant.

To my mind, such a vital role requires the full complement of IEBC with all hands on deck. It is to me another instance of official skulduggery for IEBC, which is fully aware of its current limping

status its commissioners having dropped to below half of what its Act prescribes, to wear a brave face and state, in legal proceedings no less that it is doing just fine.

A more honourable stance would have been for IEBC and the Attorney General to make a clean breast of it and concede that the former needed urgent help and send an SOS to the appointing authority to bring that intolerable state of affairs to an end by making the necessary appointments to empower IEBC for the performance of its key mandates including the conduct of referenda as stated in **Article 88(4)** of the Constitution and required in **Article 257**. Its relevant statute demands immediate filling of positions of commissioner that fall vacant. It is fortuitous that interviews have since been conducted and IEBC should shortly be fully-constituted, and not a day too soon.

I was totally unable to follow, less still be persuaded by argument made strenuously before us that since the Constitution places the quorum of Independent Commissions at three, then IEBC with its remnant of 3 Commissioners was properly constituted. The absurdity of that position, even were it correct, lies in the fact that a vote of merely two commissioners would suffice to routinely make far-reaching decisions of constitutional moment by a commission considered of such importance as to have **seven**

commissioners with a quorum of **five**. That, to me, coming from IEBC and the Attorney General, sounds like a case of institutional dereliction of duty and self-sabotage.

It is noteworthy that an attempt to reduce the quorum of IEBC from five to three via the **Elections Laws Amendment Bill (2017),** passed by the National Assembly on 11th October 2017, was on 6th April 2018 declared unconstitutional and invalid by the High Court. This was in ***KATIBA INSTITUTE & OTHERS vs. ATTORNEY GENERAL [2018] eKLR.*** That decision, to my mind, means that the attempt at amendment having been nullified, the position prevailing *ante* must remain, which is that he quorum of IEBC remained at *five*. It was argued before us with much fury that the effect of the declaration of unconstitutionality or invalidity of the proposed amendment was to repeal the previous position on quorum, which is to me untenable, and I reject it without much ado.

It is instructive that the Constitution at **Article 250(1)** provides that Chapter Nine Commissions shall have a minimum of three and a maximum of nine Commissioners. It would seem to me unreal and plainly illogical to suppose that the same quorum of three would apply to all commissions be they constituted by three, five, seven or fifteen commissioners. I think that the impracticality

of such a position is plain to see and I would have to go against the canons of statutory interpretation to arrive at such a construction.

The various constitutive statutes have provisions on quorum that clearly repudiate that inverted logic, with virtually all of them stating in the relevant Schedules that the quorum shall be *half or more* of the number of Commissioners IEBC Act is no exception. *See for instance, the Kenya National Commission on Human Rights Act (No. 14 of 2011) the National Land Commission Act. (No. 5 of 2012); Parliamentary Service Act (No. 21 of 2019); Judicial Service Act (No. 1 of 2011) Teachers Service Commission Act (No. 20 of 2012)* and *the Public Service Commission Act (No. 10 of 2017).*

I would therefore agree with and affirm the learned judges' holding that all the decisions made by IEBC in relation to the proposed constitutional amendments via the BBI Amendment Bill were invalid, null and void for lack of quorum.

I. VOTER REGISTRATION

The learned judges in deciding a complaint raised by the petitioner in Petition **No. E416 of 2020** held that holding a referendum without first conducting voter registration would violate the political rights guaranteed under **Article 38** for a class of

citizens who would have been denied the opportunity to register and vote in deciding their destiny.

IEBC is aggrieved by that finding and the consequential declaration that the BBI Amendment Bill 2020 cannot be subjected to a referendum before it carries out nationwide voter registration exercise. It complains that the learned judges erred;

> ***"...in law in finding that the appellant ought to have carried out a separate nationwide voter registration exercise for the specific purpose of the intended referendum whereas the obligation placed on the appellant is for continuous voter registration which the appellant has in fact been carrying out.***
>
> ***...***
>
> ***In law and fact in misconstruing and thereby confusing the process of certification of the register of voters under section 6 and 6A of the Elections Act with the requirement for continuous voter registration under sections 5 of the Elections Act."***

The Attorney General joined IEBC and complained, in submissions, that the learned judges failed to consider evidence by IEBC that in fulfilment of its obligations under **Article 88(4)(a)** of the Constitution and **section 4(a)** of its Act, it had undertaken continuous voter registration and updating of the register of voters thereby adding some 108,000 more voters up to the time of the Kibra by election of 2018. He also urged that IEBC still had more time for registration which it could only stop between the date of

the referendum question and the date of the publication of the referendum as provided for under s**ection 5(1)** of the **Elections Act**.

During argument of the appeal, it did come out quite clearly that there really has been no serious and sustained continuous voter registration. A Gazette notice attached to the affidavit of one Michael Goa indicated that the last update on registration of voters was as at 31st December 2019, more than 18 months ago. It is also clear that the numbers indicated are measly, to say the least, when thousands of young people are daily attaining the age of majority. The learned judges took the view, with which I am in full agreement, that when the petitioner complained that there had not been national and continuous voter registration, the burden to rebut that claim rested with IEBC as the bearer of the obligation to register voters continuously, and also as the custodian of the records of such registration. I do not accept the argument made before us that it was upon the petitioner to prove the contrary. He bore no such burden.

I think, with respect, that the learned judges' findings at paragraph 770 of the judgment were fully justified;

> ***"770. There was also no evidence that IEBC had sensitized citizens that there was continuous voter registration. Holding a referendum without voter***

registration; updating the voters register, and carrying out voter education, would particularly disenfranchise citizens who had attained voting age but had not been given an opportunity to register as voters, thus violating their constitutional right to vote and make political choices."

I find it rather odd that IEBC, which routinely carries out voter registration drives in anticipation of general elections, did not as much as indicate that it had plans to do the same in the face of a looming referendum. It would have been an unacceptable dereliction of duty and violation of rights were the referendum to be held with hundreds of thousands, or millions even, of young people sitting it out on account of not being registered. Where the referendum in question involves proposed changes to the Constitution, it is this very segment of the citizenry, the very youngest of adults, who have the greatest stake in the matter and everything should be done to aid in having their voice heard, their vote taken and their decision made known.

It is further testimony to the nonchalance that attends this question that the registration of young people as voters is a matter that has to be pursued as a chore when attainment of majority ought to lead to an automatic registration as a voter. I note that the report of the Krieglar Commission dated 17th September 2008 on this very aspect has never been actioned more than a decade later

in yet further demonstration of failure and default on the part of our public institutions. Back then, that Commission had made this recommendation;

> ***"Concerning registration of voters***
>
> - ***<u>Move to a new registration system</u>: IREC recommends that as soon as possible the issuance of the national ID card be integrated with the registration of voters, so that when a person requests an ID card, s/he will automatically be entered in the voter register and informed of the location of polling station where s/he should vote (a cheap voter card containing such information can be provided to the voter). The ECK [now IEBC] should immediately begin the necessary studies to implement this solution (resorting, if so desired, to external technical support) and a significant part of the human and budgetary resources today devoted to the registration of voters should be transferred to the new system. The availability of additional resources should allow a much faster implementation of the IPRS, which should be the final goal."***

Given the importance and centrality of the people in the referendum such as was proposed, and given that their right to choose is predicated on being able to vote, I find no fault with the learned judges' decision that absent continuous nationwide voter registration, it would have violated the political rights of young adults who were entitled to, but had not been registered as voters, were IEBC to proceed with the proposed referendum.

J. FORMAT OF THE REFERENDUM QUESTION

Both IEBC and the Hon. Attorney General also took issue with the finding of the learned judges on the form in which the proposed constitutional amendments to the Constitution were to be presented to the people for decision in

referendum. The learned judges arrived at the conclusion that;

> ***"xvii. Article 255(1) of the Constitution yields the conclusion that each of the proposed amendment clauses ought to be presented as a separate referendum question."***

They then proceeded to order, in disposition that;

> ***"xviii. A declaration is hereby made that Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People."***

Part of the complaint by *those* appellants is that the learned judges adopted an interpretation unsupported by a reading of the Constitution and which would lead to an absurd outcome with prohibitive costs and impossibility. Moreover, it was charged that the High Court improperly and prematurely encroached onto IEBC's constitutional and statutory mandate by purporting to direct it on how it should conduct matters within its province. I will

quickly dispose to the last bit of the complaint by stating that in so far as a proper question was posed by a petitioner apprehensive that the rights of citizens were in real danger of being violated by the manner in which the referendum question might be posed, the matter was properly before the High Court, and it was under a duty to make appropriate declarations. The matter involved interpretation of the Constitution including the question whether what was about to be done *"under the authority of the Constitution or of any law was inconsistent with or in contravention of the Constitution"* and therefore properly within the jurisdiction of the High Court as expressly spelt out in **Article 165(3)(d) (i)** and **(ii).** The courts retain the final word on the interpretation of the Constitution, and I am unpersuaded that the High Court in the present instance went beyond its own, and transgressed onto the exclusive province of an independent commission. I do not understand independence of commissions to mean that they are in any way beyond being told by the courts what the law is.

The learned judges took the view that given the wording of **Article 255(1)** of the Constitution, it was intended and contemplated that *"each amendment to the Constitution shall be considered on its own merit and not within the rubric of other amendments."* This is a view I share wholeheartedly from my own

careful reading of the provision and the Article and those that follow, as a whole. The provision is in these terms;

> ***"255(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257 and approved in accordance with clause (2) by a referendum, if the amendment relates to the [entrenched provisions] ..."***

Both **sub Articles (2)** and **(3)** go on to speak in the singular *"An amendment to this Constitution."*

If I may pause here for a moment, it is immediately clear that under **Article 255(1)** some amendments to the Constitution do not require the involvement of the people generally at a referendum. Only an amendment relating to the entrenched provisions listed as (a) to (j), which I already found do or nearly coincide with the *basic structure* of the Constitution, require to be subjected to a referendum.

Thus understood, it is clear to see that herein lies the further infirmity of the overkill that is the BBI Amendment Bill. It contains multiple and altogether way too many proposed amendments, some of which would require a referendum while others do not. The confusion becomes intolerable in that a bill is prepared containing provisions that from their different proposed impacts, requires, two different tracks for enactment.

The singular conception of amendment to the Constitution is repeated in **Article 257** which stipulates that;

> *(1)An amendment to this Constitution may be proposed by a popular initiative …*
> *(2)A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated Bill.*

It is clear to me that the exclusive contents of the bill has to be the amendment contemplated in **sub-article (1)** and it is this bill, containing that one proposed amendment, that is to be dealt with under **sub-article (10)** as follows;

> ***"If either House of Parliament fails to pass the Bill or the Bill relates to a matter specified in 255(1) the proposed amendment shall be submitted to the people in a referendum."***

The only matter that may be in the bill other than the proposed single amendment, in my understanding, and this by practical necessity, would be consequential amendments of legislation arising from the Bill, which is a borrowing I make from **Article 256(1)(b)** which deals with amendment by parliamentary initiative. Save for that, I would maintain that the framers of the Constitution did not intend for more than a single proposed amendment at a time, and per bill.

The mischief of lumping together a multiplicity of amendments, other than going against the clear text of the

Constitution, was well-captured by the learned judges when they delivered themselves thus;

> ***"615. We opine that the drafters of the Constitution were alive to the fact that a Bill to amend the Constitution may propose different amendments to the Constitution some of which may be agreeable to the voters while others may not. In such event to lump all such proposals together as an omnibus Bill for the purposes of either laundering or guillotining the whole Bill is not permissible under our constitutional architecture. Not only does such a scenario lead to confusion but also denies the voters the freedom of choice. For instance, the Constitution of Kenya Amendment Bill under consideration contains at least seventy-four (74) proposed amendments to the Constitution. A faithful reading of Article 255(1) of the Constitution yields the conclusion that each of the proposed amendment clauses ought to be presented as a separate referendum question. This not only avoids confusion but it also allows the voters to decide on each presented amendment question on its own merit. Petition No. E282 of 2020 (Consolidated). Page 250 For example, a voter might be persuaded that Clause 50 of the Constitution of Kenya Amendment Bill which proposes to amend Article 203 of the Constitution to increase the percentage of funds allocated to county governments from 15% to 35% ostensibly to strengthen devolution and ensure that county governments have adequate funds to carry out their operations merits passage. However, the same voter might be similarly persuaded that Clause 10 as read together with Clause 74 of the Constitution of Kenya Amendment Bill creating seventy additional constituencies and allocating them to specific counties while directing IEBC on the apportionment criteria is unconstitutional and ill-advised. Such a voter will be forced to vote for an outcome she does not want; and the promoters would have succeeded in laundering Clauses 10 and 74 of the Constitution of Kenya Amendment Bill into***

passage notwithstanding their cumulative unconstitutionality."

With respect, I agree.

I do not for a moment think that it was ever the intention of the people that amendments to the Constitution should be the normal, done thing whenever we feel the urge. It should come rarely and even then when compelled by the greatest necessity. And for that reason, an amendment should come singly. Once. Rarely.

If for any reason, and I cannot readily conceive of any, amendments must be brought other than singly, the original intent must be maintained by having each amendment presented separately and distinctly to be voted upon independently. That way the choice presented to the people is not a binary one and the people do not have to feel ramrodded into choosing what they do not like alongside what they like or vice versa. That Hobson's choice may perhaps be avoided by way of a multi-option referendum but I will refrain from making any conclusive findings on it in the absence of a *Referendum Act*, the desirability of which I have already addressed under the rubric of legal and regulatory framework.

I have read the Article by Charlotte C.L. Wagenaar and Franck Hendriks titled *"Setting the voting Agenda for Multi-option*

Referendums Process Variation and Civil Empowerment" cited by the Hon. Attorney General and I think that it makes a stronger case for, as against, multi-option referendum but I need not say more on it. I note that the learned judges took the view, correctly so, that **section 49** of the **Elections Act** does contemplate a multi-question referendum. I would think, however, that whereas the section applies to referendums generally, the specific proposed constitutional amendment under a people's initiative in **Article 257** must be presented as a single amendment at a referendum for the people to either approve or reject.

On the whole, therefore I do find and hold that the learned judges were right in holding that specific proposed amendments must be submitted as separate and distinct referendum questions. I would only preface the relevant part of the declaration by the words *"must be presented singly or ...."* I would in any event reject the grounds of appeal preferred against the holdings on the structure or format of the referendum question.

K. CONSTITUENCY APPORTIONMENT & DELIMITATION

The last of the substantive thematic complaints revolves around the BBI Amendment Bills' intention as expressed in its **clause 10**, to amend **Article 89(1)** of the Constitution to increase the number of constituencies in the country from 290 to 366. The

gist of what is intended is found in **section 74** which refers to transitions and consequential provisions, to take effect on the date the Act comes into effect, and are contained in the second schedule made pursuant to the section. IEBC, which to its credit has not appealed against the findings of the learned judges on this aspect of the case, is then required to determine the boundaries of the 70 extra constituencies within 6 months of the commencement of the Amendment Act in the counties among which the new constituencies are to be spread in the manner specified.

Petition No. 402 *"challenged the provisions in the impugned second schedule"* and prayed that they be declared unconstitutional, illegal or regular;

> ***"i. in so far as it purports to set at 70 the number of constituencies.***
>
> ***ii. in so far as it purports to predetermine the allocation of seventy constituencies.***
>
> ***iii. in so far as it purports to direct IEBC in the performance of the function of constituency delimitation.***
>
> ***iv. in so far as it purports to have determined by delimitation the number of constituencies and apportionment within the counties.***
>
> ***v. In so far as it purports to have determined the delimitation and apportionment of constituencies within the counties without public participation."***

The learned judges identified two issues as arising from the petition and papers filed in resistance thereto, namely, whether it was lawful for the amendment bill;

(i) to set specific number of constituencies under Act 98(1) and;

(ii) to directly allocate the apportion such new constituencies without a delimitation exercise under Article 89.

The learned judges undertook a detailed historical account of constituency delimitations which goes to show how the matter is a delicate, emotive and often highly contentious exercise undergirded by what the Krieglar Report termed *"gross disparities in the voting populations and gross disparity in the sizes of Kenya's constituencies."* The Interim Independence Boundaries Review Commission (IIBRC) in a *"Report on Delimitation of Constituencies and Recommendation on Local Authority Electoral Unites and Administrative Boundaries for Districts and Other Units."* identified historical injustices and past gerrymandering as having highly contributed to the 2007 post-election debacle. It took cognizance of the people-driven character requiring close consultation with the public and close stake holders, of the delimitation of electoral boundaries, and identified a number of guiding principles which were later to find constitutional enshrinement in **Article 89**.

IEBC was successfully sued in ***JOHN KIMANTHI MAINGI vs. ANDREW LIGALE & 4 OTHERS*** ***[2010] eKLR*** and it could not gazette its report. Moreover, its mandate was taken over by IEBC which delimited the current 290 constituencies.

The learned judges rejected objection raised by the respondents to **Petition No. E402 of 2020** to the effect that as the amendment bill was at the time of its filing still pending before the county assemblies for consideration, they should, on the basis of the doctrines of political question and ripeness, exercise judicial restraint and constitutional avoidance as the issues raised were not justiciable. The learned judges argued that **Articles 22**, **165(3)(d)** and **258** of the Constitution, properly understood, donated jurisdiction for the High Court to handle threatened violation or contribution of the constitution. They followed this Court's decisions in ***COALITION FOR REFORM AND DEMOCRACY CORD & 2 OTHERS vs. REPUBLIC & 10 OTHERS*** ***[2015] eKLR*** where, after pronouncing on the meaning of *threatened contravention,* this Court affirmed and endorsed the decision of Lenaola, J. (as he then was) to the effect that the court cannot sit back and do nothing where there is a threat to the *basic structure* of the Constitution in the form of proposed legislation as follows;

"115. What is the test to apply when a Court is confronted with alleged threats of violations aforesaid" In our view, each case must be looked at in its unique circumstances, and a Court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of constitutional violations. In that regard, Lenaola J. in Commission for the Implementation of the Constitution vs The National Assembly & 2 Others [2013] eKLR differentiated between hypothetical issues framed for determination in that case and the power of the High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where Petition No. E282 of 2020 (Consolidated). Page 266 the impugned Act has been enacted and has come into force. He stated in that regard that:

..... where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution.

116. We agree with the Learned Judge and would only add that clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene."

I hold without hesitation, in rejecting the complaint that the learned judges erred in not exercising judicial restraint or constitutional avoidance, that I am in full agreement with this Court's reasoning and holding aforesaid. It resonates with what I stated earlier when treating of the basic structure doctrine, that the Constitution places on judges an unmistakable obligation to defend the Constitution. Where there is real, clear and present danger of

violation or contravention of rights or an unlawful tinkering with or alteration of the Constitution's basic structure such as portended by some of the provision of the BBI Amendment Bill, the courts when moved, must take defensive action in aid of the Constitution even by making a pre-emptive strike that ensures the threatened unconstitutional constitutional amendments do not see the light of day.

For largely the same reason I would hold that the learned judges were correct to be undeterred by the other objections of separation of powers and the doctrine of exhaustion which clearly proceeded from a misconception and misapprehension of the true character and application of the doctrines that were cited.

In arguing the appeal for the Attorney-General learned counsel **Mr. Karori's** stance on this matter was that it was wrong for the learned judges to hold that a proposal to alter the number of constituencies was unconstitutional, and he proceeded to point out the distinction between powers of IEBC with regard to wards as opposed to that over constituencies.

He explained, and correctly so, that unlike in the case of wards where IEBC is empowered under **Article 89(3)** to review the *number*, *names* and *boundaries* thereof periodically, its powers in the case of constituencies entail the mandatory review of the *names*

and *boundaries* of constituencies at stated intervals. It cannot review the number of constituencies.

A careful reading the judgment does not suggest to me that the learned judges held that the number of constituencies cannot be altered. I think they stated the opposite, and quite emphatically and unambiguously so;

> ***"670. Given this history and the text of the Constitution, we can easily conclude that whereas Kenyans were particular to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual number of constituencies. Utilizing the Canons of constitutional interpretation we have outlined in this Petition No. E282 of 2020 (Consolidated). Page 271 Judgment, we conclude that Article 89(1) of the Constitution – which provides for the exact number of constituencies – while being part of the Basic Structure of the Constitution, is not an eternity clause: it can be amended by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution."***

What the learned judges did hold was that it was impermissible for the BBI Amendment Bill to directly allocate and apportion the 70 extra constituencies it created without the delimitation exercise that is commanded and provided for in detail to be undertaken by IEBC in **Article 89** as read with **Article 88(4)(c)** which lists the delimitation of constituencies and wards as one of the particular, and I dare add *exclusive*, responsibilities of IEBC.

The procedure for delimitation of electoral boundaries is further provided for in great detail under **section 36** of IEBC Act and there can be no argument whatsoever that it is a critical constitutional and statutory duty. This is consistent with, and to be jealously guarded as an object of an independent commission whose aim is *to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism* as provided in **Article 249(1)** of the Constitution. To my mind, the protective role of independence commissions over the sovereignty of the people is of critical and vital importance and can only be attained by a jealous and uncompromising assertion, exercise and defense of their independence. I apprehend that it is independent commissions alongside the Judiciary which must police and patrol the lines of delegation of the sovereignty of the people to Parliament and the legislative assemblies in the county governments, the national exercise and the executive structures in the county governments, and the Judiciary and independent tribunals. Independent Commissions are charged with duty of vigilantly and keenly ensuring that the State organs to which sovereign power is delegated maintain the stance of delegates accountable to their principals, and remain always the servants of the people. And therein lies the absolute necessity of the

independence of those commissions being kept firm and inviolate. I would thus hold that seeing how critical the independence of independent commissions is to the sovereignty of the people, it has to be part of the basic structure of the Constitution, which is given express amplitude by entrenchment in **Article 255(1)(g)**.

Having taken this view, it should be obvious that I find the provisions of the BBI Amendments Bill to be an unconstitutional attack on the independence of IEBC and materially seek to alter by the operation of various of its provisions, the delimitation scheme set out in **Article 89(1)** of the Constitution. It effectively attempts to repeal that provision without saying so, by stealth and subterfuge.

The learned judges arrived at the following findings with which I am entirely in agreement;

> ***"681. Looking at the provisions of the Constitution and statutory law reproduced above as well as the history we outlined at the beginning of this part of the Judgment, we can, at the outset, state authoritatively that the impugned sections of the Constitution of Kenya Amendment Bill are unlawful and unconstitutional for the following reasons: a) First, they impermissibly direct IEBC on the execution of its constitutional functions; b) Second, they purport to set a criteria for the delimitation and distribution of constituencies which is at variance with that created by the Constitution at Article 89(5); c) Third, they ignore a key due process constitutional consideration in delimiting and distributing constituencies namely the public***

participation requirement; d) Fourth, they impose timelines for the delimitation exercise which are at variance with those in the Constitution; e) Fifth, they impermissibly take away the rights of individuals who are aggrieved by the delimitation decisions of IEBC to seek judicial review of those decisions; and f) Sixth, by tucking in the apportionment and delimitation of the seventy newly created constituencies in the Second Schedule using a pre-set criteria which is not within the constitutional standard enshrined in Articles 89(4); 89(5); 89(6); 89(7); 89(10); and 89(12) of the Constitution, the new provisions have the effect of extra-textually amending or suspending the intended impacts of Article 89 of the Constitution which forms part of the Basic Petition No. E282 of 2020 (Consolidated). Page 276 Structure of the Constitution and are, therefore, unamendable."

It is a testament to the thoroughness of forensic analysis and intellectual engagement the learned judges brought into this aspect of the case, as indeed the entire case, that they proceeded to expound in some detail on each of the six reasons or markers of unconstitutionality they identified. As I am myself fully satisfied with the accuracy and logical-legal foundations of those reasons, I do not consider it necessary to rehash them. The conclusion is inescapable that being so violative of the Constitution, the provisions of the BBI Amendment Bill were benighted and ill-fated at inception and had to be struck down as null and void. The challenges to the learned judges' findings are thus without merit and I would accordingly reject them.

L. THE CROSS APPEALS

My short answer to the two cross appeals by the Kenya National Union of Nurses (KNUN) the Petitioner in **Petition No. 397 of 2020** and **Mr. Omoke Morara** the petitioner in **Petition No. E416** is that they should both fail for want of merit.

KNUN's complaint before the High Court, rejected by the learned judges, was that the BBI Steering Committee had dashed and violated its legitimate expectation to have personnel in the Health Sector transferred from County Governments to an Independent Health Services Commission to be anchored in the Constitution.

According to this cross-appellant, in so far as the BBI Taskforce had recognized and given tacit acknowledgement to its pleas, it was improper for the Steering Committee to have omitted their proposal in the Constitutional Amendment Bill thereby violating its legitimate expectation, an argument the learned judges rejected.

I think, with respect, the learned judges were perfectly entitled to hold as they did. I am in agreement with their understanding and application of the authorities on legitimate expectation they cited namely De Smith; Woolf & Jowell's ***JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 6th Edn, Sweet & Maxwell 609;***

REPUBLIC vs. COUNTY GOVERNMENT OF KIAMBU EX PARTE ROBERT GAKURU & ANOR (supra) and ***BRITISH AMERICAN TOBACCO LTD vs. CABINET SECRETARY FOR THE MINISTRY OF HEALTH & 5 OTHERS [2017] eKLR*** to the effect that the mere fact of having given views does not create an obligation on the person or body to whom the views are given to incorporate them in the final decision as there is no promise or expectation that the views must prevail or carry the day. Moreover, the learned judges found, as I do, that no proof was furnished that representations were in fact made to the cross appellant that its views would be incorporated in the amendment bill. Whatever expectation it held were more subjective than legitimate in character. See ***SOUTH BUCKS DISTRICT COUNCIL vs. FLANAGAN [2001] WLR 260.***

All things considered the plea by KNUN was properly disallowed. I would only add that in view of the holding that the Steering Committee's constitutional change mission was unlawful and the amendment bill was itself illegal, null and void, the cross appeal becomes purely academic and would not be granted. I would dismiss it.

Mr. Omoke Morara's cross-appeal faults the learned judges for failing to order that the President makes good the public funds allegedly used in the unconstitutional constitutional change

process. The learned judges advanced reasons, all of them legitimate, for not issuing those orders, and I would not interfere with their conclusion. I would only add that other than the non-demonstration that request for information on the financial outlay or expenditure on the ill-fated BBI constitutional amendment process, and the fact that enquiry into the use of public funds lies with a different office which had not been engaged, it would be improper and unjust were we to make contrary orders in the dark, without information. Moreover, as the President of the Republic was not shown to have been served, an order for personal liability cannot be made against him unheard. I would therefore dismiss this cross-appeal.

M. COSTS

This being a matter of great public interest, touching on a vital aspect of civic life and the defense of the Constitution, the order for costs that commends itself to me is that each party bear its own costs of the appeal and of the proceedings at the High Court.

DISPOSITION

In the end the appeals by the BBI proponents wholly or substantially fail as do the cross appeals and the exact dispositive orders are as proposed by Musinga, P.

CONCLUSION

I would like to express my deep gratitude to all counsel and parties who appeared before us. The depth and extent of learning that went into the preparation of these appeals and cross appeals by both side of the divide was truly impressive. The authorities were numerous and the workload quite daunting, and I must commend the industry and commitment on display before us.

The erudite submissions made passionately and with persuasive force exemplified the importance of oral advocacy at the Bar by both seasoned seniors and talented young legal eagles. The latter exemplified Chinua Achebe's quip in *Things Fall Apart* that when a child washes his hands he gets to eat with kings. These young lawyers will soar to great heights should they maintain the discipline, hard work, courtesy and professionalism that was in prodigious display before us. There is reason for optimism that the future of the profession is safe, despite present troubles.

As the cases, textbooks, articles, commentaries and other authorities were in their scores, running into hundreds, nay, thousands of pages, it was not possible to refer to each and every one to them, just as it was not practical to quote verbatim all the submissions made before us for days not to mention and the hundreds pages of the same in writing. My not having referred to

any is no indication of their lack of worth or importance, but merely the function of limited space and time.

In the end, I trust we have all kept the Constitution of Kenya secure on this occasion. May it remain so.

Dated and Delivered at Nairobi this 20th day of August, 2021.

P. O. KIAGE

.....
JUDGE OF APPEAL

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE, GATEMBU,

SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION……..……..……..APPELLANT

AND

DAVID NDII…..……1ST RESPONDENT
JEROTICH SEII……..…..……2ND RESPONDENT
JAMES GONDI……..……3RD RESPONDENT
WANJIRU GIKONYO……...4TH RESPONDENT
IKAL ANGELEI……5TH RESPONDENT
ATTORNEY GENERAL…….....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY…….……..…...7TH RESPONDENT
SPEAKER OF THE SENATE……...8TH RESPONDENT
KITUO CHA SHERIA……...…9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION……10TH RESPONDENT
DR. DUNCAN OJWANG……..11TH RESPONDENT
OSOGO AMBANI……..12TH RESPONDENT
LINDA MUSUMBA……13TH RESPONDENT
JACK MWIMALI……...…...14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES……..…15TH RESPONDENT
THE STEERING COMMITTEE ON THE
IMPLEMENTATION OF THE BUILDING BRIDGES
TO A UNITED KENYA TASKFORCE……..16TH RESPONDENT
BUILDING BRIDGES NATIONAL SECRETARIAT……...17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE……..18TH RESPONDENT
THIRDWAY ALLIANCE……19TH RESPONDENT
MIRURU WAWERU…….....20TH RESPONDENT
ANGELA MWIKALI……..……..21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY……..22ND RESPONDENT
THE SPEAKER OF THE SENATE……..23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA……...24TH RESPONDENT
COUNTY ASSEMBLY OF KWALE…..……..25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI……..26TH RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER……..27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU……...……..28TH RESPONDENT

COUNTY ASSEMBLY OF TAITA TAVETA……..……..29TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA……..…….....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR…….....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA……..……32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT……..33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO……..34TH RESPONDENT
COUNTY ASSEMBLY OF MERU……..……35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI…..……..36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU……..……37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI……..……38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS……39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI……..…....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA……41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI…..……42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA……..……43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A……44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU……..…....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA……...46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT…..……....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU……...48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA……49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU……..…....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET…....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI……..……...52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO……..……..53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA……..……54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU……..…….....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK……..……56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO……..……57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO……..……58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET……..……59TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA……..……60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA……..……61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA…..……62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA……..……63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA……..……..64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU..……..……..65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY……..……..…....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI……..……...67TH RESPONDENT
COUNTY ASSEMBLY OF KISII……..……....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA……..……...69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY……..……70TH RESPONDENT
PHYLISTER WAKESHO……..……71ST RESPONDENT
254 HOPE……..……..……...72ND RESPONDENT
THE NATIONAL EXECUTIVE OF
THE REPUBLIC OF KENYA……..……....73RD RESPONDENT
JUSTUS JUMA……..……..74TH RESPONDENT
ISAAC OGOLA……..……...75TH RESPONDENT

MORARA OMOKE……..……..76TH RESPONDENT
RTD. HON. RAILA ODINGA……..….77TH RESPONDENT
ISAAC ALUOCHIER……78TH RESPONDENT
UHURU MUIGAI KENYATTA…….....79TH RESPONDENT
PUBLIC SERVICE COMMISSION…….……..80TH RESPONDENT
THE AUDITOR GENERAL…….....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI)…….82ND RESPONDENT

(An appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G.V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with

Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT)…….....1st APPELLANT
HON. RAILA AMOLO ODINGA…….……..2ND APPELLANT

AND

DAVID NDII & 76 OTHERS ….……..RESPONDENTS
KENYA HUMAN RIGHTS COMMISSSION…….……..1ST AMICUS CURIAE
DR. DUNCAN OJWANG……..……..2ND AMICUS CURIAE
OSOGO AMBANI……..……..3RD AMICUS CURIAE
LINDA MUSUMBA…….…….....4TH AMICUS CURIAE
JACK MWIMALI ……..…..5TH AMICUS CURIAE

(An appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G.V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
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As Consolidated with

Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
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CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL……APPELLANT

AND

DAVID NDII & 73 OTHERS ……RESPONDENTS

(An appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G.V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020

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As Consolidated with

Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)

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CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA……APPELLANT

AND

DAVID NDII & 82 OTHERS ……RESPONDENTS

(An appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G.V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

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JUDGMENT OF GATEMBU KAIRU, JA

1) These consolidated appeals stem from a judgment delivered on 13th May 2021 by which the High Court (***Ngugi, Odunga, Ngaah, Mwita and Matheka, JJ.***) declared, among other things, that the *'Basic Structure Doctrine'* is applicable in Kenya; that that doctrine limits the amendment power set in

Articles 255 to 257 of the Constitution of Kenya, 2010 (the Constitution), and in particular, that the doctrine limits the power to amend the basic structure of the Constitution and eternity clauses which can only be amended through primary constituent power which must include civic education, public participation and collation of views, constituent assembly debate, and ultimately a referendum.

2) In the same judgment, the High Court declared: that civil court proceedings can be instituted against the President or a person performing the functions of that office during their tenure of office in respect of anything done or not done contrary to the Constitution; that the President does not have authority under the Constitution to initiate changes to it; that a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution; that the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report appointed by the President under Kenya Gazette Notice No. 264 of 3rd January 2020 is an unconstitutional and unlawful entity and does not therefore have legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution; that the entire process promoted by that Steering Committee is unconstitutional, null and void.

3) Other orders made in that judgment include declarations: that the entire BBI process culminating in the launch of the Constitution of Kenya (Amendment) Bill 2020 (the Constitution Amendment Bill) was done unconstitutionally and in usurpation of the people's exercise of sovereign power; that the President contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i) thereof by initiating and promoting a constitutional change process contrary to the provisions of the Constitution; that the Constitution Amendment Bill

cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission (IEBC) carries out nationwide voter registration exercise; that IEBC does not have quorum stipulated by Section 8 of the Independent Electoral and Boundaries Commission Act (IEBC Act) as read with Paragraph 5 of the Second Schedule to that Act for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification of signatures submitted in support of the Constitution Amendment Bill under Article 257(4) of the Constitution.

4) The High Court also declared: that at the time of the launch of the Consitution Amendment Bill and the collection of signatures there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of the referendum and for that reason the attempt to amend the Constitution through the Constitution Amendment Bill is flawed; that County Assemblies and Parliament cannot, as part of their mandate to consider the Constitution Amendment Bill initiated through popular initiative under Article 257 of the Constitution, change the contents of such a Bill; that the Second Schedule to the Constitution Amendment Bill insofar as it purports to predetermine the allocation of 70 constituencies and to direct IEBC on its function of constituency delimitation is unconstitutional; that the IEBC Administrative Procedures for the verification of signatures are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of Article 94 of the Constitution and Sections 5, 6, and 11 of the Statutory Instruments Act; that Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution to be submitted as separate and distinct referendum questions to the people. The court also restrained IEBC, by order of permanent injunction, from undertaking any the processes required under Article 257(4) and (5) in respect of the Constitution Amendment Bill.

5) Prayers that had been sought before the High Court that the President makes good public funds used in the process promoted by the Steering Committee and for the Attorney General to ensure the public officers who have directed or authorized the use of public funds should make good those funds were declined. That is the subject of cross appeals.

6) The grounds on which the appellants, IEBC, Building Bridges to A United Kenya, National Secretariat (BBI Secretariat), Hon. Raila Amolo Odinga, The Attorney General, and The President, Uhuru Muigai Kenyatta, supported by some of the respondents, have challenged the judgment in these consolidated appeals, are to a large extent, overlapping. The main complaints are that the High Court misapprehended the interpretation methodology applicable under the Constitution; erred in declaring that the doctrines of basic structure, eternity clauses and un-amendability apply to Kenya and for that reason wrongly concluded that there are provisions of the Constitution that are unamendable except through primary constituent power; erred in reading into Chapter 16 of the Constitution extraneous standards thereby usurping the sovereign power of the people; and ignored and misconstrued the correct historical background in relation to Chapter 16 of the Constitution.

7) The appellants further complain that the High Court: misconstrued the role of IEBC under Article 257 of the Constitution; erred in finding that a special legal framework was required for verification that the popular initiative is supported by at least one million registered voters; imposed a nonexistent duty for verification of signatures; erred in invalidating the administrative measures put in place by IEBC for verification of voters; erred in finding that a separate nationwide voter registration exercise for the purpose of the intended referendum was required; erred in finding that IEBC and the promoters of the Constitution Amendment Bill had an obligation to conduct

public participation exercise and misapprehended the place of public participation in relation to the constitutional amendment process by way of popular initiative; erred in finding that IEBC lacked the requisite quorum, and failed to appreciate that IEBC was guided by a binding decision of the High Court in the case of ***Isaiah Biwott Kangwony vs. IEBC [2018] eKLR*** on the question of quorum.

8) Other complaints are that the High Court: misdirected itself in reading into Article 257(10) of the Constitution a requirement that separate and distinct referendum questions should be put to the people; misconstrued roles of the President, the Executive and the Steering Committee in the constitutional amendment process; wrongly contradicted the decision of the High Court in the case of ***Thirdway Alliance Kenya & another vs. Head of Public Service-Joseph Kinyua, Building Bridges To Unity Advisory Task Force & 2 others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR***; wrongly found that the President can be sued in his personal capacity contrary to Article 143 of the Constitution; issued orders against the President without affording him an opportunity to be heard in violation of Articles 50 and 159 of the Constitution and contrary to rules of natural justice; failed to appreciate that though named as a party in Petition No. 426 of 2020, the President was not served; contravened Article 27 of the Constitution by denying the President equal protection and equal benefit of the law; misinterpreted Article 257 of the Constitution with respect to persons or entities which can promote amendments to the Constitution; erred in admitting and relying on purported *amicus curiae* whose briefs were partisan; failed to appreciate that the jurisdiction of the court was limited by doctrines of mootness, ripeness, political question and constitutional avoidance and deference to other state organs; and that in declaring the Schedule to the Constitution Amendment Bill unconstitutional, the High Court failed to have regard to Article 38 of the Constitution and the

objective of creating additional constituencies and the role of IEBC regarding delimitation, as opposed to creation of additional constituencies.

9) The background and procedural history as well as an acknowledgment of learned counsel appearing for the parties in this matter (to whom I am indebted for the extensive and thorough research and forceful arguments) are set out in the lead judgment of the President of the Court, Justice Musinga. I will not repeat all that here, except to the extent necessary for providing context.

10) In this judgment, I only address some of the issues arising from the consolidated appeals. I do so under six broad themes. First, is the question of applicability of the basic structure doctrine to Kenya. Second is the question of the scope of popular initiative under Article 257 of the Constitution and the place of public participation in that regard. Under that, there is the question whether it is open to the President to propose or initiate amendment of the Constitution through popular initiative route and whether the amendment process used in this instance (the BBI process) is constitutional.

11) The third thematic area I address is in relation to IEBC. Its role in the popular initiative process. Whether there is adequate legal infrastructure to enable IEBC to conduct the referendum under Article 257 of the Constitution. Whether IEBC's administrative procedures are adequate to enable it to undertake its verification role; whether it had quorum to conduct business in that regard; whether it is under a duty to conduct nationwide voter registration before carrying out the referendum; I will also address, under this theme, the question whether a single or multiple questions should be framed for the referendum.

12) The fourth thematic area is in relation to the matters concerning the President. Does the President enjoy absolute immunity from civil proceedings under Article 143 of the Constitution? Was the President's right to fair hearing violated and was he condemned unheard? Fifth, I will touch on the role of *amicus curiae* and whether the High Court erred in admitting amici in the proceedings. Sixth, is the question whether the High Court wrongly exercised jurisdiction in the matter by reason of doctrines of mootness and ripeness, political questions and constitutional avoidance and deference to other state organs.

The basic structure, eternity clauses and unamendability doctrines

13) In this regard, the High Court declared as follows:

> **"a)** ***That the Basic Structure Doctrine is applicable in Kenya.***
>
> ***b)*** ***That the Basic Structure Doctrine limits the amendment power set out in Articles 255-257 of the Constitution. In particular, the Basic Structure Doctrine limits the power to amend the Basic Structure of the Constitution and eternity clauses.***
>
> ***c)*** ***That the Basic Structure of the Constitution and eternity clauses can only be amended through their Primary Constituent Power which must include four sequential processes namely: civic education; Public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum."***

14) In making those declarations, the High Court traced the history of the making of the Constitution which, according to the court, demonstrated that at every stage of that process, Kenyans were clear that they wanted a Constitution in which the ordinary mwananchi, Wanjiku, took center stage in debating and designing the Constitution; that Kenyans were very clear about the need for informed public participation in Constitution-making that they

ensured that the Constitution making process contained detailed and specific requirements for civil education, public participation, debate, consultations and public discourse and referendum; and that based on the history of insistence of the four processes in constitution making, Kenyans intended:

> ***"…that the constitutional order that they so painstakingly made would only be fundamentally altered or remade through a similarly informed and participatory process. It is clear that Kenyans intended that each of the four steps in constitution making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010. Differently put, Kenyans intended that the essence of the constitutional order they were bequeathing themselves in 2010 would only be changed in the exercise of Primary Constituent Power (civic education; public participation; constituent assembly plus a referendum) and not through Secondary Constituent Power (public participation plus referendum only) or Constituted Power (Parliament only)."***

15) The High Court noted whereas "*there is no clause in the Constitution that explicitly makes any article in the Constitution un-amendable, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited*". The court expressed that the sovereignty of the People in constitution making is exercised at three levels, namely, the primary constituent power, secondary constituent power and constituted power; and that "*the text, structure, history and context of the Constitution all read and interpreted using the canon of interpretive principles decreed by the Constitution yield the conclusion that the basic structure doctrine is applicable in Kenya*" and that "*as applied in Kenya that doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment*" using "*either secondary constituent power or constituted power*"; that "*the essential features of the Constitution forming the basic structure can only be altered or modified by the people using their primary constituent power",* which in Kenya is exercisable after the four sequential

processes of civic education, public participation and collation of views, constituent assembly debate, consultations and public discourse and referendum.

16) In terms of identification of the basic structure in the Constitution, the court stated that it consists of the foundational structure of the Constitution as provided in the preamble; the 18 chapters; and the six schedules of the Constitution which form the fundamental core structure, values and principles of the Constitution which cannot be amended without recalling the Primary Constituent Power of the people. This structure, the court stated, outlines the system of government Kenyans chose including the design of the judiciary; Parliament; the Executive; the Independent Commissions and Offices; and the devolved system of government and includes the provisions on land and environment; Leadership and Integrity; Public finance; and National Security. The High Court went on to say that:

> ***"While the Basic Structure of the Constitution cannot be altered using the amendment power, it is <u>not</u> every clause in each of the eighteen chapters and six schedules which is inoculated from non-substantive changes by the Basic Structure Doctrine. Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, unamendable: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in a vacuum. Whether a particular clause in the Constitution consists of an "unamendable***

clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, it's text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our Canon of constitutional interpretation principles."

17) To illustrate the distinction between un-amendable and amendable constitutional provisions, the court cited Article 2(1) of the Constitution, which provides that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government, as an example of an unamendable or eternity clause which can only be changed through exercise of Primary Constituent Power on the ground that it expresses a core and fundamental principle of the Constitution. In contrast, the court stated, Article 2(5) of the Constitution which provides that *"the general rules of international law shall form part of the law of Kenya"* is also part of the basic structure and that the spirit or the core meaning, or value of that clause cannot be changed without involving the Primary Constituent Power. It may however be amended through the Secondary Constituent Power under Article 255, to clarify its meaning. The other example given is Article 89(1) of the Constitution which provides that there shall be 290 constituencies in respect of which the court expressed that *"its core meaning and import"* can only be changed through Primary Constituent Power but the actual number of constituencies can be increased or reduced through either secondary constituent power or constituted power.

18) The appellants, and the respondents supporting the appeals, have submitted that the High Court erred in making those findings; that although the history, text and context of the Constitution is important in interpreting it, the High Court was not objective, was selective in its consideration of the history of the making of the Constitution; that it ignored that the Constitution was ultimately the result of a political compromise; that no regard was had by the

court to the input to the Constitution through the Naivasha Accord, the Kilifi Report, the Public Service Commission, and the National Assembly. According to the appellants, the High Court was biased towards scholarly works while ignoring other historical accounts and reports, for instance the report of the Constitution of Kenya Review Commission (CKRC) in which the basic structure doctrine did not feature.

19) It was submitted further that the analysis by the High Court wrongly suggests that the process of making of the Constitution was a continuum when in fact it was a disjointed process. Referring to the reports of the Constitution of Kenya Review Commission (CKRC) and the Committee of Experts (CoE), counsel stressed that contrary to the view taken by the High Court, the constitution was not entirely a product of the opinions of Kenyans. It was submitted that even though the doctrine of basic structure had been in existence for a long time prior to the making of the Constitution, neither the CKRC nor the CoE referred to it. It was submitted that the history of the making of the Constitution of Kenya, 2010 clearly demonstrates that the question of application of the basic structure did not arise.

20) It was submitted that Chapter 16 of the Constitution on amendment of the Constitution was informed by the proposals of the CKRC; that there was no intention of making any provisions of the Constitution unamendable; that to the extent the basic structure doctrine limits amendment power, the same was inconsistent with the drafting history of Chapter 16 of the Constitution; and that contrary to claims by the High Court that the Constitution was the product of exercise of primary constituent power, it was eventually a product of CoE and Parliament.

21) The appellants submitted that the basic structure doctrine lacks credibility; does not have universal application and has been rejected in many jurisdictions including Malaysia, Singapore, Zambia, Uganda, South Africa; that

although it was applied in India in the case of ***Kesavananda Bharati vs. State of Kerala, (19730 4 SCC 255: AIR 1973 SC 1461*** (the Kesavananda case), the circumstances in that country are radically different from those obtaining in Kenya; that in India there is no provision for amendment of the constitution by popular initiative or involvement of the people; that the power to amend the constitution there vests exclusively in Parliament and the basic structure doctrine was deployed to check parliamentary power; that India, unlike Kenya, is a federal state; that the Kenyan Constitution, unlike the Indian one, incorporates all organs of the government in the amendment process by popular initiative; that in any case the Supreme Court of India decision in Kesavanda case was not unanimous and was heavily criticized.

22) Relying on the Supreme Court of Kenya decisions in ***Kenya Airports Authority vs. Mitu-Bell Welfare Society [2016] eKLR*****,** and ***Jasbir Singh Rai & others vs. Estate of Tarlochan Singh Rai & 4 others [2013] eKLR***, it was submitted that courts should guard against wholesale importation of foreign concepts in interpreting the Constitution without regard to our circumstances; that the application of the doctrine of basic structure to Kenya is misadvised; that the right to amend the Constitution in accordance with the rules and processes established in the Constitution should not be curtailed; that the High Court failed to analyse Chapter 16 of the Constitution *vis a vis* the basic structure doctrine and how it applies in Kenya; that there is a rigorous procedure for amending the matters set out under Article 255(1) of the Constitution; that the threshold of one million voters for purposes of a popular initiative, relative to other countries, is onerous and the people can reject an initiative at a referendum; the application of the doctrine to Kenya was based on a wrong premise that *'the people exist outside the Constitution'*; that there is no provision in the Constitution that demonstrates that the doctrine is applicable in Kenya; and

that a proper appreciation of the history of the last 10 years when the Constitution has been in place should have demonstrated that the hyper amendment experienced with the independence constitution has been checked.

23) It was submitted that every article in the Constitution is amendable provided the amendment is done constitutionally; that the impugned orders made by the High Court are tantamount to law making and a usurpation of sovereign and legislative authority; that the concept of primary constituent power invoked is not provided for in the Constitution, there are no unamendable provisions in our Constitution and nor does it have eternity clauses; that eternity clauses are actual clauses in a Constitution explicitly so providing; that the High Court wrongly used the expressions, basic structure, eternity clauses and unamendability interchangeably as though they mean the same thing; that a provision of the Constitution is only unamendable if express provision is made in that regard. Examples cited of such explicit provisions are Article 89 of the 1958 French Constitution that France is a republican State; Article 139 of the Italian Constitution of 1947, Article 103 of the 2001 Senegalese Constitution, Article 134 of the Equatorial Guinea Constitution of 1996, and Article 118 of the Malian 1992 Constitution.

24) It was argued that by stating that the application of the doctrine of basic structure would be decided on a case by case basis, the result is confusion as there is no clarity as to how and with respect to which provisions of the Constitution the doctrine would apply; that the High Court failed to indicate which clauses of the Constitution are inoculated from change by the basic structure doctrine; and that whenever amendment is contemplated the court would have to be approached for advisory opinions, an avenue only available under Article 165(3) of the Constitution and inaccessible to Wanjiku; that given that the Constitution has express provisions for its amendment

through referendum, the doctrine of basic structure would not apply. According to counsel, the alteration of the basic structure of the Constitution is permitted provided the process is adhered to; that Articles 255, 256 and 257 of the Constitution set out the amendment procedure in detail; and that the power of the people to amend under those provisions of the Constitution is absolute.

25) The Court was urged to follow Malaysia, Singapore, Zambia, Uganda and South Africa where the doctrine was rejected because in Kenya, the power to amend the Constitution lies with the people. It was submitted that the 4 step process prescribed by the High Court for amending the Constitution does not accord with Article 257 of the Constitution; and that the High Court erred in unilaterally setting a standard that would require the court to determine whether an amendment touches on the basic structure. Drawing from experiences in other jurisdictions, it was submitted that the basic structure doctrine applies to amendment by Parliament and not to amendment by the people and that the same was not intended to apply to the Kenyan Constitution; and that the High Court case of ***Timothy Njoya & 6 others vs. Attorney General & 3 others [2004] eKLR*** (the Timothy Njoya Case) on which the High Court relied on the issue of constituent power related to Constitution making as opposed Constitution amendment.

26) For the respondents opposing the appeals, the Court was urged to uphold the finding of the High Court on applicability of the doctrine of basic structure, unamendability and eternity clauses; that no error was made by the High Court in applying the doctrine and in relying on the legislative history to guide it in construing the Constitution; that whereas Chapter 16 of the Constitution deals with amendment of the Constitution, a dismemberment or dismantling of the basic structure of the Constitution is not envisaged; that an alteration of the basic structure of the Constitution is

permissible only through exercise of primary constituent power and involves the four step process as articulated by the High Court that culminates with the referendum; that the basic structure doctrine, which limits amendments to the core of the edifice and values of the Constitution, is inherent and not a creation by the court; that as stated by the High Court in the ***Timothy Njoya case***, constituent power is inherent and need not be textualized in the Constitution.

27) It was argued that the doctrine of basic structure and concept of constituent power are traceable to the writings of John Locke in ***Two Treatises of Government*** and Charles de Secondat, Baron de Montesquieu in ***The Spirit of Laws***; that the doctrine is part of the common law applicable to Kenya; that the High Court rightly applied the doctrines, which ensure that alteration of the Constitution can only be effected through primary constituent power; that although Article 255 of the Constitution identifies matters that form the basic structure which can be amended by the people through a referendum, the amendment powers cannot be used to destroy the basic structure of the Constitution; that on a holistic reading of the Constitution, there can be no doubt that the basic structure doctrine, which serves to defend the power of the people, is applicable in Kenya; that a dismemberment or replacement of the Constitution cannot be undertaken under the guise of Constitutional amendment; that any person proposing to amend the Constitution must be cognisant of whether the proposed amendment affects the basic structure, however, the argument that an initiator of a proposal must first approach the court for a determination as to whether a proposed amendment touches on the basic structure is misplaced.

28) It was submitted that the delineation by the High Court of primary and secondary constituent power and constituted power is well founded under Article 1 of the Constitution and that the four-step process pronounced by

the High Court for exercise of primary constituent power is in line with Article 20 of the Constitution and Article 259 of the Constitution which calls for a purposive approach to the interpretation of the Constitution and the High Court did just that.

29) It was submitted that there is a hierarchy of norms in the Constitution; that Article 255 of the Constitution identifies higher norms in that hierarchy the amendment process of which is more rigorous; that an amendment to Article 4(2) of the Constitution from multiparty democracy to a monarchy, for example, is not the same as amending an article on independent commissions; that the High Court correctly stated that changes to those provisions can only be done by the people; that the people, as the creators of the Constitution, have extra-Constitutional power through which they can exercise their sovereignty and the Constitution cannot be superior to the people who created it; and that the people's power includes the power to abolish the Constitution. Counsel posited that under Article 2 of the Constitution, Supremacy ends where the power of the people starts; that *a fortiori*, the people are above the Constitution.

30) Urging us to uphold the decision of the High Court and to dismiss the appeals with costs, counsel submitted that the Constitution Amendment Bill is a failed attempt to overthrow the people and the Constitution; and that the High Court correctly found that the basic structure doctrine, which is the DNA of any Constitution, applies to Kenya and must be protected.

31) Having considered those arguments, the question whether the High Court correctly determined that the doctrine of basic structure is applicable in Kenya is a difficult one. The arguments advanced by learned counsel on both sides are powerful and most persuasive. The following is the view I take.

32) In his book, ***Constitutional and Administrative Law***, De Smith argues that "*although written Constitutions differ widely in their purposes, form and content, they will normally be found to have two characteristics in common*", namely, they will be the fundamental law of the land and they will be a "*kind of higher law*" and the "*legal source of legitimate authority*". A higher kind of law in that the law set out in the Constitution will be hierarchically superior to other laws "*and will not be alterable except by a specially prescribed procedure for amendment.*"

33) Chapter 16 of the Constitution, titled *"amendment of this Constitution"* prescribes the procedure for amendment of the Constitution. Article 255(1) stipulates that a proposed amendment to the Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the matters set out under Article 255(1), namely,

> ***"(a) the supremacy of this Constitution;***
>
> ***(b) the territory of Kenya;***
>
> ***(c) the sovereignty of the people;***
>
> ***(d) the national values and principles of governance referred to in Article 10 (2) (a) to (d);***
>
> ***(e) the Bill of Rights;***
>
> ***(f) the term of office of the President;***
>
> ***(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;***
>
> ***(h) the functions of Parliament;***
>
> ***(i) the objects, principles and structure of devolved government; or***
>
> ***(j) the provisions of this Chapter"***

34) Clause 255(2) then provides that:

> ***"(2) A proposed amendment shall be approved by a referendum under clause (1) if—***
>
> ***(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and***
>
> ***(b) the amendment is supported by a simple majority of the citizens voting in the referendum."***

35) While clause 255 (3) provides that:

> ***"(3) An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—***
>
> ***(a) by Parliament, in accordance with Article 256; or***
>
> ***(b) by the people and Parliament, in accordance with Article 257."***

36) Article 256 sets out the amendment process through a parliamentary initiative while Article 257 sets out the amendment process by popular initiative. On the face of it, those provisions of Chapter 16 of the Constitution would appear clear and unambiguous and construed in their natural and ordinary sense would mean that every provision in the Constitution is amendable provided the stipulated process for amendment is followed.

37) However, Article 259 of the Constitution commands that the Constitution shall be interpreted in a manner that promotes its purposes, values, and principles; advances the rule of law and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. Article 10 of the Constitution commands that in applying or interpreting the Constitution or any law, the national values and principles of governance set out in that Article, including the rule

of law, democracy and participation of the people bind all state organs (read judiciary), state officers (read judges) and all persons. Earlier the same principle of Constitutional interpretation was expressed by the Court of Appeal of Tanzania when it stated that:

> ***"Courts must…endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law****." Per Justice Samatta, CJ in* ***Ndyanabo vs. Attorney General [2001] 2 E A 485."***

38) The Supreme Court of Kenya ***In The Matter of Interim Independent Commission [2011] eKLR*** expressed that the rules of Constitutional interpretation ***"do not favour formalistic or positivistic approaches"*** and that ***"the very style of the Constitution compels a broad and flexible approach to interpretation"*** and that:

> ***"…The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.***
>
> ***[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom;"***

39) Given those principles of Constitutional interpretation, the High Court was right in the methodology it employed in the interpreting the Constitutional provisions from a historical and contextual perspective and the complaint that the court misapprehended the methodology applicable is not well founded. What then is the doctrine of basic structure, and was the High Court correct in holding that it applies in Kenya? In an article for the Center for Public Interest Law, Uganda titled, "*The Basic Structure Doctrine and Constitutional Restraint: Take-away from the 'Age Limit' Decision*" Benson Tusariwe, writes that the doctrine of basic structure holds that the Constitution "*has certain basic features which underlie not just the letter but also the spirit of that Constitution. These features constitute the inviolable core of the Constitution, and any amendment, which purports to alter the Constitution in a manner that takes away that basic structure, is void and of no effect*"; that even without explicit limitations to the Constitutional amendment power, there are implied Constitutional limitations to the nature and scope of Constitutional amendments by which the Constitution should not be amended in a way that changes features of the Constitution that form its basic structure. The doctrine rests on the distinction between original or primary power to make or effect radical changes in the Constitution *vis-à-vis* secondary power to amend or effect minor changes on the Constitution.

40) Under the doctrine, the decision to make fundamental changes to the Constitution is a matter solely reserved for the people, the constituent assembly. Courts may invalidate any exercise of the derivative amendment power that proposes to violate the Constitution's basic feature. Constitutional amendments may be found to be infirm because of the actual proposed content of the amendments that will replace the Constitution and not just amend it.

41) Yaniv Roznai, who was widely quoted by counsel on both sides, states in his book, *UnConstitutional Constitutional Amendments* -The Limits of Amendment Powers- that, under the doctrine, "*the amendment power is not unlimited; rather, it does not include the power to abrogate or change the identity of the Constitution or its basic features*' and that "*any organ established within the Constitutional scheme to amend the Constitution, however unlimited it may be in terms of explicit language, cannot modify the basic pillars underpinning its Constitutional authority so as to change the Constitution's identity*."

42) The other phraseology used in reference to the doctrine of basic structure is *"unConstitutional Constitutional amendments (UCA)"*. In their article, ***Democratic Erosion, Populist Constitutionalism and The UnConstitutional Constitutional Amendments Doctrine***, Yaniv Roznai and Tamar Hostovsky Brandes posit that:

> **"*One feature of modern Constitutionalism that is especially relevant for Constitutional change is that of Constitutional unamendability. Constitutional unamendability refers to the limitations or restrictions imposed upon Constitutional amendment powers from amending certain Constitutional rules, values or institutions.*"**

43) They argue that unamendability may appear in the form of an explicit unamendable Constitutional provision or may also be judicially imposed, when the court derives such limitations implicitly from the Constitution, declaring that certain Constitutional changes are strictly prohibited. They say that unamendability aims to protect the core values of the Constitution that express in a way its Constitutional identity, and that the UCA doctrine:

> **"*…rests on the distinction between primary and secondary constituent power. It protects the people's constituent power, expressed in the Constitutional fundamental decisions, vis-à-vis the more limited amendment power of the constituted organs. While the doctrine limits the latter it does not-and conceptually cannot-limit the exercise of***

***the primary constituent power making a new Constitution, that is regarded as having extra-Constitutional characteristics.*"**

44) The doctrine therefore distinguishes *'amendment'* properly so called and *'dismemberment'* of the Constitution. Richard Albert in "*Constitutional Amendments*" Making, Breaking and Changing Constitutions, Oxford University Press states at page 84 that:

> **"*a Constitutional dismemberment entails a fundamental transformation of one or more of the Constitution's core commitments. A dismemberment is incompatible with the existing framework of the Constitution because it seeks to achieve a conflicting purpose. It intends deliberately to disassemble one or more of the Constitutions elemental parts. An amendment does not go nearly as far because, properly defined, it keeps the altered Constitution coherent with its pre-change identity, rights, and structure. To use a rough shorthand, the purpose and effect of a Constitutional dismemberment are the same: to unmake a Constitution.*"**

45) As is evident from the material presented by both sides of the argument, the doctrine of basic structure is not new to our jurisprudence. It was acknowledged and applied by ***Ringera J***. in the case of ***Njoya and others vs. Attorney General and others [2004] 1 EA 194*** in the context of determining whether Parliament could enact a new Constitution in exercise of its amendment power under Section 47 of the retired Constitution. Section 47 of the retired Constitution provided that, subject to that section, Parliament may alter the Constitution. Justice Ringera found that Parliament had *"no power under the provisions of section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place*". In reaching that conclusion the learned Judge found support in dicta from the Supreme Court of India in the case of ***Kessevananda vs. State of Kerala [1973] AIR(SC) 1461***, a decision that subsequently received unanimous endorsement by the same

court in the case of ***Minerva Mills Limited vs. Union of India [1981] 1 SCR 206***. He expressed that:

> **"*The provision* (section 47) *plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution. A new Constitution cannot by any stretch of the imagination be the existing Constitution as amended.*"**

And later, that,

> **"*It is crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered.*"**

46) In the end, ***Ringera, J.*** endorsed the view that "*every provision of the Constitution could be amended provided in the result the basis foundations and structure of the Constitution remained the same*" before concluding that,

> **"*all in all, I completely concur with the dicta in the Kessevananda case that Parliament has no power to and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle.*"**

47) In the same case, the learned Judge expressed that the power to make or change the Constitution resides with the People as the sovereign in exercise of constituent power. In that regard, the learned Judge expressed:

> **"*With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and***

fauna or other things and resources within its territory. All government power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power- the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one."

48) There is also the decision of the High Court in the case of ***Commission for Implementation of the Constitution vs. National Assembly of Kenya & 2 others [2013] eKLR*** where ***Lenaola, J.*** (as he then was) expressed that ***"the basic structure of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency, deriving from certain unalterable Constitutional values and principles"*** and that ***"where the basic structure or the design and architecture of our Constitution is under threat, this Court can genuinely intervene and protect the Constitution."***

49) In short, the doctrine of basic structure and the pillars on which it is founded has been recognised and applied by our courts and is very much part of our jurisprudence. It is not as alien a concept as perhaps some of the appellants argued. In his book ***Presidentialism in Commonwealth Africa***, chapter XIII on *"Presidentialism and Constituent Power"* B.O. Nwabueze in his discourse on *'abolition or attenuation of restrictions on the amending power',* discusses what he terms as the *"assault"* on the independence Constitution of Kenya which resulted in *'sweeping away'* of restrictions that had been entrenched with regard to alteration provisions. He states that the assault culminated with what he refers to as the final stage *"where any amendment could be made by a unicameral national assembly with a 65 per cent majority (less than the usual two-thirds)."* Against that backdrop, he argues that:

> ***"A Constitution is supposed to be a permanent charter, which is to endure for ages to come, and not be lightly altered to meet the temporary expediency of party politics. If the procedure for its amendment is not sufficiently rigid, and the temptation to alter it in accordance with the fancy or interest of the party in power is succumbed to over-readily, the Constitution loses its sanctity in authority of the bedrock of Constitutionalism, and may become instead a mockery of the very idea of a government of laws. This is not to say that a Constitution should be made unduly rigid, since that might invite its overthrow by revolutionary means when a genuine need for change has arisen and cannot be affected Constitutionally."***

And that:

> ***"It may even be conceded that the need for a Constitution that is able to evolve with changing social and political conditions is perhaps greatest in a developing country launched into independent statehood under a Constitution made for it by its former imperial masters."***

And further that,

> ***"The really fundamental aspects of a Constitution should be immune from alteration without reference to the people."***

50) Nwabueze goes on to note that apart from Botswana, all presidential regimes in Commonwealth Africa, have adopted new Constitutions since independence. He then argues that the process of adoption of a new Constitution should entail, "*the framing of proposals for a Constitution, popular consultation, formalized discussion of the proposals in an assembly of the people (i.e., constituent assembly) and, lastly, final adoption by the constituent assembly or by the people as a plebiscite*." He states that "*the importance of constituent power needs to be emphasised";* that *"it is the power to constitute a frame of government for a community, and a Constitution is the means by which this is done. It is the primordial power, the ultimate mark of a people's sovereignty*."

51) There is abundant authority therefore based on which the High Court concluded that the doctrine of basic structure applies in Kenya. What does all this mean in the context of the Constitution and the present appeals? It is perhaps in the manner of application of that doctrine in the context of Chapter 16 of the Constitution where my perspective somewhat differs from that of the High Court.

52) The journey to the Constitution of Kenya, 2010 is well documented in the Final Report of CKRC as well as the Final Report of the Committee of Experts on Constitutional Review of 11th October 2010. The High Court in this case also gave that account. The CoE concluded in its report that:

> ***"The new Constitution of Kenya is a compromise and none of the interest groups, including the CoE itself, politicians, the religious sector, and Kenyans at large, got all that they wanted. But Kenyans must stand tall in the knowledge of having bestowed on themselves and future generations a Constitution of their own and one that corresponds to their will and aspirations for a better, peaceful and prosperous future" and that what remains is to be vigilant in ensuring that the new Constitution is implemented in the way in which it is designed to be."*** [Emphasis added]

53) As I have already stated, the High Court in the present case, found, that in the making of the Constitution of Kenya, 2010, Kenyans were insistent on the four sequential processes in the form of civic education, public participation and collation of view, constituent assembly debate, consultations, and public discourse and ultimately a referendum to ratify the Constitution. According to the High Court, Kenyans "*intended that the Constitutional order that they so painstakingly made would only be fundamentally altered or re-made through a similarly informed and participatory process*" and that it is clear that Kenyans "*intended that each of the four steps in Constitution-making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010*".

54) I understand the High Court to say that in making the Constitution of Kenya, 2010, Kenyans adopted a rigorous process involving the four stated steps to make the Constitution. To remake it or to fundamentally alter it, an equally rigorous process, as was used in making it must be undertaken. In that finding, the High Court appreciated, correctly in my view, that a distinction must be made between *"amendment"* of the Constitution and *"abolition"* or *"annulment"* of the Constitution. For if what is proposed as an amendment, is not in fact an amendment, then the provisions in the Constitution on amendment cannot be used to abrogate the Constitution.

55) In his article titled ***Constitutional Amendment and Dismemberment*** published in The Yale Journal of International Law, Vol. 43.1, Richard Albert argues that:

> ***"…the impetus behind the theory of Constitutional dismemberment is that some Constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the Constitution and to destroy its foundations. They dismantle the basic structure of the Constitution while at the same time building a new foundation rooted in principles contrary to the old. These Constitutional changes entail substantial consequences for the whole of law and society."***

56) Abolishing or abrogating provisions of the Constitution in such a way as to alter its foundation and structure is therefore not envisaged under Chapter 16 of the Constitution. That is a preserve of the people exercising sovereign power, which belongs to them in accordance with Article 1 of the Constitution. To that extent, I am in agreement with the High Court. As I have stated, it is in the manner of application of that doctrine, given the text of Chapter 16 of the Constitution, where I take a different path. According to the High Court, the identification of whether a provision of Constitution

is part of the basic structure is a matter of analysis on a case to case basis. In the words of the High Court:

> ***"Whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, it's text, its internal coherence, the history of the clause and the Constitutional history; and other non-legal considerations permitted by our Canon of Constitutional interpretation principles."***

57) On my part, I am persuaded that the framers of the Constitution identified for all to know what the basic structure of our Constitution is. In what learned counsel referred to as the hierarchy of norms, the framers set out in Article 255(1) of the Constitution what they identified to be the fundamental pillars that define the Constitution. Those provisions are amendable, in the sense of in which I have referred to that word as meaning minor revision, addition or modification in contradistinction to dismemberment, in accordance with Article 257. Provided the amendments proposed do not amount to an abrogation or dismemberment of the Constitution, they are permissible. But even then, such amendment, not amounting to dismemberment, of the matters set out in Article 255(1) of the Constitution must, be done in accordance with Article 257.

58) In other words, the doctrine of basic structure, as I understand it, is a complete bar to dismemberment or abolition of provisions of the Constitution in the name of amendment. Abolishing or abrogating those provisions cannot be an amendment within the purview of Chapter 16 of the Constitution. On the other hand, under the Constitution, all provisions of the Constitution are amendable, in the sense of correcting, modifying, clarifying, improving, or expounding without fundamentally altering the identity of the Constitution. The matrix, as I see it is that if a proposed change to the Constitution is a dismemberment of the Constitution, then

Chapter 16 provisions are not available. If on the other hand the proposed change is an amendment, properly so called, then the next question is whether it relates to a matter set out in Article 255(1) of the Constitution. If so, then the provisions of Article 257 must be invoked. If it does not touch on a matter set out in Article 255(1), then the amendment may be pursued via the parliamentary initiative route under Article 256. Ultimately however, whether a particular proposal for amendment is strictly that or a disguised attempt to abrogate the Constitution is a matter for judicial interpretation.

59) Based on the foregoing, my conclusion in relation to the basic structure doctrine is that it is applicable in Kenya. In its application in the context of our Constitution, it bars (as opposed to limiting) the dismemberment, replacement or abolition of the Constitution in the name of amendment. The Constitution does not envisage, contemplate or permit its replacement, abrogation, or its dismemberment. That is a preserve of the People and can only be done by the People, outside the framework of the Constitution, following the procedure used or akin to that used to make the Constitution and which must include civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum. The doctrine does not, in my view, prevent genuine amendments to the Constitution. The framers of the Constitution identified the matters set out in Article 255(1) of the Constitution as the core or the basic structure of the Constitution and any amendments, properly so called, to the Constitution relating to or touching on those matters can be done in accordance with Article 257 of the Constitution infused with the national values and principles. Whether a proposed amendment amounts to a dismemberment, abolition or derogation of the Constitution is ultimately a matter of judicial interpretation. Any other amendments to the Constitution that does not relate to or touch on the matters set out in Article 255(1) can be made in

accordance with Article 256 of the Constitution. In my view, there are no eternity clauses in the Constitution.

60) That said, there remains the question whether amendments, properly so called, with respect to the matters set out under Article 255(1) of the Constitution must follow the four sequential steps necessary for the exercise of primary constituent power as outlined by the High Court, namely, civic education, public participation, constituent assembly, and a referendum. I address that in the next part of my judgment in the context of the scope of popular initiative under Article 257 and the place of public participation in that regard.

Scope of Popular initiative and public participation

61) In this regard, the High Court expressed that:

> ***"It is our finding that Popular Initiative as a means to amend the Constitution under Article 257 of the Constitution is a power reserved for Wanjiku. Neither the President nor any State Organ can utilize Article 257 of the Constitution to amend the Constitution."***

62) It was submitted for the appellants that the only qualification under the Constitution for amending the Constitution by popular initiative is the backing of one million registered voters subject to verification by IEBC; that the obligation to conduct public participation lies with Parliament and the County Assemblies even though that they cannot alter the Amendment Bill presented to them; that the High Court erred in concluding that the Constitutional Amendment Bill was not a popular initiative.

63) It was submitted that amendment of the Constitution by popular initiative under Article 257 is not the preserve of a special class of people; that any person, a private citizen, state officer or public officer, including the President is at liberty to initiate amendment of the Constitution by popular initiative;

that Article 257 sets out a people centric process that does not exclude anyone; that under Section 49 of the Elections Act, the President is empowered to refer any issue to IEBC for purposes of conducting a referendum.

64) It was submitted that the President, like every other person, enjoys equal protection of the law under Article 27 of the Constitution; that the President is a registered voter and a citizen and a leader of a political party entitled to enjoy political rights under Article 38 of the Constitution and can campaign for any cause; that under Articles 131 and 132 of the Constitution, the President as a symbol of national unity has a duty to promote national unity, and the contention that there would be a conflict of interest if the President were to be the promoter of a popular initiative has no foundation as it is the People through the referendum, and not the President who determine whether the initiative becomes law.

65) It was urged that the popular initiative route for amending the Constitution was coined as an alternative to Parliament and there is nothing to suggest that it is a route that is not available to the Executive. In any case, it was argued, no evidence was tendered to show that the President was the promoter of the Constitution Amendment Bill; that as a matter of fact, the promoters were Hon. Junet Mohammed and Hon. Dennis Waweru, who by their letters dated 18th and 24th November 2020 submitted the Constitution Amendment Bill to IEBC; that as at 30th June 2020 neither the BBI Task Force nor The BBI Steering Committee were in existence and could not therefore have been the promoters of the Bill.

66) As regards public participation, it was submitted for the appellants that Article 257 of the Constitution sets out an elaborate process of amending the Constitution culminating with a referendum through which the people express themselves; that the High Court misapprehended the place of public

participation in relation to that process; that it failed to appreciate that there are inbuilt mechanisms within Article 257 to ensure public participation at the various stages of the process.

67) It was submitted that there was no justification for the High Court to prescribe a four-step process, characterised as exercise of primary constituent power, which has no foundation in Article 257 of the Constitution. According to counsel the process prescribed by the High Court would place *"Wanjiku"* in an impossible situation because, to initiate the process, Wanjiku would have to translate her proposal into different languages, undertake civic education, seek the opinion of the court as to whether her proposal touches on the basic structure, present a bill to IEBC which would be required to undertake country wide voter registration, provide bills to counties, and undertake public participation. This, it was submitted is not possible for a citizen to do and neither is it provided for in the Constitution.

68) Moreover, it was urged, the issue regarding public participation was not ripe because the process was at a preliminary stage; that the process is a continuum and the parameters of public participation vary from state to stage; that although the petitioners bore the burden of proof to show that there was no public participation, the High Court wrongly shifted that burden to the appellants.

69) For the respondents opposing the appeals, it was submitted that popular initiative is a weapon to combat domination by legislative bodies and the Executive and the legislator cannot be a *Wanjiku*; that the President ceased to be an ordinary person on becoming the President and cannot therefore exercise constituent power in the amendment of the Constitution; that the role of the holder of that office is restricted to that of assenting as provided in Article 257(9) of the Constitution and that of referring the Bill to IEBC for

purposes of conducting a referendum under Section 49(1) of the Elections Act.

70) It was submitted that there is overwhelming evidence that the President was indeed the initiator of the Constitution amendment process that resulted in the Constitution Amendment Bill, which was in violation of Article 257 of the Constitution, and by so doing usurped the power of the people; that the initiative was the product of the handshake between the President and Hon. Raila Odinga; that Hon. Junet Mohammed and Hon. Dennis Waweru were not the initiators of the process but stepped in to deliver the draft Bill to IEBC; that the process is a continuum and did not begin with the submission of the draft Bill to IEBC; that the President would have to abdicate his position as President in order to engage in activities of a private citizen to promote a popular initiative; and that attempts to *'sanitize'* the process by roping in the people at the tail end of the process must be rejected.

71) It was submitted that the BBI Task Force and the BBI Steering Committee that were created by the President in his official capacity were unlawful and unConstitutional and lacked standing to initiate a popular initiative under Article 257; that although the President established the BBI Task Force and the BBI Steering Committee in his official capacity, he was engaging in non-official conduct meaning he was acting in a personal capacity and to that extent, it was urged, the President abused his powers and violated Article 73(1)(a)(i) of the Constitution.

72) Public participation, it was submitted for the respondents, is a Constitutional requirement under Articles 10, 118, 124, 174 and 196 of the Constitution and amendment process under Chapter 16 of the Constitution is no exception. In further support of the critical role of public participation, reference was made to the requirement for establishment of modalities and platforms for citizen participation under Section 91 of the County

Governments Act and the requirement for establishment of County Budget and Economic Forum consultation forum under Section 137 of the Public Finance Management Act 2012. It was submitted that the State was under an obligation to carry out civic education but failed to do so with the result that Wanjiku's rights under the Constitution were violated when the County assemblies hurriedly debated and passed the draft Bill.

73) It was submitted further that it was necessary for public participation to be undertaken before the collection of signatures to prevent voter prejudice and that the four-step process declared by the High Court as comprising exercise of primary constituent power is necessary. It was urged that the entire process pertaining to the Constitution Amendment Bill is illegal because Wanjiku played no part in proposing the amendments, her role being relegated to one of mere rubberstamp; It was submitted the appellants had the burden, which they failed to discharge, to prove, that public participation was undertaken; that in Nairobi, only two stakeholder meetings were shown to have been held; that public participation is not a proforma exercise and must be meaningful. In that regard reference was made to the case of ***Abe Semi Bvere vs. County Assembly of Tana River & another; Speaker of the National Assembly & another [2021] eKLR***; and the South African Constitutional Court decision in ***Doctors for Life International vs. Speaker of the National Assembly and Others [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)*** for the proposition that public participation should be real and not illusory; that the period of 90 days set in the Constitution for county assemblies to consider the draft Bill is intended to ensure there is meaningful public participation and engagement.

74) Having considered the rival arguments on the remit of the popular initiative and public participation, the issues arising are: Whether amendment of the

Constitution by popular initiative is a preserve of the citizen?; Whether the president or the executive can initiate amendments through popular initiative?; Who was the promoter in this case? What is the scope of public participation regarding popular initiative? Was it undertaken in this instance?

75) I will begin with the question whether amendment of the Constitution by popular initiative a preserve of the citizen. Article 257 provides as follows:

> ***"257. (1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
>
> ***(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.***
>
> ***(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.***
>
> ***(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.***
>
> ***(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.***
>
> ***(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.***

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10).”

76) On the face of those provisions, there is no qualification of who may or may not promote a popular initiative. As correctly submitted by counsel for the appellants, there is no explicit bar against any person, including the President, from promoting a Constitution amendment by popular initiative. It is not, as it were, in the black letter of Chapter 16 of the Constitution who may or may not propose an amendment by popular initiative. It is a matter of interpretation in accordance with the principles of Constitutional interpretation to which reference has already been made. See Supreme Court of Kenya decisions in the case of ***In the Matter of Interim Independent Commission*** (above) and ***The Matter of The Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2021 [2014] eKLR***.

77) The background to Chapter 16 of the Constitution on amendment of the Constitution is well explained in paragraphs 476-480 of the High Court

judgment. In ***Commission for Implementation of the Constitution vs. National Assembly of Kenya & 2 others*** (above) ***Lenaola, J.***, as he then was, alluded to "*our peculiar history*" where "*the Independence Constitution was amended soon after its promulgation and many times thereafter*" and that "*the call for a new Constitution was key to the demands for a return of a true Constitutional democracy since nothing good was left of our Independence Constitution due to its piecemeal amendments*". He cautioned that, "*in the Kenyan arena now and in decades to come, it is important to be conscious of our history and aspirations for a future based on Constitutional supremacy*".

78) To add to that, in the Final Report of the Constitution of Kenya Review Commission (CKRC), of 2005, it is reported that the people, as owners of the Constitution review process, "*expected to be provided with an opportunity to actively, freely and meaningfully participate in generating and debating the proposals to alter the Constitution.*" In chapter Three of that report dealing with *"the views from the people",* the Commission reports that during the public hearings the manner of changing provisions of the Constitution was an important concern The report notes:

> **"*The extent to which a Constitution is regarded as supreme law depends on the ease with which its provisions may be amended. Experience in Africa and elsewhere shows that, while it may not be so difficult to make a good Constitution, it is very difficult to implement and observe it and all too easy to alter or even overthrow it. This was an important concern during the public hearings*"**

79) The report records that considering how frequently the Independence Constitution was amended, the question of how to protect the new Constitution from a similar fate was a matter that was frequently raised during public hearings. In that regard, the Commission noted that:

> **"*There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is***

too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable Constitutional means. Thus, a balance must be struck between these two extremes."

And that,

"*The people, therefore, wanted a fairly rigid arrangement, the amendment of which would require their participation in some form. In their view, the new Constitution should only be amended in the same way in which it is made*."

80) In Chapter 27 of the same report, titled *"Consideration of the Commission's Report and the Draft Bill by Technical Working Committees"* the Commission reported, with specific reference to Constitutional Commissions and Constitutional offices and amendment to the Constitution, that:

"*The amendments to the Constitution relating to the supremacy of the Constitution, territory of Kenya; sovereignty of the people; principles, values and goals of the Republic; the Bill of Rights, term of office of the President; the independence of the Judiciary and Constitutional Commissions and Offices; functions of Parliament, values and principles of devolution; and the chapter on Amendments to the Constitution should be approved by the people in a Referendum.*

That citizen and the civil society may initiate Constitutional amendments through a process called 'popular initiative'.

That Parliament should enact a Referendum Act to govern the conduct of referenda in the country."

81) In the end, the framers of the Constitution separated the route which the elected representatives can take for amending the Constitution through Parliamentary initiative under Article 256 and the route which the citizen can take through the popular initiative under Article 257 of the Constitution.

Although the phrase *"popular initiative"* is not defined in the Constitution, the background I have set out above, and the lexical meaning of the word popular lend credence to the conclusion reached by the High Court that amendment by popular initiative under Article 257 of the Constitution is the preserve of the citizen. In The Concise Oxford English Dictionary for example, the word "popular" is defined as including, "*intended for or suited to the taste or means of the general public*", while Miriam Webster Dictionary defines the word "popular" to mean "*of or relating to the general public*." In both definitions the phrase "general public" features. I do not think the President or the executive would fall under the category of *"general public"*.

82) In reaching this conclusion I am cognizant of the provisions of Articles 19, 20, 22, 24 and 38 of the Constitution and the contention that, the holder of the office of President, like every citizen, is entitled to enjoy of rights under the Bill of Rights. However, it seems to me that the curtailment, in certain respects of those rights in relation to the holder of the office of the President, is sanctioned by the Constitution given the Constitutional role assigned to the holder of the office in the amendment process.

83) As to who the promoters are with respect to the Constitution Amendment Bill, I take the view that the process began with the handshake, followed by the establishment by the President of the Task Force. Thereafter the President established the BBI Steering Committee whose mandate included proposing Constitutional reforms. The BBI Steering Committee generated the Constitution Amendment Bill. The President and the Hon. Raila Odinga then flagged off the signature collection. The Constitution Amendment Bill and the list of voters supporting was then delivered to the IEBC by Hon. Junet Mohammed and Hon. Dennis Waweru as the co-chairs of BBI National Secretariat. It is a continuous process. A continuum. It is unnecessary in my view to attempt to split that process to justify the claim that the process

towards initiating the popular initiative began with the delivery of the draft Amendment Bill and supporting signatures to IEBC and to ignore what preceded that. The delivery of the draft Amendment Bill and supporting signatures to IEBC was part of a process that had begun before the generation of the draft amendment Bill by the Steering Committee. In my view all the players in that process, beginning with the President, the Hon. Raila Odinga, the BBI Steering Committee and the Hon. Junet Mohammed and Hon. Dennis Waweru qualify as promoters in a continuum that preceded the delivery of the Bill to IEBC by the Hon. Junet Mohammed and Hon. Dennis Waweru.

84) I do not think there is merit in the contention that the President's involvement in the amendment process was in his capacity as a private citizen. The material presents shows otherwise. The Kenya Gazette Notices based on which the Task Force and the Steering Committee, whose mandate included consideration of amendment of the Constitution, are testament that the President was acting in official capacity.

85) Regarding public participation, reference to Article 10 of the Constitution is again pertinent to the extent that all state organs, state officers, public officers and all persons are bound by the national values and principles of governance, including participation of the people, when enacting, applying, or interpreting the Constitution or any law. In ***British American Tobacco Kenya, PLC vs. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (interested parties); Mastermind Kenya Limited (the affected party) SC Petition No. 5 of 2017 [2019] eKLR*** the Supreme Court of Kenya underscored "*that public participation and consultation is a living Constitutional principle that goes to the Constitutional tenet of the sovereignty of the people*." In the same case, the

Supreme Court of Kenya enunciated the guiding principles for public participation thus:

> ***"(i) As a Constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
>
> ***(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this Constitutional principle using reasonable means.***
>
> ***(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a Constitutional requirement. There is need for both quantitative and qualitative components in public participation.***
>
> ***(v) Public participation is not an abstract notion; it must be purposive and meaningful.***
>
> ***(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.***
>
> ***(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.***
>
> ***(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.***
>
> ***(ix) Components of meaningful public participation include the following:***

a. ***clarity of the subject matter for the public to understand;***

b. ***structures and processes (medium of engagement) of participation that are clear and simple;***

c. ***opportunity for balanced influence from the public in general;***

d. ***commitment to the process;***

e. ***inclusive and effective representation;***

f. ***integrity and transparency of the process;***

g. ***capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."***

86) Earlier, in ***Meru Bar, Wines & Spirits Owners Self Help Group (Suing through its secretary) Ibrahim Mwika vs. County Government of Meru Petition No. 32 of 2014; [2014] eKLR*** the High Court had expressed that, "*under the new Constitutional dispensation, public participation is a requirement in the formulation of legislation. The participation of people is one of the National values and principles of governance under Article 10(2) (a) of the Constitution of Kenya, 2010*". In ***Kiambu County Government & 3 others vs. Robert N. Gakuru & others, C.A. No. 200 of 2014 [2017] eKLR***, this Court cited with approval the observations made by ***Ngcobo, J.*** in the South African case of ***Doctors for Life International vs. Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006 (6) SA 416*** where, in addressing the need for public participation in the legislative process, the learned Judge stated:

> **"*Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public***

> ***involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens….[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few….”***

And that:

> ***“It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process….”***

87) There can be no question therefore that public participation is a fundamental Constitutional principle in our country, “*a major pillar, and bedrock of our democracy and good governance*” to use the words of retired Chief Justice Mutunga in ***In the Matter of the National Land Commission [2015] eKLR*** . It is a Constitutional command that it must be infused or integrated into the amendment processs under Chapter 16 of the Constitution.

88) It was argued for the appellants that Wanjiku, or the ordinary Kenyan citizen who may wish to propose an amendment to the Constitution by popular initiative, and to whom the vehicle of amendment of the Constitution by popular initiative is reserved, would not have the wherewithal or resources

to carry out the onerous task of public participation. There is some merit in that argument. For it might appear that by one hand, Wanjiku is given a vehicle by the Constitution to propose amendments to the Constitution, but the vehicle is then taken away by the other hand, by making it impossible for Wanjiku to drive that vehicle by reason of want of resources. But that, is not the case here. It might be so, if indeed the Constitutional Amendment Bill was an initiative by Wanjiku. As already noted, the process under review was initiated, supported and on the face of it funded by the state given that the Task Force and the Steering Committee were appointed by the President through gazette notices as already indicated. Had the initiative been a Wanjiku initiative, given that the scope of public participation is a matter for consideration on a case-by-case basis, it would perhaps have been open to Wanjiku to say that she was handicapped and therefore regard should be had to her means. But it was clearly not Wanjiku who was driving the Constitution Amendment bill.

89) In ***IEBC vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR***, this Court endorsed the pronouncement of the High Court in ***Kituo Cha Sheria & another vs. Central Bank of Kenya & 8 others [2014] eKLR*** that every case in which an allegation of lack of public participation is alleged must be considered in the peculiar circumstances of the case. See also the guidelines by the Supreme Court of Kenya in the ***British American Tobacco case***, above. It might be open to Wanjiku to plead lack of resources to undertake public participation. Not so for IEBC. Under Article 88 of the Constitution, IEBC is responsible for conducting or supervising referenda and elections as it is also responsible for voter education. Like all state organs, it is bound by the national values and principles of governance, including the values of participation by the people, good governance, and democracy, when applying or interpreting the Constitution.

90) Under Article 257(4) of the Constitution, the IEBC becomes seized of the draft Bill when the same, and the supporting signatures of those supporting the popular initiative, is delivered to it. IEBC is then required to verify that the initiative is supported by at least one million registered voters before submitting the draft bill to the county assemblies. No time frame is prescribed in Article 257 within which IEBC must submit the draft Bill to the county assemblies after satisfying itself that the threshold of one million registered voters support the initiative. There is opportunity for IEBC, after satisfying itself that the threshold is met, to undertake voter education and sensitization on the amendments proposed in the draft Bill to empower the citizenry to engage meaningfully, and from a point of information, with their representatives at the county assemblies. It is of course not for the court to direct IEBC on how to discharge its Constitutional and statutory function of voter education and public participation, but it is certainly for the court to consider whether it has reasonably discharged its duty.

91) I am therefore in agreement with the High Court that there is a legal requirement under Article 10 of the Constitution for voters to be supplied with adequate information to make informed decision. There is no evidence that that was not done in this case. I would not go as far as the High Court did, in prescribing in minute detail, how public participation might be undertaken. As the Supreme Court stated in ***British American Tobacco Kenya, PLC*** (above) allegation of lack of public participation must be considered within the peculiar circumstances of each case and *"the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis."* It is perhaps also a matter for the legislature to prescribe in appropriate legislation the scope and breadth of public participation short of which the court is left to apply the standard of reasonableness on a case-to-case basis. To be clear, I take the view that amendment, properly so called, of matters touching on or relating to Article 255(1) is achieveable through

what the High Court referred to as secondary constituent power, namely public participation and referendum.

Matters relating to IEBC

92) The issues arising in relation to IEBC relate to its role in signature verification, the question of the need for legal or regulatory framework to guide its operations; the question of quorum; the issue whether to frame a binary referendum question or multiple questions.

Verification

93) The issue of the verification role of IEBC was addressed by the High Court alongside the need for legal or regulatory framework. The High Court framed the question (paragraph 733 of the judgment) as follows:

> ***"…the question for determination is whether IEBC's role includes verifying of signatures or whether the role only ends at the proverbial bean-counting: mere technocratic ascertainment that a promoter of a popular initiative has delivered 1 million voters to the IEBC. If the IEBC's role includes verification of signatures and not mere ascertainment of numbers of registered voters whose signatures accompany the Popular Initiative Bill, it would follow that the IEBC would need some legal or regulatory framework to guide it in its operations. On the other hand, if IBEC's a role is the venial administrative task of ascertaining numbers, then, perchance, no further legal or regulatory framework would be required."***

94) The High Court concluded (para 751 of the judgment) that IEBC's verification role involves both the ascertainment of numbers of registered voters in support of a popular initiative to amend the Constitution as well as verification of the authenticity of the signatures of the registered voters claimed to be in support of the popular initiative. The court went on to find that the existing statutory framework is not sufficient for verification of signatures under Article 257(4) of the Constitution and that the

Administrative Procedures IEBC had put in place were invalid for lack of public participation and failure to comply with provisions of the Statutory Instruments Act.

95) Challenging those findings, it was submitted for IEBC that its duty, upon delivery of a draft amendment bill to it under Article 257(4) of the is to verify that "*the initiative is supported by at least a million voters registered voters*"; that the High Court erred in construing IEBC's role in that regard as one requiring it to carry out a forensic investigation regarding the signatures; and that contrary to the finding of the High Court there is no legal requirement imposed on IEBC for *"verification of signatures"*.

96) It was submitted that in discharge of its duty, IEBC employed clerks to assist in the verification exercise; that IEBC demonstrated that after the verification, it published a list on its website and invited members of the public to inspect and verify and that no complaint was received; that after satisfying itself that the initiative met the threshold of at least a million registered voters who supported it, it went ahead to forward the draft amendment bill to the County Assemblies in accordance with Article 257(5) of the Constitution. It was accordingly submitted that the finding by the High Court that IEBC acted unConstitutionally or illegally in its verification role and in processing the Constitution Amendment Bill was erroneous.

97) It was submitted that contrary to the findings of the High Court, there exists, in the Constitution and in the Elections Act (Section 49-55) an adequate legal framework for the conduct of the referendum; that the High Court contradicted itself by stating, on the one hand, that absence of legal framework is not a hindrance, but on the other hand declared otherwise. Citing the case of ***Independent Electoral and Boundaries Commission vs. NASA Kenya [2017] eKLR*** it was submitted that the absence of enabling legislation or regulations cannot suspend enjoyment of Constitutional rights;

that having regard to Article 261(1) of the Constitution and the 5th schedule to the Constitution, it was not envisaged that an enabling legislation would be enacted in relation to Article 257.

98) Regarding the Administrative Procedures, it was submitted that the court erred in construing and elevating standard operating procedures or internal administrative procedures as statutory instruments and in that regard the case of ***NASA vs. Independent Electoral and Boundaries Commission [2017] eKLR*** was cited.

99) In the opposition, it was submitted that under Article 88(4)(g) of the Constitution, IEBC is mandated to undertake voter education; that it did not discharge that function by educating the populace on what they were appending their signatures to; that posting the names on a website was inadequate; that IEBC appreciated that it had a role to verify signatures and advertised vacancies for persons to undertake it; that it is evident that the IEBC has a data base of voters which includes signatures; that IEBC lacked a verifiable process to satisfy itself that the initiative was supported by at least one million registered voters.

100) It was submitted that the High Court was right in concluding that there is need for legislative framework for verification of signatures under Article 257 of the Constitution; that the need is also captured in the report of the Justice and Legal Affairs Committee (JLAC) of the National Assembly which recommended legislation regarding public participation in the processing of Constitutional amendment bill by popular initiative and the publication of the Amendment Bill.

101) It was submitted that the IEBC, the AG, and Parliament all admitted there is lack of legal framework for the conduct of referendum; that Article 257 is not self-executing as submitted; that under Article 82(1)(d) of the

Constitution Parliament is required to enact legislation for the conduct of referenda; and that the provisions in the Elections Act do not provide for verification of signatures.

102) In relation to the Administrative Procedures, it was submitted that the High Court was right that they were made without authority or compliance with Statutory Instruments Act, 2013 and are therefore illegal; that Sections 55 of the Elections Act and IEBC Act did not empower IEBC to make the administrative procedures on verification of signatures; the same were not gazetted and the same were made without public participation. In that regard, the Supreme Court decision in the case of ***British American Tobacco*** (above) was cited.

103) Having considered the rival arguments, I take the following view of the matter. The role of IEBC, upon delivery of the draft bill proposing amendment to the Constitution by popular initiative, is set out under Article 257(4) of the Constitution which provides:

> ***"The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters."*** [Emphasis]

104) In an affidavit sworn on 25th February 2021, Michael Goa, a director of legal and Public affairs of IEBC, deposed that IEBC received the draft amendment Bill on 10th December 2020 accompanied by 4.4 million supporters signatures upon which it issued a press release on 18th December 2020 informing the public of the same; that IEBC "*carried out a process to confirm that the said initiative was supported by the signatures of at least one (1) million registered voters in order to ensure compliance with the requirements of Article 257(4) of the Constitution*"; that after completion of that process, an interim report was prepared during which "*data cleaning exercise by removing*

incomplete records including missing signatures, ID numbers and names, duplicates and those not in the register of voters"; that thereafter " *a list of verified supporters*" was uploaded on IEBC's website "*to enable them to check and confirm their details*"; that the purpose of uploading the list of verified supporters on the website was to provide an opportunity for objection by anyone who had been captured as a supporter without their consent; that upon completion of that process, it was established that the popular initiative met the Constitutional threshold and the Amendment Bill was transmitted to the County Assemblies.

105) Based on the depositions in that affidavit, the finding by the High Court that the role of IEBC under Article 257(4) entails ascertaining the number of registered voters in support of a popular initiative to amend the Constitution, and verifying that the initiative is indeed supported by the registered voters claimed to be in support of the popular initiative, is correct. As submitted by counsel, "*the verification of signatures of supporters of the Constitutional amendment initiative entailed ascertainment of whether they were registered voters and had appended their signatures*." The controversy appears to be with regard to, precisely how IEBC was to execute or carry out the verification. According to IEBC, that would be achieved by posting the list of voters claimed to have supported the initiative on its website for scrutiny with an invitation that any objections should be raised within a given period. The respondents on the other hand argue that IEBC should itself have undertaken a forensic examination of the signatures.

106) In the case of ***National Super Alliance (NASA) Kenya vs. Independent Electoral and Boundaries Commission (IEBC) & 2 others, C.A. No. 258 of 2017 [2017] eKLR*** the Court stated that "*courts cannot step in to police or prefect independent Constitutional bodies or direct them how to carry out their own mandates unless there is wilful neglect or violation of their Constitutional or*

statutory functions" and the independent commissions are "*clothed with discretion and latitude to decide the governance process or procedure to employ, as to how and when to execute their mandate, as long as it is within the law*" and that "*this operational and functional independence has Constitutional underpinning*."

107) So guided, the question is whether IEBC properly discharged its verification mandate under Article 257(4) of the Constitution. The record shows that IEBC uploaded the list of signatories in support of the initiative on its website on 21st January 2021. The closing date for scrutiny and for any objections to be taken was indicated to be Monday 25th January 2021. Under item q) and r) of part B on Verification Procedure of IEBC's, Administrative Procedures, after "*actual signature verification exercise and documentation*" the "*compiled list of supporters is published in the Commission's website for information and 'verification' for two (2) weeks*." Publishing the list of supporters over a weekend was clearly in violation of IEBC's own prescribed time frame of two weeks. The time provided for the scrutiny and for raising objections was grossly insufficient. Why IEBC was in such rush is not clear. Secondly, there is the question whether merely uploading the list on IEBC's website, without more, is sufficient? Would it have been more effective for IEBC to, in addition to uploading the list on its website, to publicise the matter in other media as well? These questions are germane and bolster the argument that a comprehensive legal or regulatory framework for the conduct of referendum is important.

108) In my view, had the IEBC given sufficient notice, opportunity and means to the public to interrogate the list of verified supporters of the initiative, it would perhaps have been considered to have discharged its duty of ascertaining and verifying that the registered voters who were indicated as supporting the initiative had indeed done so. That said, the conclusion by the

High Court that, "*IEBC's role under Article 257(4) involved both the ascertainment of numbers of registered voters in support of a popular initiative to amend the Constitution as well as verification of the authenticity of those signatures*" is partially correct in my view. Yes, IEBC is required to ascertain that the threshold of one million registered voters is met. Secondly, it must verify or establish or confirm that those voters whose names that have been submitted have in fact endorsed the initiative. That, as I have stated, is in my view achievable if IEBC affords reasonable means and opportunity for the voters to interrogate and confirm their endorsement of the initiative. That said, this discussion is further testimony of the need for a legislative/ regulatory framework for matters relating to Article 257.

Regulatory or legal framework

109) As concerns the matter of absence of legislative or regulatory framework for collection, presentation and verification of signatures and the conduct of referenda, the High Court declared that:

> ***"…at the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of referenda"***

And that,

> ***"…the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda <u>in the circumstances of this case</u> renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill 2020 flawed."***

110) Under Article 88(4) of the Constitution, IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an

Act of Parliament. The Elections Act in its preamble states that it is "*an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor, and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes*." Part V of Elections Act deals with referendum. Sections 49 to 55 thereof address matters pertaining to initiation of a referendum, notice of holding referendum, referendum committees *et al*. Section 53 provides that the procedure for the conduct of an election shall apply with necessary modifications to the conduct of referendum.

111) There is, undoubtedly therefore, some legal framework, albeit not an elaborate one, for the conduct of referendum even though it may not specifically address or fully address all aspects of a referendum including matters of collection, presentation, and verification under Article 257 of the Constitution. I do not doubt, as I have mentioned, that it is important to have specially tailored legislation that specifically and fully addresses matters relating to Article 257. Indeed, there is realization in that regard as it was demonstrated that there are two pending Bills before the National Assembly, namely, the Referendum Bill, 2020 and the Referendum (No. 2) Bill, 2020 with more detailed provisions on the conduct of referenda.

112) That said, I agree with the High Court that "*notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such Constitutional process may still be undertaken as long as the Constitutional expectations, values, principles and objects are met*" and that in doing so "*the process must be in strict compliance with, inter alia, Article 10 of the Constitution which prescribes the national values and principles of governance*" and that those "*principles must be infused at every stage of the process*". That statement is consistent with the legal principle exemplified by a decision of this Court in the case of ***Independent Electoral and Boundaries Commission (IEBC) vs. National***

Super Alliance (NASA) Kenya & 6 others [2017] eKLR where this Court reversed a finding by the High Court invalidating procurement of ballot papers without legislative framework to facilitate a meaningful programme of public participation. In doing so, this Court expressed that:

> ***"The absence of a legal framework for public participation is not an excuse for a procuring entity or a state organ to fail to undertake public participation if required by the Constitution or law. A State organ or procuring entity is expected to give effect to Constitutional principles relating to public participation in a manner that satisfies the values and principles of the Constitution."***

113) Equally, the absence of a legal framework *per se* cannot be a basis for asserting that IEBC should not discharge its Constitutional mandate under Article 257 of the Constitution. There is also the High Court decision in the case of ***Titus Alila & 2 others (suing on their own behalf and as the registered officials of the Sumawe Youth Group) vs. Attorney General & another, Kisumu HCP No. 22 of 2018 [2019] eKLR***, where the question whether there was *"a proper legislative framework for holding a referendum"* arose and the High Court (***F. Ochieng, J.***) in answer found, "*that the Constitution has already set up a Proper Legislative Framework for holding a referendum*".

114) In my view therefore, the declaration by the High Court that the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill 2020 flawed, even though qualified with the statement "*in the circumstances of this case*", is one I am respectfully unable to endorse, to the extent I construe it to mean that IEBC cannot, absent of specific legislation on conduct of referenda, conduct referendum under Article 257.

Administrative Procedures

115) There is then the matter of IEBC's Administrative Procedures. Even without an elaborate legal framework, IEBC asserted that it had in place administrative procedures to guide its functions. In that regard, the High Court posed the question, "*whether the Administrative Procedures are lawful, and if so whether they adequately serve the role of providing the required regulatory framework*." The High Court found those administrative procedures invalid on grounds: that they were developed without public participation as required by Article 10 of the Constitution; that they were made in violation of the Statutory Instruments Act for want of parliamentary approval and want of publication; and that they were developed without quorum.

116) IEBC submitted before us that in reaching the conclusion that the Administrative Procedures were developed without public participation as required by Article 10 of the Constitution and that they were made in violation of the Statutory Instruments Act, the High Court misapprehended the nature and character of those administrative procedures and wrongly characterised them as statutory instruments; that the administrative procedures do no fall within the meaning of statutory instruments under Section 2 of Statutory Instruments Act; and that there is no requirement of public participation in relation to internal administrative procedures.

117) It is noteworthy, in my view, that IEBC supplied the Administrative Procedures upon request for information by Muslims for Human Rights (Muhuri). In their letter of 15th December 2020 Muhuri inquired from IEBC whether it has "*regulations and/or rules/guidelines on how to undertake its mandate under Article 257(4) of the Constitution on verification that a popular initiative is supported by at least one million registered voters*". In its response of 23rd December 2020, IEBC stated, "*The Commission confirms having developed*

administrative procedures on how to undertake its mandate under Article 257(4) of the Constitution" and attached the same. They are titled, "*Administrative Procedures for the verification of signatures in support of a Constitutional Amendment Referendum*."

118) In the preamble to those Administrative Procedures, reference is made to the sovereignty of the people and that one of the ways in which that sovereignty can be used is to change the Constitution by dint of Article 257 which provides "*the general requirements and procedures to amend the Constitution*" and that the role of IEBC is "*to receive the initiative draft bill and supporting signatures; verify that the initiative is supported by the prescribed number of registered voters and communicate the outcome of the verification process to the promoters of the initiative, and to forward the bill to county assembly where the initiative has met the requirements of article 257*."

119) Was the High Court therefore right in its determination that the Administrative Procedures were a statutory instrument? The Statutory Instruments Act is an Act for the making, scrutiny, publication, and operation of statutory instruments and for matters connected therewith. The objectives of the Act include provision of a comprehensive regime for the making, scrutiny, publication, and operation of statutory instruments by requiring regulation-making authorities to undertake appropriate consultation before making statutory instruments; requiring high standards in the drafting of statutory instruments to promote their legal effectiveness, clarity, and intelligibility to anticipated users; and improving public access to statutory instruments. A statutory instrument is defined under the Act as:

> ***"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which***

that statutory instrument or subsidiary legislation is expressly authorized to be issued."

120) The Act applies to every *"statutory instrument"* made directly or indirectly under any Act of Parliament or other written legislation. Instructively, in discharging it scrutiny role, Parliament is required to be guided, by among other things, the principles of good governance and rule of law. Parliament is required to consider whether the statutory instrument is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law; infringes on fundamental rights and freedoms of the public; and contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament.

121) Although IEBC contended that the administrative procedures are internal operating procedures, they are evidently more than that. They are guidelines, not only for the internal use within IEBC, but also for the guiding the public on matters pertaining to the discharge of IEBC's Constitutional mandate under Article 257. Section 31 of the IEBC Act empowers the Commission to make regulations for the better carrying out the provisions of the Act and under Section 31(2) such regulations may provide for *"(g) any other matter required under the Constitution"*, the Act or any written law. Section 31(3) provides that the purpose and object of making the rules and regulations under Section 31(1) is to enable the Commission to effectively discharge its mandate under the Constitution and the IEBC Act.

122) Whereas the Administrative Practices were not avowedly made in exercise of the Commissions' power under Section 31 of the Act, in a replying affidavit sworn by Michael Goa of IEBC, he deposed that the Administrative Procedures were developed pursuant to Section 55 and Regulation 98 of the Election (General) Regulations, 2012 after extensive public participation.

Accordingly, based on Michael Goa's deposition, the Administrative Procedures fall within the statutory definition as they were "*made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.*"

123) Moreover, this Court can only interfere with the decision of the High Court if it is established that the High Court misdirected itself in law or that it misapprehended the facts; or considered factors it should not have or failed to consider matters it should have, or that its decision is plainly wrong. See ***Madan, J.A.*** in the case of ***United India Insurance Co Ltd & 2 Others vs. East African Underwriters (Kenya) Ltd [1985] eKLR*.** I am not persuaded that it has been demonstrated that the decision of the High Court in this regard is erroneous.

Quorum

124) I turn to the matter of the quorum. In that regard, the High Court pronounced:

> ***"Taking into account how serious and consequential amendments to the Constitution are, all decisions connected therewith including the verification of signatures in support of a popular initiative and the determination whether or not the Constitutional threshold under Article 257(4) has been met, we conclude that these decisions could only be taken by quorate IEBC. We also conclude that the IEBC Act categorically places the quorum of IEBC for purposes of transacting business at five commissioners. Finally, we conclude that the IEBC did not have this quorum at the time it made the consequential decisions related to the Constitution of Kenya Amendment Bill. It, therefore, follows that all decisions so made by the IEBC in relation to the proposed Constitutional amendment and in particular, the Constitution of Kenya Amendment Bill are invalid, null and void for lack of quorum."***

125) In challenging that decision, it was submitted for IEBC that under Article 250 of the Constitution, a minimum of three (3) commissioners is sufficient to conduct the business of the Commission; that the High Court erred in holding that IEBC was not quorate; that the High Court departed, without proper reason, from a binding decision of a court of coordinate jurisdiction in the case of ***Isaiah Biwott Kangwony vs. IEBC & another [2018] eKLR*** where it was held that a quorum of 3 commissioners was sufficient to conduct the business of the Commission; that that decision was binding and the matter was *res judicata*.

126) It was urged that the High Court wrongly based its decision on provisions of Paragraph 5 and 7 of the Second Schedule to the IEBC Act which were declared unConstitutional by the High Court in the case of ***Katiba Institute & 3 other vs. AG [2018] eKLR***; that Paragraph 5 and 7 of the Second Schedule to the IEBC Act on which the High Court based its decision no longer had the force of law and were non-existent. Citing the decision of the Supreme Court in the case of ***Mary Wambui Munene vs. Peter Gichuki King'ara & 2 others, SC Petition No. 7 of 2014 [2014] eKLR***, among other authorities, it was submitted that the effect of declaring amendments introduced to IEBC Act by the Election Laws (Amendment) Act, No. 34 of 2017 as unConstitutional could not revive the repealed provisions.

127) In opposition, it was submitted that in ***Katiba Institute & 3 others vs. Attorney General and 2 others, H.C. C.P No. 548 of 2017 [2018] eKLR***, what the High Court declared unConstitutional were parts of the Election Laws (Amendment) Act, No. 34 of 2017 that had sought to amend Paragraphs 5 and 7 of the 2nd Schedules; that in effect the High Court was right in its pronouncement on quorum. It was submitted further that there is a difference between composition as provided in Article 250 of the Constitution at a minimum of 3 commissioners, and the requirement under

the IEBC Act which sets the number at 7; that in Paragraph 5 of the Schedule to the IEBC Act the quorum is set at 5 commissioners; that in any case the High Court in ***Isaiah Biwott Kangwony vs. IEBC & another [2018] eKLR*** did not say that Paragraph 5 of the Schedule is not law.

128) My view is as follows: Section 5(1) of the Independent Electoral and Boundaries Commission Act provides that the Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of the IEBC Act. Section 5(3) provides that the process of replacement of a chairperson or a member of the Commission shall commence at least six months before the lapse of the term of the chairperson or member of the Commission. Section 5(4) provides that the procedure set out in the First Schedule shall apply, with necessary modifications, whenever there is a vacancy in the Commission.

129) Section 7A of th IEBC Act provides that the office of the chairperson or a member of the Commission shall become vacant if the holder dies; resigns from office; or is removed under circumstances specified in Article 251 and Chapter six of the Constitution. Under section 7A(2) of the IEBC Act the President is required to publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy and the process of recruitment "*shall commence immediately after the declaration of the vacancy by the President.*"

130) Section 8 of the IEBC Act provides that the conduct and regulation of the business and affairs of the Commission shall be as provided for in the Second Schedule but subject thereto the Commission may regulate its own procedure. Paragraphs 5 to 7 of the Second Schedule, prior to amendments introduced through the Election Laws (Amendment) Act No. 34 of 2017, provided as follows:

"5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission.

6. The chairperson shall preside at every meeting of the Commission at which he is present and in the absence of the chairperson at a meeting, the vice-chairperson, shall preside and in the absence of both the chairperson and the vice-chairperson, the members present shall elect one of their number who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members."

131) Through Election Laws (Amendment) Act No. 34 of 2017 Paragraph 5 and 7 of the Second Schedule was repealed and replaced with the provision that:

"5. ***The quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members.***

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting."

132) Paragraph 8 of the Second Schedule which was not affected by the amendments provides that:

"8. ***Subject to paragraph 5, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof.***"

133) Those amendments were successfully challenged and declared unConstitutional by the High Court in the case of ***Katiba Institute & 3***

other vs. AG (above). In its judgment delivered on 6th April 2018, the High Court (***Mwita, J.***) stated:

> ***"Quorum being the minimum number of commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraph 5 and 7 of the Second Schedule are plainly skewed and unConstitutional."***

And later in the judgment, the learned Judge expressed as follows:

> ***"I am persuaded that certain amendments introduced through the Election Laws (Amendment) Act No. 34 of 2017 failed the Constitutional test of validity. All the amendments made to the Independent Electoral and Boundaries Commission, namely section 2, on definition of the word "chairperson", and section 7A(4), 7A(5), and 7A(6), the entire section 7B and paragraphs 5 and 7 of the Second Schedule to the Act on the quorum for purposes of meetings of the Commission are unConstitutional."***

134) IEBC contends that as Paragraphs 5 and 7 as previously enacted had been repealed, the declaration by the High Court invalidating the amendments did not revive the repealed provisions. It was urged that by relying on the provisions of Paragraphs 5 and 7 of the Second Schedule as they existed prior to the amending provisions being declared unConstitutional, the court

relied on non-existent provisions and therefore Article 250 which sets the minimum at 3 applied.

135) Respectfully, I do not understand the decision of the Supreme Court in the case of ***Mary Wambui Munene vs. Peter Gichuki King'ara & 2 others*** (above) which was cited, as supporting the proposition put forth for IEBC. If I understand the argument correctly, it is that the effect of the declaration of unconstitutionality by the High Court of the provisions of the Election Laws (Amendment) Act, No. 34 of 2017 that had sought to amend paragraphs 5 and 7 of the Second Schedule, is that the Schedule is silent on quorum; that there is in effect no longer a provision at all in the Schedule on quorum and recourse must therefore be had to Article 250 of the Constitution. I am not entirely persuaded by that argument.

136) Article 250 of the Constitution does not, with respect, address the question of quorum of the Commission. It is a provision on composition. It sets the minimum number of persons who must make up the Commission. Quorum speaks to the minimum number of commissioners that must be present to make a binding decision. It speaks to the number of commissioners who, when duly assembled, are legally competent to transact business of the Commission. As defined in ***Black's Law Dictionary***, it is "*the minimum number of members who must be present for a deliberative assembly to legally transact business*." Article 250 of the Constitution cannot therefore fill the gap, which the IEBC says was created by the declaration of unconstitutionality of the provisions that had sought to amend Paragraphs 5 and 7 of the Second Schedule.

137) In the case of ***Mary Wambui Munene vs. Peter Gichuki King'ara & 2 others*** (above), the Supreme Court of Kenya, in paragraph 87 of the judgment, expressed as follows:

> ***"However, while we have pronounced ourselves on the issue of invalidity of Section 76(1)(a) of the Elections Act, in line with the Constitution, this Court is not precluded from considering the application of the principles of retroactivity or proactivity <u>on a case-by-case basis</u>."*** *[Emphasis]*

138) In the same case, the Supreme Court of Kenya stated that it is a matter of the discretion of the court declaring a provision unConstitutional to "*give its Constitutional interpretations retrospective or prospective effect*". At the same time, the Court endorsed the holding by Justice Kreigler in the South African case of ***<u>Sias Moise vs. Transitional Local Council of Greater Germiston, Case CCT 54/00</u>*** that:

> ***"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent Constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, <u>automatically operates retrospectively to the date of inception of the Constitution</u>."***
>
> ***"<u>Because the order of the High Court declaring the section invalid as well as the confirmatory order of this Court was silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective</u> to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law that provision has been a nullity since that date."*** [Emphasis added]

139) The decision of the High Court in case of ***<u>Katiba Institute & 3 other vs. AG</u>*** (above) was silent on the effective date of the declaration of unConstitutionality. Based on the decision of the Supreme Court, I take the view that the default position is that the declaration of unconstitutionality related back to when the unconstitutional provisions were enacted, with the result, in my respectful view that the *status quo ante*, was restored. Therefore, the requirement of a quorum of five applies. I am therefore in

agreement with the High Court when it pronounced in the impugned judgment that "*IEBC Act categorically places the quorum of IEBC for purposes of transacting business at five Commissioners*" and that "*IEBC did not have that quorum at the time it made the consequential decisions related to the Constitution of Kenya Amendment Bill*."

140) IEBC also contended that the impugned decision of the High Court "*runs afoul of a subsisting decision in rem in a Constitutional matter*" in the case of ***Isaiah Biwott Kangwony vs. Independent Electoral and Boundaries Commission & another*** (above) where the High Court (***Okwany, J.***) in a judgment delivered on 10th August 2018 pronounced that the Commission was not unconstitutional on account of vacancies that had not been filled. ***Okwany, J.*** stated:

> ***"Clearly therefore, the mere fact that there are vacancies in the Commission does not mean that the Commission becomes unConstitutional and by extension, the mere fact that the appointing authority has not initiated the process of recruiting new commissioners does not mean that the Commission as presently constituted, is not Constitutional considering that the Commission still meets the minimum threshold of three members as envisaged under Article 250(1) of the Constitution."***

141) In the judgment, the subject of the present appeal, the High Court expressed that whilst the question in ***Isaiah Biwott Kangwony vs. Independent Electoral and Boundaries Commission & another*** was whether the composition of the IEBC was illegal and unconstitutional following the resignation of majority of the commissioners, hence a challenge of the constitutionality or legality of the commission under Article 250(1) of the Constitution, in the consolidated petitions leading to the impugned judgment, the concern was that IEBC was not properly constituted for purposes of verifying signatures and does not have a quorum to conduct a referendum. The High Court in the present case also took issue with the

distinction made in ***Isaiah Biwott Kangwony vs. Independent Electoral and Boundaries Commission & another*** by ***Okwany, J.*** between decisions of the Commission touching on policy and other decisions and pointed out that such distinction was nonexistent in the statute.

142) Although there is a relationship between *'composition'* and *'quorum'* of the Commission in the sense that the composition may fall below the required number of commissioners to form a quorum, I am, as I have already stated, of the view that composition and quorum of the Commission are not the same thing. I am conscious that this Court is not presently sitting on appeal from the judgment in ***Isaiah Biwott Kangwony vs. Independent Electoral and Boundaries Commission & another***. However, it seems to me, that quite apart from reading into the text of the Paragraph 5 of the Schedule the words *"policy decisions"*, and apart from mixing up composition with quorum, the learned Judge appears to have either overlooked or infused statutory provisions with what she considered to be common sense when she stated:

> ***"My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the Commission and not the other way around. In view of the above findings, I do not find paragraph 5 of the Second Schedule of the Act unConstitutional having found that it was enacted on the belief that a maximum number of commissioners would be appointed."*** [Emphasis added]

143) Furthermore, in making that pronouncement, the learned Judge does not appear to have considered the provisions of Paragraph 8 of the Second Schedule which provides that:

> ***"8. <u>Subject to paragraph 5</u>, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof."***

144) Under that provision, the requirement under Paragraph 5 is overriding. The pronouncement by learned Judge in the above cited passage, appears, therefore, to be an abrogation of a statutory provision and to that extent it is *per incuriam*. Consequently, the High Court in the present case was entitled, for that reason, among the other reasons the court gave, to depart from it. Moreover, the statutory commands in the IEBC Act, if heeded and complied with, would have ensured that the number of commissioners would not have fallen below the number required to form a quorum.

145) For those reasons, the complaint regarding the findings by the High Court on quorum have no merit.

Continuous Voter registration

146) Next is the matter of continuous voter registration. In its judgment, the High Court held that there was no evidence that IEBC had sensitized citizens that there was continuous voter registration; that holding a referendum without voter registration; updating the voters register, and carrying out voter education, would particularly disenfranchise citizens who had attained voting age but had not been given an opportunity to register as voters, thus violating their Constitutional right to vote and make political choices. Consequently, the High Court declared that the Constitution of Kenya Amendment Bill 2020 cannot be subjected to a referendum before the IEBC carries out nationwide voter registration exercise.

147) Challenging those findings and declaration, IEBC submitted that the declaration by the High Court that IEBC was under an obligation to carry out nationwide voter registration was uncalled for; that the court introduced an unknown concept of *"nationwide voter registration"* for

purposes of referendum even though it was demonstrated through affidavit evidence of Michael Goa that IEBC has been carrying out continuous voter registration in fulfilment its obligations under Article 88(4) of the Constitution and Section 40 of the IEBC Act; that mass voter registration is done during elections and in this case IEBC was yet to be seized of the referendum and it would be premature to say that the voters would be disenfranchised.

148) On the other hand, it was urged that under Article 282 of the Constitution, Section 5(1)(b) and Section 49 of the Elections Act continuous voter registration as well as a revision of the register are requirements and that there was no evidence that this had been done; that beyond 31st December2019 there was no evidence of this having been done either; that IEBC admitted that it last updated its register in 2018 during the Kibra elections; that under Section 112 of the Evidence Act, it was incumbent upon the IEBC to establish that it was discharging its duty of continuous voter registration; that in any case, based on the Gazette notice exhibited by IEBC, a only a small number of 50,000 voters had been registered between 2017 and December 2019.

149) It is common ground that under Article 88 of the Constitution, Section 4 of the IEBC Act and Section 5 of the Elections Act, IEBC has the responsibility of undertaking continuous registration of citizens as voters, regular revision of the voters' roll, and voter education among other duties pertinent to its responsibility for the conduct and supervision of referenda and elections. It was however urged that no evidence was tendered before the High Court to suggest that IEBC had not discharged its responsibilities in that regard and that the burden lay with the petitioners before the High Court to do so.

150) The claim having been made by the petitioners in the High Court that IEBC had not discharged its of continuous registration, a basis had been laid

requiring IEBC to answer the claim and to demonstrate that it had in fact discharged its obligations. IEBC does not appear to have presented the evidence, which it has since presented to this Court as additional evidence vide the affidavit of Michael Goa sworn on 28th June 2021. That evidence comprising of a Gazette Notice of 16th September 2020 certifying the completion of the revision of register of voters as at 31st December 2019 and showing the number of voters as at 31st December 2019 was evidently available when the High Court heard the petitions but was not made available to the court. The High Court cannot therefore be faulted for having concluded as it did that there was no evidence that the IEBC had discharged its obligation of continuous voter registration. I would therefore not interfere with the decision of the High Court in that regard.

Separate and distinct referendum questions

151) The next matter which touches on IEBC is the question whether the High Court erred in declaring that Article 257(10) of the Constitution "*requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People*." In that regard, the High Court held that:

> ***"Article 257 (10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively."***

152) It was submitted for the Attorney General that this holding has no basis in law; that it was premature as IEBC was yet to be seized of the matter to execute its mandate; and that it would be impractical to submit seventy separate and distinct question in a referendum. It was submitted that under Article 257(10) what is required to be submitted to the people in the referendum is the Bill and not separate questions.

153) In opposition, it was submitted that the Amendment Bill proposed 74 changes to the Constitution and that a reading of Article 255(1) and Section 49(2), and Section 51 of the Constitution and the Elections Act respectively confirms that separate questions are envisaged; and that formation of committees for each question are required; that under Article 257(1) of the Constitution, a single amendment is permitted and that an omnibus Constitutional amendment interferes with the freedom of voters.

154) Article 257 of the Constitution provides that a popular initiative for an amendment of the Constitution may be in the form of a general suggestion or a formulated draft Bill and that if it is in the form of a general suggestion the promoters of that popular initiative shall formulate it into a draft Bill. That Bill is then delivered to the IEBC, who after verifying that the initiative is supported by at least one million registered voters submits it to the county assemblies for consideration. If approved by a majority of the county assemblies, the Bill is then submitted to the Speakers of both Houses of Parliament, where it is passed if supported by a majority of members of each House. If Parliament passes the Bill, it is then submitted to the President for assent. If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), *"the proposed amendment"* shall be submitted to the people in a referendum.

155) In my reading of those provisions, it is the Bill in which an amendment proposal is contained, that is submitted to the people to vote on in the referendum by indicating whether they agree or disagree with the amendment proposal, much in the same way as the members of county assemblies and members of the Houses of Parliament would have signified their approval or disapproval of the amendment proposal in the draft Bill.

156) It seems to me therefore that under Article 257(10) of the Constitution, as read with the other provisions in that Article, what is envisaged of the voter at the referendum is for the voter to make a choice, to ratify or not to ratify, to approve or not approve, the amendment proposal in the draft Bill. However, that choice, in my view, is rendered nugatory, inoperative, and inconsequential if the voter is called upon to vote on an omnibus draft Bill, that contains a raft of numerous, diverse, and unrelated proposed amendments to the Constitution, in this case over 70 proposals of amendments, that cut across the entire spectrum of the Constitution. As ***Ochieng, J***. correctly observed in the ***Titus Alila & 2 others*** case:

> ***"It may be logical to have a referendum which addresses one specific issue, rather than an omnibus question. That could result in the people of Kenya having a clear picture of the exact issue they were being called to vote upon.***
>
> ***62. Such a process would avoid a situation in which a voter was compelled to throw out the baby with the bath water, simply because the omnibus issue contained one or more objectionable matters, which had been lumped together with good amendments***."

157) The argument made for the respondents on the principle of unity of content or single subject matter, that Constitutional amendment through a referendum should deal with only one main issue, is one I find most attractive and persuasive. It was urged that under that principle the proposed amendment should deal with one subject only to allow the voter to form and express their opinion freely and genuinely. In other words, if a proposed constitutional amendment includes several substantive questions, the voter may not have a free choice; that each proposed constitutional amendment ought to secure adoption on its own merits, not on the merits of other different proposals to which it is attached; and that there must be an intrinsic connection between the various parts of each question put to the vote in order to guarantee freedom of suffrage and the voter must not

be expected to accept or reject as a whole provisions without an intrinsic link between them.

158) I would venture to suggest that what is envisaged under Article 257 is an amendment Bill on single thematic topic to which the provisions in draft Bill must relate. For instance, a Bill proposing amendments to the provisions on land under Part 1 of Chapter five of the Constitution would in my view be incongruous with proposals in the same Bill for amendment of the unrelated matter of offices of parliament under Part 3 of Chapter Eight of the Constitution.

159) Ultimately, it seems to me that to put a single binary question or multiple question is a matter to be informed by the nature of amendment proposed. It may well be that certain proposed amendments may require separate and distinct referendum questions to be framed. What in my view Article 257(10) of the Constitution does not contemplate is the submission to the people in a referendum of an omnibus amendment Bill, a hotchpot of an amendment Bill, such as the Constitution Amendment Bill in this case. The argument that it would be impractical on account of logistical difficulties to formulate over 70 separate and distinct questions is perhaps more the reason that an omnibus amendment Bill should never be entertained.

Constituency apportionment and delimitation of boundaries

160) In High Court Petition No. E402 of 2020 objection was taken concerning Clause 10 the Constitutional Amendment Bill, proposing amendment to Article 89(1) of the Constitution to increase the number of constituencies from 290 to 360. The High Court identified two issues in that regard. First, whether Article 89(1) of the Constitution is part of the Basic Structure, and whether it is an unamendable clause of the Constitution. In other words, whether it is lawful for a Constitution of Kenya Amendment Bill to set a

specific number of constituencies under Article 89 of the Constitution. Second, whether it is lawful for that Bill to directly allocate and apportion the constituencies it creates without a delimitation exercise as set out in Article 89 of the Constitution.

161) On the first issue, the High Court concluded that while being part of the Basic Structure of the Constitution, Article 89(1) of the Constitution is not an eternity clause, it can be amended by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution. On the second issue, the High Court found that it is not lawful for that Bill to directly allocate and apportion the constituencies it creates without a delimitation exercise as set out in Article 89 of the Constitution. The court held that Clause 10 of the Constitution of Kenya Amendment Bill is unlawful and unconstitutional.

162) It was submitted for the Attorney General that the High Court erred in making that decision as the IBEC has no mandate to increase or reduce the number of constituencies; that IEBC's mandate in that regard extends to wards only and not constituencies; that creation of constituencies is the mandate of the people, not the IEBC; that constituencies can only be created by amending the Constitution and the question of encroaching on the mandate of IEBC does not therefore arise; that it is a political question whether to increase constituencies and where they will be allocated; that the role of IEBC is delimitation, not creation of constituencies; that once passed, the proposed amendment would become a provision of the Constitution and the question of violating the Constitution would not arise as it is within the power of the people to amend the Constitution as long as the procedure is followed; that the court wrongly interfered with a political process.

163) On the other hand, it was submitted that to the extent that the Constitution Amendment Bill was purporting to usurp the functions of the IEBC in delimitation of constituency boundaries, it was interference with the independence of a Constitutional commission; that the High Court correctly set out the history to Article 89 and the proposals in Clause 10 of Constitution Amendment Bill was an attempt by the political class at gerrymandering through political allocation of constituencies not based on a scientific formula; that the High Court properly construed Article 89 in its historical context and arrived at the correct decision.

164) The historical background to the provisions in Article 89 of the Constitution has been set out in detail in paragraphs 642 to 656 of the High Court judgment and has not been challenged. Against that historical background the High Court stated as follows:

> ***"Given this history and the text of the Constitution, we can easily conclude that whereas Kenyans were particular to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual number of constituencies. Utilizing the canons of Constitutional interpretation we have outlined in this judgment, we conclude that Article 89(1) of the Constitution-which provides for the exact number of constituencies-while being part of the Basic Structure of the Constitution, is not an eternity clause: It can be amended by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution."***

165) I do not understand there to be any challenge to the finding that Article 89(1) of the Constitution is amendable. I have, on my part, taken the view that all provisions of the Constitution, including those that are considered to form the basic structure are amendable, within the meaning I have ascribed to the word amendment, provided the amendment process outlined in Chapter 16, infused with national values and principles to which I have

already referred, is followed. I am therefore in agreement with the High Court that Article 89 of the Constitution is amendable.

166) It follows, that provided the procedure in Article 257 of Chapter 16 of the Constitution, infused with national values and principles is followed, Article 89 of the Constitution can be amended to increase the number of constituencies. In that event and provided the Constitutional standard of amendment is met in effecting the amendments, I am not persuaded that once the amendments are passed and made part of the Constitution it can then be argued that they are unconstitutional.

167) In as far as the proposal in the Constitution Amendment Bill to directly allocate and apportion the constituencies is concerned I associate myself with reasons and conclusion reached by Justice Musinga in upholding the decision of the High Court in this regard.

` *Legal issues touching on the President*

168) Under this head, the issues are whether the President's right to fair hearing was violated; whether the President enjoys absolute immunity under the Constitution and whether the High Court was right in declaring that the occupier of the office of the President, is liable to being sued in his personal capacity during his tenure of office

169) It was submitted that the President's Constitutional right to fair trial was violated because he was not served with the petition in which he was named as a party, namely, Petition No. 426 of 2020; that no evidence of service was submitted; that the petitioner in that petition, the 78th respondent in the consolidated appeals, admitted that he did not serve the petition which was tantamount to abandoning the claim as against the President.

170) It was submitted further that that upon the determination by the High Court that the Attorney General could not represent the President in his personal capacity, the President should then have been given an opportunity to engage his own counsel. It was urged that in the foregoing circumstances, the President's rights under Article 50 and 27 of the Constitution were violated as he was denied a fair hearing and equal protection and benefit of the law, and for those reasons the orders made as against the President in Petition No. 426 of 2020 are null and void and should therefore be set aside.

171) In opposition, the 78th respondent asserted that electronic service of process was duly effected on the President; that the affidavit of service dated 16th January 2021 shows that the President was served and was not condemned unheard; that the President did not at any time cease being a party to the petition before the High Court and cannot assert that the proceedings against him were abandoned; that as confirmation that he was aware of, and never ceased being privy to the proceedings before the High Court, he filed the present appeal challenging the judgment of the High Court.

172) Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body. Therein is the long-standing principle of natural justice (See for instance the English decision in ***Ridge vs. Baldwin [1964] A. C. 40***) of the right to a fair hearing, *audi alteram partem*. As this Court held in ***Onyango Oloo Onyango vs. Attorney General [1987] eKLR***, denial of the right to be heard renders any decision made null and void *ab initio*, and it matters not that the same decision would have been arrived at, had the aggrieved party been heard. That no person should be condemned unless that person has prior notice of allegations against him or

her and a fair opportunity to be heard is an established and Constitutionally protected principle.

173) The critical question, which is a matter of fact, is whether the President was firstly, served with Petition No. E 426 of 2020 in which he was named as the 1st respondent, and secondly, whether he was served with notice of hearing. The record of proceedings of 21st January 2021, show that the High Court gave directions on the conduct of the consolidated petitions. Among the directions given on 21st January 2021 were directions that, "*all the petitioners in the 7 petitions to serve the petitions on all the parties by close of business on 22/1/2021. The Deputy Registrar to facilitate the process where necessary*" and that "*the respondents, interested parties and Amici to file and serve their responses to the various petitions within 14 days of tomorrow*".

174) On the same date, 21st January 2021, directions were given by the court regarding exchange of written submissions and the conduct of the hearing and hearing dates. The record shows that on subsequent appearances before the High Court, under the coram in relation to Petition 426 of 2020, the court indicated "*N/A for the 1st respondent.*" The record does not show whether after the directions given on 22nd January 2021, any inquiry or follow up was made by the court to confirm that its directions regarding service had been complied with. In subsequent attendances before the High Court, the record continued to reflect that there was no appearance for the 1st respondent (the President) in Petition 426.

175) The Petitioner in Petition 426, Isaac Aluochier, indicated on the face of the petition that it was to be served upon, "*Uhuru Muigai Kenyatta, Office of the President, Harambee House, Harambee Avenue, Nairobi. Email address: cos@president.go.ke. Telephone: 0716446500. Twitter: @ StateHouseKenya.*" Before this Court, Mr. Aluochier filed a supplementary affidavit dated 8th June 2021 in which he attached an affidavit of service sworn on 16th January

2021 in which he stated that he served the petition by email on all the parties, including the President, whom he served at the stated email address on 21st December 2020. He stated further that he also lodged a service request with the judiciary e-filing platform and got a response on 15th January 2021 that all parties had been served.

176) Notwithstanding the directions given by the High Court on 21st January 2021 to which I have referred, it appears to me, that the question whether the President was in fact served with the petition and the hearing notice in respect of the hearing appears to have been overlooked by the High Court. The continued recording by the court of *"N/A"* against the name of the President after the directions given on 21st January 2021 should, respectfully, have signalled the court to inquire whether the President had in fact been served. The depositions by Mr. Aluochier in his affidavit sworn on 16th January 2021 filed herein are matters that should have been presented before the High Court in order to satisfy itself that the President was duly served.

177) In paragraph 537 of its judgment, the High Court observes that the President "*did not enter appearance in these proceedings and neither did he file any grounds of objection or a replying affidavit to contest these proceedings on the ground of misjoinder, or any other ground for that matter*". However, there is no indication that the High Court satisfied itself that service had been effected in the first place. Indeed, in the same paragraph of the High Court judgment, the court stated, "*as much as the Honourable Attorney General has come to his defence, the grounds of objection and the submissions filed by the Honourable Attorney General are clearly stated to have been filed on behalf of the Attorney General himself and not Mr. Uhuru Muigai Kenyatta*," an acknowledgment, in my view, that the proceedings against the President were undefended. Having concluded that the Attorney General could not in this instance represent the President, it

was imperative for the court to satisfy itself that the President had been served with the petition and the hearing notice.

178) It is also noteworthy that although the High Court expressed in paragraph 532 of its judgment, that the question whether the President "*can be sued in his personal capacity and not as the President of the Republic of Kenya*" is a question that "*should be determined as a preliminary issue*", it was not in fact handled in that manner. For had it been handled as such, the determination should have been made before the substantive hearing of the petition commenced to afford the President an opportunity to defend himself, in his personal capacity. By making the determination in the final judgment, that opportunity was lost.

179) All in all, I am not persuaded that it was satisfactorily demonstrated that service on the President was effected. For that reason alone, I would set aside the orders made by the High Court against the President in Petition No. 426 of 2020.

Presidential immunity

180) As to whether the President enjoys absolute immunity under the Constitution and whether High Court was right in declaring that the occupier of the office of the President, is liable to being sued in his personal capacity during his tenure of office, it was submitted that in declaring, in paragraph 784 of its judgment, that the President could be sued during his tenure in office for anything done or not done, the High Court failed to appreciate that under Article 143, 144, and 145 of the Constitution, the President enjoys absolute immunity and cannot be sued in his personal capacity in criminal and civil proceedings while in office except as contemplated under Article 143(4); that the High Court failed to appreciate

that there is a mechanism under Article 145 of the Constitution for impeachment.

181) It was submitted that under Article 156(4)(b) of the Constitution as read with Section 12 of the Government Proceedings Act, the Attorney General is the right representative of the President in legal proceedings and the finding of the High Court to the contrary was in error.

182) In opposition it was submitted that the concept of absolute immunity no longer holds sway and is not applicable. Reference was made to the ***Regina vs. Bartle and Commissioner of Police, Ex parte Pinochet, H.L [1999] 2 W.L.R 827***. It was submitted that the availability of an impeachment process does not exclude court proceedings against the President and that anything done outside the President's Constitutional mandate is not protected by immunity under the Constitution as the same does not extend to conduct or misconduct outside the presidential mandate.

183) The issue therefore is whether the High Court erred in holding that the President can be sued in his personal capacity. It was in that context that it was urged that the President enjoys absolute immunity. That in turn hinges on the interpretation of Article 143 of the Constitution which provides:

> ***"143. (1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.***
>
> ***(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.***
>
> ***(3) Where provision is made in law limiting the time***

within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."

184) In the case of ***Kenya Human Rights Commission & another vs. Attorney General & 6 others [2019] eKLR***, this Court pronounced itself on this question. As that decision fully addresses the matter of presidential immunity and provides a complete answer to the question under consideration, I will quote from it at length. The Court stated:

"Article 143 (2) regarding civil proceedings specifies that;

> ***"Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their power under this Constitution".*** (Emphasis ours)
>
> ***In effect, a plain and ordinary interpretation of Article 143 (2) would infer that, the President's immunity is limited; (i) to proceedings instituted during his or her term in office and (ii) to anything done or not done in exercise of the President's powers under the Constitution. Put differently, the immunity does not extend to acts or omissions that have resulted in civil proceedings commenced prior to assumption of the office of the President or that were not in exercise of the President's powers.***
>
> ***The aforegoing makes it clear that it was the intention of the framers of the Constitution to limit the extent of the President's immunity in civil proceedings to only those instituted while***

he or she was in office. This intent is evident from the difference in construction between Article 143 (1) and Article 143 (2). Whereas Article 143 (1) expressly prohibits institution or continuance of criminal proceedings once the President assumes office, under Article 143 (2) the immunity in civil proceedings is limited to only those suits instituted against the President during the term of office in respect of anything done or not done in the exercise of power as the President of Kenya. Acts or omissions that gave rise to civil proceedings instituted prior to assuming office are not covered by the prescribed immunity."

The Court went to say in that case that:

> ***"The framers' intent is further evinced by the stark distinction that emerges when Article 143 (2) is compared with section 14 (2) of the retired Constitution that addressed a similar immunity. The repealed provision provided that;***
>
> > ***"no civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall <u>be instituted or continued</u> against the President while he holds office or against any person while he is exercising the functions of the Office of President".*** (Emphasis ours)
> >
> > ***The construction of section 14 (2) accorded civil proceedings with absolute immunity before and during the period in office in the same way as Article 143 (1) spells out the immunity specified for criminal proceedings, whether or not the cause of action was done or omitted to be done in exercise of the functions of office of the President. More importantly, section 14 (2) expressly prohibited continuation of civil proceedings against the President whilst he or she was in the office.***
> >
> > ***This is not the case with Article 143 (2). The words "or continuing" are clearly absent, meaning that it was never intended that***

> ***immunity would extend to civil litigation that preceded the assumption of office. So that without inclusion of the words "or continuing", the provision effectively allowed proceedings instituted prior to assumption of office to continue even while the President is in office."***

And later:

> ***"Further, the interpretation of the phrase "…the President or the person performing the functions of that office during their tenure of office...", is instructive. It would infer that immunity was limited to the "…functions of that office…" as well as "…during their tenure of office…". So that, to be covered by the immunity under Article 143 (2), firstly, the person should have been in office, and secondly, the impugned actions should have taken place during the tenure of office. Immunity would not therefore extend to acts or omissions not connected to the office or carried out before or after the term of office."***

185) This is a position I still hold and therefore agree with the pronouncement by the High Court in the present case that the President can be sued in his personal capacity during his tenure because the protection afforded under Article 143(3) of the Constitution extends to *"anything done or not done in the exercise of their powers under"* the Constitution.

Amicus curiae

186) It is contended that the High Court erred in law and in fact by admitting and heavily relying on submissions of *amici curiae*; that the briefs submitted by the *amici curiae* were demonstrably partisan and offended the principles that govern the admission and scope of the *amici curiae* briefs as pronounced by the Supreme Court of Kenya in an application in Supreme Court Petition No. 12 of 2013 in the case of ***Trusted Society of Human Rights Alliance vs. Mumo Matemu, [2015] eKLR***; that the *amici curiae* failed the test of neutrality and that their submissions should be disregarded. It was also

submitted that it was erroneous to allow the *amici curiae* to be represented by advocates who in addition to the briefs filed by the amici also filed submissions.

187) On the other hand, it was submitted that the *amici curiae* were properly admitted, and their briefs properly considered having met the criteria warranting their admission; that the claims that they were not neutral are not founded; and that the coincidence between the submissions of the amicus curiae and those of parties did not mean they were partisan.

188) In the case of ***Trusted Society of Human Rights Alliance vs. Mumo Matemu*** (above), the Supreme Court of Kenya gave comprehensive guidelines regarding admission and participation of *amicus curiae* from which it emerges that the admission of *amicus curiae* in a case involves exercise of discretion by the court. The record of proceedings of the High Court shows that application to admit *amici curiae* was considered by the court on 21st January 2021. Learned counsel Mr. Mwangi and Mr. Bitta objected to admission of law professors as *amici curiae* on ground that no special expertise was demonstrated and that application for admissions should have been in writing and must include a brief. The record does not show that the complaint of bias or partisanship was raised at that stage. As the Supreme Court stated in the said case, *"any perception of bias or partisanship"* should be raised *"by documents filed, or by ... submissions"*.

189) The Supreme Court stressed the importance of the principle of neutrality and fidelity to the law; that an *amicus curiae* brief should address point(s) of law not already addressed by the parties to the suit or by other *amici curiae*, to introduce only novel aspects of the legal issue in question that aid the development of the law; that where:

> ***"…Parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the***

applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue."

190) The Supreme Court was also clear that *amici curiae*, are "*advisors to the Court*", and "*not to the parties, and are in no way bound by the resulting Judgement, except by way of precedent*" and that:

> ***"****Amicus* ***participation is a matter of privilege, rather than of right. And "intervention" in a case, as provided under Rule 25 of the Supreme Court Rules, 2012 allows parties*** *with sufficient interest in the matter* ***to apply to be enjoined as interveners or interested parties. This avenue is set apart from that of amicus. As opposed to*** *amicus****, interveners have an interest in the res of the suit, as to be affected by the resulting Judgement of the Court.*** *Amicus curiae* ***on the other hand, are "advisors to the Court", and not to the parties, and are in no way bound by the resulting Judgement, except by way of precedent.*** *Amici curiae* ***cannot be perceived as an extension of the Court; and they are not to advance any party's case, and ought not to extend their participation to the realm of interveners in any legal proceedings. The interposition of*** *amici* ***in judicial proceedings is terminated when they have put forward the points of law outlined in their*** *amici* ***brief."***

191) As stated, the objection taken by two of the counsel before the High Court was not on basis of bias or partisanship but on other grounds despite which the *amici curiae* were admitted through directions given by the court on the same date. No challenge appears to have been taken regarding those directions and I would think it is late to raise the matter at this stage.

192) Furthermore, it is not demonstrated that the admission of the *amici curiae* was a wrong exercise of discretion by the court. The briefs submitted by the *amici curiae* were considered alongside all other material submitted but, ultimately it is the court that determined the matter. In the result I am not satisfied that it has been established that the High Court erred in admitting

the *amici curiae* or in considering their briefs. I would add that given the directions by the Supreme Court that *amici curiae* are *"advisors to the Court"*, and not parties and are in no way bound by the resulting Judgement, joining them as respondents in these appeals was irregular. They should not have been made parties to these appeals.

Justiciability

193) As concerns the question of ripeness, justiciability, it is correct as submitted for the appellants that by dint of the doctrine of ripeness courts ought not engage in premature adjudication of matters or matters which are not ready for determination or are of purely academic interest. See for instance the High Court decision in ***Wanjiru Gikonyo & 2 others vs. National Assembly & 4 others [2016] eKLR***.

194) In reference to the present matter, I would echo the words of the High Court in *Coalition for Reform and Democracy (CORD) and 2 others vs. Republic of Kenya & 10 others [2015] eKLR* where the court stated:

> ***"What is the test to apply when a court is confronted with alleged threats of violations aforesaid.***
>
> ***In our view, each case must be looked at in its unique circumstances, and a court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of Constitutional violations. In that regard, Lenaola J. in Commission for the Implementation of the Constitution vs The National Assembly & 2 Others [2013] eKLR differentiated between hypothetical issues framed for determination in that case and the power of the High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where the impugned Act has been enacted and has come into force. He stated in that regard that:***
>
> > ***"..... where the basic structure or design and architecture of our Constitution are under***

threat, this Court can genuinely intervene and protect the Constitution."

116. We agree with the Learned Judge and would only add that clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene." [Emphasis]

195) In this case, there was clear demonstration that there was a real threat of dismemberment of the Constitution. I do not think the petitioners should have waited for the changes proposed in the Constitution Amendment Bill to become part of the Constitution and then, effectively challenge the Constitution. In light of Article 2(3) of the Constitution, it is arguable whether that avenue would be available.

196) In relation to the complaint regarding the Independent Health Commission, the cross appeals, and the other matters, I associate myself with views expressed by the President of the Court in lead judgment in that regard and have nothing to add.

CONCLUSION

197) Based on the foregoing I conclude as follows:

i. I would agree with the High Court that:
   a) That the Basic Structure Doctrine is applicable in Kenya.
   b) However, my understanding is that the doctrine bars (as opposed to limiting) the dismemberment, replacement or abolition of the Constitution in the name of amendment. The doctrine does not, in my view, prevent genuine amendments to the Constitution.
   c) The Constitution does not envisage, contemplate or permit its replacement, abrogation, or its dismemberment. That is a preserve of the People and can only be done by the People,

outside the framework of the Constitution, following the procedure used or akin to that used to make the Constitution and which must include civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum.

d) Whether a proposed amendment amounts to a dismemberment, abolition or derogation of the Constitution is ultimately a matter of judicial interpretation.

e) In my view, the framers of the Constitution identified the matters set out in Article 255(1) of the Constitution as the core or the basic structure of the Constitution and any amendments, properly so called, to the Constitution relating to or touching on those matters can be done in accordance with Article 257 of the Constitution infused with the national values and principles.There is no requirement under Article 257 for a constituent assembly in that regard.

f) There are no eternity clauses in the Constitution.

g) Any other amendments to the Constitution that do not relate to or touch on the matters set out in Article 255(1) can be made in accordance with Article 256 of the Constitution.

ii. I would uphold the declarations by the High Court:

a. That civil court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution.

b. That the President does not have authority under the Constitution to initiate changes to the

Constitution through a Popular Initiative under Article 257 of the Constitution.

c. That the Constitution of Kenya Amendment Bill, 2020 is unConstitutional.

d. That IEBC is under an obligation to carry out continuous voter registration and there must be evidence that that is done before a referendum is carried out under Article 257(10) of the Constitution.

e. That IEBC does not have quorum stipulated by Section 8 of the IEBC Act as read with Paragraph 5 of the Second Schedule to the Act for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat.

f. That County Assemblies and Parliament cannot, as part of their Constitutional mandate to consider a Constitution of Kenya Amendment Bill initiated through a Popular Initiative under Article 257 of the Constitution, change the contents of such a Bill.

g. That Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum, and in violation

Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

I would also uphold the orders of the High Court:

h. Declining the order that the President makes good public funds used in the unConstitutional Constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report.

i. Declining the order that the Honourable Attorney General to ensure that other public officers who have directed or authorized the use of public funds in the unConstitutional Constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report make good the said funds.

iii. I would set aside the declarations by the High Court that:

a. The President, Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a Constitutional change process.

b. That at the time of the launch of the Constitutional of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor a

legal framework to govern the conduct of referenda.

c. That the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed.

iv. I would qualify the declaration by the High Court that:

a. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People by adding the words subject to the nature of proposed amendment.

198) As regards costs, I would agree that this being a public interest matter, parties shall bear their own costs of the proceedings in the High Court and of these appeals.

The final orders are as set out in the lead judgment of the President of the Court.

Dated and delivered at Nairobi this 20th day of August, 2021.

S. GATEMBU KAIRU, FCIArb

……

JUDGE OF APPEAL

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE, GATEMBU, SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....APPELLANT

AND

DAVID NDII .....1ST RESPONDENT
JEROTICH SEII.....2ND RESPONDENT
JAMES GONDI.....3RD RESPONDENT
WANJIRU GIKONYO.....4TH RESPONDENT
IKAL ANGELEI.....5TH RESPONDENT
ATTORNEY GENERAL.....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....7TH RESPONDENT
SPEAKER OF THE SENATE.....8TH RESPONDENT
KITUO CHA SHERIA.....9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT
DR. DUNCAN OJWANG.....11TH RESPONDENT
OSOGO AMBANI.....12TH RESPONDENT
LINDA MUSUMBA.....13TH RESPONDENT
JACK MWIMALI.....14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT
THE STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED KENYA TASKFORCE.....16TH RESPONDENT
BUILDING BRIDGES NATIONAL SECRETARIAT.....17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE.....18TH RESPONDENT
THIRDWAY ALLIANCE.....19TH RESPONDENT
MIRURU WAWERU.....20TH RESPONDENT
ANGELA MWIKALI.....21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY.....22ND RESPONDENT
THE SPEAKER OF THE SENATE.....23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA.....24TH RESPONDENT

COUNTY ASSEMBLY OF KWALE.....25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....26TH RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER.....27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU.....28TH RESPONDENT
COUNTY ASSEMBLY OF TAITA TAVETA.....29TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA.....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....34TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI.....36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU.....37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI.....38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA.....41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI.....42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU.....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI.....52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET.....59TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA.....63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY.....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....67TH RESPONDENT

COUNTY ASSEMBLY OF KISII.....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY.....70TH RESPONDENT
PHYLISTER WAKESHO.....71ST RESPONDENT
254 HOPE.....72ND RESPONDENT
THE NATIONAL EXECUTIVE OF
THE REPUBLIC OF KENYA.....73RD RESPONDENT
JUSTUS JUMA.....74TH RESPONDENT
ISAAC OGOLA.....75TH RESPONDENT
MORARA OMOKE.....76TH RESPONDENT
RTD. HON. RAILA ODINGA.....77TH RESPONDENT
ISAAC ALUOCHIER.....78TH RESPONDENT
UHURU MUIGAI KENYATTA.....79TH RESPONDENT
PUBLIC SERVICE COMMISSION.....80TH RESPONDENT
THE AUDITOR GENERAL.....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI).....82ND RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT).....1ST APPELLANT
HON. RAILA AMOLO ODINGA ..... 2ND APPELLANT

AND

DAVID NDII & 76 OTHERS .....RESPONDENTS
KENYA HUMAN RIGHTS COMMISSSION.....1ST AMICUS CURIAE

DR. DUNCAN OJWANG.....2ND AMICUS CURIAE
OSOGO AMBANI.....3RD AMICUS CURIAE
LINDA MUSUMBA.....4TH AMICUS CURIAE
JACK MWIMALI .....5TH AMICUS CURIAE

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
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As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)

CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT

AND

DAVID NDII & 73 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
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CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA.....APPELLANT

AND

DAVID NDII & 82 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020

****

As Consolidated with
Constitution Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)

JUDGMENT OF SICHALE, JA

On **13th May, 2021,** the High Court, (**Ngugi, Odunga, Ngaah, Mwita** and Matheka**, JJ**) delivered a judgment that has been the subject of highly contested appeals before us. The background to the consolidated appeals, the grounds (and cross-appeal), the rival oral and written submissions of counsel and litigants in person as well as those of amicii are aptly captured in the lead judgment of **Musinga, (P)** and I need not rehash on them.

[A]. THE BASIC STRUCTURE DOCTRINE

One of the most contested issues in this appeal is whether the Basic Structure Doctrine is applicable in Kenya. I shall therefore

endeavour to address this issue before delving into the other issues raised in the consolidated appeals. On the doctrine of basic structure, at paragraph 474(g) of the impugned judgment, the learned judges held as follows:

> ***"(g) While the Basic Structure of the Constitution cannot be altered using the amendment power, it is not every clause in each of the eighteen chapters and six schedules which is inoculated from non-substantive changes by the Basic Structure Doctrine. Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, unamendable: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of a "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the***

constitutional history; and other non-legal considerations permitted by our canon of constitutional interpretation principles".

As stated above, a key issue is whether the doctrine of basic structure is applicable in Kenya. The appellants and the respondents in support of the appeal came out strongly challenging the High Court's finding on its applicability in Kenya. On the other hand, the respondents opposed to the appeal came out in equal measure in support of the findings of the High Court. Both sides of the divide relied on scholarly writings, decided cases in Kenya and elsewhere as well as the history, text and context of the 2010 Constitution. It is noteworthy to point out that the scholars themselves were not in agreement on the applicability of the basic structure doctrine in Kenya. **Prof. Migai Aketch** and **Prof. Charles Manga Fombad** supported the notion of non-applicability of the basic structure doctrine in Kenya whilst **Dr. Ojwang, Dr. Linda Musumba** and **Dr. Osogo** supported the notion of the applicability of the basic structure doctrine.

Be that as it may, the respondents opposing the appeal expressed fear that if the legislature is left unchecked, the 2010

Constitution may be dismembered and mutilated to the extent of it being "*a shell*" of a Constitution. No doubt, the respondents' deep rooted fear is informed by the history of lack of constitutionalism in Kenya. It is for this reason that the respondents opposed to the appeal urged us to find that the basic structure doctrine is rooted in Kenya's history, text and experience as well as comparative constitutional theory in the form of decided cases and scholarly works. It was their argument that courts must reconcile "**contradictions**" "**draftsmanship gaps**", "**vagueness**" and "**phraseology**" in the Constitution and arrive at the conclusion that the basic structure doctrine is applicable in Kenya for the safety of the 2010 Constitution. In support of their contention that courts are called to give life to the Constitution, they relied on the advisory opinion In ***The Matter of The Speaker of the Senate & another [2013] eKLR at para. 156*** wherein the Supreme Court held:

> ***"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 ... the constitutional text and letter may not properly express the minds of the framers, and the minds and***

hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras".

The respondents opposed to the appeal maintained the position that although the 2010 Constitution does not expressly prohibit amendments, there is an implicit prohibition contained in the spirit of the Constitution. To this end, reliance was placed on the decision of **Martha Kerubo Moracha vs. University of Nairobi [2021] eKLR** wherein it was held:

"in interpreting the Constitution, a Court must always remain alive to the truism that a Constitution has a structural posture. It has the main framework and pillars forming its 'core and an unalienable soul'. That is the basic structure of the Constitution. Such a structure is so sacred that it cannot even be undermined by a constitutional amendment. This is the doctrine variously referred to as the "basic structure doctrine" or the doctrine and theory of unamendability of "eternity clauses" or the doctrine and theory of "constitutional entrenchment clauses" or the doctrine and theory of "unamendable constitutional provisions" or the doctrine and theory of "unconstitutional constitutional" clauses.

They also placed reliance in the ***Commission for the Implementation of the Constitution vs. The National Assembly & 2 Others [2013] eKLR***, wherein **Lenaola, J** (as he then was) held that:

> ***"...where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution".***

It was their further contention that our Supreme Court has not banned the use of foreign material, and that in ***Jasbir Singh Rai & 3 others vs. Estate of Tarlochan Singh Rai & 4 others [2013] eKLR,*** they stated:

> ***"while our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weakness of such jurisprudence so that ours is suitably enriched"***

And that:

> ***"references to foreign cases will have to take into account these peculiar Kenyan needs and contexts" and that "the country's history has to be taken into consideration"*** *[see* ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] at 232; Judges & Magistrates Vetting Board & others v. Centre for Human Rights & Democracy & 11 others [2014] eKLR paragraph 206****].*

Then there are scholarly writings that the respondents opposed to the appeal called to their aid. These included a German Scholar, **Professor Dietrich Conrad** on "**implied limitations**" who observes that:

> ***"Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority***".

In support of the contention that the Constitution also has the unspoken language, reliance was placed on scholarly writings of **Yaniv Roznai in "Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford University Press, 2017) 215]**" where he states:

> ***"In order to 'find' unamendable basic principles, one has to resort to... interpretation of the constitution as a coherent whole: 'it is, after all, a constitution and not just a disjointed collection of constitutional pieces which must be interpreted'. According to this approach, the language of the constitution is not merely the explicit one, but also the implicit one... _ By using a structural interpretation, the interpreter can discern whatever is implicitly written between the lines from the constitution's internal architecture - interactions and connections between different constitutional structures – and the text as a whole. It is ... a matter of reading 'the document holistically***

and attend [ing] to its overarching themes'. In holistic constitutionalism, 'various parts are understood and treated as dependent on the integrity of the whole'. Therefore, holistic interpretation considers the constitution's surrounding values and principles, basic structure, constitutional history, preambles, and 'basic principles' provisions". [page 215]".

The respondents opposed to the appeal argued that notwithstanding the fact that the 2010 Constitution does not expressly bar amendments, it does so implicitly as one has to pay attention to its "**overarching themes**", and/or the '**spirit**' of the Constitution. Heavy reliance was also placed on the Indian Supreme Court decision of ***Kesavananda Bharati vs. State of Kerala, 1973 4 SCC 225: A/R 1973 SC 1461*** (the **Kesavananda** decision). The **Kesavananda** decision by a majority of 7 to 6 held that there are some provisions in the Indian Constitution that form the basic structure of a Constitution and hence are unamendable, not even where the prescribed procedures are adhered to.

On the other hand, the appellants and the respondents in support of the appeal were clear – the basic structure doctrine is not applicable in Kenya. They urged us to find that the 2010 Constitution

has sufficient safeguards that militate against hyper amendments of yesteryears. The appellants and the respondents supporting the appeal also sought to rely on case law, decided cases, the history, text and context of the 2010 Constitution. These included: In ***Council of Governors vs. the Attorney General & 7 others [2019] eKLR***, wherein the Supreme Court warned:

> ***"Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be "unduly strained". It should avoid excessive peering at the language to be interpreted".***

On the invocation of the "**spirit of the Constitution**", reliance was placed on a decision of South Africa, ***In the decision of the Premier of KwaZulu Natal v. President of South Africa [1995] CCT 36/95),*** wherein the Constitutional Court of South Africa held:

> ***"[47'The reliance upon the "spirit" of the Constitution is, in my view, misconceived. There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable".***

Back home, the appellants and the respondents in support of the appeal drew our attention to the decision in ***Jasbir Singh Rai &***

3 others vs. Estate of Tarlochan Singh Rai & 4 others *(supra)* wherein the Supreme Court cautioned on the use of precedent from other jurisdiction when they held that:

> "***In the development and growth of our jurisprudence, common wealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country".***

Thus far, how have the Kenyan Courts in some of their decisions interpreted Chapter 16 of the Constitution on amendments? There are several decisions that speak to amendments as provided in Article 16 of the 2010 Constitution. In the matter of the ***Speaker of the Senate & another [2013] eKLR***, the Supreme Court at para. 284 stated:

> ***"The second way, in which the Senate may canvass for expansion of its mandate, is to initiate an amendment of the Constitution through referendum as articulated under Article 255(1) of the Constitution, which states:***
>
> ***"A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and***

approved in accordance with clause (2) by a referendum, if the amendment relates to the following matters ...”

Further, in the decision of ***The Attorney General & another v Randu Nzai Ruwa & 2 others [2016] eKLR***, this Court (**Musinga, Ouko, Kiage, M’ Inoti & J. Mohammed,JJ.A**) held that the people may amend the 2010 Constitution by a referendum to alter the territory of Kenya, i.e to give effect to a secession. At para. 56 & 57, this Court stated:

“However, Articles 255, 256 and 257 of the Constitution provide for the amendment of the Constitution and the manner of effecting the proposed amendment. Article 255 (I) states as follows:

> ***A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum. If the amendment relates to any of the following matters:***

(a) The supremacy of this Constitution;
(b) The territory of Kenya;
(c) The sovereignty of the people;
(d) The national values and principles of governance mentioned in Article 10(2) to (d);
(e) The Bill of Rights...

There is therefore a constitutional way of seeking to amend the Constitution to define the territory of

Kenya and the sovereignty of the people, among other issues. That in essence implies that we, the people of Kenya, in adopting, enacting and giving the new Constitution to ourselves and to our future generations. (as the preamble states), we recognized a constitutional right to secession. However, that can only be done in the manner stipulated under the Constitution and not otherwise".

Similarly, in the ***Senate & 48 others v Council of County Governors and 54 others [2019] eKLR, Civil Appeal No. 200 of 2015,*** this Court (**Waki, Kiage, Gatembu, Sichale & Otieno Odek, JJ.A**) held:

"50. In this matter, Article 255(I) (i) of the Constitution expressly states that any alteration to the objects, principles and structure of devolved governments can only be done by way of referendum. If a finding is made that the Amendment Act alters the structure of devolved government, it would follow that the alteration is unconstitutional as no referendum was conducted prior to enactment of the Amendment Act".

And in ***Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR, Civil Appeal No. 145 of 2015,*** this Court (**Nambuye,J.A)** held as follows:

"From the above assessment, protection of a right or fundamental freedom is dependent on either an entrenchment of such a right in the constitution or through a legislation. The Constitution itself has

provided for methods for such an entrenchment. Article 255 (2) makes provision for an amendment to the constitution through a referendum; Article 256, through legislation; and Article 257 through popular initiative. None of these cover a judicial pronouncement. It is therefore my finding that the issue as to whether "sexual orientation" falls into the elements for non-discrimination enshrined in Article 27 (4) as found by the Judges, has to be put to the Kenyan people through any of the above methods with a view to entrenching in the Constitution in order for it to crystalize the right accorded to the 1st respondent by the impugned judgment. Short of the above in my view, it only amounts to an aspirational right".

Then there is the decision of ***Titus Alila & 2 Others suing on their own behalf and as the Registered Officials of the Sumawe Youth Group vs. Attorney General & Another [2019] eKLR,*** in interpreting Article 255 (I) of the Constitution on matters that require amendment through a referendum **F. Ochieng, J** held as follows:

At paragraph 47: ***"To my mind, that provision (Article 255 (I) is very clear about the proposed amendments to the constitution which must be approved by a referendum***"

At paragraph 50: ***"the distinction between amendments to the constitution which may be made without a referendum and those that can only be made through a referendum has been made by the constitution***

itself. Therefore, there is no interpretation required in that respect"

In my view, the above decisions underscore the fact that the 2010 Constitution is amendable, subject to the process and methodology of amendment set out in Articles 255-257of the Constitution.

As regards jurisprudence from foreign lands, reliance was placed on several decisions including that of ***Phang Chin Hock V. Public Prosecutor – Federal Court Criminal Appeal No. 27 of 1977, FC***, ***Kuala Lumpur Suffian LP, Wan Suleiman & Syed Othman FJJ 21 August, 1979*** where an appellant had challenged amendments to the Federal Constitution that paved the way to his arraignment. In acknowledging that a Constitution can be reviewed from time to time as its not cast in stone, the court observed:

"If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, Article 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiworks, it would have been perfectly easy for them to so provide; but nowhere in

the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbor such intention.
On the contrary apart from Article 159, there are many provisions showing that they realized that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) polity, a living document that is reviewable from time to time in the light of experience and, if need be, amended ...”

In another decision of ***Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 – Federal Court Civil Appeal No. 157 of 1975*** in finding merit in an amendment made in line with changing circumstances, the Court held:

“It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with “power of formal amendment”. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country’s growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later”.

On the question of '**explicit**' and '**implicit**' provisions in a Constitution, reliance was placed on the Singaporean decision of ***Teo Soh Lung vs. Minister of Home Affairs [1989] \ SLR (R) 461*** wherein its High Court held:

> "***If the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But Art 5 of the Constitution does not put any limitation on the amending power.***
>
> ***...***
>
> ***I am of the view that the Kesavananda doctrine is not applicable to our Constitution. Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution ..."***

Closer home, in Zambia, in the decision of the **Zambia Democratic Congress vs. Attorney General** SCZ judgment No. 37 of 1999, on the question of applicability of the doctrine of basic structure, the Court held:

> ***"The entrenched provisions can be altered. The theory of basic structure or framework does not exist in Zambia. Until such time that the electorate decides to vote in a party into government that will effect alterations to the constitution that the applicant has in mind, the whole idea cannot be***

achieved under the present Constitution or indeed under the 1991. The answer lies in politics rather than under the law. The Court cannot dig into and delve into that domain. It is a political question.

The second category consist of cases in three countries where the courts were actually invited to apply the Doctrine. The first of these countries is Tanzania, where it came up in the Court of Appeal case of Mtikila v. Attorney General. The petitioner argued that a proposed 8th Constitution (Amendment) Act, 1992, amending article 39 of the Tanzanian 1977 Constitution was a violation of article 21 (1), dealing with the citizen's right to participate in governance. The petitioner invited the Court to declare the amendment unconstitutional on the grounds that it meddled with the basic structure of the Constitution and in doing so invited the Court to apply the Indian Basic Structure Doctrine.
The Court of Appeal, after describing the doctrine as nebulous with no agreed yardstick to determine what it means declared that it had no place in the Tanzanian Constitutional framework. In the Court's opinion, what the constitution did was to provide safeguards and not basic structures and once the amendment procedure was followed, then the change was valid".

And in Uganda, the Supreme Court in ***Paul K. Ssemogerere & others vs. AG, Supreme Court Constitutional Appeal No. 1 of 2002*** discounted the **Kesavananda** case by stating:

"... Those who frame the Constitution also know that new and unforeseen problems may emerge; that problems once considered important may lose their importance because priorities have changed; that

solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of Government to another .... The framers of the Constitution did not put any limitations on the amending power because the end of a Constitution is the safety; the greatness and well-being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution, (Para 959).
This passage indicates that written Constitutions are not static and are liable to be amended. There is an obvious implication in this passage that courts have to interpret Constitutional provisions to bring the Constitution in line with current trends".

There is also another recent Ugandan decision, ***Male Mabirizi & Others vs. A.G. of Uganda, Constitutional Petition 49 of 2017*** wherein the Court rendered itself as follows:

"I have gone to considerable length to review these selected decisions on the issue of Basic Structure Doctrine in the interpretation of provisions of the Constitution, to demonstrate a number of things. First, is that the doctrine is still at a nascent stage of its development; and so it has not yet gained universal appeal. Second, is that even in India, where it originated and has come up for consideration several times, the matter has not been authoritatively or conclusively settled; as is manifested by the ambivalence discernible in the decisions of the Indian Supreme Court on the matter. Third, is the narrow or thin margin – in the for and against decision – of the

Indian Supreme Court on both occasions when the matter was placed before a panel constituting the highest number of judges; pointing to the fact that the Court's decision could have gone either way on both occasions".

In particular, **Arach-Amoko**, JSC stated:

"In the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution, which it considers are fundamental features of the Constitution. They carefully entrenched these provisions by various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fetter Parliament's powers to do so and thereby deny it the freedom to treat the Constitution with reckless abandon".

And in Tanzania, the Court of Appeal in ***Hon. Attorney General of Tanzania vs. Reverend Christopher Mitikila, C.A No. 45 of 2009***, whilst rejecting the doctrine of basic structure stated:

"We agree with Prof. Kabudi that the doctrine is nebulous as there is no agreed yardstick of what constitutes basic structure of a constitution ... We may also point out that even Prof. Conrad himself conceded that there is no litmus test as to what constitutes basic structure. He wrote in one of his essays carrying the title "Basic Structure of the Constitution and Constitutional Principles": Finally,

a note of caution might not be out of place. The jurisprudence of principles has its own distinct dangers arising out of the flexibility and lack of precision of principles as well as their closeness to rhetorical flourish. This might invite a loosening of judicial discipline in interpreting the explicit provisions of the Constitution ... Tightening of judicial scrutiny would be necessary in order to diminish the dangers of opportunistic use of such principles as mere political catchwords".

and that:

"We have already seen that Art 98(1) provides for the alteration of any provision of the Constitution, that is, there is no article which cannot be amended. In short there are no basic structures. What are provided for are safeguards. Under Art 98(1)(a) constitutional amendments require two-thirds vote of all Members of Parliament while Art 98(1)(b) goes further that: "A Bill for an Act to alter any provisions of the Constitution or any provisions of any law relating to any of the matters specified in List Two of the Second Schedule to this Constitution shall be passed only if it is supported by the votes of not less than two-thirds of all Members of Parliament from Mainland Tanzania and not less than two-thirds of all Members of Parliament from Tanzania Zanzibar." ... These eight matters could have been basic structures in the sense that Parliament cannot amend them. However, they are amendable once the procedure for amendment is followed. So, there is nothing like basic structures in our Constitution. ... It is our considered opinion that the basic structure doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case persuasive, when considering our Constitution".

The above decisions demonstrate that in Malaysia, Singapore, Zambia, Uganda and Tanzania, courts have rejected the doctrine of basic structure on the reasoning that a Constitution being a living document must inevitably change as society progresses; that a living Constitution must be flexible to allow for a country's growth and the review of a Constitution is essential so as to cater for new and unseen future problems and hence it is inadvisable to have a Constitution cast in granite (read stone).

To my mind, I have no illusion whatsoever that the Kenya's constitutional past was indeed, a dark past. The pre-2010 Constitution was misused and abused for selfish political gains. Several instances stand out. In **1974**, **Paul Ngei**, the then Minister in the late **President Kenyatta's** government was found guilty of an election offence and by operations of the law was barred from running in the ensuing by-election. To 'save' him, H. E. the late **President Kenyatta** passed into law, a bill tabled in Parliament and passed into law in a single afternoon, pardoning **Hon**. **Paul Ngei** of an election offence. Then there was the **1982** Constitutional amendment that

dealt a death blow to Multi-Party Democracy and turned Kenya into a dejure single Party State of the then all-Powerful Kenyan African National Union (KANU). The reason for the hastily carried out amendments or dismemberments of the pre-2010 Constitution are not difficult to discern. The power to amend the Constitution was provided in Section 47 of the pre-2010 Constitution and this power was reposed in Parliament to the exclusion of the proverbial **Wanjiku.** Section 47 provided as follows:

"Section 47 (1)

> ***1. Subject to this section, Parliament may alter this Constitution.***
>
> ***2. A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members).***
>
> ***6. In this section:***
>
> ***(a) references to this Constitution are references to this Constitution as from time to time amended; and***
>
> ***(b) reference to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution,***

the suspension or repeal of that provision and the making of a different provision in the place of that provision".

It is important to point out that Section 47 of the pre-2010 Constitution, unlike the 2010 Constitution provided for a Parliamentary process and there was no provision of amendments by a popular initiative. In my view, the provisions of Section 47 of the pre-2010 Constitution are akin to the provisions of Article 368 of the Indian Constitution which explicitly reposed in Parliament the power to amend the Constitution by a simple majority. The Indian Constitution provides:

> "***368. [Power of Parliament to amend the Constitution and procedure therefor:***
>
> ***[(1)] Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend the Constitution by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.]***
>
> ***[(2)] An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [it shall be presented to the***

President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill. Provided that if such amendment seeks to make any change in-

(a) article 54, article 55, article 73, 9 [article 162, article 241 or article 279A] or

(b) chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

The amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

[(3) Nothing in article 13 shall apply to any amendment made under this article.]

[(4) <u>No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any Court on any ground. (Emphasis added)</u>

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.]"

Our pre-2010 Constitution, like the Indian Constitution did not bar amendability. It is against the backdrop of the Indian Constitution where there is no provision for amendment of the Constitution by the constituent power but the power to amend being reposed solely in Parliament; that the **Kesavananda** decision was made. In his scholarly writings, **Yaniv Roznai** traces the history of the basic structure doctrine and how it was developed in response to Prime Minister **Indira Gandhi's** attempts to amend the constitution. He states:

> ***"The Indian Constitution lacks any unamendable provisions. Also, Indian jurisprudence, rooted in British tradition, initially rejected the notion of implicit unamendability. That position, however, was revised in the 1960 and 1970s following Prime Minister Indira Gandhi's far-reaching attempts to amend the constitution, leading eventually to the judicial development of the 'Basic Structure Doctrine'. According to this doctrine, the amendment power is not unlimited; rather, it does not include the power to abrogate or change the identity of the constitution or its basic features" [page 42].***

Yaniv Roznai provides a further criticism of the **Kesavananda** case for failure to identify the unamendable clauses. He writes:

"***The Kesavananda case did not provide a precise list of unamendable features that constituted the Constitution's Basic Structure, thus forming a sort of common law doctrine that develops on a case by case basis***" and that the **Kesavananda** Judgment created a "***Constitutional quicksand***"."

In his written submissions, **Prof. Charles Manga Fombad**, amicus curiae on the basic structure doctrine outlines the essence of the "**... much acclaimed Indian Basic Structure**" as follows:

"The Basic Structure Doctrine in a Nutshell:
This much acclaimed Indian Basic Structure Doctrine owes its origin to the famous Supreme Court decision in Kesavananda Bharati Sripadagalvaru v. State of Kerala, although the issue had been raised in a number of earlier cases. According to this doctrine, even in the absence of explicit limitations on constitutional amendment powers, parliament's amendment powers are not unlimited. There are, as a result, implied constitutional limitations that render an amendment unconstitutional if it infringes, negates or substitutes the basic structure of the constitution regardless of whether all the formal or procedural requirements of amendment have been met".

Prof. Fombad points out that when the doctrine of basic structure was developed, India was dealing with ***"... India's 20th Century Independence Constitution of the 1950s whereas, African Courts are now dealing with "made in Africa***"

Constitutions of the 21st Century" and that due to the changed circumstances, the **Kesavananda** decision is not relevant to our circumstances. This Court has had occasion to express its reservations in adopting foreign concepts to our home grown Constitution, in **Kenya *Airports Authority vs. Mitu-Bell Welfare Society [2016] eKLR,*** this Court stated:

> ***"Whereas citation and reliance on persuasive foreign jurisprudence is valuable, foreign experiences, values and aspirations of other countries should rarely be invoked in interpreting the Kenyan Constitution. The progressive needs of the Kenyan Constitution are different from those of other countries" (emphasis added).***

Prof. Fombad sums up the various ways, the 2010 Constitution can be amended. These are:

> ***"(i) An amendment by Parliament with a special majority;***
> ***(ii) An amendment by Parliament subject to approval at a national referendum; and***
> ***(iii) An amendment by popular initiative subject to approval at a national referendum".***

In my view, the position obtaining in India in so far as it related to its Constitution was not any different from the position obtaining in Kenya before the promulgation of the 2010 Constitution on **27th**

August, 2010. The Indian Parliament has the exclusive power to amend the Constitution. Our Parliament had similar power to amend the Constitution, prior to the 2010 Constitution. The situation obtaining in Kenya after the promulgation of the 2010 Constitution is totally different. There are explicit provisions on the amendments of the Constitution as well as in-built mechanism which limit Parliament in amending the Constitution. The methodology to amend the entrenched provisions is also clearly spelt out. There are also clearly spelt out entrenched provisions. Suffice to state that the Constitution itself anticipated that it can be amended and it provided for its own amendment procedures. In the same Constitution, there are strictures as regards entrenched provisions which require a referendum and which ones do not. The ones listed in Article 255 (1) (a) –(j) require an approval in a referendum. These are:

> ***"(a) the supremacy of this Constitution;***
> ***(b) the territory of Kenya;***
> ***(c) the sovereignty of the people;***
> ***(d) the national values and principles of governance referred to in Article 10 (2) (a) to (d);***
> ***(e) the Bill of Rights;***
> ***(f) the term of office of the President;***

(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;
(h) the functions of Parliament
(i) the objects, principles and structure of devolved government; or

(j) the provisions of this Chapter'.

Article 255(2) then states***:***

"(2) A proposed amendment shall be approved by a referendum under clause (1) if—

(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(b) the amendment is supported by a simple majority of the citizens voting in the referendum."

There is a further provision in Article 255 (3)(a) and (b) as relates to amendments without a referendum. Article 255 (3) (a) and (b) provides:

"(3) An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—
(a) by Parliament, in accordance with Article 256; or
(b) by the people and Parliament, in accordance with Article 257"

The High Court appreciated as much and at part of paragraph 473 of its judgment, it stated:

"To be sure, there is no clause in the Constitution that explicitly makes any article in the Constitution unamendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited. The structure and history of this Constitution makes it plain that it was the desire of Kenyans to barricade it against destruction by political and other elites. As has been said before, the Kenyan Constitution was one in which Kenyans bequeathed themselves in spite of, and, at times, against the Political and other elites. Kenyans, therefore, were keen to ensure that their bequest to themselves would not be abrogated through either incompatible interpretation, technical subterfuge, or by the power of amendment unleashed by stealth".

In my view, whereas the High Court correctly found that there are no explicit provisions in the 2010 Constitution barring amendments, the judges erred in finding that the bar to amendment is implicit. As stated above, the pre-2010 Constitution did not have provision for the amendment of the Constitution by way of a popular initiative, and neither did Parliament recognize the notion of implicit unamendability. Indeed, the issue in ***Njoya & Others vs. Attorney General & Others [2004]*** was whether Parliament could, in the exercise of its amendment power under Section 47 of the Pre-2010

Constitution, repeal the Constitution. In a landmark decision delivered on **25th March, 2004**, Ringera, J held as follows:

> "***With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory. All Governmental power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power - the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualized by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognise the sovereignty of the people and their constituent power, they would do so only ex abundant cautela (out of an excessiveness of caution). Lack of its express textualization is not however conclusive of its want of juridical status. On the contrary, its power, presence and validity are writ large by implication in the framework of the Constitution itself as set out in sections 1, 1A, 3 and 47. In that regard I accept the broad and purposive construction of the Constitution canvassed by counsel for the Applicants. I accept that the declaration of Kenya as a sovereign Republic and a democratic multi-party state are pregnant with more meaning than ascribed by the respondents. A***

sovereign Republic is a sovereign people and a democratic state is one where sovereignty is reposed in the people. In the immortal words of Abraham Lincoln, it is the government of the people, by the people, and for the people. The most important attribute of a sovereign people is their possession of the constituent power. And lest somebody wonder why, the supremacy of the Constitution proclaimed in section 3 is not explicable only on the basis that the Constitution is the supreme law, the grandnorm in Kelsenian dictum; nay, the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves. And as I shall in due course demonstrate the powers of Parliament under section 47 of the Constitution are a further recognition that the constituent power reposes in the people themselves. In short, I am of the persuasion that the constituent power of the people has a juridical status within the Constitution of Kenya and is not an extra-constitutional notion without import in constitutional adjudication".

It is the **Njoya** decision that paved the way for the "**amendment**" of the pre- 2010 Constitution by constituent power via a referendum. This was in recognition of the supremacy of the sovereignty of the people who then exercised that sovereignty in the referendum that birthed the 2010 Constitution. In my view, the Njoya decision was our '**Kesavananda moment**' and to paraphrase **Yaniv Roznai**, this

may have been as a result of the late **President Kenyatta's** and the late **President Moi's** "**far reaching attempts to amend the Constitution**" and the need to curb those excesses.

As history will attest, the clamour for a new Constitution was long and arduous, but that notwithstanding, when the Kenyan people finally bequeathed themselves a new Constitution, they ensured that it would be free from hyper-amendments. Indeed, the 2010 Constitution was informed by Kenya's dark past and its citizenry were determined "***Never Again***" shall we have a Constitution that can be amended at will. In the formulation of the 2010 Constitution, a conscious effort was made to ensure that we do not have hyper-amendments. This conclusion is supported by the findings contained in the Final Report of the Constitution of Kenya Review Commission (CKRC) of 2005 which mirror Chapter 16 of the Constitution. CKRC reported:

> "
>
> ***(a) The new Constitution should have some entrenched provisions – for example, on human rights, that Parliament does not have power to amend;***

(b) The new Constitution should address the issue of the relationship between the various organs of State and must deal with checks and balances;

(c) The new Constitution should have a supremacy clause that should state that the Constitution is binding on all the people and all organs of State and at all levels;

(d) The Constitution should only be amended by at least 75% of members of Parliament; and

(e) The amendment procedure should make the following distinction:

(i) A Bill seeking to amend an entrenched provision should not be passed unless:

- ***It receives the support of two thirds of members of Parliament at the second and third reading; and subsequently,***
- ***It receives approval at a referendum.***

(ii) The entrenched provisions should include:

- ***The procedure on amending the Constitution itself;***
- ***The provisions establishing the Republic of Kenya;***
- ***The provisions of sovereignty of the people;***
- ***The provisions on supremacy of the Constitution;***
- ***The Bill of Rights;***
- ***Separation of powers;***
- ***Provisions on existence and powers of independent commissions and bodies".***

Following the recommendations of the CKRC and true to word, Chapter 16 of the 2010 Constitution is dedicated to "**Amendment of the Constitution**". It provides:

> "255(1***) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—***
> ***(a) the supremacy of this Constitution;***
>
> ***(b) the territory of Kenya;***
>
> ***(c) the sovereignty of the people;***
>
> ***(d) the national values and principles of governance referred to in Article 10(2)(a) to (d);***
>
> ***(e) the Bill of Rights;***
>
> ***(f) the term of office of the President;***
>
> ***(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;***
>
> ***(h) the functions of Parliament;***
>
> ***(i) the objects, principles and structure of devolved government; or***
>
> ***(j) the provisions of this Chapter".***
>
> ***(2) A proposed amendment shall be approved by a referendum under clause (1) if—***
>
> ***(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and***

(b) the amendment is supported by a simple majority of the citizens voting in the referendum.

(3) An amendment to this Constitution that does not relate to a matter specified in clause

(1) shall be enacted either—

(a) by Parliament, in accordance with Article 256; or
(b) by the people and Parliament, in accordance with Article 257

Amendment by parliamentary initiative.

256. (1) A Bill to amend this Constitution—

(a) may be introduced in either House of Parliament;

(b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;

(c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House; and

(d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two-thirds of all the members of that House.

(2) Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill.

(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—

(a) the Bill, for assent and publication; and

(b) A certificate that the Bill has been passed by Parliament in accordance with this Article

(4) Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

(5) If a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255 (1)—

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255 (2), the President shall assent to the Bill and cause it to be published.

Amendment by popular initiative.

257. (1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the

requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10)".

The clear text and language of Chapter 16 is that there are explicit provisions in the 2010 Constitution providing for amendment and there is no reason to look outside the Constitution and import

the Basic Structure doctrine on the basis that the Constitution has the unspoken language and/or implicit provisions.

It has now been slightly more than ten (10) years since the Constitution was promulgated and to the credit of the drafters of the Constitution, the 21 attempts to amend the Constitution, (19 were through a Parliamentary initiative whilst 2 (**Okoa Kenya and Punguza Mzigo, Punda Amechoka**) were through a popular initiative) have all fallen by the wayside. These are tabulated in the written submissions of **Mr. Ogeto**, the Solicitor General (appearing for the Hon. Attorney General) as follows:

> ***"(i) The Constitution of Kenya (Amendment) Bill, 2013***
>
> ***3. The objective of the bill was to amend Articles 260 of the Constitution to remove the office of Members of Parliament, Members of County Assemblies, Judges and Magistrates from the list of designated State offices. This bill was not progressed beyond the Second Reading in the National Assembly.***
>
> ***(ii) The Constitution of Kenya (Amendment) (No. 2) Bill, 2013***
>
> ***4. The objective of the bill was to amend Articles 204 of the Constitution so as to remove the disbursement of the Equalization Fund from the purview of the national government and transfer it to the constituencies in which the marginalized areas exist. While the bill was passed by the National Assembly, the same was not passed by the Senate.***

(iii) the Constitution of Kenya (Amendment) Bill, 2015

5. The objective of the bill was to amend the Constitution to give effect to the two-thirds gender principle through the creation of special seats that will ensure that the gender principle is realized in Parliament and further that the State takes legislative policy and other measures including the setting of standards, to achieve the realization of the principle.

(iv) The Constitution of Kenya (Amendment) Bill, 2015

6. The bill sought to change the date for conducting the general elections. The bill was lost at the Second Reading.

(v) The Constitution of Kenya (Amendment) (No. 4) Bill, 2015

7. The objective of the bill was to amend the Constitution to give effect to the two thirds gender rule as provided for in the Constitution. The bill was not passed.

(vi) The Constitution of Kenya (Amendment) (No. 5) Bill, 2015

8. The objective of the bill was to prevent the office of a Member of Parliament from becoming vacant for failure to attend eight sittings of the relevant House during any session of Parliament. This bill did not go beyond the First Reading.

(vii) The Constitution of Kenya (Amendment) (No. 6) Bill, 2015

9. The objective of the bill was to amend the Constitution to ensure that the membership of the National Assembly and the Senate conforms to the two-thirds gender principle provided for in Article 81(b) of the Constitution. The bill was not passed.

(viii) The Constitution of Kenya (Amendment) Bill, 2016

10. The objective of the bill was to give effect to Article 2 (5) of the Constitution of Kenya which entrenches the general rules of international law as being part of the Law of Kenya. It asserted the immunities recognized under customary law for the President and Deputy President. The bill did not proceed beyond the Second Reading.

(ix) The Constitution of Kenya (Amendment) Bill, 2016

11. The objective of the bill was to amend various provisions of the Constitution dealing with electoral disputes. The bill was not passed.

(x) The Constitution of Kenya (Amendment) (Bill,2016)

12. The purpose of the bill was to amend Section

15 of the Sixth Schedule to the Constitution so as to allow for the extension of the period for transfer of functions from the National Government to the County Governments by a maximum of three years after the expiry of the three years' period currently specified in Section 15 of the Sixth Schedule. The bill did not proceed beyond the First Reading in the Senate.

(xi) The Constitution of Kenya (Amendment) (No. 2) Bill, 2016

13. The bill sought to amend the Constitution to reduce the number of constituencies to 46, and to place Nairobi under the National Government. The bill did not proceed beyond the First Reading in the Senate.

(xii) The Constitution of Kenya (Amendment) Bill, 2017

14. The purpose of the bill was to amend the Constitution by inserting a new Article 206A to provide for the establishment of the National Government Constituencies Development Fund and

two new Articles 208A and 208B to provide for the establishment of the National Government Affirmative Action Fund and the Parliamentary Oversight Fund, respectively. The bill did not proceed beyond the First Reading.

(xiii) The Constitution of Kenya (Amendment) Bill, 2018

15. The bill sought to amend the Constitution exclude Nairobi from the ambit of county governments and to place it under the leadership of the National Government. The bill did not proceed beyond the First Reading.

(xiv) The Constitution of Kenya (Amendment) No. 2) Bill, 2018

16. The bill sought to change the date of the general elections. The bill was lost at the Second Reading.

(xv) The Constitution of Kenya (Amendment) (No. 2) Bill, 2019

17. The object of the bill was to amend Article 97(1)(c) of the Constitution to expressly include Kenyans in the diaspora as a special interest group to be catered for in the party lists from which twelve Members are nominated to the National Assembly. The bill did not proceed to the First Reading.

(xvi) The Constitution of Kenya(Amendment) Bill, 2019

18. The object of the bill was to amend the Constitution to provide for the two-thirds gender rule and to provide for the representation of persons with disabilities pursuant to Article 54 of the Constitution. The bill did not proceed beyond the First Reading.

(xvii) The Constitution of Kenya (Amendment) (No. 2) Bill, 2019

19. The bill sought to amend the Constitution so as to restrain the Courts from intervening with matters

pending consideration or being proceeded with before Parliament, the County Assemblies or any of their committees in line with international practice where courts only intervene after Parliament has executed its mandate. The bill did not proceed to the First Reading.

(xviii) The Constitution of Kenya (Amendment) (No. 6) Bill, 2019

20. The bill sought to amend the Constitution to delete reference to the term Cabinet Secretary and substitute with the term "Minister" as was the case with the repealed Constitution and provide for appointment of Ministers from among the Members of Parliament. The bill was not passed.

(xix) The Constitution of Kenya (Amendment) Bill, 2019

21. The object of the bill was to amend the Constitution to make it mandatory for the Independent Electoral and Boundaries Commission to submit a Report to Parliament, containing details of proposed alterations to names and boundaries of constituencies and wards. The bill did not proceed beyond the Second Reading.

(b) Popular Initiative

22. There have been two attempts to amend the Constitution through popular initiative, namely, the Okoa Kenya initiative that was initiated by the Coalition for Reforms and Democracy in 2016 and the Punguza Mzigo initiative, which was initiated by the Third Way Alliance in 2019. The Okoa Kenya Initiative failed at the signature verification stage while the Punguza Mzigo Initiative garnered the endorsement of only one County Assembly, against the constitutional minimum of at least half of the forty-seven County Assemblies"

It is also true that the framers of our Constitution balanced between flexibility and rigidity. To this end, CKRC had recommended that:

> ***"There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes***".

Accordingly, a balance had to be struck to avert violent revolutions against abusive amendments. In "***The politics of Constitutional Change in Kenya since Independence, 1963 – 1969***". **Professor H.W.O. Okoth –Ogendo** underscores the fate of Post-Independence Constitutions. He writes:

> "***Constitutional Systems in Anglophone Africa have not had a happy history, especially during the last decade. Almost without exception the independence documents have either ended up in military dustbins or have undergone change so profound and rapid as to alter their value content and significance beyond recognisance***".

I hear the good Professor saying the Independence Constitutions were so badly dismembered and that if they did not

suffer that fate of dismemberment, it was more likely that the Constitutions would find their way into dustbins following military Coup-detats. The writings of Professor **Okoth-Ogendo** echo the profound words of **John F. Kennedy** in 1962 when he stated:

> "***Those who make peaceful revolution impossible will make violent revolution inevitable".***

It is no secret that the framers of our 2010 Constitution struck that balance between stability and instability by providing for amendments in Chapter 16 of the 2010 Constitution and this being the supreme law of the land, it was desirable to give it a more stable character and free it from hyper amendments. This is important as no society is static and what is good for one generation may not necessarily be good for the next.

In an article "***No generation has the right to impose its own values and political principles on a later generation***", **Prof. Fombad** cites another scholar, ***Colvin de Silva*** who states thus:

> ***"Constitutions are made in terms of the stage of development at which any given society or country has arrived. In terms of that stage of development it looks upon things, and for any generation of people to imagine that it can so completely project itself into infinity of the future so as to be able to decide its own***

generation that it will constrain a future generation or generations forever within the confines of its own postulates is to make the mistake of thinking that any human collectivity is the equivalent of the divinity".

He concludes:

> ***"It is unlikely that the framers of the new or revised African constitutions wanted to prevent future generations from repealing these constitutions. A constituent body is omnipotent only to the extent that it has no powers to destroy or limit the omnipotence of a future constituent body. In short, the present and future generations should not be ruled by the "dead hand" of their ancestors***".

I think it behooves us to recognize that inspite of the supremacy of Constitutions, we cannot, and we should never legislate from the graves, the dead hand. We cannot possibly shackle future generations by what we consider to be noble today.

The other troubling aspect of the impugned judgment is that the High Court came to the conclusion that whatever is amendable will be decided on a case by case basis. They stated:

> ***"Whether a particular clause in the Constitution consists of a "unamendable clause" or not will <u>be fact-intensive determination</u> (emphasis supplied) to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the***

constitutional history; and other non-legal considerations permitted by our canon of constitutional interpretation principles".

The above finding, in my view, poses difficult questions. Who is to carry out "… **the fact intensive determination** …"? And at what stage in the process of Constitutional Change? The appellants told us, and rightly so, that in terms of seeking an advisory opinion, **Wanjiku** has no place as by dint of Article 163(6), this is a preserve of the National Government, a State Organ or a County Government. Article 163 (6) provides:

"(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government"

Since **Wanjiku** does not have the luxury of approaching the Supreme Court under Article 163(6), how does **Wanjiku** get to have an issue subjected to "**fact intensive determination**"? Sight should also not be lost that Judges being human, are not infallible and they should not arrogate unto themselves the unfettered power to validate or invalidate amendments on the basis that there are eternal clauses from their preferred reading of the Constitution. If for a moment we

were to find that Judges are fallible, where will be the unwritten constraint? The absence of constraint, no doubt, leads to uncertainty and absurdity, clearly an unacceptable situation.

In an article by ***Adern Kassie Abebe*** appearing in "***The Substantive Validity of Constitutional Amendments in South Africa***" 131/ [3] South African Law Journal 656 [2014], he writes:

> "***The desirability of imposing fundamental limits on the power of constitutional amendments is contentious. The judicial enforceability of such fundamental limits is even more controversial. The article contends that constitutions may recognize certain fundamental limits on the power of constitutional amendment. The existence of judicially enforceable substantive limits on the amending power may indeed be desirable and even necessary in certain circumstances. The fact of potential abuse of the amendment power, as evidenced in the constitutional history of many African countries, may justify the imposition of some limits on such power. In particular, in countries with a single dominant party, the legislature may not effectively play its role of safeguarding fundamental constitutional principles and provisions. In fact, it may be complacent in undermining such principles ...***
> ***Nevertheless, any such limits on the amending powers of Parliament should be explicitly established, and cannot be implied. The incorporation of immutable guarantees or principles should be the outcome of political consensus, not judicial innovation. Moreover, any conviction that there should be substantive limits on the power of constitutional***

amendment does not necessarily imply that such limits should be judicially enforceable. That power is not inevitable and cannot be left for judicial interpretation or implication. The idea of judicially enforceable implied limits on the power of constitutional amendment is particularly unacceptable in cases where a constitution explicitly outlines the fundamental principles and subjects such principles to amendment, as is the case in South Africa. In the absence of clearly defined and enforceable substantive limits, the judicial control of constitutional amendments will lead to a situation where courts effectively arrogate the role of the people and their elected representatives in defining a polity's 'fundamental' values over which there may be reasonable disagreement. The absence of clearly defined limits also means that every constitutional judge will have his or her own list of what is basic and what is not. The judicial power to define basic social and political values belies the ideal that courts should merely apply settled rules and principles, not discover some vague 'fundamental' values to invalidate the best judgments of the overwhelming majority of the political representatives. In the absence of clearly established substantive limits, and an explicit jurisdiction to enforce substantive limits on constitutional amendments, the power and responsibility of ensuring compliance with any desirable substantive limits lies beyond the courtroom. Only the democratic process or a revolution could legitimately and effectively stymie any temptation to legitimize undemocratic behavior through constitutional amendments." ***(emphasis supplied)***

Similar sentiments on infallibility of judges are expressed in an article "***The Conundrum of Unconstitutional Constitutional***

Amendments" **by Po Jen Yap, Global Constitutionalism 114 (2015).** He writes:

> ***"The people may not be always right, for popular sovereignty is not an absolute guarantee of substantive justice. But neither are judges infallible in their moral deliberations. In these circumstances, the judiciary must cede to the expression of popular sovereignty, not merely because the amendment is an unmistakeable expression of public will, but because this convergence of interests is undisputable evidence of 'the triumph of the political process over the intervening institutional and electoral barriers erected by the separation of governmental powers***"

I agree. It is not correct to elevate judges to the status of demi-gods and just as it is possible to have a distrustful and rogue parliament, it is also possible to have a rogue and distrustful judiciary, more so bearing in mind that the latter are not elected as the people's representatives. I know that as Kenyans, we love to demonise our elected political leaders. We do that all the time, but rarely do we stop to remember "**we get the leaders we deserve**".

I am therefore of the persuasion that the contest of what is amendable and what is not should not be left to be a matter of judicial innovation. Judges, just like Parliamentarians cannot assume

supremacy over all others as indeed, it is the people who are sovereign. Article 1(1) of the 2010 Constitution screams out:

> ***"(1) (1) All sovereign power belongs to the people of Kenya and shall be exercised in accordance with this Constitution".***

The people of Kenya in the exercise of their constituent power in a referendum voted for the amendment /overhaul of the pre- 2010 Constitution. In came the 2010 Constitution with provisions on how it can be amended, '**in accordance with this Constitution'**. On the ultimate expression of the will of the people, I find an article by **Yaniv Roznai** "**Unconstitutional Constitutional Amendments: A study of the Nature and Limits of Constitutional Amendment Powers**" to be telling. He writes:

> ***"Unconstitutional constitutional amendment seems puzzling. The constitution is the highest positive legal norm. The power to amend the constitution presupposes the same kind of power as the one to constitute a constitution. It is a supreme power within the legal system, and as such, it can reach every rule or principle of the legal system. If this power is indeed supreme, how can it limit itself? If it is limited, how can it be supreme? This is the legal equivalent of the 'paradox of omnipotence. Can an omnipotent entity bind itself? Both positive and negative answers to these questions lead to the conclusion that it is not omnipotent. Moreover, if the***

amendment power is a kind of constituent power, then it remains unclear why a prior manifestation of that power prevails over the later exercise of a similar power. Quite the reverse: according to the lex posterior derogate priori principle, a later norm should prevail over a conflicting earlier norm of the same normative status. Finally, the constitution, which expresses the people's sovereign power, binds and guides ordinary law, which expresses the parliament's ordinary power. The common meaning of unconstitutionality is that an ordinary law, inferior to and bound by the constitution violates it. How can unconstitutionality refer to an act carrying the same normative status as the constitution itself..."

The question posed by **Yaniv Roznai is** "... **why a prior manifestation of that power prevails over the later exercise of a similar power**" underscores the people's will to amend the Constitution without a prior manifestation of that power prevailing over the subsequent exercise of similar power.

Suffice to state that, in the 2010 Constitution, Kenyans recognized their constitutional right to amend the Constitution, as long as this is done in the manner provided in the Constitution. If perchance the framers of our Constitution had intended that there be a limitation on the power of amendment, they would have

provided as much. There are no such limitations in Chapter 16 of our Constitution.

In this Court's decision of ***Attorney General & Another v. Randu Nzai Ruwe & 2 Others*** *(Supra)* this Court recognized as much. They stated:

> ***"A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters:*** -
>
> ***(a) The supremacy of this Constitution;***
> ***(b) The territory of Kenya;***
> ***(c) The sovereignty of the people;***
> ***(d) The national values and principles of governance mentioned in Article 10(2) to (d);***
> (e) ***The Bill of Rights...;***
>
> ***There is therefore a constitutional way of seeking to amend the Constitution to define the territory of Kenya and the sovereignty of the people, among other issues. That in essence implies that we, the people of Kenya, in adopting, enacting and giving the new Constitution to ourselves and to our future generations, (as the preamble states), we recognized a constitutional right to secession. However, that can only be done in the manner stipulated under the Constitution and not otherwise".***

At the risk of being repetitive, I reiterate that there is no clause in the 2010 Constitution that prohibits amendments but there is an inbuilt mechanism that provides safeguards and I am of the persuasion that the High Court erred in imposing another hurdle on the basis of an implied provision anchored on the "**spirit**" or "**overarching theme**" of the Constitution. This "**spirit**" and "**overarching theme**" was discounted in the landmark High Court decision of ***Rev. Dr. Timothy Njoya vs. A.G. & Others, Misc. Appl. No. 82 of 2004, (OS),*** when the Court held:

> ***"...An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view".***
>
> ***...This has to be read with the following part of the quotation from Keshava Menon vs. State of Bombay at page 360: "but a Court of law has to gather the spirit of the Constitution from the language of the Constitution".***

In my view, the High Court erred in invoking the Spirit of the Constitution without the need to do so as the language of the

Constitution is clear on amendments. It is also my view, as explained above that the findings of the High Court were not supported by the context, structure and history of the Constitution, 2010.

The upshot of above analysis is that the appellants' appeal on the non-applicability of the basic structure is for allowing subject, however, to the views of the majority members of this bench.

[B]. THE ROLE OF HIS EXCELLENCY, THE PRESIDENT IN THE BBI PROCESS

As regards the role of **His Excellency the President** in the BBI process, **the BBI Secretariat and Hon Raila Odinga** contended that **Hon. Junet Mohamed** and **Hon. Dennis Waweru** were the promoters of the (Amendment) Bill. **The Attorney General** associated himself with the sentiments by the BBI Secretariat that that His Excellency the President was not the promoter of the Amendment Bill but rather the BBI National Secretariat. The respondents in opposition to the appeal on the other hand, submitted that the President's hand was openly manifest in the process leading to the Constitutional Amendment Bill 2020 and that the process was largely driven by the executive.

For a start, Article 131(2)(c) of the Constitution requires of the President to:

"(***c) Promote and enhance the unity of the Nation***".

With a noble intention, on **9th March 2018**, His Excellency, **President Uhuru Muigai Kenyatta** held talks with the former Prime Minister **Honourable Raila Odinga** that culminated in what is now commonly referred to as "**the handshake**". The intention of the handshake was to bring to an end the political disharmony, demonstrations, protests and disgruntlements that arose with the outcome of the Presidential elections held in **August 2017**. The "**handshake"** would then become a political tool to calm the nation that was deeply divided and allow for consensus building. Vide Gazette Notice Number 5154 dated **24th May 2018** and published on **31st May 2020,** His Excellency The President appointed a 14 member team known as *"***The Task Force on Building Bridges to Unity Advisory***"* (The BBI Taskforce) with 2 joint secretaries with a mandate to outline the policy, administrative reform proposals, and implementation modalities for each identified area; and conduct

consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both county and national levels.

Further, the specific terms of reference of the taskforce were as follows:

1. To evaluate the national challenges outlined in the Joint Communique of Building Bridges to a new Kenyan Nation, and having done so, to make practical recommendations and reform proposals that build lasting unity.

2. Outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area and; -

3. Conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both county and national levels.

The taskforce was further required to make periodic written recommendations for action by the government and submit its comprehensive report within 12 months from the date of its official launch. On **23rd October 2019**, the BBI taskforce published a report to be presented to His Excellency the President titled; "**Building Bridges to a united Kenya; from a nation of blood ties to a nation of ideals**". According to the task force, the report was a response from the public on the 9 major national challenges contained in the Joint

Communique issued pursuant to the **9th March 2018**, handshake which were; lack of national ethos; responsibilities and rights of citizenship; ethnic antagonism and competition; divisive elections; inclusivity; shared prosperity; corruption; devolution and safety and security.

On **26th November 2019**, the BBI Taskforce report was presented to His Excellency the President and was subsequently launched by His Excellency together with **Hon Raila Odinga** on **27th November, 2019** at the Bomas of Kenya. Subsequent thereafter, vide a Gazette Notice Special Issue Number 264 dated **10th January 2020,** the Head of Public Service**, Mr. Joseph Kinyua** notified the public that the President had appointed the same members of the BBI taskforce under a different outfit known as ***"The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report"*** *(*The Steering Committee) whose terms of reference were:

1. To conduct validation of the Taskforce Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith based organizations, cultural leaders, the private sector and;

2. Propose administrative policy of Constitutional changes that may be necessary for the implementation of the recommendation contained in the Task Force Report, taking into account any relevant contribution made during the validation period.

Further, the Steering Committee was tasked to collect views from Kenyans within 6 months and submit a comprehensive report to the government by **30th June 2020**. The Steering Committee subsequently submitted its report to His Excellency the President on **21st October 2020,** which was later launched on **26th October 2020** at the Bomas of Kenya in an event presided over by His Excellency the President. The Building Bridges National Secretariat further appointed **Mr. Dennis Waweru** and **Junet Mohammed** as its Co-Chairpersons.

Subsequently after the launch, The Building Bridges National Secretariat commenced the constitutional amendment process where vide a letter dated **18th November 2020,** they made a request to the Independent Electoral and Boundaries Commission (IEBC) for guidance as well as approval for their proposed format to be used in the signature collection in support of the Constitution of Kenya

(Amendment) Bill 2020. I reproduce the aforesaid letter for ease of reference:

"18th November 2020

The Chairperson,
The Independent Electoral and Boundaries Commission,
University Way, Anniversary Towers, 6th Floor,
P.O Box 45371-00100,
Nairobi.

Dear Sir,

RE: BUILDING BRIDGES TO A UNITED KENYA: KENYA MOJA.

The Secretariat of the Building Bridges to a United Kenya (Kenya Moja) desires to collect one million signatures in support of the proposed constitution of Kenya (Amendment) Bill 2020.

Attached find a proposed format for the signature collection for your guidance and approval.

Yours Sincerely,

Hon. Dennis Waweru ***Hon Junet Mohammed***
Co- Chairperson ***Co- Chairperson"***

The Independent Electoral and Boundaries Commission vide a letter dated **24th November 2020** addressed to the BBI National Secretariat provided an approved format/template for the roll out of collection of signatures from Kenyans in support of the amendment of the Constitution. I reproduce the foresaid letter for ease of reference;

"Ref IEBC/CP/REFER/1/VOL 1/56 24th November, 2020

The Co-Chairpersons,

Building Bridges Initiative National Secretariat

NAIROBI.

RE: BUILDING BRIDGES TO A UNITED KENYA; KENYA MOJA

We refer to your letter dated 18th November 2020 on the above subject matter that was delivered to our offices on 23rd November 2020. Further in reference is made to your proposed format for collection of signatures in support of the Constitution of Kenya (Amendment) Bill, 2020 attached therein.

The Commission takes note of your request for guidance as well as approval of your proposed format and provides to you the approved format /template (copy enclosed herewith) that should be used for collection of signatures.

To enable the voter verification process and to ensure completeness of the supporters' records, all the fields in the said approved format should be duly filled as provided.

W.W. CHEBUKATI
CHAIRMAN."

The approved format is reproduced hereunder:

"BUILDING BRIDGES INITIATIVE CONSTITUTIONAL AMENDMENT BILL 2020 - SIGNATURE COLLECTION FORM

Referendum Petition ……	**Serial No.**
We the undersigned registered voters in the Republic of Kenya and in the exercise of our sovereign powers, having read and understood the contents of the BBI Constitutional Amendment Bill 2020, do hereby consent to the	

proposal to amend the Constitution of Kenya, 2010, through popular initiative envisaged under Article 255 and 257 of the Constitution (ATTACH THE PROPOSED BILL).									
NO.	**NAME:**	**ID/PASSPORT NUMBER**	**COUNTY**	**CONSTITUENCY**	**COUNT ASSEMBLY WARD**	**POLLING STATION**	**MOBILE NO.**	**EMAIL ADDRESS**	**SIGNATURE /THUMB PRINT**
1									
2									
3									
4									
5									
6									
7									
8									
9									

The report by the Building Bridges to Unity Advisory taskforce gave rise to the Constitution of Kenya (Amendment) Bill, 2020. On 25th **November 2020**, at Kenyatta International Conference Centre (KICC), His Excellency the President launched the Constitution of Kenya (Amendment) Bill 2020 and the roll out for the collection of signatures.

On **30th November 2020**, the Co-Chairpersons of the BBI National Secretariat held a press conference confirming that they had already collected over 1.5 million signatures and that by close of business they were anticipating to collect over 2 million signatures.

It is not in dispute that the Taskforce on Building Bridges to Unity Advisory Taskforce was appointed by His Excellency the President on **24th May 2018**, vide Kenya Gazette Notice Number 5154. It is also not in dispute that on **10th January 2020**, **Mr. Joseph Kinyua** who is the Head of Public Service informed the public vide Gazette Notice Special Issue Number 264 that His Excellency the President had appointed the same members of the Taskforce under a different outfit known as ***"The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report***.

It is noteworthy to state that the Kenya Gazette is an official publication of the government of Kenya. It is also not in dispute that the Steering Committee submitted its report to His Excellency the President and it would therefore be logical to infer that this process was heavily led by the executive arm of government. More so, given

the fact that some government departments/ ministries were involved in the collection of signatures. Reference can be made for example to a letter dated **1st December 2020** written by **Joe Okundo, the Principal Secretary, Ministry of Sports, Culture and Heritage** addressed to the Director General in the Ministry and copied to the Cabinet Secretary which I reproduce hereunder. It reads:

"Mr. Pius Metto
Director General
Sports Kenya
Nairobi

BUILDING BRIDGES INITIATIVE CONSTITUTIONAL AMENDMENT BILL 2020 SIGNATURE COLLECTION FORMS- SERIAL NOS 0224407 TO 0224425

The above subject matter refers.

Attached please find the Building Bridges Initiative Constitutional Amendment Bill 2020, signature collection form. You are required to supervise your staff to fill in the forms and sign appropriately.

Kindly take this exercise seriously and note that the deadline is tomorrow, 2nd December 2020.

Joe Okundo CBS

PRINCIPAL SECRETARY."

From the above, it is evident that the process leading upto the formulation of the Constitution of Kenya (Amendment) Bill, 2020 was largely driven by the executive and it is difficult to truncate the BBI Taskforce and the BBI Steering Committee from the submissions of the letter by **Hon. Junet Mohamed** and **Hon. Waweru,** as promoters of the Constitution of Kenya (Amendment) Bill, 2020**.** It is clear that one thing led to the other until the culmination of the letter of **18th November, 2020** by **Hon. Junet Mohamed** and **Hon. Waweru** to the IEBC seeking approval of the format to be used in the collection of signatures. Article 256 and 257 of the 2010 Constitution provide for amendments by way of a Parliamentary initiative and a popular initiative. The proposals by **Hon. Junet** and **Hon. Waweru** would best have been channeled through a Parliamentary process as they were heavily laden with the executive arm. The route of popular initiative was not open to them as this was not a **Wanjiku** driven process.

There was an alternative argument that although **H.E. Honourable Uhuru Kenyatta** was not a promoter of the Constitution of Kenya (Amendment) Bill, 2020, it was contended that nothing

stops him from being a promoter of a popular initiative in his personal capacity as it may well be possible that a President may find himself in a peculiar position that he/she does not enjoy the support of Parliament, hence he would be locked out of both the Parliamentary as well as the popular initiative route.

Mr. Kiragu Kimani Senior Counsel while urging the appeal on behalf of His Excellency The President submitted that the President under Article 38 of the Constitution of Kenya 2010, has a right to make political choices just like any other Kenyan and that the term "initiator" that was used by the High Court in reference to H.E. the President was not recognized in the Constitution and that there was nothing that barred the President from being a promoter of the (Amendment) Bill 2020; that the President has a right to campaign for any political party or cause. Further, that Article 12 of the Constitution provides that:

> ***"(1) Every citizen is entitled to—***
>
> ***(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution",***

It was contended that if we were to find that His Excellency the President, in his personal capacity cannot use the route of popular initiative then, this would be tantamount to denying him his rights as a citizen.

In my view, the balancing of the rights of a sitting President pose a challenge as it is difficult to make a demarcation when a President is acting in his personal capacity *vis-à-vis* his official capacity. Can a President cease to be a President without handing over power during the tenure of his office? In the circumstances of this case, we were told that **H.E. Hon. Uhuru Kenyatta** was not the promoter (the promoters were **Hon. Junet Mohamed** and **Hon. Waweru**). Indeed, the High Court having acknowledged that H.E. the President was not the promoter, coined the term '**initiator**', a term not anywhere in the Constitutional amendment process. Be that as it may, the question to be answered is whether H.E. the President can be a promoter of an amendment Bill? In my view, I would liken the situation to that obtaining in the Military, where Military Officers are often said to be children of a lesser god to the extent that some of

their fundamental rights are limited by virtue of their joining the Military.

Regrettably, by conduct, there are limitations placed on public officers as to what they can do or not do.

Further, I liken the position of H.E. the President to that of a judge, where one is a judge 24-7 and it is difficult to say when he/she is not acting in his official capacity. Given the above, it is my view that H.E. the President cannot therefore be a **Wanjiku** for the purposes of Article 257 of the Constitution and to this extent, I am in agreement with the High Court's finding that H.E. the President cannot initiate changes to the Constitution through a popular initiative (Article 257).

[C]. THE LEGALITY OF THE BBI TASKFORCE AND THE BBI STEERING COMMITTEE

As to the issue of the legality of the BBI Taskforce and the Steering Committee and as explained above, the Taskforce and the Steering Committee were borne out of noble intentions of His Excellency the President. Both were ad hoc Committees appointed by H.E. the President for purposes of advising him on the discharge of his Constitutional mandate in fostering unity in the nation. The

question of illegality (or otherwise) of the BBI Taskforce came up for consideration by **Mativo, J** in the decision of **Thirdway Alliance Kenya & Another vs. the Head of the Public Service – Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties) [2020], eKLR,** where **Mativo, J,** considered the President's power to appoint a taskforce such as the BBI taskforce, and came to the conclusion that H.E the President acted within his powers under Article 131 and 132 of the Constitution. I have also had the advantage of reading the draft judgment of my sister **Okwengu, JA** and I am in agreement with the sentiments expressed therein that the BBI Taskforce and the BBI Steering Committee were not illegal outfits.

[D]. <u>PRESIDENTIAL IMMUNITY</u>

On the question of the Presidential Immunity (or otherwise), at paragraph 494 of the judgment, the High Court alluded to the fact that His Excellency, the President was acting in his official capacity and not private capacity. They stated:

> ***"494. It has been argued that the President was acting in his personal capacity and not as the Chief Executive of the Republic of Kenya. This argument is,***

however, betrayed by the very fact that the BBI Steering Committee was established via a Gazette Notice, an official publication of the government of the Republic of Kenya and its report was addressed to "His Excellency the President of the Republic of Kenya and Commander-in-Chief of the Defence Forces, Hon. Uhuru Kenyatta, C.G.H." (paragraph 7, page 411 of the Record of Appeal).

And although the question of whether H.E. the President can be sued in his private capacity was not framed as one of the issues, nevertheless, it found expression in the judgment of the High Court. At paragraph 546 and 547 of the judgment, the High Court held as follows:

"546. On the specific question of whether the President can be sued in his personal capacity during his tenure, our answer is in the affirmative because it is apparent from Article 143(3) that the President or any other person holding the office is only protected from such actions in respect of anything done or not done in the exercise of their powers under this Constitution".

"547. Assuming in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff? We think that in such circumstances, any person may invoke the jurisdiction of this Court

by suing the President, whether in his personal or in his official capacity; whichever capacity he is sued may very well depend on the nature of the violation or threatened violation and will certainly depend on the circumstances of each particular case".

Articles 143 and 145 of the Constitution address the question on immunity of President. Article 143 provides as follows:

"143. Protection from legal proceedings:

(1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.

(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity".

Whilst Article 145 (1) provides:

"145. Removal of President by impeachment

(1) A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—

(a) on the ground of a gross violation of a provision of this Constitution or of any other law;

(b) where there are serious reasons for believing that the President has committed a crime under national or international law; or

(c) for gross misconduct"

These Articles of the Constitution have been considered in the decision of ***Katiba Institute vs. President of Republic of Kenya & 2 others*** *and* ***Judicial Service Commission & 3 others (Interested Parties) [2020] eKLR***, where this Court, stated:

"41. ...If a party is aggrieved by anything done or not done by the 1st respondent, then the available remedy is either judicial review orders or constitutional declarations. That would mean that this court has jurisdiction to hear and determine judicial review proceedings and issue constitutional declarations such as those sought by the petitioner in the instant petition and application against the 1st respondent. It means that the 1st respondent does not enjoy absolute immunity from litigation. His actions or inactions can be questioned in court ...

46. We have not come across any other decision or decisions, of a Kenyan court on Article 143, where a contrary view is held or expressed, to effect that the 1st respondent should be made or named as a party in civil or constitutional proceedings, where his action or inaction is the subject-matter. It would follow from

the above decisions, therefore, that although there is immunity for the 1st respondent from prosecution, the same does not bar prosecutions of a civil or constitutional nature being mounted, which challenge exercise of power by the 1st respondent, save that such proceedings ought not to be commenced against the 1st respondent, whether as the individual occupant of the office or in his official capacity, but rather the same ought to be against the 2nd respondent. That way there is compliance with Article 143 of the Constitution. To that extent, it can be said that there was a misjoinder of the 1st respondent, and the 1st respondent ought not to have been named as or made a party in these proceedings".

The rationale for "***immunity***" was long recognized in ***Nixon vs. Fitzgerald 457 US 731*** wherein, the Supreme Court of the United States held that:

"Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government ... Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the nation that the Presidency was designed to serve ..."

The immunity of the President is akin to the immunity provided to judicial officers. In ***Bellevue Development Company Ltd vs. Francis Gikonyo & 7 others [2018] eKLR,*** this Court**, (Kiage, JA)** stated:

> "*I* ***have no difficulty whatsoever in holding that judicial officers are under Article 160(5) immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words "good faith" and "lawful" in the sub-article are a qualification or limitation of the immunity for the rather obvious reason that so long as a judge is acting in a judicial capacity and exercising his usual jurisdiction, there is a common-sensical presumption that he is acting lawfully and in good faith. There exists an implicit covenant of good faith binding judges...***
>
> ***Being of that persuasion, I cannot accept, less still lend approval to the appellant's ill-advised path of dragging the Judges into court by way of litigation against them in their personal capacities for their rulings delivered in the course and in the context of their lawful discharge of their judicial functions. The alleged particulars of ill-will and illegality were not supplied and would have been of no moment as the objections raised were bound to succeed. It is quite clear to me that the notion and spectre of judges being sued for discharging their judicial functions must be firmly resisted as a serious threat to judicial independence, the integrity of the judicial process, the sanctity of the rule of law and the liberty of all citizens which cannot be countenanced in a rational***

society and a constitutional democracy such as ours... Such moves to sue or punish judges with whose determinations, decisions and judgments a litigant is disenchanted ignore the critical, indispensable role a free, fair, fearless and fiercely independent judiciary plays as the defender of the Constitution and the arbiter of justice between parties, be they mighty or weak, and the last bastion of liberty for all citizens". *Emphasis added)*

There is also the route of judicial review in which the Attorney General is named as a party. In ***Julius Nyarotho vs. Attorney General & 3 others [2013] eKLR***, the High Court, (**Gikonyo, J**) rightly stated:

"From the foregoing, I am not persuaded by the argument that because a sitting President enjoys immunity from legal proceedings under article 143 of the Constitution, no proceedings in the nature of public remedy should commence to put right a clear violation of the law in the exercise of a public power by the President ... Judicial review being a public law remedy is available in the Constitution to ensure due process has been followed and it will not suffer ineffective because the impugned exercise of public power was committed by the President. Such proceedings where it is claimed a state officer acted in contravention of the law are in the nature of Constitutional remedy under article 22 and 23 of the Constitution, and are legally instituted and maintained against the Attorney General unless the Constitution or an Act of Parliament governing the particular state office provides otherwise, or where liability is of a criminal nature. These proceedings

are not proceedings against the President but against the State itself and any ensuing liability would certainly be liability of the State within the public law of the State".

It follows from the above that if anyone is aggrieved by "***anything done or not done by the President in the exercise of the powers of this Constitution***", such an entity files suit against the Hon. the Attorney General by way of a Judicial Review. There is also the route of impeachment provided by Article 145 of the Constitution which is a Parliamentary Process. In the instant matter, whatever his H.E. the President is alleged to have done was in the exercise of his powers conferred to him by the Constitution. He could not therefore have been sued in his personal capacity. Article 143 affords immunity to a sitting President for "**anything done or omitted to be done....**" in the discharge of his constitutional mandate. However, If the action complained of is not as a result of the discharge of his official duties, then the President is open to civil proceedings even during the term of his office as the immunity in Article 143 and 145 of the Constitution are in so far as his official

functions are concerned. To this extent, I am in agreement with the findings in paragraph 784(ii) of the judgment.

[E]. <u>QUORUM OF IEBC</u>

On the question of quorum of the IEBC, the appellants and the respondents in support of the appeal challenged the High Court's finding that the IEBC was not quorate for purposes of its business including the verification of signatures in support of the Constitution of Kenya (Amendment) Bill, 2020.

For a start, the IEBC is an Independent Constitutional Commission, established pursuant to Chapter 15 of the 2010 Constitution. Article 250(1) sets out the composition of an Independent Commission. It reads:

> ***"250(1) Each Commission shall consist of at least three, but not more than nine members".***

On the other hand, Section 5 of the IEBC Act provides that:

> ***"5(1) The Commission shall consist of a Chairperson and eight other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act".***

Then, the second schedule of paragraph 5 of the IEBC Act provides that:

"***5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission".***

It is common ground that a Commission can operate with a composition of three (3) members being the minimum number provided by the Constitution. It is also common ground that a Commission with 3 members is constitutionally compliant. To that end, no one has faulted the Commission as currently constituted with only three (3) members as being unconstitutional. If this be the case, how is it expected that a Commission, such as IEBC with a composition of three (3) members, the minimum constitutional requirement, can be expected to have a quorum of five (5) members? To say that a Commission that is Constitutionally compliant (by having a composition of three members) must have a quorum of 5 members is in my view, absurd.

Fortunately for the appellants and the respondents in support of the appeal, the issue of quorum of the IEBC was the subject of litigation in **Isaiah Biwott Kangwony vs. IEBC & Another [Nrb High Court Petition No. 212 of 2018,** by **Okwany, J.** The petitioner therein sought several declarations including a declaration to the

effect that the composition of the IEBC was illegal and unconstitutional as a result of resignation of four (4) Commissioners**.** In a judgment rendered on **10th August, 2018, Okwany, J** held that:

> ***"Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of***

commissioners would be appointed"(Emphasis supplied)

The learned judge at paragraphs 40, 41, 42, 45 & 46 of the judgment further stated as follows:

> ***"40. As a starting point, I note that the IEBC Act is a creature of the Constitution. Articles 88 of the Constitution establishes the IEBC and provides under Clause 5 that the Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation, in which case the legislation in question is the IEBC Act among other laws governing elections. In my humble opinion the provision under Article 250(1) for a minimum of three members of the commission and a maximum of nine members shows that the framers of the Constitution gave the appointing authority the latitude to appoint number of commissioners as long as they did not exceed nine or go below three members." (emphasis supplied)***
>
> ***"41. In this case, the number of the commissioners was reduced following resignations and as I have already found in this judgment, the mere fact that some commissioners have resigned does not invalidate the composition of the commission. All that the reduction of the numbers does is to limit the operations of the commission especially in respect to raising the quorum required for the meetings"***
>
> ***"42. Turning to the issue of the quorum of the commission as stated in Paragraph 5 of the second schedule of the IEBC Act, it is noteworthy that the issue of the quorum of the commission only arises during the conduct of the business of the commission.***

My humble view is that the issue of the quorum of the commission, even though tied to the commission's membership, is not per se an issue that should lead to a declaration that the commission is improperly constituted as quorum will can only be the subject of a challenge if the policy decisions of the commission are made without the requisite quorum." (emphasis supplied)

Again at para. 45 and 46 of the judgment the judge stated as follows:

"45. It is worth noting that in the instant case, the lack of quorum has been occasioned by vacancies in the commission which vacancies cannot be attributed to the fault of the remaining commissioners or the Commission so as to warrant the issuance of a declaration that the Commission is not properly constituted. In any event, the vacancies ought to have been addressed through the immediate recruitment of new commissioners as I have already found in this judgment".

"46. In the present case, the petitioner argued that the current composition of the commission is unlawful and it cannot supervise the by-elections that are slated for 17th August 2018. My finding is that the conduct of elections or by-elections is not a matter that arises out of the resolutions or decisions made by the commissioners at a meeting of the commission but are dictated by the operation of the law following the declaration of vacancies by the speakers in the elective positions that are the subject of the elections or by-elections." (Emphasis supplied)

In **Katiba Institute & Others v Attorney General & 2 others [2018] eKLR,** the Petitioners had *inter alia* sought;

> " ***A declaration be and is hereby issued that the Election Laws (Amendment) Act as passed through national Assembly Bill No 39 of 2017 on October 12, 2017 in its entirely is unconstitutional."***

The said Amendment had sought *inter alia* to amend **paragraph 5 of the Second Schedule to the Act IEBC Act** as follows:

> ***"The quorum for the conduct of business at a meeting of the commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members."***

Prior to the proposed amendment, paragraph 5 of the Second Schedule to the Act provided that the quorum was **five**, stating:

> ***"The quorum for the conduct of business at a meeting of the commission shall be at least five members of the commission."***

Mwita J in a judgment delivered on **6th April 2018** while declaring the aforesaid provisions unconstitutional stated as follows at para. 74 and 75 of the judgment;

> "**74**. ***The Commission is currently composed of 7 members including the chairperson. The quorum for purposes of conducting business is half of the members but not less than three. This means the Commission can comfortably conduct business with***

three out of seven members, a minority of the Commissioners. Taking into account the new paragraph 7 which requires that if there is no unanimous decision, a decision of the majority of the Commissioners present and voting shall prevail, has one fundamental flaw. With a quorum of three Commissioners, there is a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. This would not auger well for an independent constitutional Commission that discharges very important constitutional mandate for the proper functioning of democracy in the country. Such a provision, in my respectful view, encourages divisions within the Commission given that the Commission's decisions have far reaching consequences on democratic elections as the foundation of democracy and the rule of law".

"75.Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason,

paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional".

The aforesaid provisions having been repealed, there was nothing for the IEBC to fall back into. I say no more regarding this issue.

Additionally, it is my considered view that the issue of verification of signatures is not a matter requiring a policy decision. The functions of the IEBC Commission are spelt out in Section 4 of the Act as follows:

"4. Functions of the Commission:
As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament and in particular, for – (Emphasis added)

(a) ***the continuous registration of citizens as voters;***
(b) ***the regular revision of the voters' roll;***
(c) ***the delimitation of constituencies and wards in accordance with the Constitution;***
(d) ***the regulation of the process by which parties nominate candidates for elections;***
(e) ***the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;***

(f) ***the registration of candidates for election;***

(g) ***voter education;***

(h) ***the facilitation of the observation, monitoring and evaluation of elections;***

(i) ***the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;***

(j) ***the development and enforcement of a code of conduct for candidates and parties contesting elections;***

(k) ***the monitoring of compliance with the legislation required by Article 82 (1) (b) of the Constitution relating to nomination of candidates by parties;***

(l) ***deleted by Act No. 36 of 2016, s. 30***

(m) the use of appropriate technology and approaches in the performance of its functions; and

(n) Such other functions as are provided for by the Constitution or any other written law".

In my respectful view, the verification of signatures ***"... is not a matter that arises out of the resolution or decisions made by the Commissioners at a meeting of the Commission but one dictated by the operation of the law..."*** as the process of verification of signatures is not a policy decision to require the IEBC to be quorate. In my view, it cannot be said that in performing such mundane tasks as ***"... the continuous education of voters..."*** would require the Commission to be quorate, more so bearing in

mind that the Commission has a Secretariat that undertakes its day to day operations. I am therefore of the considered opinion that the verification of signatures was not null and void for lack of quorum and neither was it a function that required a policy decision.

[F]. THE ROLE OF IEBC IN A POPULAR INITIATIVE

This brings me to the next issue of the Role of the IEBC in the processes for amendment of the Constitution through a popular initiative. In paragraph 733 of the impugned Judgment, the High Court stated:

> ***"... if the IEBC's role include verification of signatures and not mere ascertainment of numbers of registered voters whose signatures accompany the Popular initiative Bill, it would follow that the IEBC would need some legal or regulatory framework to guide it in its operations. On the other hand, if the IEBC's role is the venial administrative task of ascertaining numbers, then, perchance, no further legal or regulatory framework would be required ..."***

The court proceeded to define '***verify***' as:

> ***"...the only reasonable meaning of the term "verify" as used in Article 257 (4) of the Constitution includes both the ascertainment of numbers and confirming the authenticity of the signatures submitted".***

The role of the IEBC is spelt out in Article 257 of the Constitution. Article 257(4) of the Constitution provides:

> ***"... (4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters".***

In the matter before us, we were told that the IEBC carried out verification by removing names of those without signatures, removed those that did not have names, national ID or passport numbers, removed duplicated names and asked the promoters to deposit affidavits deponing that the signatures were collected with consent of the parties. I have in this judgment reproduced a format of the collection of signatures that was approved by IEBC. The details to be captured therein include:

(i) Names,
(ii) ID or passport number
(iii) County
(iv) Constituency
(v) County Assembly Ward
(vi) Polling Station
(vii) Mobile Numbers
(viii) Email Address
(ix) Signatures or Thumb print

Article 257(4) did not in my view envisage a forensic examination on the authenticity of the signatures, more so bearing in mind that IEBC does not have a repository of signatures. But even if it had, in my view, it would be a herculean task to undertake. For instance, the verification would require that IEBC obtains known signatures of those who appended their signatures to the initiative. The known signatures would then be subjected to forensic investigation by hand-writing experts. Given that the IEBC published the list of those said to have supported the initiative, what was so difficult for one to say that they did not append their signatures? In my view, to place near impossible demands on IEBC would as it were, greatly cripple the operations of IEBC.

[G]. <u>CONTINUOUS VOTER REGISTRATION</u>

Then there is the question of continuous voter registration. At paragraph 770 the Court found that:

> ***"...There was also no evidence that the IEBC had sensitized citizens that there was continuous voter registration. Holding a referendum without voter registration, updating the voters register, and carrying out voter education, would particularly disenfranchise citizens who had attained voting age but had not been given an opportunity to register as***

voters, thus violating their constitutional right to vote and make political choices".

It is this finding that led to declaration No. (ix) Wherein the court declared that **"... the *Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission (the IEBC) carries out nationwide voter registration exercise".* Mr. Morara Omoke (the 76th respondent),** urged *inter alia* that the IEBC could not conduct a referendum before conducting nationwide voter registration as this would disenfranchise many voters. The IEBC on the other hand argued that it had been continually conducting voter registration at the constituency level. Article 88(4) (a) requires of IEBC to undertake ***"(a) Continuous registration of citizens as voters"***. Suffice to state that this is an on-going process and it is upon every Kenyan who attains the age of eighteen (18) to register as a voter. It is the same registered voters who vote in an election that also vote in a referendum.

Indeed, the 1 million persons who support an initiative are registered voters. Further, there is distinction between the time and

place of an election *vis-à-vis* the time and place of a referendum in that the 2010 Constitution provides for an election cycle. We know that elections are carried out after every five (5) years. Not so when it comes to a referendum, as there is no defined time when a referendum is to be held. In my view, the fact that IEBC carries out continuous voter registration, it cannot be said that they failed to carry out "**Nationwide**" voter registration when we know that the time and place of a referendum, unlike an election, is not known and cannot be defined with specificity.

[H]. <u>CREATION OF NEW CONSTITUENCIES</u>

As regards the issue of creation of 70 new constituencies, in declaration No. (xiv), the High Court held that the Constitution of Kenya (Amendment) Bill 2020, is unconstitutional in so far as it purports to pre-determine the allocation of 70 more constituencies. It held:

> ***"It is unconstitutional for a Constitution of Kenya Amendment Bill to directly allocate and apportion constituencies in contravention of Article 89 of the Constitution".***

Indeed, Clause 10 of the Constitution of Kenya (Amendment) Bill provides as follows:

> ***"Article 89(1) of the Constitution is amended by deleting the words "two hundred and ninety" and substitute therefore with the words "three hundred and sixty."***

On the other hand, Article 89(1) of the 2010 Constitution provides that:

> ***"(1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a)".***

The respondents opposed to the appeal contested this part of the Bill on the basis that it sought to amend Article 89(1) of the 2010 Constitution. Firstly, it is important to state that the High Court held that Article 89(1) of the 2010 Constitution is not an eternity clause and is amenable to amendments subject to due process being followed. They stated as much at paragraph 670 of the Judgment. This is what they said:

> ***"We can easily conclude that whereas Kenyans were particular to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual***

number of constituencies. Utilizing the canons of constitutional interpretation we have outlined in this judgment, we conclude that Article 89(1) of the Constitution – which provides for the exact number of constituencies – while being part of the Basic Structure of the Constitution, is not an eternity clause: it can be amended by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution".

It is clear that the Court recognized, and rightly so in my view, that Article 89(1) of the 2010 Constitution is amenable to amendment. Having so recognized, was it unconstitutional for the Constitution of Kenya (Amendment) Bill, 2020 to purport to create 70 more constituencies?

The (Amendment) Bill in Schedule 2 paragraph 1 sub-paragraph 3 provides that:

"(3) The allocation of additional constituencies among the counties specified under subsection (2) shall –

(a) Prioritize the constituencies underrepresented in the National Assembly on the basis of population quota; and

(b) Be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota".

The purpose was to:

> ***"The allocation of additional constituencies among the counties specified under subsection (2) shall –***
>
> ***(c) Prioritise the constituencies underrepresented in the National Assembly on the basis of population quota; and***
>
> ***(d) Be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota".***

In my view, once we appreciate that **Wanjiku** can seek to amend any provisions of the Constitution as long as the procedure set out in Articles 255 – 259 of the Constitution is adhered to, then the Kenyan people have the right to reduce or increase the number of Constituencies to ensure there is no underrepresentation. They can even vary the mandate of the IEBC. Further, the functions of the IEBC are spelt out in S.4 of the Act. It includes:

> ***"(c) delimitation of constituencies and wards in accordance with the Constitution".***

Black's Law Dictionary defines "***delimitation" as*** "***The act of making a boundary or fixing a limit***". Suffice to state that the Constitution of Kenya (Amendment) Bill, 2020 did not seek to make boundaries or fix the limits of a boundary but an increase in the

number of constituencies. The allocation of increased constituencies is not "**delimitation**". Clearly, the IEBC has no role in the creation of boundaries.

Moreover, the role of IEBC in delimitation is still maintained as the Bill provided:

> ***"Within 6 months of the commencement of the Act, the IEBC shall, subject to subsection 2 determine the boundaries of the additional seventy constituencies created in Article 89(1) using the criteria in Article 81(d) and 87(7) (sic). The seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column".***

The upshot of the above is that the Second Schedule to the Constitution of Kenya (Amendment) Bill 2020 in seeking to determine the creation of 70 more constituencies in my view, is not unconstitutional.

[I]. IEBC REGULATORY FRAMEWORK

As regards the IEBC regulatory framework the High Court was faulted for finding *inter alia,* that at the time of the launch of the Constitutional (Amendment) Bill 2020 and the collection of endorsement signatures, there was no legislation governing the collection, presentation and verification of signatures nor a legal

framework to govern the conduct of referenda. Article 88 (1) of the Constitution establishes the Independent Electoral and Boundaries Commission. It provides:

> ***"There is established the Independent Electoral and Boundaries Commission."***

Sub-Article 4 thereof further provides:

> ***"(4) The Commission is responsible for <u>conducting or supervising referenda and elections</u> (emphasis supplied) to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for- (Emphasis supplied).***
>
> ***(a) the continuous registration of citizens as voters;***
> ***(b) the regular revision of the voters roll;***
> ***(c) the delimitation of constituencies and wards***
> ***d) the regulation of the process by which parties nominate candidates for elections;***
> ***(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;***
>
> ***(f) the registration of candidates for election;***
>
> ***(g) voter education;***
>
> ***(h) the facilitation of the observation, monitoring and evaluation of elections;***

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

(5) The commission shall exercise its powers and perform its functions in accordance with the Constitution and national legislation."

On the other hand, the preamble to the Independent Electoral and Boundaries Commission Act provides:

"An Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution, and for connected purposes."

Section 3 which provides for the purposes and objects of the Act states:

"3. ***Object and purposes of the Act***

The object and purposes of this Act are to:

(a) provide for the operations, powers, responsibilities and functions of the Commission <u>to supervise elections and referenda at County and National government levels</u>; *(Emphasis added)*

(b) provide a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 88(1), (2) and (3) and 250(2) of the Constitution;

(c) provide for the manner of the exercise of the powers, responsibilities and functions of the Commission pursuant to Article 88(5) of the Constitution;

(d) establish mechanisms for the Commission to facilitate consultations with interested parties pursuant to Article 89(7) of the Constitution; and ...".

Part II of the Act which deals with administration and in particular Section 4 provides for the functions of the Commission as follows:

"4. Functions of the Commission:

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament and in particular, for *– (Emphasis ours)*

(a) the continuous registration of citizens as voters;
(b) the regular revision of the voters' roll;
(c) the delimitation of constituencies and wards in accordance with the Constitution;
(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;

(f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development and enforcement of a code of conduct for candidates and parties contesting elections;

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) of the Constitution relating to nomination of candidates by parties;

(l) deleted by Act No. 36 of 2016, s. 30

(m) the use of appropriate technology and approaches in the performance of its functions; and

(n) such other functions as are provided for by the Constitution or any other written law"

On the other hand, the preamble to the Elections Act No. 24 of 2011 provides:

"An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, County Governor and County Assembly; to provide for the conduct of referenda; to

provide for election dispute resolution and for connected purposes." *(Emphasis added.)*

Part V of the Elections Act which deals with a referendum and in particular section 49 of the Elections Act provides:

PART V – REFERENDUM

"49. Initiation of a referendum

(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.

(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.

(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.

(4) The National Assembly may approve one or more questions for a referendum.

(5) The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate."

"50. Notice of holding referendum

(1) The Commission shall, within fourteen days after publication of the question referred to in section 49 publish a notice of the holding of the referendum and the details thereof in the Gazette, in the electronic and print media of national circulation.

(2) the notice shall specify:

(a) the referendum question or questions and the option of the answer or answers;

(b) the symbols assigned for the answer or answers to the referendum question or questions;

(c) the day on which the referendum is to be held which shall not be less than twenty-one days after the date of the publication of the notice;

(d) the polling time of the referendum;

(e) the day by which the referendum committees shall have registered with the Commission; and

(f) the day and time by which campaign in support of or in opposition to the referendum question shall start and cease."

"51. Referendum committees

(1) Where a referendum question requires a "yes" or "no" answer, persons intending to campaign for or against the referendum question shall form such national referendum committees and constituency referendum committees as are necessary.

(2) Where there is more than one referendum question, persons intending to campaign for or against each referendum question shall, on application to the Commission, form one national referendum committee each and one committee each in every constituency for each referendum question.

(3) A referendum committee shall apply to the Commission for registration in the prescribed form.

(4) An application under subsection (3) shall be accompanied by information showing that the applicant adequately represents persons campaigning for or against the referendum question.

(5) The national referendum committees shall control and regulate the constituency referendum committees.

(6) A member of a referendum committee shall subscribe to and abide by the Electoral Code of Conduct set out in the Second Schedule."

"52. Costs of referendum committee

(1) Each referendum committee shall bear its own costs during the campaign period of the referendum.

(2) The costs referred to in subsection (1) include payment of the agents of the respective referendum committees."

"53. Procedure for conduct of referendum

The procedure for the conduct of an election shall apply with necessary modifications to the conduct of referendum."

"54. Voting threshold

A referendum question on an issue other than that contemplated in Articles 255, 256 and 257 of the Constitution shall be decided by a simple majority of the citizens voting in the referendum"

Section 55 further provides:

"55. General power of the Commission.

Nothing in this Act shall preclude the Commission from taking any administrative measures to ensure effective conduct of the referendum." *(Emphasis ours).*

From the aforestated provisions, it is my considered opinion and contrary to the finding by the High Court, that there is legislation pursuant to the Constitution, the Independent Electoral and Boundaries Commission Act and the Elections Act to govern the collection, presentation and verification of signatures and a legal framework to govern the conduct of referenda. Indeed, the High Court appreciated as much when at paragraph 783 (xv) of the judgment stated as follows:

"notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still be undertaken as

long as the constitutional expectations, values, principles and objects especially those in Article 10 of the constitution are met."

Besides, in ***Titus Alila & 2 others vs. The Attorney General & Another [2019] eKLR***, the High Court had held:

> ***"Secondly, I find that the Constitution has already set up a proper legislative framework for holding a referendum" (paragraph 53).***

The Court further stated that:

> ***"Furthermore, there are explicit provisions in the Elections Act which govern the conduct of referendum in Kenya" (paragraph 56).***

In the impugned judgment, the court had endorsed the findings in the **Alila** decision. At paragraph 603 of the judgment, it stated:

> ***"Though we have found that it is necessary to enact Referendum Act, we do not subscribe to the school of thought that absence of legislation implementing a provision of the Constitution, renders such a provision inoperative and unenforceable. On that finding we agree with the decision in Titus Alila & 2 others (suing on their own Behalf and as the Registered Officials of the Sumawe Youth group) vs. Attorney General & Another [2019] eKLR, where it was held that the Constitution has set up a framework for holding a referendum."***

And at paragraph 606, the court stated:

> ***"It is, however, our view and we so hold that notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still be undertaken as long as the constitutional expectations, values, principles and objects are met."***

It is surprising that having found so, the High Court proceeded to make declaration thus:

> ***"A declaration is hereby made that the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed."***

It is my view that the IEBC's existing statutory framework as well as the administrative procedures established therein are sufficient for the purposes of carrying out a referendum. However, be that as it may, this Court is alive to the Referendum Bill No. 11 of 2020 and the Referendum Bill No. (No.2 of 2020) which Bills are both pending in Parliament. It is my considered opinion that notwithstanding the fact that these Bills have not been passed and fully debated by Parliament, it cannot be said that there was no regulatory framework to govern the conduct of a referenda.

Consequently, it is my finding that there is legal framework to govern the collection, presentation and verification of signatures as well as the conduct of referenda.

[J]. SERVICE UPON HIS EXCELLENCY THE PRESIDENT

On the issue of service of the petition to H.E. the President, in **Mr. Aluochier's** supplementary affidavit dated **8th June 2021**, he attached an affidavit of service sworn on **16th of January 2021** and filed at the High Court, Constitutional and Human Rights Division Registry on **18th January 2021**. In the aforementioned affidavit, **Mr. Aluochier** avers that on **21st December, 2020** at **1522 hrs**, he served his petition via email to all parties including **H.E. Hon. Uhuru Muigai Kenyatta.** The email addresses used were: cos@president.go.ke, legalservices@oagkenya.go.ke, info@iebc.or.ke, slo@ag.go.ke and psck@publicservice.go.ke. **Mr. Aluochier** further states that he lodged a service request with the judiciary e-filing platform to which he got a response on **15th January, 2021** that all parties had been served. On the same day, **15th January 2021**, at **1436Hrs**, the Deputy Registrar of the Constitutional and Human Rights Division emailed all the parties notifying them that the petition

would be mentioned on **21st January, 2021**. On the mention date, **21st January 2021**, the court gave directions that the hearing would take place on **17th, 18th** and **19th of March 2021**, on which dates there was no appearance for **H.E. Hon. Uhuru Muigai Kenyatta**.

At paragraph 537 of the impugned judgment the court observed that:

> ***"To begin with, it is worth noting that Mr. Uhuru Muigai Kenyatta did not enter appearance in these proceedings and neither did he file any grounds of objection or a replying affidavit to contest these proceedings on the ground of misjoinder, or any other ground for that matter. As much as the Honourable Attorney General has come to his defence, the grounds of objection and the submission filed by the Honourable Attorney General are clearly stated to have been filed on behalf of the Honourable Attorney General himself and not Mr. Uhuru Muigai Kenyatta. It could be that the Honourable Attorney General has proceeded on the understanding that since Mr. Uhuru Muigai Kenyatta ought not to have been sued in his personal capacity, he need not have responded or participated in these proceedings. However, since this is the very question in dispute, we are of the humble view that Mr. Uhuru Muigai Kenyatta ought to have responded to the petition either by himself or by his duly appointed representative and contested his inclusion in the petition on any of the grounds that would be available to him. We find it a bit intriguing that the Honourable Attorney General can file***

documents for the Honourable Attorney General and proceed to argue Mr. Uhuru Muigai Kenyatta's case."

In my view, it was at the point when the court made a finding that the Hon. A.G. could not act for H.E. the President, that it should have gone further to ascertain if service was effected upon H.E. the President. It is clear that the High Court overlooked the issue of service. The court erred as it needed to satisfy itself that service had been effected to all the parties before confirming the matters for hearing. It is a cardinal principle of natural justice that a party cannot be condemned unheard. The email address used by **Mr. Aluochier** and the court was cos@president.go.ke. This appears to have been an official email address. The court found that **H.E. President Uhuru Kenyatta** was sued in his personal capacity and could not be represented by the Attorney General who had filed grounds of opposition dated **8th February, 2020.** If this be the case, the beginning point would have been to ascertain if **H.E. Hon. Uhuru Kenyatta** was served. To find that H.E**. Hon. Uhuru Kenyatta** knew or ought to have known of the suit is to delve into the arena of conjecture. It is a cardinal principle of natural justice that a party

cannot be condemned unheard. Article 50 provides for fair hearing. Article 50 (1) provides:

> ***"50 (1) Fair hearing (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

His Excellency, the President was also entitled to equality and freedom from discrimination as per the dictates of Article 27(1) of the Constitution which provides:

> ***"27. Equality and freedom from discrimination***
>
> ***(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law."***

Whilst Article 25(c) lists "…***the rights to a fair trial***;" as a fundamental right. In my view, the right to be heard is enshrined in the 2010 Constitution and no one can be deprived of this right. This Court underscored the right to be heard in the decision of **Onyango Oloo v. Attorney General [1986-1989] EA 456**, when it held:

> ***"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard..."***

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ... Denial of the right to be heard renders any decision made null and void ab initio."***

It matters not that **H.E. Hon. Uhuru Muigai Kenyatta** is the President of the Republic of Kenya. He is entitled to the protection of the law as the law protects the weak as well as the strong. It was wrong for the High Court to have proceeded with the hearing and thereafter make adverse findings against H.E. **Hon. Uhuru Kenyatta** without ascertaining whether he had been served, either with the petition and/or the subsequent hearing notice.

[K]. CONCURRING ISSUES /CROSS-APPEAL BY MORARA OMOKE [THE 76TH RESPONDENT]

With regard to the issues raised in **Morara Omoke (76th respondent's)** Cross Appeal namely; **whether the Constitution (Amendment) Bill, 2020 violated Article 43(1)(a) of the Constitution in view of the covid-19 pandemic, Whether both or either of the houses of Parliament infirmed from considering the Constitutional Amendment Bill in view of the Chief Justice's**

advisory for the dissolution of Parliament and Whether the Petitioners had made out a case for disclosure and publication of the BBI Steering Committee's financial information, I have had the advantage of reading the lead judgment by **Musinga J.A (P)** on this issue and I entirely agree with the same save to add as follows:

As was rightly pointed out by **Musinga J.A**, there was indeed no evidence provided that holding of public rallies attended by thousands of people amounted to violation of **Article 43 (1) (a) of the Constitution**. I hasten to add that the manner in which the said Article was violated was not pleaded with specificity/reasonable precision. As was held by this Court (differently constituted) in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, the court while affirming the principle set out in **Anarita Karimi Njeru v *v The Republic* *(1976-1980) KLR 1272* stated thus at paras 43 and 44:**

> ***"43. The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs***

ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars."

"(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."

Similarly, as regards the amount of expenditure involved, it is my finding that there was no evidence that the said expenditure amounted to a Constitutional violation. Consequently, I would dismiss the cross- appeal on this issue.

On the question as to whether both or either of the houses of parliament infirmed from considering the Constitutional Amendment

Bill in view of the Chief Justice's advisory for the dissolution of parliament, I am entirely in agreement with the reasoning and findings by **Musinga J.A (P),** and I have nothing useful to add on this issue.

Finally, as to whether the petitioners had made out a case for disclosure and publication of the steering committee's financial information and in absence of any evidence that the respondent had requested from the appellants for such information and the same was declined, it is my finding that the High Court could not be faulted for declining to issue such orders and I am entirely in agreement with the findings by **Musinga J.A (P**) on this issue and consequently I would dismiss the respondents Cross Appeal on this issue as well.

The upshot of the foregoing is that I would dismiss the 76th respondent's Cross Appeal in its entirety.

[L]. THE APPEAL BY KENYA NATIONAL UNION OF NURSES

The **Kenya National Union of Nurses (KNUN),** the 15th respondent herein filed a cross appeal dated **8th June, 2021**. Their gist of their complaint was that whereas their views had initially been included in the BBI Taskforce, the same did not find its way to the

Constitution of Kenya (Amendment) Bill 2020. They supported the appeal and urged us to find that the amendment process was legal and constitutionally sound and faulted the High Court for finding that the basic structure doctrine applied in Kenya.

As stated above, the 15th respondent's grievance is that whereas their views of having an independent Commission were initially captured in the BBI Taskforce, these views were subsequently omitted. In my view, this is a fairly straightforward issue. If the 15th respondent would like an amendment of the 2010 Constitution to have itself included as an Independent Commission, then they can take advantage of the provisions of Article 257 of the Constitution. They cannot ride on an initiative of another and complain that their views have been left out. In any event, the fact that their views were contained in the BBI Taskforce did not create any legitimate expectation on their part.

I shall say no more on this issue save to state that their appeal is devoid of merit. It is accordingly dismissed.

I wish to take this opportunity to thank all counsel for their erudite submissions before us as well as for providing necessary

research material in form of decided cases and scholarly works. I also thank scholars who on their own made invaluable submissions before us. I also wish to thank my researcher, **Mr. James Ndungu** for providing topnotch research that helped me to put together this judgment. I also wish to thank my Law clerk, **Mr. Anthony Mwangi** for his meticulous work in putting the reading materials within easy reach at all times. Last, but not least, **Mrs. Lonah Mecha**, my secretary, who spent many hours, sometimes upto mid-night in putting this judgment together.

I am eternally grateful.

Dated and delivered at Nairobi this 20th day of August, 2021.

F. SICHALE

.....
JUDGE OF APPEAL

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. E291 OF 2021

(CORAM: MUSINGA, (P), NAMBUYE, OKWENGU, KIAGE,

GATEMBU, SICHALE & TUIYOTT, JJ.A.)

BETWEEN

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....APPELLANT

AND

DAVID NDII .....1ST RESPONDENT
JEROTICH SEII.....2ND RESPONDENT
JAMES GONDI..... 3RD RESPONDENT
WANJIRU GIKONYO.....4TH RESPONDENT
IKAL ANGELEI.....5TH RESPONDENT
ATTORNEY GENERAL.....6TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....7TH RESPONDENT
SPEAKER OF THE SENATE.....8TH RESPONDENT
KITUO CHA SHERIA.....9TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT
DR. DUNCAN OJWANG.....11TH RESPONDENT
OSOGO AMBANI.....12TH RESPONDENT
LINDA MUSUMBA.....13TH RESPONDENT
JACK MWIMALI.....14TH RESPONDENT
KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT
THE STEERING COMMITTEE ON THE
IMPLEMENTATION OF THE BUILDING BRIDGES
TO A UNITED KENYA TASKFORCE.....16TH RESPONDENT
BUILDING BRIDGES
NATIONAL SECRETARIAT.....17TH RESPONDENT
BUILDING BRIDGES STEERING COMMITTEE.....18TH RESPONDENT

THIRDWAY ALLIANCE.....19TH RESPONDENT
MIRURU WAWERU..... 20TH RESPONDENT
ANGELA MWIKALI.....21ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY.....22ND RESPONDENT
THE SPEAKER OF THE SENATE.....23RD RESPONDENT
COUNTY ASSEMBLY OF MOMBASA.....24TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....25TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....26TH RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER.....27TH RESPONDENT
COUNTY ASSEMBLY OF LAMU.....28TH RESPONDENT
COUNTY ASSEMBLY OF TAITA TAVETA.....29TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA.....30TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....31ST RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....32ND RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....33RD RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....34TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....35TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI.....36TH RESPONDENT
COUNTY ASSEMBLY OF EMBU.....37TH RESPONDENT
COUNTY ASSEMBLY OF KITUI.....38TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....39TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....40TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA.....41ST RESPONDENT
COUNTY ASSEMBLY OF NYERI.....42ND RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....43RD RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....44TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU.....45TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....46TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....47TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....48TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....49TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....50TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....51ST RESPONDENT
COUNTY ASSEMBLY OF NANDI.....52ND RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....53RD RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....54TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....55TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....56TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....57TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....58TH RESPONDENT
COUNTY ASSEMBLY OF BOMET.....59TH RESPONDENT

COUNTY ASSEMBLY OF KAKAMEGA.....60TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....61ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....62ND RESPONDENT
COUNTY ASSEMBLY OF BUSIA.....63RD RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....64TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....65TH RESPONDENT
COUNTY ASSEMBLY OF HOMABAY.....66TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....67TH RESPONDENT
COUNTY ASSEMBLY OF KISII.....68TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....69TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI CITY.....70TH RESPONDENT
PHYLISTER WAKESHO.....71ST RESPONDENT
254 HOPE.....72ND RESPONDENT
THE NATIONAL EXECUTIVE OF
THE REPUBLIC OF KENYA.....73RD RESPONDENT
JUSTUS JUMA.....74TH RESPONDENT
ISAAC OGOLA.....75TH RESPONDENT
MORARA OMOKE.....76TH RESPONDENT
RT. HON. RAILA ODINGA.....77TH RESPONDENT
ISAAC ALUOCHIER.....78TH RESPONDENT
UHURU MUIGAI KENYATTA.....79TH RESPONDENT
PUBLIC SERVICE COMMISSION.....80TH RESPONDENT
THE AUDITOR GENERAL.....81ST RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI).....82ND RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E292 OF 2021

BUILDING BRIDGES TO A UNITED KENYA,
NATIONAL SECRETARIAT (BBI SECRETARIAT).....1ST APPELLANT
HON. RAILA AMOLO ODINGA ..... 2ND APPELLANT

AND

DAVID NDII & 76 OTHERS .....RESPONDENTS

KENYA HUMAN RIGHTS COMMISSSION.....1ST AMICUS CURIAE
DR. DUNCAN OJWANG.....2ND AMICUS CURIAE
OSOGO AMBANI.....3RD AMICUS CURIAE
LINDA MUSUMBA.....4TH AMICUS CURIAE
JACK MWIMALI .....5TH AMICUS CURIAE

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
****

CIVIL APPEAL NO. E293 OF 2021

THE HONOURABLE ATTORNEY GENERAL.....APPELLANT

AND

DAVID NDII & 73 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
****

As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
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CIVIL APPEAL NO. E294 OF 2021

H.E. UHURU MUIGAI KENYATTA.....APPELLANT

AND
DAVID NDII & 82 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (**Prof. M. Ngugi, G. V. Odunga, Ngaah Jairus, E.C. Mwita & Mumbua T. Matheka, JJ.**) delivered on 13th May, 2021

in

Constitutional Petition No. E282 of 2020
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As Consolidated with
Constitutional Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 & E2 of 2021)
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JUDGMENT OF TUIYOTT J.A.

1. For four days Kenyans followed the plenary hearing of this Appeal through live television. Just like us, they were treated to various sheds of

impressive legal arguments and thesis. The material we were referred to, and which we have had to read, is nothing less than copious. Much of it was relevant but others not so. Most of the arguments were cogent but you would not miss a prolix. Often, the positions taken were extremely divergent and asymmetrical. If the proceedings left any Kenyan in doubt as to the clarity and precision of our Constitution, then the words of the great artist Hans Hofmans will be of some comfort;

"The ability to simplify means to eliminate the unnecessary so that the necessary may speak"

2. I am indebted to the President of this Court for fully setting out the background to this Appeal and his succinct summary of the arguments by the parties. I thank him. I need not rehash that background and summary, instead I straight away render my opinion on the various issues raised in this Appeal.
3. Those issues have been ably set out in the judgement of my brother Musinga (P) and I can do no better than to plagiarize the good Judge:-

1) Whether the basic structure doctrine, eternal clauses and unamendability doctrines apply in Kenya.

2) **Who were the initiators and promoters of the BBI Initiative?**

3) **The legality of the BBI Steering Committee and the BBI Taskforce Report in the Constitution amendment process.**

4) **Whether the proposed amendments as contained in the Constitution Amendment Bill, 2020 were by popular initiative and whether there was public participation.**

5) **Whether the President of Kenya can initiate the process of amendment of the Constitution as a popular initiative.**

6) **Whether the IEBC had requisite quorum to carry out its business in relation to the Amendment Bill.**

7) **Role of the IEBC in Constitution amendment by popular initiative.**

8) **Whether the IEBC was under an obligation to conduct a nationwide voter registration exercise and verification of signatures.**

9) **Whether the proposals contained in the Constitution Amendment Bill are to be submitted as separate and distinct referendum questions.**

10) **Whether the High Court had jurisdiction to entertain the petitions on account of the principles of justiciability, mootness and ripeness.**

11) **Whether it was constitutional for the promoters of the Amendment Bill to create 70 Constituencies and allocate them.**

12) **Whether there was necessity for legislation or legal framework on conduct of referenda.**

13) **Whether civil proceedings can be instituted against a sitting President.**

14) **Whether Mr. Muigai Kenyatta was served with Petition No. E426 of 2020 and the effect of orders made by the High Court against his person.**

15) **Whether the proceedings against Mr. Uhuru Muigai Kenyatta were *res judicata*.**

16) **Whether President Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution.**

17) **Whether promotion of the Amendment Bill violated Article 43(1)(a) in view of the covid-19 pandemic.**

18) **Whether both or either of the Houses of Parliament were infirmed from considering the Amendment Bill in view of the Chief Justice's advisory for dissolution of Parliament.**

19) **Whether the High Court erred in finding that the BBI Taskforce did not create a legitimate expectation that the submissions by KNUN would be incorporated in the Amendment Bill.**

20) **Whether the Petitioners had made out a case for disclosure and publication of the BBI Steering Committee's financial information.**

21) **Whether the High Court erred in law in admitting *amici curiae* who were partisan.**

THE BASIC STRUCTURE DOCTRINE AND ITS APPLICATION TO KENYA

4. The basic structure doctrine prescribes that notwithstanding the absence of explicit limitations on the constitution amendment power, there are implied constitutional limitations which guard against amendments that change the basic structure or identity of a Constitution. A matter that dominated this appeal is whether the doctrine is applicable to the Constitution of Kenya. I have had the advantage of reading the draft Judgments of the President and my brother Kiage, J.A on this highly contested matter and I am substantially in agreement with their analysis and conclusions. I propose, however, to weigh in on the proposition that the doctrine should be rejected solely for the reason that, had the framers

of the Constitution intended this category of limitation be part of our law, then it would have found explicit expression in the text of the Constitution. Another matter that I reflect on is what constitutes the basic structure in our Constitution.

5. The appellants argue that to hold that the basic structure doctrine applies to the Constitution of Kenya is to impose an additional hurdle to an already onerous mechanism for constitution amendment. It being asserted that the provisions of chapter sixteen are sufficiently arduous and have failed at least 19 attempts to change the Constitution, we were urged not to adopt interpretive coordinates to reach an outcome that contradicts express substantive provisions of the Constitution. The clarion call on this side of the divide was that this Court should not endorse an extra-constitutional mechanism for amending our Constitution.

6. The answer to those arguments, and accepted by my brother Kiage, J.A, is that fundamental alterations to the core of the Constitution requires the exercise of the primary constituent power of the people which exists notwithstanding non-codification. And that an insistence that it should be expressly provided for in the Constitution is an antithesis of the very

concept that it is a power which exists in spite of the Constitution and to provide for it is a superfluity.

7. It is common ground that the interpretation of the Constitution is influenced by both text and context. In this regard the Supreme Court of India in **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd and Others [1987] 61 Comp Cas 663** stated: -

> **"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."**

8. A history of the making of the current Constitution gives colour to the text of the provisions of Chapter Sixteen on amendments.

9. After making significant strides towards the making of a new constitution, the Bomas initiative encountered a legal challenge presented in **Njoya and 6 Others v Attorney-General and Another [2004[1 KLR 232**. In those proceedings, the Applicants, *inter alia*, sought a declaration that certain provisions of the Constitution of Kenya Review Act which was the legal framework for the Bomas process,

transferred, diluted and vitiated the constituent power of the people of Kenya to adopt a new Constitution.

10. Ringera J who was in the majority took the following view: -

"It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered. Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute or reconstitute the framework of Government, in other words, make a new Constitution. That being so, it follows *ipso facto* that Parliament being one of the creatures of the Constitution it cannot make a new Constitution. Its power is limited to the alteration of the existing Constitution only. Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the peoples sovereignty; (ii) Constitution betokens limited powers on the part of any organ of Government; and (iii) the principle

of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ; it follows that the power vested in Parliament by Section 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution: no more and no less."

11. The Judge then makes this important holding: -

"[69.] From what I have stated so far it should be manifestly clear that the bane of the Act is the inherent presumption that the making of a new Constitution could be accommodated within the power of Parliament to alter the Constitution. As demonstrated herein the two are entirely different processes requiring the exercise of different powers. The former requires the exercise of the peoples' constituent power and the latter requires the exercise of Parliament's limited amendment power."

12. The essence of that decision (**Njoya**) was that the making of a new constitution could only be through the exercise of the people's constituent power perfected in a referendum. So as to conform with the decision, the Constitution of Kenya Review Act was amended to provide

for a mandatory referendum to ratify a new constitution. All this while, however, section 47 of the repealed Constitution still read: -

> **"Alteration of Constitution**
>
> **(1) Subject to this section, Parliament may alter this Constitution.**
>
> **(2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members).**
>
> **(3) If, on the taking of a vote for the purposes of subsection (2), the Bill is supported by a majority of the members of the Assembly voting but not by the number of votes required by that subsection, and the Bill is not opposed by thirty-five per cent of all the members of the Assembly or more, then, subject to such limitations and conditions as may be prescribed by the standing orders of the Assembly, a further vote may be taken.**

(4) When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly.

(5) A certificate of the Speaker under subsection (4) shall be conclusive as regards proceedings in the Assembly, and shall not be questioned in any court.

(6) In this section –

(a) references to this Constitution are references to this Constitution as from time to time amended; and

(b) references to the alteration of this Constitution are references to the amendment, modification or reenactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision."

13. As things stood, there was now a mechanism, provided by statute, for adoption of a new constitution after the exercise of the peoples' constituent power in a referendum but which mechanism was not contemplated by section 47 of the repealed Constitution.

14. In the run up to the proposed referendum, the process faced yet another hurdle in Nairobi Miscellaneous Civil Application **No. 677 of 2005 (OS)** **Onyango & 12 Others vs Attorney General & 2 others (2008) 3 KLR (EP) 84** An issue that arose in those proceedings, and which is not without considerable importance to the matter at hand, was whether a new constitution could validly come into being without an amendment to section 47 of the existing Constitution to provide for the making of a new Constitution.

15. In the lengthy submissions before us regarding the doctrine of the basic structure and its place in Kenya, the decision of **Onyango & Others** (*supra*) was not cited at all and appears to be the unsung opinion in the jurisprudence around this question in Kenya. The three Judge bench of the High Court consisting of Nyamu, Wendoh and Emukule, JJ. observed: -

"However the exercise of legislative power and the distinction as outlined above is not applicable to the making of a new constitution by a constituent assembly or a referendum because constituent power is not subject to restraints by any external authority. In other words the constituent power to frame a constitution is unfettered by any external restrictions and it is a plenary law making power. The power to frame a Constitution is a primary power whereas a power to amend a rigid Constitution is a derivative power, since it is derived from the Constitution and is subject to the limitations imposed by the prescribed procedure under the constitution.

The amending power must be exercised in accordance with the existing Constitution. In other words the touchstone of validity in respect of the amending power is the existing Constitution. On the other hand the touchstone of validity in respect of the constituent power is the people. Put differently there is no touchstone of validity in respect of constituent power because it is primary and assumed or presumed to exist and always

vested in the people. Hans Kelsen in *General Theory of Law and State* and Wade and Phillips – *Constitutional Law* 4th Edition page 13 express the same view in their own words and we have touched on this in this judgment."

16. And in answer to the specific question whether the constituent power of the people needed to be textualized, the Judges were emphatic: -

"Section 47 of the Existing Constitution

It has been argued that for a valid new Constitution to come into being section 47 of the existing constitution should be amended to provide for the making of a new Constitution.

This Court does not regard this as good constitutional law or good constitutional justice. First we agreed with the holding in the *Njoya* case that section 47 does not deal with the making of a new Constitution or the process of making a new Constitution. The power to make a new Constitution was not therefore vested in Parliament – it is the amending power that is vested in Parliament under s 47 subject to the special

procedures concerning the entrenched provisions and also subject to the doctrine of the basic structure. We must also add that Parliament has no right to alter the basic structure of the Constitution and for example if it were to move to repeal chapter 5 on Fundamental Rights and Freedoms, or repeal the Republican, and democratic stipulations in s 1 and 1A of the constitution this Court would if moved declare such amendments unconstitutional. Parliament has the power to amend because those powers derive from the provisions of section 47 of the Constitution. The power to amend is derivative whereas the constitution making power is primary hence it is not provided for in the current constitution and need not been textualized. Even where a Constitution provides that although this would be good constitutional practice and good order such a provision is superfluous. It follows therefore that what was not delegated to Parliament by the constitution was reserved to the people i.e the constitution making power was so reserved to the people and is inherent in them. This is in

addition to the expression of constituent power in sections 1 and 1A of the Constitution."

17. Six days after the decision in **Onyango** (*supra*), on 21st November 2005, the proposed new Constitution was put to vote but was rejected by the people in a referendum. Important for the discussion at hand is that this was an attempt to replace the Constitution by the people exercising their constituent power notwithstanding that the power was not expressly provided for by the Constitution sought to be replaced. A recognition that the power was not subject to limitations or restrictions prescribed by the written word of the Constitution.

18. A fresh impetus to replace the Constitution came after the post-election violence of 2007/2008. In this renewed initiative, Parliament enacted two cardinal legislations. The Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act (2008).

19. The latter Act introduced section 47A to the existing Constitution. The provision read: -

"Replacement of the Constitution

(1) Subject to this section, this Constitution may be replaced.

(2) Notwithstanding anything to the contrary in this constitution.

(a) the sovereign right to replace the Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section;

(b) when a draft Constitution proposing the replacement of this Constitution has been introduced into the National Assembly, no alteration shall be made in it unless such alteration is supported by the votes of not less than sixty-five percent of all the members Assembly (excluding *ex-officio* members);

(c) the National Assembly shall, within thirty days of the introduction in the Assembly of a draft Constitution proposing the replacement of this Constitution, debate all proposed amendments to the draft Constitution, and submit to the Attorney-General the draft Constitution and any proposed amendments thereto as may be approved by the Assembly in accordance with paragraph (b).

(3) Proposals for amendment to a draft Constitution under subsection (2) shall be considered and the draft Constitution

published in such a manner as may be prescribed by or under an Act of Parliament.

(4) The Interim Independent Electoral Commission shall, not later than 90 days from the date of publication of the draft Constitution pursuant to subsection (2), hold a referendum as may be prescribed by or under an Act of Parliament to give the people of Kenya the opportunity to ratify the draft constitution.

(5) The following provisions shall apply with respect to a referendum on a Constitution draft-

(a) section 43 shall apply with necessary modifications with respect to the referendum;

(b) the draft Constitution shall be ratified if-

(i) more than fifty per cent of the valid votes cast are for ratification; and

(ii) at least twenty-five per cent of the votes cast in at least five of the eight provinces are for ratification.

(6) If a draft Constitution is ratified pursuant to subsection (5) (b), the President shall, not later than fourteen days from the

date of publication of the final result of the referendum, promulgate and publish the text of the new Constitution in the Kenya Gazette.

(7) Subject to any provisions in the new Constitution relating to its commencement, and notwithstanding anything to the contrary in this Constitution, the new Constitution shall become law and have effect when the new Constitution is published under subsection (6), on or on the expiry of a period of fourteen days from the date of the publication of the final result of the referendum in the Kenya Gazette, whichever is the earlier.

(8) In this section-

(a) references to this Constitution are references to this Constitution as from time to time amended; and

(b) references to the replacement of this Constitution are references to the repeal of this Constitution and its replacement with a new Constitution."

20. This new section entrenched a mechanism for replacement of the Constitution and expressly recognized that the sovereign right to replace

the existing Constitution with a new Constitution vested collectively in the people of Kenya and was exercisable by them through a referendum. For the first time, the constituent power of the people had found itself into the text of the Constitution.

21. Against this backdrop, another referendum was conducted on 4th August 2010, giving birth to the Constitution of Kenya, 2010. Admittedly then, the new Constitution was created in the context where the constituent power of the people to replace their own Constitution was codified in the Constitution that was replaced.

22. What are the lessons to draw from this journey? First is that the 2005 and 2010 referendums are a testimony that the people of Kenya embraced and adopted a constitution making concept in which the sovereign right to replace the Constitution vested in the people of Kenya exercisable through a referendum. The exercise of the constituent power in 2005 had received judicial nod in the decisions of **Njoya** and **Onyango** while that in the 2010 referendum was codified through an amendment of the existing Constitution. The concept is therefore neither an alien nor a foreign notion to Kenya, it is very much part of us.

23. Second, the 2005 experience tells us that the constituent power is unfettered and unlimited notwithstanding that it is not textualized in the Constitution to be replaced. I therefore align to the view that while codifying the constituent power is good constitutional practice, failure to do so neither takes away nor weakens the force of the power. In other words, textualizing it, though a bonus, is superfluous and unnecessary. That is an invaluable part of context that the history of our constitution making offers.

24. I turn now to the text of the 2010 Constitution. In doing so, it has to be remembered that, as correctly pointed out by the Attorney General, Njoya (*supra*),so too **Onyango** (*supra*), was decided against the backdrop of the making of a new Constitution altogether. Should it be any different in circumstances not involving the replacement of the Constitution but in regard to its amendment? The Respondents invite this Court to approach this question from the perspective that the basic structure doctrine protects the Constitution against constitutional dismemberment or replacement disguised as amendments.

25. I start by noting that the provisions of Chapter Sixteen make reference to the "amendment" of the Constitution. Neither in that

Chapter nor elsewhere in the Constitution is the word amendment defined. And the Interpretation and General Provisions Act (Chapter 2) is not helpful because, by dint of its section 2, the provisions of that statute do not apply in the construction or interpretation of the Constitution.

26. Turning for assistance elsewhere, the Black's Law Dictionary (Tenth Edition) defines Amendment as follows:-

> **"1. A formal and usu. minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or collection, esp., an alteration in wording. 2. The process of making such a revision."**

27. This can be contrasted with a repeal or abrogation which are: -

> **"Repeal - Abrogation of an existing law by express legislative act.**
>
> - **express repeal – Repeal by specific declaration in a new statute or main motion.**

- **implied repeal – Repeal by irreconcilable conflict between an old law or main motion and a more recent law or motion – Also termed *repeal by implication.***

Abrogation - The abolition or repeal of a law, custom institution, or the like.

- **express abrogation – The repeal of a law or provision by a later one that refers directly to it; abrogation by express provision or enactment.**
- **implied abrogation – The unannounced or none-explicit repeal of a legal doctrine, legal power, or other rule, esp. resulting from an old law's incompatibility with a new one; specif., the nullification of a law or provision by a later one that is inconsistent with or contradictory to the first, without an express repeal."**

28. To be inferred from these definitions is that unless otherwise expressed by a Constitution itself, an amendment entails a minor revision, alteration or addition to the Constitution but which nevertheless does not destroy the Constitution being amended. It does not extend to abrogation, complete repeal or replacement of the Constitution.

29. In this regard is the work of Richard Albert in his text "Constitutional Amendments – Making Breaking and Changing Constitutions" where he makes a distinction between Amendment and Dismemberment. He takes a view that constitution dismemberments are transformative changes with consequences far greater than amendments. They do violence to the existing Constitution, whether by remaking the Constitution's identity, repealing or reworking a fundamental right, or destroying and rebuilding a central structure pillar of the Constitution. A constitution dismemberment can both enhance and weaken democracy depending on what in the existing Constitution is dismembered. He also indicates that constitution dismemberment entails a fundamental transformation of one or more of the Constitution's core commitments. It is incompatible with the existing framework of the Constitution because it seeks to achieve a conflicting purpose. In truth, the purpose and effect of constitution dismemberments are the same as to unmake a Constitution. For example, in context our Constitution, an amendment to transfer judicial authority from the Judiciary and independent Tribunals to the Executive is to unmake the Constitution as it fundamentally alters a central feature of the Constitution. An amendment is not as drastic

because, properly defined, it keeps the altered Constitution in unison with its pre-change identity, rights, and structure.

30. Article 255(1) read: -

"Amendment of this Constitution.

255. (1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

(*a*) the supremacy of this Constitution;

(*b*) the territory of Kenya;

(*c*) the sovereignty of the people;

(*d*) the national values and principles of governance referred to in Article 10 (2) (*a*) to (*d*);

(*e*) the Bill of Rights;

(*f*) the term of office of the President;

(*g*) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(*h*) the functions of Parliament;

(*i*) the objects, principles and structure of devolved government; or

(*j*) the provisions of this Chapter."

31. It does seem therefore that since the provisions of Article 255 (1) simply provide for an amendment, anything that goes further than that must be sanctioned by the exercise of primary constituent power. The provisions of Article 255(1) and the popular initiative were made against the background that the making and unmaking of a Constitution is the preserve of the people exercising their primary constituent power. A change that derogates from the core character of the Constitution is not a change in unity with the Constitution but one that defaces it. That change, too, is one that can only be made by the people organized in and exercising their primary constituent power.

32. By falling short of making provisions and procedure for the unmaking or repeal or re-enactment or abrogation of the Constitution, a textual reading of Article 255(1) matches or is in accord with the contextual interpretation of the clause, that the power to make such changes rests elsewhere, in the primary constituent power of the people and need not be codified.

33. On what constitutes the basic structure of our Constitution, the High Court rendered itself as follows: -

> **"474 (g) While the Basic Structure of the Constitution cannot be altered using the amendment power, it is not every clause in each of the eighteen chapters and six schedules which is inoculated from non-substantive changes by the Basic Structure Doctrine. Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, unamendable: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as eternity clauses.**

An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our Canon of constitutional interpretation principles."

34. The appellants criticise the findings and argue that the High Court failed to identify the said clauses or provide any objective criteria for such identification. It is submitted that in the absence of clarity, no amendment could be effected without first seeking the Court's interpretation/clarification and concurrence on which provisions are amendable or eternal/unamendable. This, therefore, will be left to the subjective opinions of individual Judges.

35. A common thread running through the Bomas Draft Constitution, the Wako Draft Constitution, the Revised Harmonized Draft and the

proposed Draft Constitution is the provision for amendment of the Constitution by popular initiative. The rationale for this amendment process, captured in the final report of the recommendations by the Constitution of Kenya Review Commission (CKRC), as regards the issue of constitutional supremacy, was that the new Constitution should have some entrenched provisions which Parliament would have no power to amend without first seeking the views of the people at a referendum. Under the scheme of the various constitution proposals a distinction was drawn between entrenched and non-entrenched provisions of the Constitution.

36. The entrenched provisions are those that the people felt were the core values and provisions of the Constitution and therefore needed to be barricaded by a special amendment mechanism in which the seal of approval by people exercising their constituent power was mandatory. Notably the entrenched provisions in various drafts were substantially the same. In the Bomas draft they were in respect to the supremacy of the Constitution; the territory of Kenya; the sovereignty of the people; the principles and values of the Republic; the Bill of Rights; the term of office of the President; the independence of the Judiciary and

constitutional Commissions; the functions of Parliament; the values and principles of devolution; or the provisions of the amending chapter. The Wako draft retained the same list save a small change in regard to devolution. The entrenched provisions in the latter Harmonised Draft and Revised Harmonised Draft are almost word for word those in the Bomas and Wako drafts. They again found their way into the protective provisions of Article 255(1) of the 2010 Constitution. It is a list that survived changes made in the various draft Constitutions. It is testimony that the people meant what they said and were clear as to what they considered to be the essential features of the Constitution. It is a list to be revered and cannot therefore be shortened or lengthened by judicial interpretation or craft. It matters not that in the mind of a judge the list as too limiting or too extensive.

37. To be deduced is that if the people of Kenya felt so strongly that provisions relating to the matters listed in clause 255(1) needed protection from indiscriminate amendment then even more those are the very provisions which should not be abrogated or replaced without the exercise of the people's primary constituent power. What comprises the basic structure of the Constitution is therefore specifically defined by the

people of Kenya and is that in Article 255(1) which even in amendment requires the exercise of constituent power, the secondary constituent power.

38. That said, the true scope of the basic structure in the Kenyan Constitution becomes clearer still by looking more closely at the words of Article 255(1). They require compliance with Article 257 for any amendment that **relates** to the **matters** listed in that Article (Article 255(1)). Save for reference to "Chapter sixteen" and "Articles 10(2) (a) to (d)", the Articles of the Constitution to be protected are not specifically set out. Instead, they are identified by theme. This makes a difference. What comprises the basic structure is what is in respect to those thematic matters. For example, matters on the sovereignty of the people, which power, by dint of Article 3, is delegated to three distinct arms of government extends the protection to the doctrine of separation of power. So, while the doctrine of separation of power is not directly mentioned in Article 255(1), it is part of the basic structure of our Constitution as it is a subset of the wider design on how the Constitution has organised and structured the exercise of sovereign power. I take a view that what comprises the basic structure of our Constitution is easily

identifiable. But should a need for judicial inquiry arise as to whether a matter is part of the basic structure of our Constitution, then that inquiry will not be a rudderless or unguided exercise because it is firmly beaconed in Article 255(1).

THE CONSTITUTIONAL REMIT OF THE POPULAR INITIATIVE

39. In paragraphs 491 and 492 of its decision, the High Court makes findings as to who can initiate constitution amendments by way of popular initiative: -

> **"491. As we concluded above, both a textual analysis of our Constitution and a historical exegesis of the clause on Popular Initiative makes it clear that the power to amend the Constitution using the Popular Initiative route is reserved for the private citizen. Neither the President nor any State Organ is permitted under our Constitution to initiate constitutional amendment using Popular Initiative.**
>
> **492. Beyond the text of the Constitution, there is another reason it is impermissible under our Constitution: in our view to permit the President to initiate such amendments through a**

Popular Initiative and then sprint to the finishing lane to await and receive it and to determine its ultimate fate would have the effect of granting to him both the roles of the promoter and the referee. This is because Article 257(5) of the Constitution provides that if a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255(1) the President shall, before assenting to the Bill, request the IEBC to conduct, within ninety days, a national referendum for approval of the Bill. In other words, Article 257(5) of the Constitution, arguably, gives the power to the President to determine whether or not a referendum is to be held. In circumstances where the President, whether in his official or personal capacity is the promoter of the Amendment Bill, his role in determining whether or not the Bill is to be subjected to a referendum may well amount to a muddled up conflict of interest. The President cannot be both player and the umpire in the same match."

40. The parties to the Appeal agree that in resolving the controversy whether the executive can initiate or promote an amendment by way of

popular initiative, the history of the clause is not to be overlooked. This is because it gives the context of the clause and therefore its objective. And the High Court dedicated a considerable part of its decision in that history and none of the parties fault the accuracy of the account. In summary, the genesis of the popular initiative clause in Kenya can be traced to the CKRC final report. For purposes of facilitating the exercise of constituent power, it was recommended that citizens and civil society be enabled to initiate constitution amendments through the process of a popular initiative. This then found expression in the Zero draft and appeared at Article 346 as follows: -

> **"An amendment to this constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote."**

Almost to the word, the clause was retained in the Bomas draft.

41. After the Bomas draft came the Wako draft which was rejected in a referendum held in 2005. In the rejected draft the popular initiative clause persisted under Article 283 in the following words: -

"An Amendment to this Constitution may be proposed by a popular initiative supported by the signatures of at least one million registered voters.''

42. A fresh start in the quest for a new constitution begun in the 2008. This effort, under the stewardship of the Committee of Experts prepared a Revised Harmonized Draft of the Constitution. As is suggestive of the name, this draft synthesized all the previous drafts save for issues identified as contentious which was subjected to further discussion. The current Article 257 of the Constitution on popular initiative is a revised version of Article 238 of the Revised Harmonized Draft. As correctly observed by the High Court, the popular initiative clause was among the non-contentious issues which remained substantively unaltered in all the drafts that were a precursor to the 2010 Constitution.

43. The objective for popular initiative as captured in the Final report of the Technical Working Group K of the Constitution of Kenya Review Commission on Constitutional Commission and Amendments to the Constitution held up to the creation of the 2010 Constitution. The report had noted: -

"…committee introduced a novel ideal called popular initiative. This is an innovation where the citizens can on their own motion initiate amendment to the Constitution by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. <u>The committee explained that their intention was a starting point towards curbing dictatorship by parliament</u>." *(*Emphasis added)

44. The monopoly of Parliament in initiating constitution amendments had been enabled by section 47 of the previous Constitution (prior to the inclusion of section 47A) which read: -

"Alteration of Constitution

(1) Subject to this section, Parliament may alter this Constitution.

(2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the *ex officio* members).

(3) If, on the taking of a vote for the purposes of subsection (2), the Bill is supported by a majority of the members of the Assembly voting but not by the number of votes required by that subsection, and the Bill is not opposed by thirty-five per cent of all the members of the Assembly or more, then, subject to such limitations and conditions as may be prescribed by the standing orders of the Assembly, a further vote may be taken.

(4) When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly.

(5) A certificate of the Speaker under subsection (4) shall be conclusive as regards proceedings in the Assembly, and shall not be questioned in any court.

(6) In this section -

(a) references to this Constitution are references to this Constitution as from time to time amended; and

(b) references to the alteration of this Constitution are references to the amendment, modification or reenactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision."

45. Although the Attorney General submits that the intention of the popular initiative was to curb parliamentary monopoly not just in respect to the private citizens but also in respect to other state organs, the report reads that "this is an innovation where the citizens can on their own motion initiate amendment to the constitution by a way of a popular initiative either in the form of a general suggestion or a formulated draft Bill." The report alludes to a citizen driven process. It does not make reference to State actors. From the historical perspective, the popular initiative route is a preserve of the citizens.

46. What about the text of the Constitution? Article 255(1) reads: -

"Amendment of this Constitution.

255. (1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and

approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

(*a*) the supremacy of this Constitution;

(*b*) the territory of Kenya;

(*c*) the sovereignty of the people;

(*d*) the national values and principles of governance referred to in Article 10 (2) (*a*) to (*d*);

(*e*) the Bill of Rights;

(*f*) the term of office of the President;

(*g*) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(*h*) the functions of Parliament;

(*i*) the objects, principles and structure of devolved government; or

(*j*) the provisions of this Chapter.

(2) A proposed amendment shall be approved by a referendum under clause (1) if—

(*a*) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(*b*) the amendment is supported by a simple majority of the citizens voting in the referendum.

(3) An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—

(*a*) by Parliament, in accordance with Article 256; or

(*b*) by the people and Parliament, in accordance with Article 257."

47. An amendment by way of popular initiative can be in relation to matters protected by Article 255(1) and those amendable by Parliament. Sub Article 3(b) of Article 255 is therefore invaluable in identifying the owners of the popular initiative. Reading that Sub Article in conjunction with Article 257, both the people and parliament are participants in a popular initiative process. By use of the word and instead of or, it is clear that a popular initiative is not achievable without participation of both.

That said, the role of Parliament is clearly circumscribed by Sub Articles (7) and (8) of Article 257. A constitution amendment bill is placed before parliament for approval after it has garnered the support of one million registered voters and has been approved by a majority of the County Assemblies. Parliament cannot initiate or promote an amendment pursuant to Article 257. Clearly it is a people-centric process in which the people own and drive the crucial roles of initiating the amendment, promoting the Bill and voting at the referendum.

48. So, who are the people? Article 1 of the Constitution reads: -

"**Sovereignty of the people.**

1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(*a*) Parliament and the legislative assemblies in the county governments;

(*b*) the national executive and the executive structures in the county governments; and

(*c*) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(*a*) the national level; and

(*b*) the county level."

49. Article 1(3) is important because it reveals the place of state organs *vis-à-vis* the people. The people, by this Article and through the constitution, delegate aspects of their sovereign power to parliament, legislative assemblies, the national executive, executive structures in county governments, judiciary and independent tribunals. By making reference to the people, Article 255(3) suggests that the amendment by popular initiative exercise is an exercise of undelegated power of the people. It is an occasion when the people exercise their sovereign power directly. The process cannot be initiated or promoted by State actors. The answer found in the text of the Constitution coincidences with the

historical justification for the popular initiative clause, that it must be truly citizen or people driven.

50. There is however an argument that this interpretation results in an outcome, in respect to a sitting president, which not only abridges the President's constitutional rights but also conflicts and undermines his official role as the symbol of national unity. I turn to consider this argument.

51. Article 27 on Equality and freedom from discrimination reads: -

"Equality and freedom from discrimination.

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

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

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

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin,

colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

52. While it is true that every person is entitled to equal protection and benefit of the law, a person who takes up a State Office must be ready to live with restrictions that come with that office. Judges, for instance,

must ascribe to conduct that is limited by the Judicial Code of Conduct and Ethics. Judges must accept personal restrictions that might be viewed as burdensome by the ordinary citizen. For illustration, a Judge [Judges] gives up some of his [their] political rights under Article 38(1) (a) as his [their] office does not permit him [them] to form or participate in forming a political party. While the Constitution does not expressly bar the President from initiating or promoting a constitution amendment by way of popular initiative, a contextual and textual interpretation of the law is that the process excludes the executive. Ineligibility to initiate a constitution amendment by way of popular initiative comes with the territory.

53. As to the argument that the President, can in his own private capacity, drive a popular initiative, one has to contend with whether a serving President can, in the eyes of the public, declothe himself of his official capacity. In this respect is the following observation: -

> **"The President is unique, for he is the only official on office twenty-four hours a day, seven days a week. This special constitutional status puts pressure on the distinction between public and private, for unlike members of congress (whom the**

Constitution presumes will be away from office at regular intervals) presidents are always "in session". The President has, constitutionally speaking, virtually no personal life while in office."

(The public and private life of presidents by Neal Kumar Katyal https://scholarship.law.georgetown.edu/facpub/127)

In the eyes of the ordinary man a sitting President remains a President and in office twenty-four hours a day seven days a week.

54. It is true that reading Articles 130(2) (e) with Article 132 of the Constitution, the President has the responsibility of promoting and enhancing the unity of the nation. Indeed, the President is a symbol of national unity. However, a wholesome reading of the Constitution does not lend itself to an outcome that one way in which the President can promote and enhance national unity is by leading a constitution amendment by way of popular initiative. The President can use the avenues permitted by the Constitution. The President must not, however, in this noble duty expand his mandate beyond that contemplated by the Constitution.

55. This is the conclusion I reach notwithstanding the further contention that in some countries like Switzerland, the Government and State organs initiate amendments to constitutions through popular initiative. While it may be true that the text of the Swiss constitution bears some similarity with that of our Constitution, that text does not have the language of our Article 255(3) which strongly underscores that the popular initiative of Article 257 is a citizen driven process in undelegated form. In addition, the historical basis for Articles 255, 256 and 257 alluded to makes the Kenyan process people-centric to the exclusion of State actors. While a comparative study of constitutions of other jurisdictions may help us unpack our Constitution, the dissimilarity in text and the historical journey of our popular initiative clause is far too illuminating to be ignored.

56. I then turn to make short comments on the following holding by the High Court: -

> **"492. Beyond the text of the Constitution, there is another reason it is impermissible under our Constitution: in our view to permit the President to initiate such amendments through a Popular Initiative and then sprint to the finishing lane to await**

and receive it and to determine its ultimate fate would have the effect of granting to him both the roles of the promoter and the referee. This is because Article 257(5) of the Constitution provides that if a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255(1) the President shall, before assenting to the Bill, request the IEBC to conduct, within ninety days, a national referendum for approval of the Bill. In other words, Article 257(5) of the Constitution, arguably, gives the power to the President to determine whether or not a referendum is to be held. In circumstances where the President, whether in his official or personal capacity is the promoter of the Amendment Bill, his role in determining whether or not the Bill is to be subjected to a referendum may well amount to a muddled up conflict of interest. The President cannot be both player and the umpire in the same match."

57. First, to be observed is that the High Court must have meant to refer to Article 256(5) and not 257(5), as the latter it has nothing to do

with the role of the President in the popular initiative. Now, Article 256(5) reads: -

> **"(5) If a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255 (1)—**
>
> **(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and**
>
> **(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255 (2), the President shall assent to the Bill and cause it to be published."**

58. Given that a constitution amendment by popular initiative is people-centric and the obligatory language of Article 256(5), the President has no option but to request IEBC to conduct a national referendum once a constitution amendment Bill coming through the popular initiative route is passed by either house of parliament. To hold that the President can determine whether or not a referendum can be held

is to create a non-existing veto power over the process. As discussed earlier, there are other good reasons for holding that the President cannot either in his official or personal capacity promote an amendment by way of popular initiative. The role granted to him by Article 256(5) is not one such reason.

59. Who was the promoter of the impugned Bill? The appellants argued that the learned Judges of the High Court coined a new word "initiators" which is not in the text of the Constitution so as to arrive at an erroneous conclusion as to who the promoters of the Bill were. The words of Article 257 (1) brook no ambiguity as to how the process of an amendment by popular initiative begins and proceeds. It starts when a promoter, having generated a proposal for amendment to the Constitution, formulates the proposal or suggestion into a draft Bill. The promoter then collects the signatures of at least one million registered voters in support of the initiative. Once the threshold is achieved, then the promoter delivers the draft Bill and supporting signatures to IEBC for verification. The appellants submit that where a promoter derives the substance of a proposed constitution amendment is immaterial. And I agree, for as long as a promoter formulates the suggestion or proposal

amendment into a formal draft Bill, the source of the suggestion or proposal may not matter. For instance, the idea or suggestion may be that of a person who never took it further than a mere idea and so the person who formulates it into a Bill and follows through the process of signature collection is the promoter of the initiative.

60. That said, the process of popular initiative must be guarded from abuse. A State actor, who is otherwise barred from initiating a popular initiative, cannot originate a proposal for amendment then hire or sponsor a citizen to formulate it into a Bill and then collect signatures in support. In that instance, the promoter will simply be a surrogate of the State actor. That will not be a truly citizen-driven initiative as it will an enterprise of the State actor. There will be occasion therefore when it will be necessary to look beyond the person who formulates the draft Bill and collects the signatures to discover the hand behind the initiative, only in this way will the true intent of the popular initiative process be protected against manipulation.

61. With this in mind, I now turn to examine the evidence before the High Court so as to determine whether there is fault with the conclusion reached that the promoter of the impugned Bill was the President.

62. The appellants have maintained that the impugned initiative was promoted by Hon. Dennis Waweru and Hon. Junet Mohamed. What did the two say at the High Court? In response to Petition No. E 402 of 2020, Hon. Waweru swore an affidavit on 5th February 2021. He opens by stating: -

> 1. *THAT I am of the Co-chairperson of the building BRIDGES TO A UNITED KENYA, NATIONAL SECRETARIAT, one of the Applicants herein, and my other co-chairperson being HONOURABLE JUNET MOHAMED, and duly authorized to swear the instant Affidavit both on my behalf, on behalf of my co-chairperson and on behalf of the BBI and Hon. Raila Amolo Odinga, the Respondents herein, in opposition to the consolidated petitions herein.*

He affirms that he is a co-chairman of the Building Bridges to a United Kenya National Secretariat and that he swears the affidavit on behalf of, amongst others, himself and BBI.

63. He then explains: -

(5) THAT the Building Bridges to a United Kenya was created and mandated with the task of initiating a constitutional amendment process and unifying Kenyans, among other functions.

(6) THAT the Building Bridges Initiative Taskforce and Secretariat conduct a robust nationwide public engagement and collection of views on a wide array including meeting professionals and professional bodies among others.

(7) THAT upon receiving the varied views on various issues, it made various legislative, policy and constitutional amendment proposals in various fields affecting various Kenyans.

(8) THAT the raft of proposals in anticipation of a constitutional amendment are to be made pursuant to Articles 255, 256 and 257 of the Constitution of Kenya, 2010 through popular initiative.

(9) THAT contrary to the Petitioner's assertions, I am advised by my counsel on record which advise I verily believe to be true that an Amendment to the Constitution is to be done on any such provision of the constitution as contemplated under Chapter sixteen of the constitution.

(10) THAT contrary to the Petitioners' assertions, there is no such limit and/or curtailment imposed under Articles 255, 256 and 257 of the constitution on the scope, nature and content of any such proposed amendment but rather the underlying factor of any proposed amendments is the ultimate involvement of the people of Kenya through a referendum.

(11) THAT contrary to the Petitioners' assertions, I am advised by my counsel on record which advise I verily believe to be true that whereas the constitution and the Independent Electoral and Boundaries Commission Act envision that the function of boundary delimitation is the function of the Independent Electoral and Boundaries Commission, there is no such express and/or implied term under CHAPTER SIXTEEN of the Constitution of Kenya, 2010 that no such constitutional amendment can be made in terms of boundaries delimitation."

64. The tone of Mr. Waweru's response must be seen from the context of what he was responding to. It was an affidavit of Justus Juma sworn on 6th December 2020 in which he essentially asserted that the amendment Bill was unconstitutional as it purported to "delimit and

allocate" constituencies. The Petitioners had annexed a copy of that amendment Bill, the Constitution of Kenya (Amendment) Bill 2020, to the affidavit.

65. To be inferred from Hon Waweru's own concession is that the formulators of the Bill, and therefore the promoter, was the Building Bridges Initiative Taskforce and Secretariat. And if there was any doubt as to who the promoters are the Bill are it is signed off as follows:-

"Dated the 25th November 2020

Building Bridges Initiative

The Promoters."

66. To be concluded is that there was a nexus between the Building Bridges Initiative and the BBI Taskforce and Secretariat. An undisputed fact is that the formation of the Building Bridges to Unity Advisory Taskforce by the President was communicated to the public through Gazette Notice No. 5154 of 24th May 2018 and published in the Kenya Gazette dated 31st May 2018. The term of the Taskforce was 12 months from the date of its launch, with an option for extension by the President.

67. After an extension of its term, the Taskforce handed its report to the President in October 2019. Thereafter, through Gazette No. 264 dated 3rd January 2020 and published in a special issue of 10th January 2020, the Head of Public Service notified the public that the President had appointed the BBI Steering Committee. The terms of reference of the committee are important to the matter at hand. They were to;

> "**(a) conduct validation of the Task Force Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and**
>
> **(b) propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Task Force Report, taking into account any relevant contributions made during the validation period."**

68. The connection between the Taskforce and the Steering Committee is apparent from those two terms of reference. The Steering Committee was to conduct validation of the Taskforce report and to

propose administrative, policy, statutory or constitutional changes for the implementation of the recommendations in the Taskforce report. In a word, the Steering Committee was to continue the work started by the BBI Taskforce.

69. At the hearing of the Appeal, the BBI National Secretariat contended that it is not connected with the Taskforce or Steering Committee. One reason proffered is that the Bill was published on 25th November 2020 after the expiry of the mandates of both the Taskforce and the Steering Committee. The former on 26th October 2019 and the latter on 30th June 2020. The date of 30th June 2020 was the appointed date of expiry of the Steering Committee set by the President.

70. However, the evidence is that the Steering Committee existed beyond that date (30th June 2020). Through a letter dated 16th October 2020, the Committee submitted its report to the President. Annexure B to the report was a draft amendment Bill. An attempt to delink the Steering Committee from the impugned Bill merely on account of the supposed expiry date of 30th June 2020 is therefore without candour.

71. There is further evidence that the draft amendment Bill which was eventually subjected to signature collection was an amended version of

the one annexed to the report. For illustration, I pick the proposed insertion of a new Article 172A on the reports to be prepared by the proposed Judiciary ombudsman. Sub Article 4 of the draft Bill reads:-

> **"The Judiciary ombudsman shall prepare regular reports to the judicial service commission on any complaint under clause (3) which shall state-**
>
> **(a)the findings of the judiciary ombudsman; and**
>
> **(b) recommendations on the action to be taken by the judicial service commission."**

While that in the impugned Bill reads: -

> **"(4) The judiciary ombudsman shall prepare regular records to the judicial service commission and an annual report to the parliament on any complaint under clause (3), which shall state-**
>
> **a) the findings of the judiciary ombudsman; and**
>
> **b) recommendations on the action to be taken by the judicial service commission."**

72. Does the difference in the text of two Bills mean that the Steering Committee has nothing to do with the impugned Bill? Again, I turn to

Hon. Waweru for the answer. In his affidavit of 5th February 2021 filed in response to Petition No. E 416 of 2020, he depones:-

> **"[19] THAT contrary to the assertions by the Petitioner at Paragraphs (80), (81), (82) and (83) of the Petition, I am advised by my Counsel on record which advise I verily believe to be true that there has been no such violation and/or contravention of Articles 7, 27 and 35 of the Constitution of Kenya, 2010 on the involvement of the people and public participation in light of the fact that firstly, the draft proposed constitutional amendment Bill, the BUILDING BRIDGES TO A UNITED KENYA TASKFORCE REPORT, OCTOBER 2020, AND THE BUILDING BRIDGES TO A UNITED KENYA FROM A NATION OF BLOOD TIES TO A NATION OF IDEAS – A REPORT BY THE PRESIDENTIAL TASKFORCE ON BUILDING BRIDGES TO A UNITY, ADVISORY 2019, are a product of a wide comprehensive and broad consultative engagement and public involvement all**

over Kenya, which process entailed voluntary nationwide public participation.

Now produced and marked as Annexure DW-4 are some of the invitations, deliberations, reports and memoranda evidencing public participation and consultations.

[20] THAT contrary to the Petitioner's assertions and in furtherance of my averments in Paragraph (19) herein above, I wish to state that the Petitioner has not pleaded with specificity and has merely made generalized assertions and allegations. For instance, no such evidence has been tendered in support of the contentions that for instance "*a vast majority of the people were grappling with lack of information as they appended their signatures. Those who do not speak English of (sic) those who are visually impaired or the deaf were disrespected, ignored and discriminated against…*"

[21] THAT contrary to the Petitioner's assertions at Paragraph 82 and 83 of the Petition, I wish to state that no such evidence has been adduced by the Petitioner in support of the

allegations made therein and as such the averments remain mere assertions.

73. Hon. Waweru was responding to the Petitioner's assertion that impugned Bill had not been subjected to public participation and involvement prior to collection of signatures. In his reaction, Hon. Waweru alludes to all as one process.

74. Further clarity on the nexus between the secretariat and the Steering Committee is provided by the pleadings and evidence in Petition No. E 400 of 2020 and the answer to it by the BBI Secretariat In paragraph 5 of the Petition it is pleaded: -

(5) <u>The 2nd Respondent is the Secretariat of the 1st Respondent established as an administrative department of the 1st Respondent. The said secretariat is co-chaired by the following individuals:-</u>

i Hon. Junet Mohamed, a sitting member of National Assembly for Suna East Constituency on the Orange Democratic Party (ODM) ticket and the minority whip in the National Assembly.

ii **Hon. Dennis Waweru, a member of Jubilee Party and former member of National Assembly for Dagoreti South Constituency on Jubilee Party ticket."**

75. In the affidavit in support, Mr. Miruru Waweru (he shares one name with Hon. Dennis Waweru) reiterates the administrative role of the secretariat and avers that the secretariat was established to implement the BBI Report launched on 26th November 2020. When Hon. Dennis Waweru of IEBC responds to the Petition and supporting affidavit, he does not deny or refute that the BBI secretariat is the administrative department of the Steering Committee.

76. To hold that the secretariat, named as promoters of the Bill, is not part of the process that began with the BBI Taskforce and progressed by the Steering Committee would be to do violence to the evidence on record. The fingerprints of the Executive are on the entire process from the setting up of the Taskforce, the formation of the Steering Committee and the formulation of the impugned Bill. These impressions refuse to go away even at the launch of the roll out for collection of signatures in support of the Bill on 25th November 2020 presided over by the President.

77. And any attempt to artificially detach the Executive from the BBI Bill suffers further setback by the damning evidence that public officers were asked to supervise the collection of signatures from government employees. As an illustration in this letter of 1st December 2020 by the Principal Secretary, State Department for Sports: -

> ***"MINISTRY OF SPORTS, CULTURE AND HERITAGE***
> ***STATE DEPARTMENT FOR SPORTS***
> ***OFFICE OF THE PRINCIPAL SECRETARY***
>
> ***1st December 2020***
>
> ***Mr. Pius Metto***
> ***Director General Sports Kenya***
> ***NAIROBI.***
>
> ***BUILDING BRIDGES INITIATIVE CONSTITUTIONAL AMENDMENT BILL 2020 SIGNATURE COLLECTION FORMS – SERIAL NOS 0224407 TO 0224425***
>
> ***The above subject matter refers.***
>
> ***Attached please find the Building Bridges Initiative Constitutional Amendment Bill, 2020 signature collection form. You are required to supervise your staff to fill in the forms and sign appropriately.***
>
> ***Kindly take this exercise seriously and note that the deadline is tomorrow, 2nd December 2020***
>
> ***Joe Okudo, CBS***
> ***PRINCIPAL SECRETARY***

Encls

Copy to: Cabinet Secretary
Ministry of Sports, Culture and Heritage."

78. The Attorney General did not deny the authenticity of that letter or that it was not written in official capacity. The inevitable conclusion is that properly reached by the High Court, that the impugned Bill was an Executive enterprise.

LEGALITY OF THE STEERING COMMITTEE

79. The High Court held that the BBI Steering Committee was an unconstitutional outfit for two reasons; it was created to perpetuate an unconstitutional purpose and secondly it was established in violation of Article 132(4) (a) of the Constitution.

80. The Gazette Notice in which members of the public were notified of the appointment of the Steering Committee reads: -

"GAZETTE NOTICE NO. 264
THE STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED KENYA TASK FORCE REPORT

APPOINTMENT

IT IS notified for general information of the public that His Excellency Hon. Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces, has appointed the

Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, which shall comprise of:

Mohamed Yusuf Haji (Sen.)
Lawi Imathiu (Bishop)
Maison Leshomo
James Matundura
Rose Moseu
Agnes Kavindu Muthama
Saeed Mwaguni (Prof.)
Peter Njenga (Bishop)
Zaccheaus Okoth (Archbishop Emeritus)
Adams Oloo (Prof.)
Amos Wako (Sen.)
Florence Omose (Dr.)
Morompi ole Ronkei (Prof.)
John Seii (Rtd) Major
Joint Secretaries
Martin Kimani (Amb.)
Paul Mwangi

1. **The Terms of Reference of the Steering Committee shall be to:**

(a) conduct validation of the Task Force Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and

(b) propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Task Force Report, taking into account any relevant contributions made during the validation period.

2. In the performance of its functions, the Steering Committee shall—

(a) appoint its chairperson and vice-chairperson from among its members;
(b) regulate its own procedure within confines of the law and the Constitution;

(c) privilege bipartisan and non-partisan groupings, forums and experts;

(d) form technical working groups as may be required in the achievement of its terms of reference;

(e) hold such number of meetings in such places and at such times as the it shall consider necessary for the proper discharge of its functions;

(f) shall solicit, receive and consider written memoranda or information from the public; and
(g) may carry out or cause to be carried out such assessments, studies or research as may inform its mandate.

3 The Joint Secretaries shall to be responsible for all official communication on behalf of the Steering Committee.

4. The Joint Secretaries may co-opt any other persons as may be required to assist in the achievement of the terms of reference of the Steering Committee.

5. The Steering Committee shall submit its comprehensive advice to the Government by 30th June, 2020 or such a date as the President may, by notice in the Gazette, prescribe.

Dated the 3rd January, 2020.

JOSEPH K. KINYUA,
Head of the Public Service"

81. It is clear that other than being tasked to propose changes to the constitution necessary for implementation of the recommendations of Taskforce report, it was mandated to propose administrative, policy, statutory changes and as well to conduct validation of the Taskforce report. The High Court found, which finding I agree, that the Steering Committee did not have any legal footing to promote a constitution amendment by way of popular initiative. To that extent it was involved in an unconstitutional activity. However, I am unable to find fault in its other functions. For the reason that it was not solely formed to promote the BBI Bill, it may be too harsh to declare the Steering Committee an unconstitutional outfit merely because it undertook an activity not sanctioned by the Constitution.

82. Next is whether the Taskforce was established contrary to the law? This issue was raised in Petition No. E 426/2020. There, Mr. Aluochier specifically challenged the Public Service Commission (PSC) to provide evidence that the President had obtained a recommendation from it

(PSC) to establish offices in public service of members of the Steering Committee. PSC who were named as an interested party in the Petition did not appear. For the Attorney General, it was asserted that the issue of the legality and mandate of the Steering Committee was adjudicated in Nairobi Constitution Petition **No. 451 of 2018** between **Third way Alliance vs The Attorney General & Others** and was therefore *Res judicata*. The issue of res judicata was, however, resolved by the High Court, correctly, in favour of the Petitioner. In this regard see the lead decision of Musinga (P).

83. Article 132(4) of the Constitution reads: -

"The President may—

(*a*) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;

(*b*) receive foreign diplomatic and consular representatives;

(*c*) confer honours in the name of the people and the Republic;

(*d*) subject to Article 58, declare a state of emergency; and

(*e*) with the approval of Parliament, declare war."

84. Both before the High Court and us, the contention of the Attorney General was that the members of the Steering Committee were not public servants and that they were appointed pursuant to the provisions of the Commission for Inquiry Act (Cap 102).

85. In its preamble, the Commission of Inquiry Act declares itself to be an Act of Parliament to provide for the appointment of Commissioners to inquire into and report on matters of a public nature referred to them by the President, to prescribe their powers, privileges and duties, and to provide for matters related thereto.

86. Section 3(1) provides the issues for which an inquiry may be undertaken. It reads: -

"Issue of commissions of inquiry

(1) The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any

public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest."

87. It has to be remembered that the mandate of the Steering Committee was to validate the BBI Taskforce report and to propose an implementation matrix of the recommendations of the report. Even on a strained construction of the word inquiry, the terms of reference of the Steering Committee is not the inquiry contemplated by statute.

88. Further, there was no evidence tendered by the Attorney General that the Steering Committee was the typical commission of inquiry envisaged by the Act. For instance;

i That members of the Committee took an oath of office as required by Section 5.

ii That it submitted its written report not just to the President but also the National Assembly (Section 7).

89. Clearly, the BBI Steering Committee was not a commission of inquiry under the provisions of the Commissions of Inquiry Act. That said, the President, to whom the Constitution bestows executive authority, can form a taskforce to advise him on aspects of his constitutionally mandated duties. As long as a taskforce is established

out of necessity, is for *bonafide* purposes and not a waste of public funds, then its establishment cannot be said to be incompatible with the legitimate exercise of executive authority. The BBI Steering Committee continued the work of the BBI Taskforce and what Mativo, J. said of the Taskforce in **Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others**; **Martin Kimani & 15 others (Interested Parties) [2020] eKLR** holds true here. The Judge said of the establishment of the BBI Taskforce: -

> **"The President's power to appoint a Taskforce is closely related to his broad, policy-formulating function, hence it is an executive power. It is a mechanism whereby the President can obtain information and advice so as to achieve his desired goal, in this case of promoting and ensuring national unity among the other terms of reference for the Taskforce''**

The Steering committee cannot be an illegal entity simply because one of its functions was an impermissible overreach.

PRESIDENTIAL IMMUNITY

90. A grievance by the President invites this Court to consider the scope of the immunity against civil action enjoyed by a sitting President

under the provisions of Article 143 (2) of the Constitution. The entire Article reads: -

"Protection from legal proceedings.

143. (1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.

(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."

91. The learned Judges of the High Court had returned the following view in respect to that question: -

"546. On the specific question of whether the President can be sued in his personal capacity during his tenure, our answer is in the affirmative because it is apparent from Article 143(3) that the President or any other person holding that office is only protected from such actions '*in respect of anything done or not done in the exercise of their powers under this Constitution.'*

547. The rationale for so holding is simple to see: Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff? We

think that in such circumstances, any person may invoke the jurisdiction of this Court by suing the President, whether in his personal or in his official capacity; whichever capacity he is sued may very well depend on the nature of the violation or threatened violation and will certainly depend on the circumstances of each particular case."

92. At the core of the appellant's challenge to these findings is that if left to stand, then Article 143(2) will be of no consequence as it would be permissible to institute civil proceedings against a sitting President in respect of things done in exercise of his powers under the Constitution by simply alleging that the acts are not within his powers or that, in taking those actions, he has violated the Constitution or the law. The appellant proposes that where there is a basis to assert that the President has engaged in gross violation of the Constitution or any other law, impeachment proceedings can be commenced against him in accordance with the provisions of Article 145(1) and only if and after the President is impeached or otherwise leaves office does he lose immunity.

93. The 78th respondent disagrees. His proposition is that when the President is performing a constitutional function of his office, his is

acting as President. But when he is engaging in conduct outside the constitutionally specified functions of the office of the President, he does not act as President even though he remains the President until such time as he ceases to be so under the provisions of the Constitution. The argument fronted by this respondent is that where the President, albeit appearing to act in his official capacity as President, engages in conduct outside what is specified by the Constitution then he is not immunized by the provisions of Article 143(2).

94. The issue presented is not entirely novel as this Court in **Civil Appeal No. 147 of 2015 Kenya Human Right Commission & Another vs Attorney General & 6 others [2019] eKLR**(**KHRC**) had opportunity to expound on some aspects of the immunity of a sitting President against civil immunity. For its importance I reproduce the Court's holding in *extenso*:-

> **"In effect, a plain and ordinary interpretation of *Article 143 (2)* would infer that, the President's immunity is limited; (i) to proceedings instituted during his or her term in office and (ii) to anything done or not done in exercise of the President's powers under the Constitution. Put differently, the immunity**

does not extend to acts or omissions that have resulted in civil proceedings commenced prior to assumption of the office of the President or that were not in exercise of the President's powers.

The foregoing makes it clear that it was the intention of the framers of the Constitution to limit the extent of the President's immunity in civil proceedings to only those instituted while he or she was in office. This intent is evident from the difference in construction between *Article 143 (1)* and *Article 143 (2)*. Whereas *Article 143 (1)* expressly prohibits institution or continuance of criminal proceedings once the President assumes office, under *Article 143 (2)* the immunity in civil proceedings is limited to only those suits instituted against the President during the term of office in respect of anything done or not done in the exercise of power as the President of Kenya. Acts or omissions that gave rise to civil proceedings instituted prior to assuming office are not covered by the prescribed immunity.

The framers' intent is further evinced by the stark distinction that emerges when *Article 143 (2)* is compared with *section 14 (2)* of the retired Constitution that addressed a similar immunity. The repealed provision provided that;

> ***"no civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the Office of President".*** **(emphasis ours)**

The construction of *section 14 (2)* accorded civil proceedings with absolute immunity before and during the period in office in the same way as *Article 143 (1)* spells out the immunity specified for criminal proceedings, whether or not the cause of action was done or omitted to be done in exercise of the functions of office of the President. More importantly, *section 14 (2)* expressly prohibited continuation of civil proceedings against the President whilst he or she was in the office.

This is not the case with *Article 143 (2).* The words *"or continuing"* are clearly absent, meaning that it was never intended that immunity would extend to civil litigation that preceded the assumption of office. So that without inclusion of the words *"or continuing"*, the provision effectively allowed proceedings instituted prior to assumption of office to continue even while the President is in office.

Further, the interpretation of the phrase *"…the President or the person performing the functions of that office during their tenure of office..."*, is instructive. It would infer that immunity was limited to the "*…functions of that office…"* as well as *"…during their tenure of office…".* So that, to be covered by the immunity under *Article 143 (2)*, firstly, the person should have been in office, and secondly, the impugned actions should have taken place during the tenure of office. Immunity would not therefore extend to acts or omissions not connected to the office or carried out before or after the term of office.

The interpretation of the extent of the immunity specified by *Article 143 (2)* can be likened to the US Supreme Court's observations as to the type of acts capable of being covered by the immunity as seen in the case of *Nixon vs Fitzgerald (1983)*, where the court stated thus;….

Similarly, in the case of *Clinton vs Jones (supra)*, the same court distinguishing between the official duties and unofficial actions of former President Clinton while he was Governor of the State of Arkansas, and limited the President's immunity to official public responsibilities, so that private conduct was excluded from immunity.

In the instant case, when the criteria described above is applied to the impugned acts which took place after the 2007 General Election and before the 3rd respondent assumed the office of President, they were clearly outside the purview of *Article 143 (2)*, and consequently, the immunity provided thereunder did not extend to those acts. And we so find.

We would add that to the extent that the authorities cited in support of the 3rd respondent's submissions, are with reference to *section 14 (2)* of the repealed constitution, they are distinguishable, and cannot be applied in this case. So much so that in relation to *Article 143 (2),* we would agree with the observations of the court in *Clinton vs Jones* *(supra)* thus;

> ***"…indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" category…" and furthermore, "If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."***

95. Although the Court in **KHRC** (*supra*) was not asked to delimit the extent of immunity enjoyed by a sitting President in respect to acts committed or omitted while President, the decision gives a useful hint as

to how the matter at hand can be resolved. Drawing from American decisions, the Court distinguished official duties from unofficial actions.

96. It is not controversial that when a sitting President acts in purely personal capacity then civil action can be brought against him notwithstanding that he holds office. The rationale being that the President, like any other citizen, must be held responsible for personal conduct. The President does not enjoy the heightened protection of section 14 of the previous Constitution which provided absolute immunity to a sitting President even in regard to personal conduct. The repealed provision read: -

> **"Protection of President in respect of legal proceedings during office**
>
> **(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.**
>
> **(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against**

any person while he is exercising the functions of the office of President.

3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person."

97. So as to discover the breadth of the immunity of the President for official acts or omissions, the provision of Sub article 2 of Article 143 must be read with that of Sub article 3. This latter provision is auxiliary to Sub-articles 1 and 2 of Article 143 and understanding it can helps unpack the scope of immunity granted by the Constitution. For its importance to this discussion, it is reproduced: -

"(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person

holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law."

98. By virtue of this provision, time, for purposes of a statute of limitation, only starts to run against a person who is entitled to take out civil action against a sitting President for official conduct, but for the bar of Article 143(2), on the day the President ceases to hold office. Implicit, therefore, is that there will be acts or omissions which a sitting President may do or not do in the name of or under the insignia of office, but which are outside or in direct contravention of the powers donated to the President by the Constitution. For those acts or omissions, the President enjoys protection from civil litigation only while in office. At the end of term, such conduct can be brought under scrutiny in civil litigation. In this way an ex-President or former President can be personally held to account for acts or omissions done or not done in the guise of official function, but which are an affront to or not authorised by the Constitution.

99. Indeed, in his written submissions the 78th respondent does not construe the purpose of Article 143(3) any differently. He submits: -

"[3.32] Article 143(3) of the Constitution is not superfluous. A person may want to institute civil proceedings against the president in his personal capacity on account of conduct or misconduct within the functions of presidential office. But Article 143(2) shields the President from such proceedings. Such a person has to wait until the President concerned is no longer in office, in order to institute such proceedings. Limitation of time laws are suspended in order not to deny such a person access to justice with respect to such proceedings. The same applies to the institution of criminal proceedings for –say-minor offences subject to limitation of time laws."

100. There is difficulty in reconciling the purpose of the provision of Article 143(3) with interpreting the scope of Article 143(2) as anything less than providing functional protection to the President. That is, protection that is predicated on the functions of the President's office. This is because, if Article 143(2) is read as providing immunity only for action or inaction in the course of the proper exercise of powers permitted by the Constitution, then Sub-article 3 will be moot and

redundant as no action could ever lie against the President for those acts or omissions even after he leaves office. The President wields executive power on behalf of the people. The extent of that power is prescribed and demarcated by the Constitution and National Legislation. Those too identify the responsibilities assigned to that high office. The expectation is that the President will act within the dictates of the law and in good faith. Mistakes, wrongs or indiscretion committed in the *bonafide*, well-intended and legitimate exercise of presidential power and authority should not give rise to personal liability on the part of the President during and even after he/she ceases to hold office. On the other hand, official acts or omissions driven by bad faith, motives ulterior to the Constitution or in deliberate disregard or contravention of the Constitution or the law receives transient protection, immunity that lasts only while the President holds office.

101. Further, I agree with Counsel for the President that to hold otherwise would make an inquiry into the constitutionality of an act or omission a basis for affording protection under Article 143(2). If that was so, then any person unhappy with official conduct of the President can sue him in his personal capacity alleging violation of the Constitution. A

possibility that a sitting President will be inundated and distracted in defending such actions is alluded to by the Supreme Court of the United States in **Nixon v Fitzgerald 457U.S. 731** when it observed: -

> **"Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government…. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequency could distract a President from his public duties, to the detriment not only of the President and his office but also the nation that the Presidency was designed to serve…"**

102. It may seem that to grant immunity on conduct predicated on official function as opposed to limiting the protection only to acts or omissions properly done within the authority of the Constitution could embolden a sitting President to engage in gross violation of the Constitution without check. Indeed, the High Court observed: -

"547. The rationale for so holding is simple to see: Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff? We think that in such circumstances, any person may invoke the jurisdiction of this Court by suing the President, whether in his personal or in his official capacity; whichever capacity he is sued may very well depend on the nature of the violation or threatened violation and will certainly depend on the circumstances of each particular case."

103. Not so, perhaps, because the potentially distractive action can still be restrained by the President being sued, not in his personal name, but in official capacity through the Attorney General. This route, as a way of questioning the actions or inactions of the President, was adverted to by the High Court in **Katiba Institute V President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (interested Parties) [2020] eKLR.** In addition, the President could still be open to

civil liability in his personal capacity on account of such action at the end of term.

104. Read, together, Articles 143(2) and 143(3) strike a balance by giving functional immunity to a sitting President during the tenure of office but leaving it open for him/her to still be held personally accountable, once out of office, for any act or omission done or not done in official name or under official badge yet in gross or egregious violation of the Constitution. I take it therefore that the breadth of the protection offered by Article 143(2) in respect to civil litigation is as follows:-

(a) Immunity does not extend to acts or omission of a sitting President done in purely personal capacity not connected with his office.

(b) The immunity is only in respect to acts or omissions connected with the office and functions of that office.

(c) Where an action or inaction/omission is in official capacity but bereft of any constitutional authority or power whatsoever or is in fact done in gross or serious violation of

the Constitution then it is actionable against the President in person but only after he leaves office.

(d) For acts and omissions falling under (c) above and which must be questioned or challenged immediately, the President can be sued, not in his personal name, but through the Attorney General.

WAS THE PRESIDENT CONDEMNED UNHEARED?

105. A second complaint by the President is that he was condemned without being afforded a fair hearing contrary to his constitutional right and rules of natural justice.

106. It is common ground that the President, in person, did not enter appearance to the proceedings before the High Court nor did he file any grounds of objection or response to the petition. In this regard the learned trial Judges made the following observations.

> **"537. To begin with, it is worth noting that Mr. Uhuru Muigai Kenyatta did not enter appearance in these proceedings and neither did he file any grounds of objection or a replying affidavit to contest these proceedings on the ground of misjoinder, or any other ground for that matter. As much as**

the Honourable Attorney General has come to his defence, the grounds of objection and the submission filed by the Honourable Attorney General are clearly stated to have been filed on behalf of the Honourable Attorney General himself and not Mr. Uhuru Muigai Kenyatta. It could be that the Honourable Attorney General has proceeded on the understanding that since Mr. Uhuru Muigai Kenyatta ought not to have been sued in his personal capacity, he need not have responded or participated in these proceedings. However, since this is the very question in dispute, we are of the humble view that Mr. Uhuru Muigai Kenyatta ought to have responded to the petition either by himself or by his duly appointed representative and contested his inclusion in the petition on any of the grounds that would be available to him. We find it a bit intriguing that the Honourable Attorney General can file documents for the Honourable Attorney General and proceed to argue Mr. Uhuru Muigai Kenyatta's case."

107. A matter that took prominence at the Appeal and which does not appear to have been raised, and therefore not addressed at Trial, is whether the President in person had been served with the petition. It was incumbent upon the Trial Court to satisfy itself that all respondents had been served before commencing the hearing. At the hearing of the Appeal, the 78th respondent filed a supplementary record of appeal dated 22nd June 2021. In the record is an affidavit of service dated 16th January 2021 and received by the High Court on 18th January 2021 in which the respondent affirms that he electronically served the President with his Petition.

108. The respondent then draws this Court's attention to the proceedings before the High Court of 21st January 2021 in which the Court made the following directions: -

i. The Petitioner and 25th Interested Party in E400 OF 2020 to serve the Certificate of Urgency and Application dated 25/1/2021 and 28/1/2021 respectively by close of business on 2/2/2021.

ii. *The Petitioner and 25th Interested Party to also file and serve written submissions in support of the Certificate of Urgency and Application by close of business on 2/2/2021.*

iii. *The Petitioner and 25th Interested Party to serve all the other County Assemblies and file evidence of such service by close of business 2/2/201.*

iv. *All the Respondents (all other parties in all the other Petitioners) to file and serve their responses and written submissions to the certificate of urgency dated 25/1/2021 and Application dated 28/1/2021 by close of business 5/5/2021.*

v. *Service will be electronic by email through a list serve to be created and confirmed by the Deputy Registrar. It will be the responsibility of each counsel to ensure that their correct email address is included in the list serve.*

vi. *Ruling on Monday, 8/2/2021 at 3.00pm*

(**Emphasis added**)

109. The respondent takes refuge in those directions and argues that he served the President via email.

110. Under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013(popularly, the Mutunga Rules) service means delivery of an order, summons or other legal paper to the person required to respond to them. The Rules provide certain forms and form B is said to be made pursuant to Rule 1 (2). That form suggests that the service of petition should be by way of personal delivery to the person required to respond. There is then a form C on substituted service by advertisement which makes reference to Rule 22 (3). However, Rule 22(3) has nothing to do with substituted service: -

> **"Copies of the authority to be relied on shall be attached to the written submissions."**

111. It does seem that the Mutunga Rules contemplated that the first line of service would be personal service and by providing a form for substituted service it can be inferred that substituted service by way of advertisement, where personal service was onerous or impossible, was within the contemplation of those rules but was never specifically provided.

112. There is merit in the argument by the 78th respondent that given development in technology and the current Covid - 19 pandemic, to insist on personal service may well be unreasonable and in disregard to Article 159(2) (b) of the Constitution which directs that in exercising judicial authority, Courts should be guided by the principal that justice should be administered without undue regard to technicalities. Indeed, keeping abreast with the changes in time, the Civil Procedure Rules have been amended so that Order 5 Rule 22B provides by service through electronic mail.

113. Although the Mutunga Rules do not save the application of the Civil Procedure Rules in respect to proceedings brought under Article 22 of the Constitution, the Courts have had occasion to consider whether the Rules can be imported to fill gaps in the Mutunga Rules. In this regard Makau, J. in **Kitty Njiru –vs- Nature & Style Fun Day Events & another** had this to say: -

> **"28. From the authorities relied upon by the Petitioner and the provisions of the Constitution as well as *the Mutunga Rules*, refereed herein above, I find that there is ample jurisprudence allowing importation of the Civil Procedure Rules to fill any**

lacuna in *the Mutunga Rules*. I find the provisions of Civil Procedure Rules are applicable to Constitutional Petitions where such provisions gives Court inherent power to make such orders as may be necessary for ends of justice. *Rule 3 (8) of the Mutunga Rules* provides that nothing in the rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. This Court finds that the litigants have the right to use the Civil Procedure Rules to fill any lacuna in *the Mutunga Rules* to seek leave to issue Third Party notice and to seek Third Party directions from the Court."

114. That holding followed the Court of Appeal decision in **Civil Appeal No. 85 of 2016 – Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR** where the Court endorsed the application of the Civil Procedure Rules to fill gaps as part of the inherent power of the Court to make such orders that promote the ends of justice.

115. The directions issued by the High Court on 21st January 2021 in respect of service via email portal would therefore be in line with that inherent power of the Court. To be noted, however, and this is important, is that the alleged service of the Petition by the 78th respondent was on 21st December 2020, a month prior to the directions of the Court and so could not have been in pursuance of the directions. Yet that service, allegedly made by electronic means, could still be excused if it met the requirements of Order 5 rule 22B in regard to service through electronic mail. The provision reads:-

> **"Electronic Mail Services (E-mail) [Order 5, rule 22B]**
>
> **(1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.**
>
> **(2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.**
>
> **(3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall**

be considered to have been served on the business day subsequent.

(4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service."

116. As the President denies receipt of service, the onus was on the 78th respondent as the person alleging to have effected service to demonstrate that he satisfied the expectations of the law on service by email. On this, the 78th respondent was not able to demonstrate that the email address cos@president.go.ke to which the email was sent was the last confirmed and used email address of the President. Second, he failed to show a delivery receipt of the email which is the evidence service in Order 5 rule 22B. Further, there is no evidence that the Petition or a hearing notice was served on the President via the Court portal.

117. It may be argued that as the President is not an ordinary mortal, insisting on personal service or to expect a person intending to sue him to know the President's last confirmed and used email is to place an unreasonable burden on an ordinary litigant and therefore to compromise the litigant's right to the equal protection of the law.

However, I take the view that the route of substituted service is available to a litigant who has difficulty in effecting personal service upon the President or obtaining the President's last used and confirmed email address.

118. As there is no evidence of service upon the President, and as the President did not in person participate in the proceedings, then any orders made against him in person would be to condemn him without an opportunity to be heard. Those are for setting aside.

IEBC QUORUM

119. In deference to section 8 of the IEBC Act, the Second Schedule to the Act makes provisions as to the conduct of the business and affairs of the commission. That schedule underwent some amendments through Act No. 1 of 2017. In respect to quorum of the Commission, the amendment reduced it from five to three in the following words: -

> **"The quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members."**

120. That amendment was not without controversy and was the subject of a constitutional challenge in **Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR** Constitutional Petition No. 548 of 2017. In a decision rendered on 6th April 2018, Justice Mwita declared the new provision unconstitutional. The disposition by the learned Judge reads: -

> **125. In the premise therefore, this petition partially succeeds and I make the following orders which I find appropriate;**
>
> **i. A declaration be and is hereby issued that sections 2, 7A (4), 7A (5), 7A (6) of the IEBC ACT, 2011, and Paragraphs 5 and 7 of the Second Schedule to the Act are constitutionally invalid.**
>
> **ii. A declaration be and is hereby issued that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the Elections Act, 2011 are constitutionally invalid.**
>
> **iii. As this was a public interest litigation, I order that each party do bear own cots."**

121. In the impugned Judgment, the High Court Judges proceed on the assumption that the latter provision requiring a quorum of not less than

five was the existing provision. The learned Judges do so without ambiguity in paragraph 702 of the decision which reads as follows: -

> **"702. Section 5(1) of the IEBC Act provides that the IEBC shall consist of the chairperson and six other commissioners. Section 8 provides that the conduct of the IEBC's business should be in accordance with the Second Schedule to the Act. Paragraph 5 of the Second Schedule, which is material to this issue, provides that the quorum for the conduct of business at a meeting of the IEBC is at least five members."**

122. The argument by IEBC is that while the decision in **Katiba Institute** *(Supra)* had the effect of declaring the new Paragraph 5 of the Second Schedule unconstitutional, the decision did not revive the older provisions and so as it now stands there is no statutory provision on quorum of the commission.

123. What would be the legal effect of the declarations in **Katiba Institute** (*supra*)? Cited by IEBC is the decision of the Supreme Court in **Mary Wambui vs Gichuki King'ara Supreme Court Petition No. 7 of 2014** in which the Court had occasion to consider the effect of a

Court's declaration of invalidity of a statute or a provision within it. The Court expressed itself: -

> **"[84] In *Joho*, this Court had been silent on the effect of its declaration of invalidity of a statute and therefore unequivocal about the invalidity of any action emanating from Section 76(1) (a) of the Elections Act. However, in appropriate cases, this Court may exercise its jurisdiction to give its constitutional interpretations retrospective or prospective effect. This derives from the broad mandate accorded this Court by Article 1, 10, 163, 159 and 259 of the Constitution, and Section 3 of the Supreme Court Act, 2011. Indeed, this Court has exercised this jurisdiction in *Re Senate Advisory Opinion Reference No. 2 of 2013*.**
>
> **[85] In the South African case of *Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler (for the majority) held:***
>
> > ***"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back***

to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution."

"Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."

The withholding of prospective effect for the declaration of invalidity, was despite a specific provision in the South African Constitution [Section 172(1)] allowing the Court to make an order limiting the retrospective effect of a declaration of invalidity, or suspending the declaration of invalidity.

[86] In India, Mahajan J, in *Keshavan Madhava Menon v. The State of Bombay [1951] INSC* held that:

> ***"If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law."***

This is also in line with the holding of Lord Denning in *Macfoy's case* (supra), which has been cited widely and with approval."

124. Clearly, the true effect of such a declaration can only be gleaned from the declaration itself. The Court may make the declaration retrospective from the date of the enactment of the offending provision or statute. The Court may choose to limit the retrospective effect of such a declaration or even to suspend it to a future date. And as held by the Supreme Court in **Mary Wambui** *(Supra)* whether the effect ought to be retroactive or proactive depends on a case-to-case basis. For example, in Petition number 413 of 2016 **Boniface Oduor V Attorney General**

& another; Kenya Bankers Association & 2 Others (Interested Parties) [2019] eKLR, after declaring sections 33B (1) and 33B (2) of the Banking Act to be unconstitutional, the High Court suspended that declaration for 12 months from the date of the decision.

125. Where, however, a declaration by the Court is silent as to when it shall take effect, the date of the declaration is deemed to be the date of effect. In **Katiba Institute** *(Supra)*, the learned Judge declared Paragraph 5 of the Second Schedule, amongst other provisions, to be constitutionally invalid without more. The Judge neither limited the retrospective effect of the declaration nor suspended it. To be inferred, therefore, is that the declaration operated retrospectively to the date of enactment of the said provision. The repercussion of the declaration was that the amendment to paragraph 5 of the Second Schedule to the Act which was introduced by the Election Laws (Amendment Act) No. 34 of 2017 was constitutionally void.

126. Under the Interpretation and General Provisions Act to amend includes: -

"Repeal, revoke, rescind, cancel, replace, add to or vary, and the doing of any two or more of those things simultaneously or in the same written law or instrument."

127. Amendment of a statute is a legislative act and whilst it is open to a Court to declare an amendment to be constitutionally void, the declaration does not revive the former provision just it does not repeal or annul a provision it has declared to be constitutionally invalid. The former provision would have to be revived by legislation, a preserve of the law-making body. In this regard are opinions of Judges of the Supreme Court of India in **Behram Khurshed Pesikaka Vs The State of Bombay 1955 1 SCR 613.** Jagannadhadas J stated;

30. I agree that no legislative function can be attributed to a judicial decision and that the decision in The State of Bombay and Another v. F. N. Balsara (supra) does not, proprio vigore amend the Act. The effect of a judicial declaration of the unconstitutionality of a statue has been stated at page 10 of Vol. I of Willoughby on the Constitution of the United States, Second Edition, as follows: "The Court does not annual or repeal the statute if it finds it in conflict with the Constitution.

It simply refuses to recognise it, and determines the rights of the parties just as if such statute had no application. The Court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons for the court may operate as a precedent for the determination of other similar cases, but it does not strike the statue from the statute book; it does repeal..... the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision can be relied on only as a precedent."

Venkatatarama Ayyar J added his voice as follows;

"Decision of Court do not amend or add to a statute. That is a purely legislative function. They merely interpret the law and declare whether it is valid or not and the result of a declaration that it is not valid is that no effect could be given to it in a Court of law. If therefore section 13(b) cannot be construed as itself amended or modified by reason of the decision in The State of

Bombay and Another v. F. N. Balsara (supra), there is no reason to hold that medicinal preparations containing alcohol, which fell within its scope before have gone out of it after that decision."

128. Although not having a direct bearing to the matter at hand, there are parallels to be drawn from the provisions of section 20 of the Interpretation and General provisions Act which reads: -

"Repealed written law not revived

Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provisions before repealed unless words are added reviving the written law or provisions."

129. Revival of a previous provision of statute has to be the work of legislative craft and cannot be implied or derived from the judicial pronouncement of the unconstitutionality of the amending provision. Let me explain why I am attracted to this proposition. Take an instance where a declaration of an invalidity of an amendment by the High Court is not challenged on appeal. If it were to be construed that the Court's

pronouncement amounts to automatically reviving the amended provision, then Courts, even of a higher rank, will be bound by that revival notwithstanding that such a Court would be of a view that the declaration was made *per incuriam.* This is because the declaration will have removed the amendment from statute. If, however, it is taken that the High Court declaration is simply a pronouncement that the amendment is in conflict with the Constitution and therefore void and inapplicable to the rights of the parties before it ,then a Court of coordinate or higher jurisdiction is free to arrive at different decision in another matter because the amendment will still exist in statute. This latter position is perhaps the better position in a jurisdiction like ours where there is no requirement that every declaration of unconstitutionality of a statute or provision must be tested and affirmed by the apex Court.

130. Given my appreciation of the law, I would reach an outcome that, although the effect of the decision in **Katiba Institute & Another** *(Supra)* was to render the new provisions of paragraph 5 to be ineffective and a nullity, the decision did not revive the former provisions. The argument that the High Court relied on non-existing provisions of statute

is therefore with some merit. Yet as I shall be proposing in due course, in interrogating the question of quorum of IEBC, the Trial Court was obliged to reach an outcome that was aligned to the expectations of both the Constitution and the IEBC Act. Simply, the Court was not handicapped in resolving the matter because the Constitution read in conjunction with IEBC Act provides a clear answer to the question.

131. Next is whether the decision of the High Court in **Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another [2018] eKLR** in regard to the issue of quorum was a decision *in rem* and if so whether the Trial Court was bound by it. The Court in **Isaiah Biwott Kangwony** (*Supra)* was not only called upon to declare that the composition of IEBC was illegal and unconstitutional as a result of the resignation of four of its commissioners, but also invited to declare that as composed at that time, IEBC lacked quorum to conduct or carry out its business. After making reference to the decision in **Katiba Institute (***supra*) Okwany, J. held: -

> **"44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the**

Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the

other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed.

132. IEBC is a constitutional commission established under Article 88 of the Constitution. The pronouncement by the Court in **Isaiah Biwott** *(Supra)* as to the constitutionality of its composition and quorum was without doubt a pronouncement made in public law and is a judgment *in rem* in regard to the two issues raised. On this, I identify with the holding in **Emms vs the Queen (1979) 102 DLR (3d)193** that:-

> **"If a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective *in rem*."**

One would be sympathetic with IEBC if it were, on the strength of the decision, take comfort as to its quorum.

133. Yet, for now, the more decisive issue is whether this pronouncement though, *in rem*, would bind a Court of coordinate jurisdiction. Stated more boldly, is the *stare decisis* doctrine to be suspended when a judgment is *in rem* so that precedent binds a Court of equal rank? I do not consider this to be a matter of small importance not in the least because of the passionate argument by counsel for IEBC that inconsistency in pronouncements of Courts in the area of public law confuses members of the public as what the law is and is a recipe for judicial anarchy and mayhem in public law.

134. Fortunately, other jurisdictions have had to grapple with similar predicament. Faced with the question whether a Court was bound to follow the declaration of unconstitutionality of a statute by another Court of coordinate jurisdiction, Justice Paciocco in **R v. Sullivan, 2020 ONCA 333** , a Canadian decision, took the following view:-

> **"[33] As the decision in *R. v. McCaw*, 2018 ONSC 3464, 48 C.R. (7th) 359 reveals, superior court case law in Ontario is split on whether this is correct. There does not appear to be appellate**

authority directly on point, although in an *obiter* comment made in another context, in *R. v. Boutilier*, 2016 BCCA 24, 332 C.C.C. (3d) 315, at para. 45, Neilson J.A. commented that a declaration is "a final order in the proceeding directed at the constitutionality of [the impugned provision], binding on the Crown and on other trial courts of [the] province" (emphasis added).

[34] With respect, I cannot agree. I am persuaded that the ordinary principles of *stare decisis* apply, and that the trial judge was not bound by the *Dunn* decision. The authorities relied upon by Mr. Chan do not purport to oust these principles. In *Nova Scotia (Workers' Compensation Board)*, at para. 28, Gonthier J. was simply explaining that a provision that is inconsistent with the Constitution "is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects." He was not attempting to alter the principles of *stare decisis* where s. 52(1) declarations have been made. ….

[37] ….. Whereas *Bedford* compromises *stare decisis* to promote accurate constitutional outcomes, the compromise on *stare decisis* proposed by Mr. Chan has the potential to discourage accuracy. For example, three superior court judges in succession could find a provision to be constitutional, but the fourth judge's ruling to the contrary would be the only one to have full force or effect in the province. Unless that fourth decision is appealed, it becomes the law in the province. The Crown can no longer rely on the provision; therefore, decreasing the prospect that the issue of constitutional validity would make it before the provincial appellate court. The development of the law would be driven by coincidence in the sequence of trial level decisions and the fortuity of discretionary decisions about whether to appeal, when it should be determined by the quality of the judicial ruling…

[39] ……. The fact that cases at the superior court trial level may produce different outcomes for respective accused persons does not mean that the remedies are personal. The disparity in outcome simply reflects the developing state of the authority on the constitutional validity of a provision, as advanced by judges of competent jurisdiction."

135. The importance of having consistency in the application of the law, particularly in matters touching on the public, cannot be minimized. Both the public and the persons or bodies charged with carrying out public functions should be able to tell, without difficulty or hesitation, whether their actions or conduct passes legal or constitutional muster. To hold that a public body is properly and legally constituted today and to say otherwise the next day may not be good for public administration. So, there is much to be gained in legal stability that is brought by *stare decisis.*

136. Yet that has to put on a scale against the effect of foreclosing another Court of coordinate rank from relooking at the same question, in a different matter, where forceful arguments are made as to the correctness of the earlier decision. Not to allow a revisit would be to

stifle judicial debate in an area that may well be unsettled and in the process to stunt growth in jurisprudence. It may be to allow a matter which has been wrongly decided to take root and to perpetuate itself.

137. So as to strike a balance, the doctrine of *stare decisis,* even in public law, should not apply any different but a latter Court should be reluctant to reopen a matter already pronounced *in rem* by a Court of coordinate jurisdiction unless there is compelling reason to believe that the outcome will be different. In addition, the Attorney General and the Public body affected, if not parties, should be invited to express themselves on the matter before the Court renders itself so that the Court can have full benefit of arguments on the subject. Lastly, if the earlier decision is on appeal, then the latter Court should await the outcome of the appeal.

138. Returning to the circumstances here, the decision in **Isaiah Biwott Kangwony** (*Supra)* was not challenged in appeal and so I turn to examine whether the High Court was justified in departing from it.

139. IEBC is established by Article 88(1) of the Constitution. It is then one of the Commissions to which Chapter Fifteen of the Constitution applies. In respect to those commissions, Article 250(1) provides: -

"Each commission shall consist of at least three, but not more than nine, members."

The Constitution does not require enactment of legislation to fix the exact composition of the Chapter fifteen commissions. However, Article 88 of the Constitution provides as follows in respect to IEBC:-

"The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation."

I would take it that this provision gives national legislation sufficient latitude to fix the number of members of the Commission (as long as it falls within the range in Article 250(1) of the Constitution) and its quorum for purposes of effectively discharging its mandate**.**

140. In its preamble, the IEBC Act declares itself to be an Act of Parliament to make provision for the appointment and effective operation of the IEBC and for connected purposes. Section 5 of the Act is on composition and appointment of the Commissions. Sub-section 1 ordains: -

"The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act."

141. While the Constitution does not fix the exact composition of the IEBC, and only provides for a range of not less than three and not more than nine, statute fixes the composition to be seven (7). None of the parties suggests that the national statute on the composition of the IEBC is unconstitutional and in so far as it does not breach the constitutional range, there may be little merit in an argument that section 5(1) of the IEBC Act abridges the Constitution. The statutory composition of IEBC is therefore seven (7) members. On why Parliament settled on this number, the High Court opined: -

"718. The Constitution placed the minimum number of commissioners of independent commissions at three and the highest number at nine members. Parliament, while appreciating the important mandate the IEBC discharges, picked a high number of seven commissioners to constitute it and placed its quorum at five members."

A view I endorse**.**

142. IEBC gallantly pressed the position that its quorum should be examined against the constitutional contemplation that the composition of the Commission could be three and so if the number of commissioners had fallen to three, as had at the time material to the Petition, then a quorum of three met the legal threshold.

143. I am unable to agree with the argument by IEBC. Whilst statute has fixed seven as the membership of IEBC, it contemplated that death, resignation or such other reasons could cause the actual membership to fall below the statutory number. Given the important constitutional mandate of IEBC, which includes conducting by-elections and referendum whose timing is unpredictable, the IEBC Act has a robust mechanism for the prompt filling of any vacancies. Section 7A provides: -

> **"7A. Vacancy in the office of chairperson and members**
>
> **(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—**
>
> **(a) dies;**
>
> **(b) resigns from office by notice in writing addressed to the President; or**

(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the

chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section."

These provisions speak to the urgency in which the recruitment process must be commenced and completed.

144. Paragraphs 1, 3 and 4 of the First Schedule to the statute which elaborates on the procedure for appointment of the chairperson and members gives short timelines as a restatement of the speed within which vacancies must be filled: -

"1. Selection Panel

(1) At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the Constitution or this Act, the President shall appoint a selection panel consisting of seven persons for the purposes of

appointment of the chairperson or member of the Commission.

(2) …….

(3) The respective nominating bodies under subparagraph (2)(b) and (c) shall, within seven days of the declaration of a vacancy in the office of the chairperson or member of the Commission, submit the names of their nominees to the Parliamentary Service Commission for transmission to the President for appointment.

(4) The selection panel shall, at its first sitting, elect a chairperson and vice chairperson from amongst its number."

145. The scheme of the statute and the regulations is that, by providing for prompt mechanism for filling vacancies, then at all times and as much as is possible, IEBC should be in its full complement of membership. A recognition that, given its important constitutional mandate, IEBC should carry out its functions with all hands on deck. To allow the quorum of the Commission to oscillate with the actual number of members at any time would be to countenance a possibility that for as long as the numbers do not fall below three, then the appointing authority

need not promptly or at all trigger the process of filling the vacancies. The membership of IEBC could then suffer want of gender parity or regional and ethnic diversity required by Article 250(4). Drastically reduced membership could lead to a crunch in confidence by members of the public in the Commission's ability to be independent and truly neutral.

146. The quorum question must therefore be answered against these broader constitutional and statutory imperatives. The answer it yields is that the quorum of the IEBC must be seen against the full composition of Seven (7) required by the IEBC Act. I am aligned to the rationale of Mwita, J. in **Katiba Institute** (*Supra)* when he held that: -

> **"74. The Commission is currently composed of 7 members including the chairperson. The quorum for purposes of conducting business is half of the members but not less than three. This means the Commission can comfortably conduct business with three out of seven members, a minority of the Commissioners. Taking into account the new paragraph 7 which requires that if there is no unanimous decision, a decision of the majority of the Commissioners present and**

voting shall prevail, has one fundamental flaw. With a quorum of three Commissioners, there is a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. This would not auger well for an independent constitutional Commission that discharges very important constitutional mandate for the proper functioning of democracy in the country. Such a provision, in my respectful view, encourages divisions within the Commission given that the Commission's decisions have far reaching consequences on democratic elections as the foundation of democracy and the rule of law.

75. Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the

Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

147. The effect of the decision was to sustain the quorum at five or at least four. To hold that the quorum could be anything less than half of the membership of seven is to weaken the Commission. It is common ground that IEBC formulated some administrative procedures to guide on the verification of signatures in support of a constitution amendment. There can be little doubt that formulation of such guidelines would be the business of the Commission given the critical importance of that threshold in a popular initiative process and the Commission needed to be quorate. Following a slightly different route, I reach the same decision as the High Court that the IEBC was not quorate when it

embarked on the business of verifying the BBI signatures on a membership of only three (3).

SIGNATURE VERIFICATION

148. The journey to the amendment of the constitution by way of popular initiative begins with the proposal to amend garnering the support of at least one million registered voters. Article 257 (1) says of this requirement: -

> **"An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters."**

149. The task of ascertaining whether this threshold has been reached is placed on IEBC by Article 257 (4): -

> **"The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters."**

150. Key words in the sub-article are "**verify that the initiative is supported by at least one million registered voters**." The meaning to be assigned to these words attracted lively debate both at trial and Appeal. The High Court characterized the debate as follows: -

> **"733. To address the three related issues framed for *Petition No. E02 of 2021*, it appears to us that the starting point is to determine what the mandate and role of the IEBC is under Article 257(4) of the Constitution. In particular, the question for determination is whether IEBC's role includes verifying of signatures or whether the role only ends at the proverbial bean-counting: mere technocratic ascertainment that a Promoter of a Popular Initiative has delivered 1 Million voters to the IEBC. If the IEBC's role includes verification of signatures and not mere ascertainment of numbers of registered voters whose signatures accompany the Popular Initiative Bill, it would follow that the IEBC would need some legal or regulatory framework to guide it in its operations. On the other hand, if the IEBC's role is the venial administrative**

task of ascertaining numbers, then, perchance, no further legal or regulatory framework would be required."

151. After examining the contents of a report intituled "The findings of the Commission on the process of the verification of signatures for the proposed Amendment to the Constitution of Kenya 2010 through a popular initiative (*Okoa Kenya Initiative*)" prepared and authored by IEBC itself, the High Court deduced: -

"741. Given this analysis of how IEBC handled the *Okoa Kenya Initiative*, given in sure-footed clarity by IEBC itself and in its own words, etched in its own report, there is no doubt that the IEBC understands that its mandate and role under Article 257(4) of the Constitution includes a two-step process of, first, ascertaining the numbers of registered voters in support of a Popular Initiative to amend the Constitution, and second, verifying the authenticity of the signatures of the registered voters claimed to be in support of the Popular Initiative."

152. Before us, IEBC submitted that the High Court disregarded the evidence it had filed and instead placed reliance of the report which had been introduced into evidence by BBI National Secretariat, an Interested

Party. But even in doing so, IEBC does not disown or discredit the report. The report was just like any other material that had been admitted into evidence and it mattered not that it was not produced by IEBC. IEBC did not and does not deny that it made the report nor does it challenge its contents. The High Court was entitled to analyse the report and making findings on it. The more crucial matter that arises, in my view, is whether the conclusions drawn were faulty in the face of the other evidence on the matter.

153. IEBC suggests that they are flawed against the text of the law and the dispositions it had made on the process. In fairness to IEBC, I reproduce an unedited explanation on the exercise it contends have undertaken: -

> a) *In order to confirm that the Constitution threshold of one million signatures of registered voters had been met, the Commission required the promoters of the initiative to ensure that the booklets containing signatures were duly serialized, bound, paginated and submitted in both hard and electronic format. This information was to be documented in order to guarantee that the data received was accurate.*

b) The Commissioner then reviewed all the entries contained in each booklet of signatures and undertook quality assurance test by group through all the records submitted to confirm that the data had been correctly captured. This involved:-

i removing records without signatures;

ii elimination of the records which did not have names, national ID or passport number; and

iii where there were multiple records of the same person the additional records would be eliminated for being duplicates.

c) The remaining data would thus be confirmed as clean records ready for verification. During the said verification, the confirmed data would be run as against the Register of Voters thus establishing if the Constitution threshold of one million signatures has been met. Thereafter, the Commission published the records of supporters of the initiative on its website to invite objections from person(s) who in their view may have been included in the list without their prior consent. Additionally, the Commission uploaded a list of verified supporters in its website to enable them check and confirm their details.

d) The purpose of uploading the list of verified supporters on the website was to provide anyone who had been captured as a supporter without their consent, an opportunity to report, in writing to the Commission by sending a duly signed objection letter containing the Name, ID Number and contact telephone number of the objector.

e) Upon ascertaining that the initiative had met the requisite threshold as required under Article 257(4) of the Constitution the Commission forwarded the Constitution of Kenya (Amendment Bill, 2020 to the Speaker of the County Assemblies on 26th January 2021 for consideration by the County Assemblies. This was done in execution of the Commission's constitutional mandate as provided for under Article 257(5).

f) Despite the submission of the Draft Bill upon the County Assemblies, the Commission continued to ascertaining the remaining records of supporters and it completed that exercise on 18th February 2021 whereupon it captured all submitted records of supporters totalling 4,352,037 which had been subjected to scrutiny. At the conclusion of the process, it was

confirmed that the initiative had been supported by a total of 3,188,001 registered voters. The Commission issued a press release on 22nd February 2021 in this regard.

g) *The above provision of the Constitution does not place an obligation upon the Commission to verify the authenticity of the signatures but to simply ascertain that at least one million signatures have been provided in support of the initiative. This is to provide an avenue to ascertain that the initiative indeed is an exercise of the will of the people. This process is not a process of forensics to check whether the signatures are valid or not but is simply to ascertain that the process is supported by the people.*

h) *Throughout the world, similar initiatives are verified using two main methodologies:*

   i *Publishing names of persons who have appended their signatures in support of an initiative to confirm their support towards the initiative; or*

   ii *Requiring the promoters of an initiative to depose affidavits at the pain of perjury and possible criminal indictment*

where the said signatures were collected without the prior consent of the bearer.

154. To be gleaned from this explanation is that verification is two-stepped. The first is what IEBC christens as the "quality assurance test". This initial step is really a sieving exercise. It involved, inter alia, removing records without signatures or duplicated entries.

155. Once the wheat had been separated from the chaff, IEBC ran the signed up names against the Register of Voters to see if the all-important count of a million had been achieved. The threshold having supposedly been reached, the Commission published the records of the supporters of the initiative on its website inviting objections from those whose names appeared as signed up and yet they had not done so.

156. The object of this second phase, it would seem, is that the Commission sought to establish that those appearing on the list of supporters of the initiative truly signed up to it. The High Court held that the Commission's role involved the ascertainment of the numbers as well as the verification of the authenticity of the signatures in support. Given the explanation by IEBC as to the actual exercise they undertook, can it be said that it did not perceive one of its duties as the need to authenticate

the signatures? I reach a conclusion that the manner in which IEBC sought to verify the BBI signatures is testimony that it clearly understood that its mandate under Article 257(4) was to verify the authenticity of the signatures of the registered voters claimed to be in support of the popular initiative. This conforms to what it proclaimed to be its role in the report. Although IEBC had assailed the High Court for placing on it an onerous task of carrying out forensics, I am unable to find such a holding in the judgement. Emphasized by the Court, time and again, was that one of IBEC's responsibility under Article 257(4) was verification of the authenticity of the signatures. Not once does the High Court suggest that the only way to authenticate the signatures was to undertake forensics.

157. As set out in the IEBC guidelines one way of authenticating signatures is to invite those who appear in the support list to confirm that they indeed appended their support by signature. But this must be done in a framework in which the list is published through a medium that easily reaches all said to be in the list. Then those in the list must be given adequate and real opportunity to confirm whether or not that they signed the support list.

158. Muhuri's case was that there was no legal or regulatory framework under which IEBC could carry out the verification process envisioned by Article 257 (4) and that the Administrative Procedures developed to fill the gap were not only inadequate but also unlawful. IEBC and the Attorney General take a view that the provisions of Article 257 are self-regulating and offer an effective regime for verification of signatures. The Attorney General submitted that had the framers of the Constitution envisioned that enactment of legislation was necessary to give full effect to the requirement for verification then the Constitution would expressly said so.

159. In finding that there does not exist an adequate statutory or regulatory framework for verification of signatures under Article 257(4) of the Constitution, the High Court carried out a comparative analysis of that requirement with that of the voter verification process for purposes of elections provided in Section 6A of the Elections Act and Rules 27A and 27B of the Election (Voter Registration) Rules, 2012. The High Court then observed: -

"748. These provisions demonstrate that IEBC determined that it was necessary to carry out a verification process for

voter registration in the case of elections. The rules provide the time frames within which the voter verification is to be done and the actual process to be followed. They require, among other things, a voter who seeks verification to appear personally before a Registration Officer to verify the information held in the register.

749. This comparative analysis demonstrates what the law requires IEBC to do in the case of voter verification for purposes of elections. There is no doubt that the IEBC takes its role in voter verification as more than a ceremonial exercise. The IEBC has established substantive standards and procedures to ensure the integrity of voter registration and verification regarding elections."

160. As I had said earlier, the Constitution is a solemn document whose amendment can only be achieved through the onerous process prescribed by Chapter Sixteen. The basic structure of the Constitution is even more heavily barricaded with the stringent requirements of amendment by popular initiative. Such amendment can only be achieved after a popular

vote in a referendum. But as demonstrated by the High Court and here, the initial trigger to a referendum is the one million supporter threshold. If the supposed support is unreal and cannot be verified in a robust and fool proof process, then the entire popular initiative can have a false start. Worse still, the numbers can be rigged and used as momentum to carry over a successful referendum. In addition, there are public resource implications once the threshold is supposedly reached. IEBC must submit the Draft Bill to each county assembly for consideration (sub-article 5). The County Assemblies must debate and either approve or reject the Draft Bill. Public participation is required at this stage. It is therefore singularly crucial that where the one million threshold is said to have been achieved then it should not be an illusion. The process of verifying the threshold is as important as the casting the vote at the referendum. And as the integrity of the entire process of the popular initiative is as good as each of its facets or phases, the verification of signatures under Article 257 (4) is critical cog in the process.

161. I have little hesitation in holding that there is need for a legal or regulatory framework for the verification of signatures under Article

257(4). The need for that framework finds support in the provisions of Article 82(1) (d) of the Constitution which reads: -

> **"82. (1) Parliament shall enact legislation to provide for—**
>
> **(a).....**
>
> **(b).....**
>
> **(c).....**
>
> **(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections."**

162. The regulation, conduct and supervision of a referendum does not start and end with the voting day. It is a continuum, triggered by the one million threshold. There is need for a legal or regulatory framework regarding each phase, not in the least the verification of signatures. The legislation must be simple, transparent, and special needs sensitive as directed by Article 82(2) of the Constitution. The legislation is so critical and cannot be left to in-house or boardroom administrative guidelines developed and formulated by the Commission without public participation and interface.

163. Indeed, the contents of the Commission's administrative guidelines demonstrate a dire need for a legislative or regulatory framework. The guidelines proposed accreditation of signatures verification agents, observers and media by the Commission. An acknowledgment that the process of the verification of the signatures itself must be verifiable. The guidelines provide: -

> **"The compiled list of supporters is published in the Commission's website for information and verification for two (2) weeks."**

A recognition that members of the public must be informed of and granted sufficient opportunity to authenticate the list of signatures.

164. The guidelines also provide that after the publication of the list: -

> **"The commission receives and address any complaints (issues relating to the published list of supporters.")**

A tacit acceptance that some form of complaint resolution mechanism in respect to the published list of supporters is necessary.

165. At trial it turned out that IEBC had itself abridged its own administrative procedures. It shortened the period in which members of

the public could verify the list of supporters from two weeks to five days. The conduct of IEBC, by itself, evinces a rationale for entrenchment of the framework in legislation or regulation. It must be in a structure in which the Commission can be held to account by members of the public. In-house administrative guidelines is hardly such framework.

166. It was contended for the Commission that being an independent body with an important mandate, IEBC should not be handicapped from carrying out its functions because of failure by Parliament to enact legislation. That argument however ignores the power of IEBC to make regulations to enable it carry out its functions effectively. This power is in section 31 of the IEBC Act which reads: -

> **"31. Regulations**
>
> **(1) The Commission may make regulations for the better carrying out of the provisions of this Act.**
>
> **(2) Without prejudice to the generality of subsection (1), such regulations may provide for—**
>
> **(a) the appointment, including the power to confirm appointments of persons, to any office in respect of which the Commission is responsible under this Act;**

(b) the disciplinary control of persons holding or acting in any office in respect of which the Commission is responsible under this Act;

(c) the termination of appointments and the removal of persons from any office, in respect of which the Commission is responsible under this Act; (d) the practice and procedure of the Commission in the exercise of its functions under this Act;

(e) deleted by Act No. 36 of 2016, s. 37;

(f) the delegation of the Commission's functions or powers; and

(g) any other matter required under the Constitution, this Act or any other written law.

(3) The purpose and objective for making the rules and regulations under subsection (1) is to enable the Commission to effectively discharge its mandate under the Constitution and this Act."

167. From the standpoint that there should be pubic involvement in the formulation of such important regulations, this is a more attractive

route than simply developing administrative guidelines because under the Statutory Instruments Act, 2013 any proposed guidelines will not escape the requirement for public participation under section 5 of the Statutory Instrument Act: -

"5. Consultation before making statutory instruments

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

(a) have a direct, or a substantial indirect effect on business; or

(b) restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—

(a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

(b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument."

168. Sufficient public participation is a cornerstone to making of statutory instruments that statute through, elaborate provisions, requires a regulation making authority to furnish proof that there has been sufficient public consultation in line with Articles 10 and 118 of the Constitution. Section 5A of Statutory Instruments Act reads: -

"5A. Explanatory memorandum

(1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—

(a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;

(b) a brief statement of all the consultations undertaken before the statutory instrument was made;

(c) a brief statement of the way the consultation was carried consultation;

(d) an outline of the results of the consultation;

(e) a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may

be accompanied by the regulatory impact statement prepared for the statutory instrument."

169. I could not help but notice that IEBC has previously used the power of section 31 of the IEBC Act to make at least three sets of regulation; Independent Electoral and Boundaries Commission(Fund) Regulations; Independent Electoral and Boundaries Commission(Staff Car Loan Scheme)Regulations), 2016 and; Independent Electoral and Boundaries Commission (Staff Mortgage Scheme) Regulations, 2016. Neither the Trial Court nor this Court was told why IEBC did not use the same power to enable it efficiently and transparently carry out an important mandate directly given to it by the Constitution , that of verification of signatures under Article 257(4).

170. Before turning away from this matter, I make observations on the finding of the High Court that the Administrative procedures developed by IEBC were statutory instruments within the meaning of section 2 of the Statutory Instrument Act but which were a nullity for violation of the Statutory Instruments Act for want of Parliamentary approval and publication, and without public participation. The provision reads: -

"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

171. Under heading B which is on verification of signatures, the guidelines sets out 23 procedures. Some of these are not on the actual process or exercise of signature verification. Examples are: -

(i) Development of work plan and budget for the signature verification exercise by the Commission.

(j) Request to the National Treasury for budgetary allocation for the signature verification exercise.

(k) Preparation of procurement plan for the signature verification exercise by the Commission.

(l) Recruitment and training of signature verification clerks by the Commission.

(o) The signature documents and draft bill secured, fumigated/disinfection prior to commencement of verification exercise.

These are typically in-house and would be to prepare and resource IEBC for the exercise. Others guide on the manner of signature collection like that on the form to be used for signature collection. Others are on the actual process of signature verification.

172. The power granted to IEBC under section 31 of the IEBC Act to make rules and regulations is one to be employed by the Commission to enhance its efficacy. This power is not to be neutered. It is donated for good reason. True, the administrative guidelines comingle matters that would ordinarily not require rules and regulations and those that fall within the contemplation of section 31, yet because of the latter, the guidelines should not be permitted to avoid public participation and the rigours of approval and publication under the Statutory Instrument Act. For that reason, the entire administrative guidelines must be construed as an instrument falling within the Statutory Instrument Act.

173. In passing, it has to be said that it seems that IEBC itself recognised the need for public participation in formulating the administrative guidelines and gave the impression, nevertheless without proof, that it had been conducted. Before the High Court the lawyers for IEBC (Kioko, Munyithya, Ngugi and Company Advocates) had submitted: -

> "**Moreover, the 1st Respondent issued Administrative procedures for the Verification of Signatures in support of Constitutional Amendment, the procedures were a culmination of extensive public participation."**

174. In the end, the following conclusions reached by High Court cannot be faulted: -

> **"763. In view of the foregoing analysis, we conclude the following:**
>
> **a. First, a legal/regulatory framework for the verification of signatures under Article 257(4) of the Constitution was required.**
>
> **b. Second, the legal/regulatory framework required does not exist and the convergence of existing statutes does not**

adequately form the requisite regulatory framework required under Article 257(4) of the Constitution.

c. Third, the Administrative Procedures developed by the IEBC are invalid for the following reasons:

i. One, they were developed without public participation as required by Article 10 of the Constitution.

ii. Two, they are in violation of the Statutory Instruments Act for want of Parliamentary approval and want of publication.

iii. Three, they were developed without quorum.

ADEQUACY OF LEGAL FRAMEWORK

175. The need for a legal framework either provided by main or subsidiary regulation has been alluded to in the discussion regarding the framework for verification of voter support for the popular initiative. While the appellants urge that there is sufficient legal framework governing the entire spectrum of the referendum, that discussion showed the disparate need for such a legal framework.

176. Part V of the Elections Act, of course, makes provision on referendum. But when one looks at those provisions it is clear that it covers the period after a proposed Bill has been approved by one or both houses of parliament. Prior to that would be other critical stages of the popular initiative. These are collection of signatures of at least one million registered voters; verification of that support by IEBC; placing of a draft Bill before county assemblies and then before both houses of Parliament. Part V does not provide a framework for those phases.

177. Granted that the Elections Act evidently lacks that framework, can it be said that Article 257, argued by the appellants to be self-regulating, be adequate framework? I have, earlier, set out a short historical context for the popular initiative. Central to the process is that it must be an authentically citizen-driven process and so public participation at every phase of the process is critical. There is need to have public involvement entrenched in those stages by legislation. Legislation that, for instance, prescribes the nature and scope of public involvement at the signature collection phase avoids leaving it to the discretion of the promoter. This is but a demonstration of the need for legislation. So, while the

Constitution provides the overall framework, national legislation will flesh out and enrich the process.

178. The High Court can therefore not be faulted when it returned the following view: -

> **"605. We, therefore, respectfully, disagree that the legislature has already enacted statutes to address the issue of a referendum. As we have stated hereinabove the Elections Act does not meet the intention of the drafters of the Constitution when they recommended that Parliament enacts a Referendum Act to govern the conduct of referenda in the country. An examination of the history of Articles 255-257 of the Constitution as we have set out in this judgement leads us to the conclusion that the provisions of the Elections Act alluding to referendum is not a Referendum Act as historically contemplated. "**

179. In closing on this matter, the High Court must be commended for holding **"***that notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still*

be undertaken as long as the constitutional expectations, values, principles and objects" are infused at every stage of the process.

180. It is a settled principle that the absence of enabling regulation or regulations should not suspend or compromise the enjoyment of a constitutional right. The Constitution leads the way on this principle when, for instance, in the provisions regarding the enforcement of the Bill of Rights it provides as follows in Article 22(3) and 22(4): -

"Enforcement of Bill of Rights.

22. (1) …….....

(2) ……..

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(*a*) the rights of standing provided for in clause (2) are fully facilitated;

(*b*) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the

court shall, if necessary, entertain proceedings on the basis of informal documentation;

(*c*) no fee may be charged for commencing the proceedings;

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

(*e*) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court."

181. This Court has itself restated this principle in the **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR** where it held:-

[189] In our considered view, the absence of a legal framework for public participation is not an excuse for a procuring entity or a State organ to fail to undertake public participation if required by the Constitution or law. A State organ or procuring entity is expected to give effect to constitutional principles relating to public participation in a manner that satisfies the values and principles of the Constitution. We take judicial notice that the Senate is aware of the need for a legal framework for public participation and to fulfill this need the *Public Participation Bill 2016* (Kenya Gazette Supplement No. 175; Senate Bill No. 15) has been published. The preamble to the Bill states that it is: -

"An act of Parliament to provide a general framework for effective public participation: to give effect to the constitutional principles of democracy and participation of the people under articles 1 (2), 10 (2), 35, 69 (1) (d), 118, 174 (c) and (d), 184 (1) (c), 196, 201 (a) and 232 (1) (d) of the Constitution; and for connected purposes."

CONTINUOUS VOTER REGISTRATION

182. Article 88(4) of the Constitution directs IEBC to undertake continuous voter registration and a regular revision of the voter's roll. In addition, it is mandated to carry out voter education. Those responsibilities are reiterated in section 4 of the IEBC Act.

183. In Petition E416 of 2020, the petitioner raised the issue of the place of voter registration *vis-à-vis* a proposed popular initiative. On the premise that on each day hundreds of thousands of Kenyans become eligible to be registered as voters, the petitioner contended that collection of signatures and contemplation of a referendum before the update of the voter register undermined the principle of public participation and the right of the unregistered but eligible voter to participate in the referendum. In laying this claim, the petitioner asserts that the last time the voter rolls were updated was in preparation for the 2017 general elections. He then sought a declaration that the Bill could not be subjected to a referendum before IEBC carried out national wide voter registration exercise.

184. In response, IEBC, through its Director, Legal and Public affairs, Mr. Michael Goa stated that its mandate is to carry on continuous voter

registration at the constituency offices to register those who were not registered in the run up to the 2017 general elections.

185. The High Court found that, without more, this explanation by IEBC was not evidence that it conducted continuous voter registration at constituency headquarters. It held: -

> **"769. We begin by noting that every single day, citizens attain the voting age. These new citizens have a right to be registered as voters and to participate in any proposed referendum. There was no evidence placed before this Court that the IEBC has been discharging its constitutional and statutory obligations to enable citizens who have recently attained the voting age to register as voters. The IEBC also stated that the last time the voter register was revised was just before the Kibra By-election. This was a confirmation that it was not discharging its constitutional and statutory mandate to continuously register voters and review the register of voters.**
>
> **770. There was also no evidence that the IEBC had sensitized citizens that there was continuous voter registration. Holding**

a referendum without voter registration; updating the voters register, and carrying out voter education, would particularly disenfranchise citizens who had attained voting age but had not been given an opportunity to register as voters, thus violating their constitutional right to vote and make political choices.

772. We are persuaded, and we agree with the petitioner, that holding a referendum without first conducting voter registration would violate the very essence of the right of a class of citizens who have not been given the opportunity to register and vote in deciding their destiny."

186. The thrust of IEBC's objection to the finding of the High Court is that it imposed an obligation on IEBC to carry out a separate voter registration exercise for the specific purpose of the intended referendum whereas the statutory responsibility placed on it was for continuous voter registration which it had in fact been carrying out. IEBC complains that the High Court introduced a requirement for a special "national wide voter registration" specific for the intended referendum.

187. A proper reading of paragraphs 769 and 770 of the decision (reproduced above) reveals that the High Court made at least three findings in respect to the requirement for voter registration. First, IEBC had not demonstrated that it was carrying out continuous voter registration. Neither had it proved that it was reviewing and updating the register of voters and lastly IEBC had failed to provide evidence that it had sensitized citizens that there was continuous voter registration. Explicit is that the Court made findings in respect to the obligatory nature of continuous voter registration, the duty of IEBC to review and update the register of voters and the requirement for continuous sensitization of the public of continuous voter registration.

188. And there is a connection between updating of the register of voters and continuous voter registration. Section 2 of the Elections Act assigns the following meaning to the term "register of voters": -

> **"....a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically."**

189. Section 3, however, merely makes mention to the register in subsection (2) as follows: -

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

But as to what comprises the Register, section 4 reads: -

"4. Register of Voters

(1) There shall be a register to be known as the Register of Voters which shall comprise of—

(a) a poll register in respect of every polling station;

(b) a ward register in respect of every ward;

(c) a constituency register in respect of every constituency;

(d) a county register in respect of every county; and

(e) a register of voters residing outside Kenya.

(2) The Commission shall compile and maintain the Register of Voters referred to in subsection (1).

(3) The Register of Voters shall contain such information as shall be prescribed by the Commission."

190. Section 5 is then all important to the matter at hand and reads: -

"5. Registration of voters

(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except—

(a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election: Provided that this applies to the first general election under this Act;

(b) in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or

(ba) in the case of a referendum, between the date of the publication and the date of the referendum;

(c) deleted by Act No. 1 of 2017, s. 3(c).

(2) Notwithstanding subsection (1), where an election petition is filed in respect of an electoral area, between the date of the filing of the petition and the date of the by-election, where a court determines that a by-election is to be held, a voter shall

not be allowed to transfer his or her vote to the affected electoral area.

(3) Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.

(3A) Deleted by Act No. 36 of 2016, s. 3.

(3B) Deleted by Act No. 36 of 2016, s. 3.

(4) All applicants for registration under this section shall be registered in the appropriate register by the registration officer or any other officer authorised by the Commission.

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Register of Voters."

(My emphasis)

191. Subsection 1 which requires IEBC to register voters and revise the register of voters at all times save in the periods expressly excluded by the provision is in tandem with Article 88(4) of the Constitution and the functions of the IEBC specified in section 4 of the IEBC Act. The connection between the continuous registration of voters and the continuous revision of the register is apparent in subsection 5 which requires that information relating to the registration of the voter be transmitted to the Commission for inclusion in the register of voters, to *inter alia*, facilitate revision of the register. So that the revision of the register of voters is carried out at all times as dictated by statute, the information relating to the registration of the voter needs to be relayed regularly by the registration officer (or any authorized officer) to the Commission. This again finds emphasis in section 8 on updating of the Register of voters which provides: -

> **"8. Updating of the Register of Voters**
>
> **(1) The Commission shall maintain an updated Register of Voters.**
>
> **(2) For purposes of maintaining an updated register of voters, the Commission shall—**

(a) regularly revise the Register of Voters;

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

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

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

(e) revise the Register of Voters whenever county boundaries are altered in accordance with Article 94(3) of the Constitution."

(My emphasis)

192. In Petition 416 of 2020, the petitioner complains, not just about the updating of the voter register, but also disenfranchisement of persons who are eligible to be registered as voters but have not been registered

by IEBC. The High Court was perfectly entitled to consider and make findings in respect to the two elements of registration.

193. It is common ground that by dint of section 5(1)(ba) of the Elections Act, No. 24 of 2011, registration of voters and revision of the register of voters, in case of a referendum, is barred between the date of the publication and the date of the referendum. As a requirement of Article 256(5), IEBC must conduct a national referendum for approval of a Constitution Amendment Bill within 90 days of receipt of the Bill from the President. In this period, it must publish the question to be determined by the referendum and also hold the referendum. Between those two dates, registration of voters and revision of the register is not permitted by law. Any citizen who intends to vote at the referendum would have to be registered before the publication of the referendum. It is therefore imperative that the infrastructure for continuous voter registration and revision of register of voters is robust and operational at all times.

194. The High Court found that IEBC had not proved that it was discharging its constitutional and statutory mandate of continuously registering voters and reviewing the register of voters. At the plenary

hearing of the Appeal, IEBC complained that the High Court improperly shifted the burden of proof to it when it rested with the petitioner. It is true that the petitioner simply made an allegation that IEBC was not registering voters and updating the register of voters as mandated in law. I would think that if IEBC thought the allegation did not need to be confronted with any evidence as it was unproved, then it did not need to lead any evidence in rebuttal. Instead, however, IEBC asserted that it continuously registered voters at its constituency offices to register those who were not registered up to the 2017 General Elections. Having offered to make this explanation, without complaining that the allegation by the petitioner was unproven, then IEBC was under an obligation to support its assertion with evidence. Whether or not it was conducting continuous voter registration or regularly revising the register of voters are matters within the special knowledge of IEBC and it should have had little difficulty in discharging that burden.

195. I have looked at the material placed before the Trial Court and I am unable to find evidence that IEBC was conducting continuous voter registration or revising the register at all times (the language of section 5 (1) of the Elections Act). Or in the very least had created the necessary

infrastructure and environment, including sensitization, to enable continuous registration of voters.

196. There was an attempt by IEBC to improve the prospectus of its case when it filed additional evidence at the Appeal after grant of leave of this Court on 25th June 2021.To the affidavit of Michael Goa sworn on 28th June 2021 is attached a copy of Gazette Notice No. 6934 dated 16th September 2020 and published on the same day under the hand of the Chairperson of IEBC. It certifies completion of revision of the Register of Voters as at 31st December 2019. This latter date is important. IEBC relies on it to demonstrate continuous registration of voters.

197. Still with this further evidence IEBC fails to answer the petitioner's assertions of derelict of duty on its part taken up in the Petition of 15th December 2020 and reiterated by way of adoption of the contents of the Petition in the affidavit of Morara Omoke sworn on the same day. It would not be a sufficient response to provide proof of revision of the register of voters for a period ending 31st December 2019, about a year prior to the date of the allegation. Regulation 11 of the Elections (Registration of Voters) Regulations requires the Commission

to prepare a list of changes to the register of voters at constituency level every six months. The requirement is as follows: -

"11. Periodic list of changes

(1) At least once every six months, each registration officer shall prepare a list of changes to the register of voters for his constituency and post the list at a place at the headquarters of the division and district within which the constituency is located where the public has access.

(2) The changes included on a list under subregulation (1) shall consist of the changes made since the previous list was prepared under subregulation (1).

(3) The list posted under subregulation (1) shall be posted for at least thirty days.

(4) The changes included on the first list prepared by each registration officer under subregulation (1) shall consist of the changes made since this regulation came into operation."

What difficulty would IEBC have in producing the most current half yearly lists touching on the period between the last revision of 31st December 2019 and the date of the Petition?

198. Turning to another aspect of voter registration, I agree with Counsel for IEBC that the revision and updating of the register of voters is different from the Certification of the register of voters which is undertaken upon closure of the registration process as a consequence of operation of section 5(1) of the Elections Act. Certification of the register of voters is prepared in accordance with Regulation 12 of Elections (Registration of Voters) Regulation,2012 which provides: -

> **"12. Certification of Register of Voters**
>
> **(1) Where as a result of operation of section 5 of the Act, the registration of voters has been ceased, the Registration officer shall compile the list of registered persons.**
>
> **(2) The registration officer shall after effecting compilation of the register of voters relating to the constituency submit his or her component for compilation by the Commission.**

(3) The Commission shall compile the register of voters comprising of components under section 4 of the Act.

(4) The Commission shall certify and publish the Register of Voters in the Gazette.

(5) The published Register of Voters under sub regulation (4) shall include the names of the County Assembly Wards and the total number of registered voters therein."

199. In ground 6 of the Memorandum of Appeal, IEBC asserts: -

"[6] The Learned Judges of the Superior Court erred in law and fact in misconstruing and thereby confusing the process of certification of the register of voters under section 6 and 6A of the Elections Act with the requirement for continuous voter registration under section 5 of the Elections Act."

200. IEBC sought to demonstrate that supposed flaw in the judgment by pointing to paragraph 769 of the decision: -

"769. We begin by noting that every single day, citizens attain the voting age. These new citizens have a right to be registered as voters and to participate in any proposed referendum.

There was no evidence placed before this Court that the IEBC has been discharging its constitutional and statutory obligations to enable citizens who have recently attained the voting age to register as voters. The IEBC also stated that the last time the voter register was revised was just before the Kibra By-election. This was a confirmation that it was not discharging its constitutional and statutory mandate to continuously register voters and review the register of voters."

201. Even if I was to find that the High Court had misconstrued the certification of the register at the Kibra by-election to be evidence that the register was last revised then, it may not give IEBC's case much traction. This is because other than the matters arising from the Kibra by-election, the Trial Court relied on other aspects of the case to draw the conclusion that IEBC had failed in its duty to conduct continuous voter registration. Look at the preceding holding: -

"768. The IEBC is under both a constitutional and statutory obligation to register voters and revise voters register at all times. The IEBC did not demonstrate to this Court, in answer

to the Petitioner's claim, that it had conducted continuous voter registration and, if so, when voter registration was last conducted. It only stated, without evidence, that it conducts continuous voter registration at constituency headquarters."

202. In closing, on this aspect, something needs to be said about the declaration of the Trial Court in respect to voter registration. It declared:-

> **"....that the Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission carries out National voter registration exercise."**

IEBC perceives this declaration as requiring it to carry out what it referred to as a massive voter registration as a precondition to conducting a referendum. This was explained to be an extra –ordinary voter registration drive aimed at enlisting as many new voters as possible in the run up to a general election but before the period barred by section 5(1) of the Elections Act. Did the High Court direct a similar exercise before the holding of a referendum?

203. It has to be common ground that continuous voter registration ought to be carried out in every constituency and is envisaged as a countrywide, call it national wide, exercise. However, the High Court decree for a "national voter registration exercise" could be construed to require massive voter registration in the correct sense explained by IEBC. The grievance of IEBC would then be well founded. That said, if IEBC had not been carrying out continuous voter registration as expected of it by the Constitution and statute, then qualified but unregistered voters could be disenfranchised unless a massive registration exercise is undertaken before the referendum is held. This is not to say that a massive voter registration drive is obligatory before a referendum is held but that in the circumstances of this case, where IEBC failed to demonstrate that it had been conducting continuous voter registration, such a drive would be imperative so as not to shut out eligible citizens from having their say at the referendum.

PUBLIC PARTICIPATION

204. Article 10(2)(a) of the Constitution recognizes participation of the people as a national value and principle of governance that binds every

person and state organs whenever any of them applies or interprets the Constitution. It is not controversial that the process of amendment of the Constitution by popular initiative under the provisions of Article 257 is a process in continuum, that is a continuous process with several phases. A divide between the parties is whether public participation should inform the first phase of the process which involves the popular initiative obtaining the support of at least one million registered voters.

205. The High Court expressed its view of the mater as follows: -

"566. We have considered the respective parties' arguments on this issue. Hon. Raila Odinga and the BBI Steering Committee did not even suggest that copies of the reports and the Constitution of Kenya Amendment Bill were provided to the people and in the form the Petitioner insists the law requires. We must state here though, that there is no legal requirement for the BBI Taskforce and BBI Steering Committee to provide the voters with copies of their reports before seeking support for the proposals to the constitutional amendment. The legal requirement under Article 10 of the Constitution is that in such an exercise, voters must be supplied with adequate

information to make informed decisions on the matter at hand as an integral part of public participation. See *Robert N. Gakuru & Others v Kiambu County Government & 3 others [2014] eKLR.*

567. As Courts have variously held, public Participation is one of the principles of good governance; a constitutional right that must be complied with at every stage of constitutional amendment process. This constitutional principle is now well established in our decisional law as well as in decisions from comparative jurisdictions. In the *Robert N. Gakuru Case (supra)*, for example, the High Court held that:

> ***[Public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.***

The Court then found that: -

"575. As we have said above, the principle of public participation is a founding value in our Constitution. Citizens

now take a central role in determining the way they want to be governed, and must be involved in legislative and other processes that affect them at all times. In that regard, for meaningful public participation to be realized, citizens must be given information they require to make decisions that affect them. There is, therefore, an obligation on the part of the promoters of any constitutional amendment process, to produce and distribute copies of a Constitution of Kenya Amendment Bill in the languages people understand to enable them to make informed decisions whether or not to support it."

206. An obligation placed on a promoter of a popular initiative is that the initiative must be supported by at least one million registered voters who signify their support by way of signatures. The Constitution does prescribe the exact manner in which the promoter ought to go about the business of obtaining the support nor does it dictate that support must be spread across the country. The promoter may well appeal for support from like-minded people. That said, the promoter must not breach the Constitution and statute.

207. Article 257(4) requires the draft Bill to be accompanied by supporting signatures of at least one million registered voters and a reasonable expectation is that at the point of appending his/her signature, the registered voter, in the very least, has information of what he/she was supporting.

208. It is of course true that to insist on a countrywide or full-blown civic education and public participation exercise at the time of collection of signatures is to place a burdensome financial and logistical obligation on the promoter. That in itself would be inimical to a core character of a popular initiative that it should be a truly a citizen driven process. Fortunately, the law on public participation is that the mode, degree, scope and extent of public participation is determined on a case-by-case basis (**Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**.)

209. While it is not the place of the Court to prescribe the mode, scope and depth of public participation, that participation must, in the context of the activity, be demonstrably effective. Not notional. The signature collection process is not the occasion for those who do not support the initiative to register their disapproval. It is simply a process in which the

promoter seeks the threshold support from registered voters. Public participation at this stage need not to be an involved or intricate activity. At the signature collection stage, a voter should be furnished with such information about the draft Bill as would enable him/her decide whether or not to sign in support. Even providing a copy of the proposed Bill in a language understood by the voter may well be sufficient. At this nascent phase of the popular initiative, information about the Draft Bill can be limited to the people from who the promoter collects the signatures and not the country at large. If a promoter has the ability to collect one million signatures, then it cannot be an onerous or unreasonable requirement that the promoter provides sufficient information of the draft Bill to the potential supporters.

210. While it is true that in the context of a constitution amendment process by popular initiative, the participation of the people is envisaged to be at various other stages, namely public participation at the County Assembly, National Assembly and the Senate, and finally in a referendum, it has been demonstrated why some form of public participation is a prerequisite to the collection of signatures in the first stage. A flaw in this stage cannot be cured by scrupulous observance of

the law in the latter stages. A flaw in one phase of the process renders the entire process defective.

211. In Petition 416, the petitioner had pleaded that the President, Rt. Hon. Raila A. Odinga and BBI Steering Committee had failed in their duty to comply with the edicts of Article 7 by failing to publish, inter alia, the Bill in Kiswahili and all indigenous languages and further failed to circulate it to each and every household in Kenya and to each and every Kenyan. These allegations are repeated in the affidavit of the petitioner sworn on 15th December 2020. In paragraph 26 of his affidavit he deponed: -

> **"26. THAT the promoters of the Constitution of Kenya (Amendment) Bill, 2020 namely the President and the 1st Respondent through their BBI agent/vehicle, the 3rd Respondent, took the option of posting copies of the interim and final BBI Report and the draft Bill on the internet instead of providing hard copies all across the country. This move locked out a majority of Kenyans who lived in the rural areas and other parts of the country where there is either no internet connectivity or internet access thereby violating the right to**

access to information and hindered public participation for a majority of Kenyans. To publish these documents online was absolutely out of touch with the country's dismal internet access statistics. As per 2019 Kenya Population and Housing Census: Volume IV only 22.6 per cent of individuals aged 3 years and above use internet while only 10.4 per cent use a computer. It does not require knowledge of rocket science to tell that most voters would be totally disenfranchised if a referendum is held under a climate where the President and the 1st Respondent have done a poor job in educating and informing the public about their proposals to amend the Constitution. ***An extract of the 2019 Kenya Population and Housing Census: Volume IV is annexed and marked "MO-6."***

212. In response, Mr. Denis Waweru sworn an affidavit on 5th February 2021. He stated: -

"[19] THAT contrary to the assertions by the Petitioner at Paragraphs (80), (81), (82) and (83) of the Petition, I am advised by my Counsel on record which advise I verily believe

to be true that there has been no such violation and/or contravention of Articles 7, 27 and 35 of the Constitution of Kenya, 2010 on the involvement of the people and public participation in light of the fact that firstly, the draft proposed constitutional amendment Bill, the BUILDING BRIDGES TO A UNITED KENYA TASKFORCE REPORT, OCTOBER 2020, AND THE BUILDING BRIDGES TO A UNITED KENYA FROM A NATION OF BLOOD TIES TO A NATION OF IDEAS – A REPORT BY THE PRESIDENTIAL TASKFORCE ON BUILDING BRIDGES TO A UNITY, ADVISORY 2019, are a product of a wide comprehensive and broad consultative engagement and public involvement all over Kenya, which process entailed voluntary nationwide public participation.

Now produced and marked as Annexure DW-4 are some of the invitations, deliberations, reports and memoranda evidencing public participation and consultations.

[20] THAT contrary to the Petitioner's assertions and in furtherance of my averments in Paragraph (19) herein above, I wish to state that the Petitioner has not pleaded with specificity and has merely made generalized assertions and allegations. For instance, no such evidence has been tendered in support of the contentions that for instance "*a vast majority of the people were grappling with lack of information as they appended their signatures. Those who do not speak English of (sic) those who are visually impaired or the deaf were disrespected, ignored and discriminated against…*"

[21] THAT contrary to the Petitioner's assertions at Paragraph 82 and 83 of the Petition, I wish to state that no such evidence has been adduced by the Petitioner in support of the allegations made therein and as such the averments remain mere assertions.

[22] THAT contrary to the assertions made by the Petitioner in Paragraph 85 of the Petition, I wish to state that the Petitioner has merely put the cart before the Horse and I am

advised by my Counsel on record which advise I verily believe to be true that the Petitioner is merely inviting the Honourable Court to encroach on the legislative arena and engage in law formulation which is a preserve of the National Assembly, the Senate and the County Assemblies."

213. The information that needed to be provided to the voters was not all reports of the taskforce and BBI Steering Committee but the draft Bill. The decisive question was whether the draft Bill had been subjected to public participation before or during the signature collection and therefore evidence of broad public consultation and involvement in formulating the reports and the draft bill did not help answer the question.

214. Specifically on the Draft Bill, the BBI Steering Committee took the position that the petitioner had made generalized assertions and allegations without support of any evidence. Identifying with BBI Steering Committee on the matter, the Attorney General now reiterates that no evidence had been placed before the High Court in relation to any voter who signed the proposal to amend the Constitution without having

been provided with copies of the proposed Bill and criticizes the Court for shifting the burden of proof to the BBI Steering Committee.

215. This issue has received my anxious consideration. The assertion by the petitioner that the promoter posted copies of the draft Bill on the internet instead of providing hard copies is not a generalised assertion or allegation. Not once does Hon. Waweru rebut this fairly specific allegation and it has to be concluded that the promoter only posted a copy of the draft Bill on the internet.

216. As to the allegation that "**a vast majority of the people were grappling with lack of information as they appended signatures**", Hon. Waweru confronted this allegation by simply stating that the pleading was without specificity and generalised. I would agree with the appellants. It was necessary for the petitioner to have provided evidence of at least one person or people who appended their signatures without the expected information. Only then could the burden of proof shift to the BBI Steering Committee, under the provisions of section 112 of the Evidence Act, being the party with special knowledge of how it may have conducted public participation to the persons who appended signatures in support. Can it be ruled out that those who signed in support

read a copy of the Bill which was posted on the internet and understood it? There is therefore merit in the submissions by the Attorney General that in regard to this issue, BBI Steering Committee was not obliged to do anything until a case was made out against it (**Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR**.)

217. I find myself unable to agree with the finding of the High Court that there was lack of meaningful public participation and sensitization of people prior to the collection of signatures in support of the Constitution of Kenya Amendment Bill.

CONSTITUENCY DELIMITATION

218. I turn now to consider the issues around the constituency apportionment and delimitation questions in the proposed referendum. In the Amendment Bill, proposed an amendment to Article 89 (1) of the Constitution by increasing the number of constituencies from two hundred and ninety to three hundred and sixty. What, however, raised controversy was the second schedule to the Bill.

219. It is a transitional and consequential provision and provides: -

"Delimitation of number of Constituencies

(1) Within six months from the commencement date of this Act, the Independent Electoral and Boundaries Commission shall, subject to subsection (2), determine the boundaries of the additional seventy constituencies created in Article 89 (1) using the criteria provided for in Articles 81 (d) and 87 (7).

(2) The additional seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column.

(3) The allocation of additional constituencies among the counties specified under subsection (2) shall —

(a) **prioritise the constituencies underrepresented in the National Assembly on the basis of population quota; and**

(b) **be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota.**

(4) The creation of additional constituencies in Article 89 (1) shall not result in the loss of a constituency existing before the commencement date of this Act.

(5) For greater certainty, any protected constituency in the counties of Tana River, Lamu, Taita Taveta, Marsabit, Isiolo, Nyandarua, Nyeri, Samburu, Elgeyo/Marakwet, Baringo, Vihiga and Busia shall not have their protected status impaired by the delimitation of additional constituencies mentioned in this schedule.

(6) The requirement in Article 89 (4) does not apply to the review of boundaries for the additional constituencies preceding the first general election from the commencement date of this Act."

220. Unpacking it, the High Court, correctly in my view, identified the following as consequences of the transitional provisions: -

"a) They create 70 additional constituencies by dint of the Constitution of Kenya Amendment Bill;

b) They direct the IEBC to determine boundaries, and to delimit the seventy created constituencies to specific counties;

c) They stipulate the period within which the IEBC must determine and delimit the boundaries of the seventy created constituencies to be six months from the commencement date of the intended Act; and

d) They stipulate to the IEBC the criteria to use in distributing and delimiting the newly created constituencies."

221. The High Court found the said provisions to be unlawful and unconstitutional on six grounds: -

"681. Looking at the provisions of the Constitution and statutory law reproduced above as well as the history we outlined at the beginning of this part of the Judgment, we can, at the outset, state authoritatively that the impugned sections of the Constitution of Kenya Amendment Bill are unlawful and unconstitutional for the following reasons:

a) *First,* they impermissibly direct the IEBC on the execution of its constitutional functions;

b) *Second,* they purport to set a criteria for the delimitation and distribution of constituencies which is

at variance with that created by the Constitution at Article 89(5);

c) *Third,* they ignore a key due process constitutional consideration in delimiting and distributing constituencies namely the public participation requirement;

d) *Fourth*, they impose timelines for the delimitation exercise which are at variance with those in the Constitution;

e) *Fifth*, they impermissibly take away the rights of individuals who are aggrieved by the delimitation decisions of the IEBC to seek judicial review of those decisions; and

f) *Sixth*, by tucking in the apportionment and delimitation of the seventy newly created constituencies in the Second Schedule using a pre-set criteria which is not within the constitutional standard enshrined in Articles 89(4); 89(5); 89(6); 89(7); 89(10); and 89(12) of the Constitution, the new provisions have the effect of

extra-textually amending or suspending the intended impacts of Article 89 of the Constitution which forms part of the Basic Structure of the Constitution and are, therefore, unamendable."

222. Before examining the substance of the findings, I have to reflect on the proposition by the Attorney General that, save, for scrutinizing whether an amendment process prescribed by the Constitution has been complied with, the Court cannot look into the constitutionality of an amendment to the Constitution. This argument leans on the decision of the South African Constitutional Court in **Premier of Kwazulu Natal vs President of South Africa [1995] CCT 36/95** Constitutional Court of South Africa Case No. **CCT 36/1995**.

223. Generally speaking, an amendment to the Constitution cannot be said to be unconstitutional merely because it is in conflict with some other Article of the Constitution. This is because the effect of the amendment will be, by implication, to repeal the earlier provision. Mohamed DP in **Premier of Kwazulu Natal** *(supra)* observed: -

> **"[1] Mr Gordon SC, who appeared for the Applicants (together with Mr Dickson SC), wisely abandoned this ground of attack during his oral argument before us. The attack was clearly untenable because even if section 135(4) of the Constitution was to be read as if it was in conflict with section 149(10) (I doubt very much that it was), an amendment to the Constitution in conflict with another part of the Constitution would simply have the effect of a *pro tanto* amendment or repeal, by implication, of the earlier provision as long as the amendment was adopted in compliance with the forms and procedures prescribed by the Constitution. The same considerations apply to the suggestion in the heads of argument of the Applicants that the amendment to section 149(10) was in conflict with section 155 of the Constitution and section 207(2) of the Constitution."**

224. There is however a reason why the substance of a proposed amendment could be called into scrutiny. As held by High Court, and

which I endorse, alterations or modifications that abrogate the essential features of the Constitution forming the basic structure is the preserve of the primary constituent power while mere amendments in respect to the basic structure can properly be made by people in the exercise of secondary constituent power. A third tier is an amendment in respect of matters not protected by Article 255 (1). This can be effected by Parliament or by the people in exercise of their secondary constituent power. Proposed amendments must therefore be processed in the track delineated by the Constitution. An examination of the substance of an amendment is inevitable where an issue arises as to whether the correct procedure has been adopted.

225. The Attorney General raised another demur as to the ripeness of the matter for judicial determination, arguing that the Amendment Bill was still, at least at the time of trial, under consideration by County Assemblies and there was no guarantee that the second schedule to the Bill would survive in that form. There may not be much to this objection as neither the County Assemblies nor Parliament can make changes to a constitution amendment Bill. It is either a wholesome approval or a wholesome rejection. For that reason, once a Bill has been formulated

in terms of Article 257(2) and (3) then it is ripe for scrutiny by Court because it could signal an impeding contravention of Constitution.

226. Pivotal to the outcome reached by the High Court in this matter is the view it took that Articles 89(4), 89(5), 89(6), 89(7), 89(10) and 89(12) of the Constitution are part of the basic structure of the Constitution and are eternity and unamendable clauses. In respect to Article 89(1), which is on the number of constituencies for purposes of members of the National Assembly, the Court held: -

> **"670. Given this history and the text of the Constitution, we can easily conclude that whereas Kenyans were particular to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual number of constituencies. Utilizing the Canons of constitutional interpretation we have outlined in this Judgment, we conclude that Article 89(1) of the Constitution – which provides for the exact number of constituencies – while being part of the Basic Structure of the Constitution, is not an eternity clause: it can**

be amended by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution."

227. I did not hear the appellants suggest that the provisions of the Constitution touching on the number of constituencies and their delimitation (Article 89) can be amended in any way other than by popular initiative. And this really is the position because how constituencies are delimited has an implication on fair representation and equitable distribution of the country's resources, matters related to the Bill of Rights. There is therefore a concession that the provisions on delimitation of constituencies are entrenched provisions under the cover of Article 255(1). As a corollary, I would think, amendments that destroy or abrogate provisions on delimitation must be put to the people in their primary constituent power. It is on this premise that I turn to examine the findings of the High Court.

228. A finding by the High Court was that by directing IEBC on how to perform its functions, the proposed amendments subverted the constitutional edict that IEBC shall not be directed on how to perform its functions. If this holding is correct then the proposed amendment also touches on the independence of IEBC, an independent commission to

which chapter fifteen applies and therefore a matter which can only be relooked at by the people in exercise of their primary constituent authority.

229. Article 88(5) of the Constitution is on the independence of the IEBC: -

> **"The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation."**

A similar provision is Article 252(1) (d) in respect to all independent commissions and offices which includes IEBC.

230. The appellants assert that, by dint of this provision, IEBC is directed on how to perform its functions of delimiting the boundaries through both the Constitution and National legislation with the provisions of the Constitution taking precedence. It is argued that, by logic, any valid amendment to the provisions relating to the IEBC's functions would have the effect of redirecting the IEBC on how to perform its functions.

231. In its current formulation, the Constitution directs IEBC to review the names and boundaries of constituencies at intervals of not less than

8 years and not more than 12, but any review is to be completed at least 12 months before a general election of members of Parliament. The criteria for review is specifically set out in the Constitution at Articles 89(5) and 89(6). Article 89(7) (a) underpins public participation and requires IEBC to consult all interested parties in their function of reviewing constituency boundaries.

232. Section 1(1) of the second schedule to the Amendment Bill reads:-

"Within six months from the commencement date of this Act, the Independent Electoral and Boundaries Commission shall, subject to subsection (2), determine the boundaries of the additional seventy constituencies created in Article 89 (1) using the criteria provided for in Articles 81 (d) and 87 (7)."

233. The High Court correctly observes the effects of this provision to be that it:-

a) Sets its own criterion on delimitation by citing Article 81(d). This is a criterion unknown as a delimitation consideration in the Constitution;

b) Refers to a non-existent criterion in the form of Article 87(7) of the Constitution;

c) Reduces all the considerations listed in Article 89(5); (6) and (7) to a single one, namely, the population quota as the basis for delimitation decisions with respect to the seventy additional constituencies."

234. Further, section 1(2) identifies the counties where the additional seventy constituencies will be located. In doing so, delimitation in respect to these 70 constituencies is in a sense pre-set without the involvement of IEBC as they are already allocated to counties set out in the schedule. This abridgment of the functions of IEBC is done in the transitional and consequential clauses by suspending or modifying the provisions of Articles 89(2), 89(5), 89(6) and 89(7) in respect to the additional 70 constituencies. Is this a permissible use of Transitional and Consequential provisions of the Constitution?

235. In **Indore Development Authority Vs Monaharlal and ors. Etc S.L.P. (C) NOS. 9036-9038 of 2016** the Supreme Court of India observed as follows, in respect to transitional provisions in a statute: -

"The learned author has further pointed out: Transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the

instrument are to take effect. …… in Britnell v. Secretary of State for Social Security, (1991) 2 All ER 726, 730 Per Lord Keith], has stated: The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force."

This would hold true as well to transitional provisions in a Constitution.

236. It is clear that in employing the use of Transitional and Consequential clauses, the promoters of the Amendment Bill want to achieve a certain end without amending the substantive provisions which set out the criteria and manner in which IEBC should delimit constituencies. The Transitional and Consequential clauses of the impugned Amendment Bill are, really, a special purpose vehicle for ensuring that the seventy additional constituencies are delimited within the specified counties without following the procedure and yardstick set out in Article 89. Once that is achieved, the clauses will have served their purpose and the provisions of Article 89 revert. One is reminded of the words "a one day one way bus ticket, only good for the day and ride."

237. The amendments do not seek to redefine the functions of IEBC in regard to constituency delimitation which are well set in Article 89 but to suspend their operation so as to achieve a preconceived outcome which IEBC left to function independently cannot guarantee. This seems to be a disingenuous use of the Transitional and Consequential provisions to stifle the independence of IEBC and to abridge the existing law, albeit, only in the delimitation of the seventy constituencies.

238. I agree with Attorney General that the question on whether to add or subtract constituencies is a political question and for that reason the proposal to amend Article 89(1) to increase the constituencies from 290 to 360 was not faulted by the High Court and cannot be faulted. But if, as well, the question of delimitation of boundaries of constituencies is purely a political question, why not simply propose for the amendment of the provisions of Article 89 to remove the manner and criteria for delimitation of boundaries altogether so that the provisions of the Constitution will provide not only for the number of constituencies but also their names and boundaries? Why not propose to make this a permanent feature of the Constitution instead of employing the use of transitional and consequential clauses to temporarily claw back on the

functions of IEBC and to suspend some of the criteria for delimitation expressly set out in Article 89? Since the transitional and consequential clauses abrogate, not merely amend, certain provisions of Article 89 (even on transient basis), they ought to be subjected to the test of the people in exercise of their primary constituent power. I could not agree more with the High Court that: -

> **"696. It is for this reason that we have also concluded that the procedure and process that the Promoters of the Constitution of Kenya Amendment Bill have used to create, apportion, and delimit the proposed seventy new constituencies amounts to an impermissible extra-textual amendment to the Constitution by stealth. We say it is an attempt to amend the Constitution by stealth because it has the effect of suspending the operation of Article 89 without textually amending it. The implications of such a scheme if allowed are at least two-fold. First, it creates a constitutional loophole through which the Promoters can amend the Basic Structure of the Constitution without triggering the Primary Constituent Power. Second, such a scheme creates a "constitutional hatch" through which future**

Promoters of constitutional amendments can sneak in fundamental changes to the governing charter of the nation for ephemeral political convenience and without following the due process of the law."

239. In closing let me comment on an argument made in plenary that this is not the first time the provisions of Article 89 have been suspended by way of a Transitional and Consequential clauses. Indeed, Section 27 of the Sixth Schedule to the Constitution had this to say in regard to delimitation of boundaries: -

"The Interim Independent Boundaries Commission.

27. (1) The Boundaries Commission established under the former Constitution shall continue to function as constituted under that Constitution and in terms of sections 41B and 41C but—

(*a*) it shall not determine the boundaries of the counties established under this Constitution;

(*b*) it shall determine the boundaries of constituencies and wards using the criteria mentioned in this Constitution; and

(*c*) members of the Commission shall be subject to Chapter Seven of this Constitution.

(3) The requirement in Article 89(2) that a review of constituency and ward boundaries shall be completed at least twelve months before a general election does not apply to the review of boundaries preceding the first elections under this Constitution.

(4) The Boundaries Commission shall ensure that the first review of constituencies undertaken in terms of this Constitution shall not result in the loss of a constituency existing on the effective date."

240. The purpose of this Transition provision was threefold: -

(i) It provided for the delimitation of boundaries by the existing interim Independent Boundaries Commission pending the formation of IEBC.

(ii) It protected the loss of constituencies existing on the effective date of the Constitution in the cause of the first review of constituencies.

(iii) It exempted the first review exercise from the requirement that it had to be completed at least 12 months preceding the first elections under the new Constitution because of the tight timeline between the effective date of the then new Constitution and the expected date of the first elections in the new order.

241. The noble object of those provisions was to enable and smoothen the transition from the old constitution order to the new one. Important, as well, is that the criteria for determination of constituency boundaries was neither suspended nor were the newly created constituencies pre-allocated like what the impugned Bill proposes. Put differently, the functions of the body charged with delimiting constituencies were not curtailed.

THE FORM OF POPULAR INITIATIVE QUESTIONS FOR REFERENDUM

242. In Petition E400 of 2020, the petitioners contended that IEBC is constitutionally required to submit to the people all the proposed amendments as distinct and separate referendum questions. It was argued that a mere "Yes" or "No" vote to the entire amendment Bill violates the people's exercise of free will in that it hinders the voter from making a choice between a good amendment proposal from a bad one since good proposals could co-joined with bad proposals and vice versa. The petitioners sought a declaration in line with this contention.

243. In answer, the High Court held: -

> **"614. In our scenario, Article 255(1) of the Constitution provides that "A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257…" In our view what the Constitution contemplates is that each amendment to the Constitution shall be considered on its own merit and not within the rubric of other amendments.**
>
> **615. We opine that the drafters of the Constitution were alive to the fact that a Bill to amend the Constitution may propose different amendments to the Constitution some of which may be agreeable to the voters while others may not. In such event**

to lump all such proposals together as an omnibus Bill for the purposes of either laundering or guillotining the whole Bill is not permissible under our constitutional architecture. Not only does such a scenario lead to confusion but also denies the voters the freedom of choice. For instance, the Constitution of Kenya Amendment Bill under consideration contains at least seventy-four (74) proposed amendments to the Constitution. A faithful reading of Article 255(1) of the Constitution yields the conclusion that each of the proposed amendment clauses ought to be presented as a separate referendum question. This not only avoids confusion but it also allows the voters to decide on each presented amendment question on its own merit.

619. Our understanding of this section is that what is to be subjected to the referendum is the question or questions as opposed to the Constitution of Kenya Amendment Bill itself. It is, therefore, our finding and, we so hold, that Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in

the referendum ballot paper and to be voted for or against separately and distinctively."

244. The Attorney General and IEBC take a view the High Court encroached, prematurely, onto the IEBC's constitutional and statutory mandate. IEBC emphasized that the Court's holding offended the doctrine of ripeness as there was no live controversy before it. To this, the respondents retort that there was a threat to their constitutional right and the High Court was properly moved under Article 165(3) which gives the High Court jurisdiction to determine, not just, whether a constitutional right has been denied or violated but also when it is under threat.

245. It is important to reset the issue as raised before the High Court because the position of the petitioners has drifted away from what was impleaded. Before us, the petitioners in E 400 defended the decision on the premise of the unity of content/single subject matter principle. This principle, the Court was told, postulates that constitutional amendments through a referendum may deal with only one main issue so that voter can form and express their opinion freely and genuinely. Supporting this position, Mr. Aluochier fervently argued that Article 257(1) of the

Constitution speaks of a single amendment being proposed and that under Article 257 (10) the Bill to be submitted to referendum can only relate to a single proposed amendment.

246. The issue before the High Court was never whether the impugned Bill was unconstitutional for proposing more than one amendment and in fact proposing multiple amendments. Indeed, the High Court was well aware of what it was asked to determine: -

> **"611. We have been asked to determine whether Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper. In some jurisdictions with similar provisions not only is it permissible to subject referendum questions to a vote separately, but it is recommended that such questions be posed by way of multi-option referendums as opposed to binary referendums. In the latter only two options are available while in the former the options are more than two."**

247. The issue was whether the 78 proposed amendments in the Draft Bill needed to be submitted as separate and distinct referendum

questions. The Petition was set against a factual background that the Constitution Amendment Bill had yet to be placed before the County Assemblies as required by Article 257 (4) of the Constitution. Would it therefore be premature to raise the issue involving the referendum question at this stage?

248. Article 257 (10) and (11) reads: -

"(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10)."

249. The manner in which the proposed amendment is to be submitted to the people in referendum is not specified by the provisions of the Constitution. However, Part V of the Elections Act are provisions on referendum and if there is any doubt that those provisions where intended to cover referenda other than that under Articles 255 and 257, then the doubt is removed by section 54 which reads: -

"A referendum question on an issue other than that contemplated in Articles 255, 256 and 257 of the Constitution

shall be decided by a simple majority of the citizens voting in the referendum."

250. Section 49 of the Elections Act on initiation of a referendum reads:

-

"49. Initiation of a referendum

(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.

(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.

(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.

(4) The National Assembly may approve one or more questions for a referendum.

(5) The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation.

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate."

251. These provisions, and more specifically sub section (2), places the responsibility of framing the referendum question or questions to be determined during the referendum on IEBC. In this instance, IEBC had not received the request to hold the referendum and occasion had not arisen for it to discharge its responsibility of framing the question or questions. Further, it has not been suggested that IEBC had already determined the manner or formula in which it would frame the question or questions in respect to the referendum touching on the impugned Bill, if it got there. It cannot therefore be fairly said that the petitioners had

an actual grievance against IEBC either arising from the conduct of IEBC or one which was threatened. I take a view, and so hold, that there was no live controversy that required the High Court to pronounce itself on.

CROSS-APPEALS

252. There are two cross-appeals

253. In Petition No. 397 of 2020, the Kenya National Union of Nurses complained that the BBI Steering Committee had, in violation of their legitimate expectation purported to limit the mandate of a proposed Health Service Commission. Its grievance is that the forerunner to the Steering Committee, the BBI Taskforce, had recognized the aspirations of the members of KNUN of the necessity to transfer the health sector from the County Governments to the proposed Commission and so there was a legitimate expectation that the proposed Commission would find its way to the amendment Bill.

254. The High Court dismissed the plea by KNUN on two substantial reasons. First, that mere fact that an entity is required to take into account public views does not necessarily mean that those views must find their way into the final decision of the entity. Second, that there was no

evidence that either the BBI Taskforce or the BBI Steering Committee had made representations to the union that its views would be incorporated in the Constitution of Kenya Amendment Bill.

255. In the main, this cross-appeal is premised on the doctrine of legitimate expectation. Black's Law Dictionary (Tenth Edition) defines Legitimate expectation as:-

> **"Expectation arising from the reasonable belief that a private person or public body will adhere to a well-established practice or will keep a promise."**

256. As to when legitimate expectation arises, the High Court correctly quoted the decision of the Supreme Court in **Communications Commission of Kenya Vs Royal Media Services Ltd & 5 Others [2014] eKLR.** The Apex Court gave a summary of when legitimate expectation arises:-

> **"[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."

257. KNUN bore the onus of proving that there was a clear and an unambiguous promise by the BBI Taskforce that the proposed health commission would be included in the Constitution Amendment Bill. In clause 163 of the Taskforce report, the issue of the Health Service Commission was highlighted as follows: -

"Health Service Commission.

Even as we retain health as a devolved function, the human resourcing element should be transferred to a Health Service Commission."

258. This, it must be remembered, was merely a recommendation made by the Taskforce. The mandate of the Steering Committee was to conduct validation of the Taskforce report and then to propose administrative, policy, statutory or constitutional changes after taking into account any relevant contributions made during validation. There

is no evidence of a promise by the Taskforce or Steering Committee to KNUN that what was recommended would be included in the proposed administrative, policy, statutory or constitutional changes. On this single failure to prove promise, the entire proposition of legitimate expectation can go no further. In similar vein, the Cross Appeal fails.

259. Now to the Cross-Appeal by Morara Omoke, the 76th respondent.

260. The first ground can be disposed of fairly quickly because of the findings I have already made. The Appellant criticizes the High Court for failing to order that the President makes good public funds used in the BBI constitution amendment process. Such order is not tenable as the President was not duly served with the Petitions and no orders could possibly be made against him, not in the least, because doing so would be to condemn him unheard.

261. The Covid pandemic has been with us for some time. At the High Court, Mr. Omoke contended that proceeding with the impugned constitution amendment process will not only lead to the spread of the disease but will also divert resources away from Health Services that are much needed now. He invokes contravention of Article 43(1) (a) on the right of every person to the highest attainable standard of health.

262. In declining to grant the orders sought by the Petitioner, the High Court held: -

> **"777. The argument put forward by the Petitioner in *Petition No. E416* of 2020, as we understand it, is that conducting a referendum now will provide an environment for the spread of the Corona virus and, therefore, this Court should stop the government from conducting such a referendum until the pandemic is over. He also argues that the resources that are to be used for the referendum, should be channeled towards fighting the pandemic.**
>
> **778. We have anxiously considered the argument by the Petitioner in *Petition No. E416 of 2020* and those by the Respondents. The issue raised by the Petitioner in *Petition No. E416 of 2020* though novel was not properly supported by sufficient evidence. Without such evidence to support the alleged threatened violations of the right to health, we are unable to make the findings the Petitioner craves."**

263. At the Appeal, it would be expected that the appellant would point out the evidence that the High Court disregarded. In an attempt to do so, the appellant faulted the High Court for failing to take judicial notice of the surge in the incidence of Covid-19 associated with political rallies led by President Kenyatta and Hon. Raila Odinga to popularize the impugned Bill. The law is that no fact of which the Court shall take judicial notice need be proved (section 59 of the Evidence Act). The matter raised herein does not fall in this category. There was need for empirical evidence that correlated a surge of Covid-19 infections with the rallies called to popularize the impugned Bill. In the absence of that evidence the assertion remains unproved.

264. In respect to diversion of necessary funds away from health services, that there was evidence that a referendum would cost Kshs.14 Billion to hold and signature verification would cost Kshs.93,729,800/=. It is submitted that this kind of expenditure, during a pandemic, violates the principle of sustainable development. The appellant in my view misses the point. The issue, from his own pleadings, is not that the proposed referendum is expensive but that by holding it, it takes away resources from health services. The relevant evidence would not be on

the expense of the proposed referendum but that the referendum would be funded from resources earmarked for health services. No such evidence was forthcoming.

265. In communication dated 21st September 2020 Justice D. K. Maraga, the Chief Justice then, advised the President to dissolve parliament in accordance with Article 261(7) which reads: -

> **"If Parliament fails to enact legislation in accordance with an order under clause (6) (*b*), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament."**

266. A plea by Mr. Omoke to the High Court was that it should compel the President to dissolve the National Assembly and Senate following that advice and also to find that the two houses cannot receive and act on the amendment Bill as they stand dissolved by dint of that advice.

267. The High Court answer to this plea was short: -

> **"782. The issue of whether or not the President should dissolve the National Assembly and the Senate is live in *Milimani High Court Petition No. 302 of 2020 Third***

***way Alliance v Speaker of the National Assembly & Another (consolidated with JR No. 1108 of 2020 and Petition Nos. E291 of 2020 and 300 of 2020*.), currently pending before another bench of this Court. The prayers the Petitioner seeks in prayers (h) and (i) in *Petition No. E416 of 2020* are subject in those Consolidated Petitions. In that regard, the Petitioner may apply to join those Petitions and urge his reliefs jointly with the Petitioners in those petitions. We decline the invitation to deal with these issues in these Consolidated Petitions."**

268. The appellant now argues that the issue raised by Petitioner was the lawfulness or otherwise of Parliament to deliberate the Bills and not those raised in **Nairobi No. 302 of 2020**. However, one relief sought by the petitioner belies the argument that the issue raised in the Petition is no more than about the lawfulness or otherwise of Parliament. Relief (h) reads: -

(h) A mandatory injunction directing the President of the Republic of Kenya, H. E Uhuru Kenyatta to comply with the

Article 267(7) by dissolving Parliament in accordance with the Chief Justice's Advice to the President pursuant to Article 261(7) of the Constitution dated September 21, 2020."

269. And again, in respect to whether or not Parliament is still properly constituted in the face of that advise of the former Chief Justice, that is a matter that is ultimately related to the issue of whether or not the President should dissolve both houses. Admittedly, a live issue in Petition No. 302 of 2020.

270. In prayer (f) of the same Petition, Mr. Omoke sought the following prayers: -

"(f) An order compelling the President of the Republic of Kenya, H. E Uhuru Kenyatta, the 1st and the 3rd Respondents to publish and/or cause to be published in a Gazette Notice detailed budget and financial statements of all the public funds allocated to and utilized by the 3rd Respondent."

271. On the basis of Section 4(2) of the Access to information Act, the High Court held: -

"595. The Petitioner did not demonstrate that he had sought the information he wants the Court to order published. He has

the right to seek information from the relevant state entities. The Act provides the procedure for doing so. If access was denied, he would have then approached the Court for a determination whether or not his right of access to information had been violated and, if so, seek appropriate orders. Having not done so, we are of the view that his quest for an order for disclosure through this Petition, is premature."

272. This aggrieves the Petitioner who argues that he did not plead that his right of access to information had been infringed and that in any event, the Access to Information Act does not oust the provisions of Article 10 of the Constitution. I understand the High Court decision to be that the petitioner had not exhausted the statutory avenue available before seeking the intercession of the Court. The judicial system is already clogged with thousands of undecided cases. It would be imprudent to burden it further with matters that can be ably resolved elsewhere. I agree with the finding of the High Court on this issue

273. As regards the appeal against the *amici*, I have read the lead Judgement by the President of this Court and I am in full agreement with the reasons and outcome reached. I need not add anything.

274. Those are my views of the matters raised in the consolidated appeals and the cross appeals. The final orders of the Court are those set out in the lead Judgement of the President of this Court.

Dated and delivered at Nairobi this 20th day of August 2021

F. TUIYOTT

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JUDGE OF APPEAL