REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL PETITION NO. 65 OF 2011
CONSOLIDATED WITH
PETITIONS NOS 123 OF 2011 AND 185 OF 2011

BETWEEN

JOHN HARUN MWAU.....1ST PETITIONER
MILTON MUGAMBI IMANYARA ..... 2ND PETITIONER
PROFESSOR LAWRENCE GUMBE ..... 3RD PETITIONER
MARTIN MUTHOMI GITONGA ..... 4TH PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL .....1ST RESPONDENT
COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION.....2ND RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

WITH

PROFESSOR YASH PAL GHAI ..... 1ST AMICUS CURIAE
DR STEPHEN KIMEMIA NJIRU..... 2ND AMICUS CURIAE
INTERNATIONAL CENTRE FOR CONSTITUTIONAL RESEARCH AND GOVERNANCE ..... 3RD AMICUS CURIAE

JUDGMENT

Introduction

1. This matter concerns, *inter alia*, the date of the first elections under the Constitution. The elections are an important milestone in the implementation of the Constitution. Elections provide a chance for renewal and change. The first elections under the Constitution will provide Kenyans with the opportunity to test

their capacity for change as they will be required to choose new leaders whom they believe conform to the values and principles of the Constitution and who are committed to ensure that the dream of a new Kenya realised on 27th August 2010 is firmly established.

2. In this judgment the Constitution promulgated on 27th August 2010 shall be referred to as "***the Constitution"*** while the repealed Constitution shall be referred to as the "***former Constitution***." ***The Transitional and Consequential Provisions*** contained in the **Sixth Schedule** shall be referred to as the **Sixth Schedule**.

The Petitions

3. The first petition in this matter is **Petition No. 65 of 2011; *Milton Mugambi Imanyara, Professor Lawrence Gumbe, Martin Muthomi Gitonga v The Attorney General, Commission for Implementation of the Constitution and Independent Electoral and Boundaries Commission***. This petition seeks the following main reliefs;
   (a) A declaration that paragraphs 9(1) and 10 of the Sixth Schedule to the current Constitution are inconsistent with Articles 101 and 102 of the current Constitution in so far as they imply that the next general elections may be held on a date other than the second Tuesday of August 2012.
   (b) A declaration that the next general election of the President, the National Assembly, the Senate, County Assemblies and County Governors shall be held on the same date, i.e., on the second Tuesday of August, 2012.

4. The second petition is **Petition No. 123 of 2011; *John Harun Mwau v The Attorney General***. The Petitioner in the matter seeks the following reliefs;

(a) A determination of the question whether the term of the existing National Assembly ends in January 2013.

(b) A determination of the question whether the next general elections shall be held within sixty days immediately after the expiry of the existing National Assembly.

(c) A determination of the question whether the next general election can constitutionally be held before the term of the existing National Assembly expires in January 2013.

(d) A declaration that the term of members of the current National Assembly began on 15th January 2008.

(e) A declaration that the term of the existing National Assembly shall continue until its unexpired term is completed.

(f) A declaration that the first general election under this Constitution shall be held within sixty days after the expiry of the term of the existing National Assembly.

(g) A declaration that the unexpired term of the existing members of the National Assembly includes terms and services.

(h) A declaration that the President has no power or authority to dissolve Parliament under the current Constitution.

(i) A determination as to whether or not the National Accord and Reconciliation Act was amended to remove the death clause before the effective date of the new Constitution came into force.

(j) A determination as to whether or not the National Accord and Reconciliation Act ceased to apply upon the enactment of the new Constitution.

(k) A declaration that on the enactment of the new Constitution the National Accord and Reconciliation Act became part of the existing laws carried forward under Article 7 of the Sixth Schedule.

5. The third matter is **Petition No, 185 of 2011; *Milton Mugambi Imanyara v The Attorney General***. The petition seeks the following main prayers;
   (a) A declaration that no amendment to the current Constitution affecting the term of the President can be proposed, enacted or effected into law without reference to a referendum in which at least 20 per cent of the registered voters in each of at least half of the counties vote in the referendum and the support of a simple majority of the citizen voting in a referendum.
   (b) A declaration that the Constitution of Kenya Amendment Bill, 2001 in so far as the same seeks to amend Article 136(2)(9) of the current Constitution is inconsistent with and in contravention of Articles 136(2)(a), 255, 226, 257 and the Sixth Schedule to the current Constitution and is therefore, unlawful, unconstitutional null and void.
   (c) An order restraining/or prohibiting the Attorney General, Minister of Justice and Constitutional Affairs, their agents, servants or any other person acting pursuant to their instructions from tabling in parliament the Constitution (Amendment) Bill, 2011 in so far as the same contains proposals to amend Article 136(2)(a) of the Current Constitution.
   (d) An order restraining and or prohibiting the Attorney General, Minister of Justice and Constitutional Affairs, their agents, servants or any other person acting pursuant to their instructions from passing or enacting into law any amendment to Article 136(2)(a) of the current Constitution without reference to a referendum.

Procedural History

6. The petitions filed in this court could not be heard immediately as there was, pending before the Supreme Court, an application

filed by the Interim Independent Electoral Commission seeking the court's advisory opinion on the election date namely **Supreme Court Constitutional Application No. 2 of 2011**.

7. When the petitions came up for directions on 13th October 2011, Hon. Mr Justice Majanja ruled that the issue of the jurisdiction of the Supreme Court under **Article 163(6)** was a matter for the Supreme Court to decide and that it was proper, in view of the hierarchy of the Courts, that the Supreme Court should deal with the issue first.

8. The Supreme Court considered the matter before it and in its ruling delivered on 15th November 2011 stated, in part, as follows: ***"We will be guided by certain principles which have clearly emerged from the submissions: the High Court is, by Article 165(3) (d) of the Constitution, entrusted with the original jurisdiction to hear and determine any question entailing the interpretation of the Constitution; it is the obligation of the Supreme Court, as the ultimate interpreter of the Constitution to protect and reinforce the conferment of first-instance jurisdiction upon the High Court especially when the matter in respect of which an advisory opinion is being sought, is pending before the High Court; subject to those principles, the Supreme Court will exercise its discretion appropriately, on a case-to-case basis, in accepting requests for an Advisory Opinion. We hereby order and direct as follows;***
   (1) We decline to declare that the Supreme Court has the jurisdiction to render an advisory opinion in the instant matter, but decline in exercise of our discretion, to give such an opinion with regard to the date of the next general election.
   (2) We reserve the reasons to be set out in a ruling upon notice.

(3) Responding to the High Court's request of 13th October 2011 for directions, High Court Petition Nos. 123 of 2011, 65 of 2011 and 185 of 2011 shall be placed before the Constitutional and Human Rights Division of that Court, for hearing on priority and on a day-to-day basis.

(4) The aforesaid petitions shall be listed for mention and directions before the Head of the High Court's Constitutional and Human Rights Division on 18th November, 2011."

9. The petitions came up for directions as directed by the Supreme Court on 18th November 2011 before Hon. Mr Justice Lenaola, the Head of the Constitutional and Human Rights Division of the High Court, who gave the following key directions;

"(1)The petitions are consolidated on the following terms;

(a) The petitioners are John Harun Mwau, Professor Lawrence Gumbe, Martin Muthomi Gitonga and Milton Mugambi Imanyara.

(b) The respondents are the Attorney General, the Commission for the Implementation of the Constitution ("The CIC"), The Independent Electoral and Boundaries Commission ("the IEBC").

(c)The friends of the court granted leave to appear in the matter are Professor Yash Pal Ghai and Dr Stephen Kimemia Njiru.

(2) The following issues are framed for determination;

(i) A determination of the question as to when the next general election should be lawfully held.

(ii) A determination as to whether an amendment to the Constitution affecting the term of the President can be proposed, enacted or effected into law without a referendum being held under the Constitution.

(iii) A determination whether the unexpired term of the existing members of Parliament includes terms and conditions of service.

(iv) A determination whether the President has power or authority to dissolve Parliament under the current Constitution.

(v) Who should bear the costs of the petitions as consolidated?"

10. The above issues were framed with the consent of the parties and the learned Judge also gave directions for the filing and exchange of written submissions and authorities and fixed the matters for hearing on 15th and 16th December, 2011 before Hon. Justices Isaac Lenaola, Mumbi Ngugi and David Majanja.

11. When the matters came up for hearing on 15th December, 2011 two additional directions were given;

(1) The International Centre for Constitutional Research and Governance was granted leave to participate in these proceedings as the 3rd friend of court.

(2) The Court directed the parties to address it on two further issues;

(i) Whether this court had jurisdiction to determine the matter.

(ii) Which body under the Constitution has the Constitutional responsibility to fix the election date.

(3) The Court also admitted into the record a letter dated 20th September 2011 from the Chairman of the Interim Independent Electoral Commission(IIEC) to the Attorney General to which is attached a letter dated 4th August 2011 from the IIEC seeking a legal

opinion on the election date from the Attorney General and a legal opinion on the date of the first election under the Constitution dated 20th July 2011 prepared by Otiende Amollo, Advocate and member of the Committee of Experts (the COE).

12. The parties, in compliance with the directions of Hon. Mr Justice Lenaola, filed extensive written submissions with supporting authorities. We heard the parties on 15th and 16th December 2011 and reserved our judgment for 13th January 2012.

13. In the meantime the Supreme Court delivered its ruling on the request for an advisory opinion on 20th December 2011, where it made the following orders;

"(i) Notwithstanding that the Supreme Court, indeed, has jurisdiction to hear the reference application, we uphold the preliminary objections and decline to give an Advisory Opinion on the date of the next general election.

(ii) The High Court shall proceed on the basis of priority and on the basis of the orders of 15th November, 2011 to hear and determine the several petitions pending before it in which the issue as to the date of the next general election has been raised in the substantive pleadings."

Submissions by Counsel

14. We now summarise the submissions, written and oral, of the parties, in so far as the same are material to the issues framed for determination by the court. As it will become apparent, there is a considerable overlap on the issues.

Jurisdiction

15. The issue of jurisdiction was raised substantively by the 1st friend of court, Prof. Yash Pal Ghai, in his written submissions dated 6th December 2011. The basis of the submission is that the petitioners seek relief based on a hypothetical case and in effect what is sought is an advisory opinion from this court.

16. He argues that the jurisdiction conferred upon the High Court under **Article 165** contemplates that there must be a dispute between the parties for which they seek relief. What the petitioners seek is an abstract interpretation of the Constitution which is not permitted by **Article 165** of the Constitution.

17. He further submits that there is no threat to the loss of rights and therefore the petitioners cannot bring this case before the court under **Articles 22(1)**, **23(1)** and **165(3)(b)** for the enforcement of fundamental rights and freedoms.

18. Prof. Ghai contends that there is no legislation or decision that is being challenged. At best, the petitions are based on public debates, positions and proposed bills to amend the Constitution and regulate elections. Such issues are not disputes and there is no controversy for this court to resolve and no wrong has been committed or done to the petitioners or any persons they purport to represent. We were referred to ***Republic v Truth Justice and Reconciliation Commission and Another ex parte Augustine Njeru Kathangu and 9 Others*** **Nairobi Misc. App. No. 490 of 2009 (Unreported)** at *para 25* where the court held that **Article 22** as read with **Article 258** obliges every applicant to clearly set out the acts and/or omissions that, in his or her view, contravene the Constitution and also specify the provisions of the Constitution that those acts or omissions contravene and the prayers or reliefs he or she seeks.

19. Prof. Ghai asserts that the nature of judicial authority and separation of powers means that although the courts are the ultimate interpreters of the Constitution, other parties are also entitled by virtue of **Article 10(1)(a)** to interpret the Constitution and this court should allow other bodies, organs or officers of state to interpret the Constitution rather than taking it upon itself to decide this matter in the absence of a real dispute.

20. Prof. Ghai contends that while **Article 165(3)** may be read to suggest that the High Court has jurisdiction to interpret the Constitution in any sort of case regardless of the existence of a true dispute, this interpretation is not inevitable. He asked us to consider the position taken in other jurisdictions regarding the interpretation of judicial power. He referred us to the case of ***Muskrat v United States*** **219 US 346(1911)** where Justice Day of the United States Supreme Court stated that judicial power is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. Justice Marshall of the United States Supreme Court also observed in the famous case of ***Marbury v Madison*** **5 US 137; 2 L.Ed 60 (1803). 1 Cranch** that the right to declare an Act of Congress unconstitutional could only be exercised when a proper case between opposing parties is submitted for judicial determination.

21. We were also referred to cases from Australia and the United Kingdom to the same effect, i.e., ***Re Judiciary Act 1903 – 1920 & In Re Navigation Act 1912-1920*** **(1921) 29CLR 257** and ***The Queen (on the application of (1)A(2)B by their litigation friend and Official Solicitor (3)X (4)Y Claimants v East Sussex County Council*** **[2003] EWHC 167**. Similarly, in the case of ***Jesse Kamau and 25 Others v The Attorney***

General, **Nairobi Misc. App. No. 890 of 2004 (Unreported)**, (*the Kadhis Court case*), it was held that the court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical.

22. The 1st friend of court urged us to find that in view of the fact that a specific 'no dispute' type of case is conferred by **Article 163(6)** to the Supreme Court, it follows that the High Court lacks jurisdiction to interpret the Constitution in the absence of a dispute. He relied on the principle of constitutional and statutory interpretation expressed in the maxim *expressio unius, exlusio alterius*, which means *"to express one thing is by implication to exclude the other"* as succinctly put by Githinji J., in ***Ntoitha M'mithiaru v Richard Maoka Maore and 2 Others*** **[2008] 3 KLR (EP) 730, 550** *at para 10***.** We were also referred to the Privy Council case of ***Attorney General of Australia v The Boiler Makers Society of Australia*** **[1957] AC 288** in support of this principle.

23. On these broad basis, Prof. Ghai pressed us to decline jurisdiction in the spirit of judicial restraint and in order to ensure that all the branches of government work harmoniously in their interaction.

24. Counsel for the 1st petitioner, Mr. Mwangi, submitted that this court had jurisdiction. He asserted that the petitioner's claim is that the people he represents have a right to elect their representative and know the election date. Under **Article 38** of the Constitution, the petitioner has a right to be elected a Member of Parliament and likewise the people of Kilome Constituency, whom he presently represents in Parliament, have a right to know who their next MP will be. He argued that these facts establish a cause of action under **Article 22** and under

Article 165 this Court has jurisdiction to interpret the Constitution.

25. Counsel submitted that under **Article 3**, all persons are enjoined to defend and protect the Constitution and promote its values. In the circumstances, a personal interest was unnecessary and this court should be satisfied that without this petition, the Constitution would suffer. He urged us to uphold the jurisdiction of the Court to determine this matter in light of the values and principles set out in **Article 10**.

26. Mr. Havi, appearing for the 2nd, 3rd, and 4th petitioners, submitted that the Supreme Court settled the issue of jurisdiction in its ruling of 15th November 2011 when it held that this court should deal with these matters.

27. The 3rd friend of court represented by Mr Mungai submitted that this court has jurisdiction. He stated that the determination of the election date was the responsibility of the Committee of Experts and if the Committee failed then the Interim Independent Constitutional Dispute Resolution Court (the **IICDRC**) ought to have done so. He submitted that under **section 30** of the **Constitution of Kenya Review Act (Act No. 9 of 2008)**, one of the contentious issues was the date of the election and it ought to have been resolved by the COE.

28. Counsel argued that the **IICDRC** having been dissolved by conclusion of the constitution review process, then the institutions created by the Constitution would deal with outstanding issues and therefore the High Court had jurisdiction to deal with the matter. He referred us to the decision of the **IICDRC** in the case of ***Alice Waithera Mwaura and 12 Others v Committee of Experts, The Attorney General and the Interim***

Independent Electoral Commission **Petition No. 5 of 2010 (Unreported).**

29. The 1st and 2nd friends of the court and all the respondents did not dispute this court's jurisdiction to deal with the matters before it.

The date of the first elections

30. The submissions relating to the date of the first elections after promulgation of the Constitution fall into three categories supported by three groups. The first group represented by the 1st petitioner, supported by Prof. Ghai and ICCRG, submitted that the date of the election is in the year 2013 and specifically between 15th January 2013 and 15th March 2013.

31. The second group represented by the 2nd, 3rd and 4th petitioners and supported by the 2nd respondent are of the view that the date of the first elections is on the second Tuesday of August 2012.

32. The third group favours an election date between October 2012 and December 2012. This date finds support from the 1st respondent, the Attorney General, and Dr Njiru, the 2nd friend of the court.

33. The 3rd respondent has submitted that it is neutral and disinterested as it only wishes to have a clarification of its mandate under **Article 88** of the Constitution in order to organise free and fair elections.

34. Counsel for the 1st petitioner relied upon the written submissions filed on 25th November 2011. The basis of his argument is that the **Constitution** and **the Transitional and**

Consequential Provisions in the **Sixth Schedule** must be read together in light of the doctrine of harmonisation as the Constitution and the Schedules constitute one document. We were referred to the case of ***Azania Peoples Organisation (AZAPO) and Others v The President of the Republic of South Africa*** **CCT 17/1996 [1996] ZACC 16** where the Constitutional Court of South Africa held that the transitional provisions in the schedule to the Constitution are part of the Constitution and must be read as such.

35. The gravamen of the 1st petitioner's case is that the **Fifth** and **Sixth Schedules** of the Constitution were enacted to make provision for the period between the effective date and the date of the first election. Thus the date of the first election under the Constitution can only be ascertained by referring to **sections 9** and **10** of the **Sixth Schedule**.

36. Mr Mwangi drew our attention to the language used in **Articles 101, 102, 136** and **180** which makes reference to ***"A general election"*** as distinct from **section 9** of the **Sixth Schedule** which refers to ***"The first elections."*** He argued that the former refers to a general policy statement respecting all elections after five years while the latter is in respect of the transition period from the former Constitution to the present one. The result is that **Articles 101, 102, 136** and **180** are not applicable in determining the question of the first elections under the Constitution and the relevant provisions in making this determination is to be found in **sections 9** and **10** of the **Sixth Schedule**.

37. The 1st petitioner contends that by virtue of **section 2** of the **Sixth Schedule**, the whole of Chapter Seven and Eight, **Articles 129** and **155** of Chapter Nine of the Constitution and the

provisions relating to the devolved government including **Article 187** are suspended and are therefore inactive. It is the 1st petitioner's position that there is no ambiguity as to the applicability of the schedule in determining the election date of the first elections for two reasons. Firstly, the provisions of **Article 101, 102, 136** and **180** are suspended and secondly, the language of **section 9** of the **Sixth Schedule** leaves no doubt as to its applicability.

38. Counsel submitted that in terms of **section 9** of the **Sixth Schedule**, the first elections for the National Assembly, Senate and devolved government shall be held at the same time, within sixty days after dissolution of the National Assembly. **Section 10** thereof provides that the National Assembly existing before the effective date shall continue as the National Assembly for its unexpired term.

39. According to **Legal Notice No. 1 of 2008**, the term of the National Assembly commenced on 15th January 2008, the day on which it first sat under the former Constitution and therefore the term of a Member of Parliament was 5 years from that date. It follows therefore that the term runs from 15th January 2008 to 14th January 2013 and the first elections, in accordance with **section 10** of the **Sixth Schedule** of the Constitution, can only be lawfully conducted within sixty days from the 14th January 2013.

40. Counsel for the 1st petitioner has urged us not to be swayed by public policy, opinions, unwritten conventions and traditions as the Constitution is clear on the date of holding elections. That the duty of this court is to interpret the Constitution and the only interpretation possible is that the first general election after

promulgation shall be held within 60 days from the expiry of the term of Parliament on 14th January 2013.

41. Finally, Mr Mwangi submitted that the ***National Accord and Reconciliation Act, 2008*** had no application to the determination of the election date. He urged us to hold that it had ceased to apply upon the enactment of the Constitution.

42. Prof. Ghai, in agreement with the 1st petitioner, submitted that the election date for the first elections under the Constitution is within 60 days from the end of the term of the National Assembly which is in mid-January 2013.

43. He submitted that the Constitution cannot be read as providing for elections in December 2012. This date is as a result of a popular expectation that elections are generally held in December, and they were so held in 1992, 1997, 2002 and 2007 though nothing in law fixed December as the election month.

44. The only reason that it was possible to hold elections in December in all these occasions was that the President of the day dissolved Parliament before expiry of its terms in accordance with **section 59(2)** and not **59(4)** of the former Constitution. Similarly, Parliament first sat on 15th January 2008 under the former Constitution and its term would have expired on 14th January 2013 subject to the possibility that the President exercised the power to dissolve it earlier in accordance with **section 59(2).**

45. Prof. Ghai further submitted that **section 9(2)** of the **Sixth Schedule** implies that the elections may be held in 2012 hence the provision that if the elections for the National Assembly are

held in 2012, those for the county governments will be held in 2012. Whether such an election can be held in 2012 depends on whether the President has power to dissolve the current Parliament.

46. According to Prof. Ghai, the only provisions for the dissolution of Parliament were contained in **section 59** of the former Constitution. That section provided that the President may at any time dissolve Parliament and Parliament unless sooner dissolved, shall continue for five years from the date when the first National Assembly meets after dissolution. On its 5th anniversary the National Assembly shall then stand dissolved.

47. Prof. Ghai further states that since the former Constitution ceased to be in force on 27th August 2010 unless preserved by **section 3(2)** of the **Sixth Schedule**, it follows that the National Assembly cannot be brought to an end by an act of dissolution. It can only come to an end automatically at the end of its *"unexpired term."*

48. Prof. Ghai also contends that the Constitution cannot be read as providing for first elections on the second Tuesday in August 2012. His argument is that the provisions of **Article 101(1)** will not be in force in time to determine the date of the first elections and that date for the elections must be determined with reference to **section 9** and **10** of the **Sixth Schedule** which makes it clear that the existing Parliament is not abolished or dissolved by promulgation of the new Constitution. It is to continue for its unexpired term and the purpose of **section 9** and **10** of the **Sixth Schedule** is to fix the date for the first election.

49. Prof. Ghai also submits that while **section 9(2)** of the **Sixth Schedule**, hints at the possibility of an election in the year 2012 as a result of the dissolution of the coalition, he suggests that there is nothing in the ***National Accord and Reconciliation Act, 2008*** that provides that an election must be held upon dissolution of the coalition established by the Accord.

50. Prof. Ghai concludes that the first elections must be held sixty days after 14th January 2013 which is the end of the existing term of the National Assembly.

51. The 3rd friend of court, ICCRG, represented by Mr Mungai, adopted the contents of the affidavit sworn on 15th December 2011 by its director, Kibe Mungai, and the submissions filed on 17th December 2011. It supported the 1st petitioner's submissions and those of Prof. Ghai in regard to the date of the first elections being between 15th January 2013 and 15th March 2013.

52. ICCRG argues that the notion of the first elections under the Constitution being held on the first Tuesday of August 2012 is absurd on two grounds. First, the inherent logic of the **Fifth** and **Sixth Schedule** is against the August 2012 elections and second, members of the Committee of Experts have publicly expressed the unanimous view that they never intended to have the first general elections conducted in August 2012. Mr Mungai argued that **Article 101** is one of the provisions of the Constitution that has been suspended by virtue of **section 2(1)(a)** of the **Sixth Schedule** and that **section 10** of the **Sixth Schedule** gives the National Assembly the right to remain in office for its unexpected term and that term expires on 14th January 2013.

53. Mr Mungai further submitted that **section 59** of the former Constitution was repealed and there is no legal way in which the term of the National Assembly can be shortened. The current National Assembly must remain until the date when its term automatically lapses and accordingly the President has no power to dissolve the current Parliament. Any assertion to the contrary would be blatantly unconstitutional.

54. Counsel asserted that the power of the President to dissolve Parliament must also be viewed in a historical context as there has been a steady diminution of the President's powers over the legislature. The Constitution currently provides that the President may dissolve Parliament under **Article 262** of the Constitution upon the advice of the Chief Justice and in the absence of any such power, none should be implied as this would upset the independence of the organs of government and the principle of separation of powers.

55. The 2nd, 3rd and 4th petitioners, represented by Mr Havi, submitted that the election date was clear, that is the first Tuesday of August 2012. He relied on the written submissions filed on 20th November 2011.

56. The 2nd, 3rd and 4th petitioners' submission proceeds from the argument that **section 9** and **10** of the **Sixth Schedule** are inconsistent with **Articles 101** and **102** of the Constitution in so far as they imply that the next general elections may be held on any other date other than the second Tuesday of August 2012. This inconsistency can only be resolved by determining the term of the National Assembly, Parliament and the President and how the same can lawfully come to an end under the former Constitution and the current Constitution.

57. That **section 9** of the former Constitution which governs the term of the President and **section 59** which deals with the term of Parliament are repealed by the Constitution and as such are expressly excluded and cannot be used to interpret the terms of the National Assembly and the President and consequently only the Constitution is to be used to make this determination.

58. It is their argument that the publication of the **Constitution of Kenya (Amendment) Bill, 2011** seeking to amend **Article 101(1), 136(2), 177(1)(a)** and **180(1)** to alter the date of the next general elections from the Second Tuesday of August to the third Monday of December is an acknowledgement that the general election is to be held on 14th August 2012 and not later. In view of the removal of the power of the President to dissolve Parliament, the current Parliament shall stand dissolved automatically on 14th June 2012 being 60 days before the second Tuesday of August 2012 to pave way for the next general election on 14th August 2012.

59. Mr. Havi submitted that the convenience or otherwise of the implementation of the Constitution is not an issue for consideration as the Constitution is the supreme law of the land and all other issues must be aligned with it and not the other way round. He referred us to ***Njoya and 6 Others v The Attorney General and 3 others*** **(No. 2) (2009) 1 KLR 261** where the Court stated that Constitution making should never be sacrificed at the altar of expediency.

60. Counsel for the 2nd respondent, Mr. Koech, associated himself with the submissions by Mr. Havi. He relied on the written submissions filed on 14th December 2011. According to the Commission for Implementation of the Constitution ("the

CIC"), there was no ambiguity on the interpretation of the Constitution as the first general election is in August, 2012 and any contrary interpretation will be a sabotage of the Constitution.

61. The 2nd respondent argues that in answering the question as to when the current term of Parliament ends, one should not look at **section 10** of the **Sixth Schedule**. The purpose of the section is not to set the time when the life of the current parliament should expire but rather to clarify the fact that the Constitution makes provisions for a two chamber Parliament and until a proper two chamber house is elected as provided in the Constitution, one chamber will serve the functions of both.

62. Further, that the words, *'for its unexpired term'* as used in **section 10** of the **Sixth Schedule** have nothing to do with the timing of the expiry of the life of Parliament but simply mean that *" for so long as the current National Assembly is in place,"* it will function as the National Assembly anticipated after the first elections.

63. According to the CIC, **section 2** of the **Sixth Schedule** does not suspend Chapter Seven and Eight of the Constitution. It argues that since Chapter Eight provides for the manner of holding elections and that the transitional clauses specifically provide that these provisions shall be applied to the first elections under the new Constitution, there is no reason to look elsewhere when ascertaining the date of the next elections.

64. That **Articles 101** and **102** clearly provide the date for the elections and since the National Assembly by virtue of **section 11** of the **Sixth Schedule** exercises the functions of both Houses under the Constitution, it means that the current Parliament will

automatically come to an end on the date of the first general elections which is the second Tuesday of August 2012.

65. The CIC further submits that the 60 day window provided under **section 9(1)** of the **Sixth Schedule** is in consideration of the fact that the IEBC may need to make arrangements for the carrying out of the elections hence the first elections need not be held on the second Tuesday of August but anytime within 60 days of August 2012.

66. According to the CIC, the term of Parliament shall come to an end on the second Tuesday of August 2012, but the IEBC may hold an election on that date or any other day within 60 days after the second Tuesday of August. In its view, the term of Parliament will nevertheless come to an end on the second Tuesday of August 2012, the date of the elections notwithstanding.

67. The CIC is also categorical that the President has no power to dissolve Parliament as **section 59** of the former Constitution was not saved by the **Sixth Schedule**. **Article 264** repeals the former Constitution and one should not look back to it to ascertain how much longer Parliament should remain in place and asserts that the life of the current Parliament will automatically end on the second Tuesday of August 2012.

68. Counsel for the 1st respondent, Ms. Kimani, the Deputy Solicitor General, submitted that it is apparent from the election related articles in the Constitution and the **Sixth Schedule** that the next elections are tied to the term of Parliament. She submitted that the Schedules to the Constitution, precedent and tradition leads one to an election in December 2012 and there is no provision warranting the first elections spilling over to 2013

and nothing compels them to be held on the second Tuesday of August 2012 either. Ms Kimani relied on the written submissions filed on behalf of the 1st respondent on 9th December 2011.

69. The thrust of her submissions was that the court should first endeavour to make a determination on whether there is a controversy in the interpretation and intended application of **Articles 101, 102, 136, 177** and **180** and the **Sixth Schedule** of the Constitution. If the court finds that there is indeed a controversy then the court should give an interpretation that harmonises these provisions. To support this proposition we were referred to several cases; The Constitutional Court of South Africa in ***Mhlungu and 4 Others v The State*** **CCT 25 of 1994 [1995] ZACC 4** particularly the dicta of Sachs J, the Supreme Court of the State of California in the case of ***Isazaga v. Superior Court (People)*** **(1991) 54 Cal. 3d 356** and the State of New Mexico Supreme Court in ***Denish v Johnson*** **1996-NMSC-005, 121 N.M 280**. In all these cases the courts recognised that when called upon to interpret conflicting provisions of the Constitution, the court should strive to harmonise and reconcile incongruent provisions.

70. The key argument by the 1st respondent is that **sections 9** and **12** of the **Sixth Schedule** imply that the President can dissolve Parliament and determine the date of the next elections which should not be beyond December 2012. Ms Kimani, submitted that **section 59** of the former Constitution is applicable by dint of **section 12** of the **Sixth Schedule** and **section 59** of the former Constitution will assist the court in defining the unexpected term.

71. The 1st respondent, in applying the principles of interpretation set out in the ***Mhlungu Case*** **(Supra)**, asked us to adopt a balanced approach which produces a balanced result, one that gives force and effect to the fundamental objectives and aspirations of the Constitution and whose consequences are modest. In her view, a literal interpretation of the subject articles will lead to absurdities like dislocating the budget cycle and dislocating international commitments/obligations that the government is engaged in. It is also necessary to put in place structures necessary for running a free and fair election which if done hurriedly will result in an imperfect general election. This argument excluded the possibility of an August 2012 election.

72. The 2nd friend of court, Dr Stephen Njiru, relied on his written submissions filed on 14th December 2011and submitted that **section 10** of the **Sixth Schedule** refers to the unexpired term. This date was fixed in accordance with **section 59** of the former Constitution. Under that section, he argued, the President could dissolve Parliament before the expiry of its five year term. According to him, the **Sixth Schedule** does not specifically exclude **section 59** as **section 58** which is preserved cannot be read alone and **section 59** is necessarily implied as saved thus the President has power to dissolve Parliament before the five years are over. In terms of the doctrine of separation of powers, it is the President who is reposed with the responsibility to dissolve Parliament and not the 3rd respondent or any other party.

73. The 3rd respondent, through its counsel Mr Pheroze Nowrojee, relied on the written submissions filed on 14th December, 2011. Its submissions were that the formula set out in **section 9** and **10** of the **Sixth Schedule** is applicable in determining when the next general elections shall be lawfully

held. Mr Nowrojee submitted that the **Sixth Schedule** contains the transitional provisions intended to bridge the old system and the new one and these provisions provide how Parliament shall come to an end. That the special provisions contained in the **Sixth Schedule** prevail over the general provisions contained in **Articles 101, 102, 136, 177** and **180** which are general in nature and apply to subsequent elections.

74. That the intent of **section 9** of the **Sixth Schedule** must prevail because it deals with a different contingency; that of the elections in the transition period. Mr Nowrojee submitted that there is no contradiction in the provisions of the Constitution as the intent and application of the two provisions is different.

75. He further submitted that in the context of the first election there are major changes in the system as well as new requirements to be met before carrying out the first elections. These changes include the fact that the IEBC will be doing the work of two commissions (that of conducting elections and delineating boundaries), there will be a bicameral parliament, counties, new rules for different levels of government and voters will be making six choices instead of three. These changes impose additional burdens on the IEBC.

76. He added that the drafters of the Constitution had envisaged that stakeholders would require the IEBC to comply with the provisions of legislation contemplated by the Constitution such as the ***Independent Electoral and Boundaries Commission Act, 2011***, ***Elections Act, 2011*** and ***Political Parties Act***. That the formula contained in **sections 9** and **10** of the **Sixth Schedule** was intended to allow for compliance with statutory provisions. In so doing it was intended that the holding of the first general election should be beyond August 2012.

77. The 3rd respondent was categorical that the provisions of the former Constitution are saved by **Article 264** subject to the express letter and spirit of the Constitution. Mr Nowrojee submitted that it could not have been the intention of the drafters of the Constitution to save the provisions of **section 59** of the former Constitution relating to dissolution or prorogation of Parliament at the will of the President. Such provisions are inconsistent with the letter and spirit of the Constitution which emphasise the separation of powers and independence of the legislature.

Alteration of the term of the President without a referendum

78. The 1st petitioner, Dr Njiru and the ICCRG agree that the Parliamentary power of amendment is regulated by **Article 255** and amendment of the term of the President is subject to a referendum.

79. The 2nd, 3rd and 4th petitioners, whose petition raised the issue of the **Constitution of Kenya Amendment Bill, 2011** argue that in so far as the date of the election is the second Tuesday of August 2012, the Bill seeking to change the date amounts to alteration of the term of the President. **Article 255** of the Constitution requires that such a Bill be subjected to a referendum.

80. Mr. Havi argued that the Bill as presented is not initiated by Parliament but by the executive contrary to **Article 256(1)** of the Constitution nor does the Bill on its face state that the proposed amendments to the term of the President will be subject to a referendum. In his submission, any amendments to the Constitution that require reference to a referendum cannot be

lumped together with the other amendments that do not require reference to a referendum.

81. The 1st respondent agreed with the argument that Parliament cannot alter the term of the President by an amendment without recourse to a referendum. However, Ms Kimani submitted that the term of the current President was saved by **section 12** of the **Sixth Schedule** and as such the proposed amendment was not in breach of **Article 255**

82. The CIC submits that the effect of the **Constitution of Kenya (Amendment) Bill, 2011** will alter the term of the office of the President as such it must be passed by the people of Kenya through a referendum. This argument is based on the date of the first elections being the second Tuesday of August 2012.

83. Prof. Ghai is also of the view that **Article 255** is clear in its import as it requires a referendum to alter the term of the President. Prof. Ghai submits that this question does not fall to be decided and it ought not to be decided as it is premature in the circumstances. Under **Article 255(5)(a)** it would be the responsibility of the President to request the IEBC to conduct a referendum before he signs the Bill, if this is required.

Terms and conditions of service of members of the National Assembly

84. According to the 1st petitioner, **section 10** of the **Sixth Schedule** provides that the existing National Assembly shall continue as the National Assembly for its unexpired term. The 1st petitioner as a Member of Parliament draws his salary from the Consolidated Fund and is also entitled to other retirement

benefits. He submits that the obligation of paying his salary still subsists by virtue of **sections 6, 32** and **33** of the **Sixth Schedule**.

85. Counsel contends that the ***National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya)*** and the ***Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya)*** are applicable as provided by **section 7** of the **Sixth Schedule** and he urges us to hold that the unexpired term of the National Assembly includes the terms and conditions of service.

86. The 2nd, 3rd and 4th petitioners submit that Parliament has been dissolved many times in the past before serving its five year term and in none of those instances were Members of Parliament paid salaries and allowances for the unexpired term. In their view, any claim for entitlement to salaries and allowances after the second Tuesday of August 2012 must be dismissed.

87. The 2nd respondent submits that the terms of service are governed by the **National Assembly Remuneration Act** and according to **Section 2** of the said Act, *"the persons for the time being holding several offices"* refers to the time the person is holding office and therefore once the life of Parliament comes to an end for whatever reason, then the benefits enjoyed also come to an end.

88. The 1st respondent, Prof. Ghai and Dr Njiru submit that Members of Parliament are entitled to remuneration and any other benefits as long as they are MPs. In their view, a person who ceases to be an MP in whatever manner ceases to be entitled to any remuneration and benefits.

Which body is constitutionally entitled to fix the date for the first elections

89. The 1st petitioner submitted that this court has jurisdiction to set the date and should proceed to do so.

90. Counsel for the 2nd, 3rd and 4th petitioners was clear that the date for the elections was already fixed by the Constitution, that is, the second Tuesday of August 2012. This negatived any intention to give IEBC authority to fix an election date.

91. The 2nd respondent concedes that in so far as the first elections could be held within sixty days of the second Tuesday of August 2012, then it is the responsibility of the IEBC to fix a date within that period.

92. Mr Nowrojee, counsel for the 3rd respondent, the IEBC, addressed us at length on this issue. He submitted that the calling of elections under the Constitution was no longer the President's secret weapon because the election date was now fixed by the Constitution thereby creating certainty about the date. He stated that the transition period requires decoupling of the old and new and therefore the declaration of the date is the task of the IEBC. It cannot be fixed by the Cabinet or Parliament in the absence of an amendment to the Constitution to that effect and no such power has been given to the President.

93. Counsel submitted that from a reading of the ***Elections Act, 2011*** particularly **sections 14** to **20**, it is the IEBC that is vested with the authority to select the date for the first elections as there is no provision that empowers any other person or authority to name the election date. Further, counsel asked us to take into account that it is the IEBC that decides the dates for by-

elections and it is also the body which decides the date of a referendum. It is therefore envisaged that the selection of the election date for the first elections under the Constitution is within the purview of the powers of the IEBC.

94. Mr Nowrojee asked us to be guided by **Article 259(1)** and hold that the IEBC, as an independent commission, is the proper body to select the election date and that **Article 88** of the Constitution, particularly **Article 88 (4)**, imposes on the IEBC the responsibility for supervising and conducting elections and so it is the appropriate body under the Constitution for this purpose. This approach, he submitted, is in conformity with the separation of powers which is enshrined in the Constitution.

95. Dr Njiru in response to the arguments by Mr Nowrojee submitted that there was no intention in the Sixth Schedule to transfer the power of unpredictability in selecting the election date to the IEBC. In his view, the Committee of Experts considered that it would be in the interests of stability to preserve the executive and legislature. He submitted that it is the President who dissolves Parliament and therefore sets the election date. The selection of an election date was an issue of separation of powers and no other person can take such a power as it would lead to constitutional gridlock.

Who should bear the costs of the consolidated petitions?

96. Mr Mwangi for the 1st petitioner submitted that the general rule is that costs follow the event. However, the matter before the court is not private litigation but public interest litigation which introduces the need for a new approach to the matter. He submitted that it is the responsibility of the state to protect the public interest and if it fails to do so the citizen who succeeds

should recover his costs in public interest litigation. Costs must also not be oppressive as access to justice, guaranteed under **Article 48**, is an important consideration in determining the issue. A litigant who contributes to development of the law must be rewarded by an award of costs. He contended that such a person must also be encouraged to promote public interest by an award of costs.

97. Mr Havi submitted that his clients' petitions were preceded by demand letters to the 1st and 3rd respondents who were obliged to right the wrongs complained of. Since they did not, the litigation had to be undertaken and therefore costs should be awarded to the petitioners. On the other hand he submitted that the petitioners should not be penalised if the suits fail.

98. Ms Kimani for the 1st respondent submitted that the situation before the Court is not the making of any party. It is a result of implementation of the Constitution and no one is to blame. It is public interest litigation and the state should not be burdened with costs.

99. In its submissions, the CIC also adopted the general proposition that costs are within the discretion of the courts. We were pointed to two cases; ***Biowatch Trust v The Registrar, Genetic Resources and Others*** **CCT 80 of 2008 [2009] ZACC 14** where Justice Sachs stated that the primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice and not the status of the parties. That the general rule in constitutional litigation is that if the government loses, it should pay costs of the other side and if the government wins, each party should bear its own costs. In ***Attorney-General of Lesotho v Mopa*** **[2002] LSHC 3**, the Court of Appeal of Lesotho stated

that in ordinary litigation, the essential principle is that the award of costs is in the discretion of the court and that a successful litigant should generally be awarded his or her costs but in constitutional litigation, an additional principle applies. The court held that litigants should not be deterred by the threat of adverse costs orders from approaching a court to litigate an alleged violation of the Constitution. If the issues raised by such a litigant are advanced in good faith and not vexatiously and are important and controversial, the court is concerned not to penalise the applicant.

100. Mr Nowrojee for the 3rd respondent submitted that the matters before the Court are issues of great national importance and each party should bear its own costs.

101. Prof Ghai submits that the award of costs is a matter within the discretion of the court which should be decided on a case by case basis. He noted that the Constitution attaches great importance to access to justice as evidenced by the provisions of **Articles 22, 159** and **258**. He also noted that while it is proper that this access be guaranteed particularly at this early stage of implementation, it is necessary that the court retains its power to penalise parties who bring frivolous matters in an appropriate case.

102. Dr Njiru was of the view that the Court has unfettered discretion on costs and that it should take into account the nature of the matter before it and determine the issues of costs appropriately.

General Principles of Interpretation of the Constitution

103. Before we proceed to determine the issues in this matter, it is important to consider the principles applicable in interpreting

the Constitution. All the parties addressed us at length, quoted authorities from far and wide and assisted us with substantial material in this noble undertaking.

104. Fortunately, our Constitution provides the guide to its interpretation. **Article 259(1)** provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

105. More recently, our Supreme Court in ***Re The Matter of the Interim Independent Electoral Commission*** **Constitutional Application No. 2 of 2011** at *paragraph 51* adopted the words of Mohamed A J in the Namibian case of ***State v Acheson*** **1991(20 SA 805 (Page 813)** where he stated that, *'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship 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.'*

106. It is also generally agreed by the parties that the Constitution must be interpreted broadly, liberally and purposively. In the case of ***Minister of Home Affairs (Bermuda) v Fisher*** **[1980] AC 319, 32H**, Lord Wilberforce stated that, *"A Constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must be interpreted broadly liberally and purposively so as to avoid 'the austerity of tabulated legalism' and so as to enable it to continue*

to play a creative and dynamic role in the expression and the achievement of the ideas and aspiration of the nation, in the articulation of the values bonding its people and in disciplining its government."

107. Where there are several articles that conflict it is the duty of the court to give effect to the whole Constitution and we fully adopt the principle of harmonization set out in the case of ***Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General*** **Nairobi Petition No 16 of 2011 (Unreported)** where the Court, quoting other decisions, stated that, *"In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation. In the Ugandan case of* ***Tinyefuza v The Attorney General Constitutional Appeal No. 1 of 1997****, the Court held as follows;*

> *" 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 the rule of paramountcy of the written constitution."*
>
> *A similar principle was enunciated by the United States Supreme Court in* ***Smith Dakota v. North Carolina 192 v 268 [1940]*** *the court stated; "it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument".*

108. We have been referred to the Report of the Committee of Experts that led to the drafting of the Constitution, opinions of certain members of that Committee and previous drafts of the Constitution. The process that led to the adoption of the Constitution was initiated by statute and our approach to these extrinsic materials is that the court is entitled to look at them but the weight to be given to these materials will of course depend on the circumstances and whether in fact there is any ambiguity in the text of the Constitution. We respectfully adopt the words of Chaskalson P., of the Constitutional Court of South Africa, in the case of ***The State v Makwanyane*** **CCT 3/94 [1995] ZACC 3** (*at para 9*) where he stated that, "*Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case."*

109. This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasise that public opinion is not the basis for making our decision. **Article 159** of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its

provisions without fear or favour and without regard to popular opinion.

110. Finally, on the approach to interpreting the Constitution, the question before us relates to the interpretation of the Constitution and the Sixth Schedule and arguments have been made in respect of the status of the Schedule vis-à-vis the main body of the Constitution. We can do no better than adopt the sentiments of the court in the case of ***Dennis Mogambi Mong'are v The Attorney General*** **Petition No. 146 of 2011 (Unreported)** where the provisions of **section 23** of the **Sixth Schedule** were challenged. The court stated, *"The transitional provisions contained in the sixth schedule are intended to assist in the transition into the new order, but are limited in time and in operation and are to remain in force for the period provided ..... These transitional provisions are as much a part of the Constitution and as much as expression of the sovereign will of the people as the main body of the Constitution."*

111. It is with these broad principles in mind that we now proceed to consider the issues framed for determination.

Determination of issues

112. A total of seven issues were framed for our determination. During the hearing it became evident that there was an overlap of the issues and indeed all the issues were intrinsically linked. In making our findings we shall deal with each issue as framed but it will be necessary to deal with the overlaps as we do so.

Jurisdiction

113. We have considered the arguments on the issue of jurisdiction and we hold that we have jurisdiction to determine the matters before us.

114. In cases concerning the enforcement of fundamental rights and freedoms under the Bill of Rights and enforcement of the Constitution a party seeking the court's relief must plead his case with precision. We agree with the dicta in ***Republic v. Truth Justice & Reconciliation Commission & Another ex parte Augustine Njeru Kathangu and Others*** **(Supra)** that an applicant has to clearly set out the acts and/or omission that, in his or her view contravene the Constitution. He or she must specify the provisions of the Constitution that those acts or omissions contravene and the prayers or the reliefs he or she seeks. In the cases before us we find that the pleadings were of sufficient particularity for the court and the respondents to know the provisions infringed and the acts and omissions that lead to the infringement of the Constitution. None of the parties before us were prejudiced or unable to respond to the allegations set out in the pleadings in any way.

115. It will also be noted that the first issue framed for determination is when the first elections under the Constitution can lawfully be held. The issue of a lawful election strikes at the core of the rule of law and any person is entitled to move the court under **Article 258** of the Constitution. An unlawful election is a real threat to the Constitution. We therefore consider that this matter is firmly within the jurisdiction of this court.

116. In addition to what we have stated, the Supreme Court in its directions and ruling in ***Re The Matter of the Interim***

Independent Electoral Commission **(Supra)**, had already considered and held that we have jurisdiction and directed that we determine this matter. It has stated (*para 45*) that:

> ***[47] The application [before the Supreme Court] is still more appropriate in light of the several petitions pending before the High court; Constitutional Petition No. 65 of 2011 – Milton M Imanyara & Others v Attorney General & Others; Constitutional petition No. 123 of 2011 John Harun Mwau v Attorney General. The two cases seek the interpretation of the Constitution, with the object of determining the date of the elections. Those petitions raise substantive issues that require full hearing of the parties; and those matters are properly lodged and the parties have filed their pleadings and made claims to be resolved by the High Court .....” [Empasis ours]***

117. We have read the judgment of the IICDR court in ***Alice Waithera Mwaura & Others v. Committee of Experts and Others*** **(Supra)** and we find nothing in the decision that imposes on us jurisdiction independent of that under the Constitution. The jurisdiction of that court was limited to disputes regarding the constitution review process and that court held as much.

118. 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 this case the dispute before the court falls squarely within the province of **Article 258** of the Constitution.

When shall the first general elections be lawfully held?

119. The issue of the date when the first elections can be lawfully held is integrated with the issue of whether the President can dissolve Parliament under the Constitution and we shall consider the two issues together.

120. There is really no distinction in substance and process of holding elections between the first elections referred to under the **Sixth Schedule** and the general and other elections referred to under **Articles 101, 102, 138, 177** and **180** of the Constitution. General elections refer to an election where all members of both Houses of Parliament are elected and the first elections under the Constitution necessarily involve a general election as all elections must be held on the same date. However, the first elections under the Constitution are distinct with regard to the date of the elections and that is what we are called upon to decide.

121. The provisions concerning elections are to be found in the main body of the Constitution and the **Sixth Schedule**. **Articles 101(1), 102(1), 136(2)(a), 177(1)(a)** and **180(1)** respectively state that the elections for members of the National Assembly and the Senate, the President, members of County Assemblies and Governors, ***"shall be held on the second Tuesday in August in Every fifth year."*** These articles provide as follows;

> ***101.*** *(1)* ***A general election of members of Parliament*** *shall be held on the* ***second Tuesday in August in every fifth year****.*
>
> ***102.*** *(1) The term of each House of Parliament expires on the date of the next general election.*

136. *(1)* ***The President shall be elected*** *by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections.*

(2) ***An election of the President shall be held—***

(a) ***on the same day as a general election of Members of Parliament****, being the* ***second Tuesday in August, in every fifth year***

177. *(1)* ***A county assembly consists of—***

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

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

122. **Sections 9** and **10** of the **Sixth Schedule** to the Constitution state as follows;

9. (1) The first elections for the President, the National Assembly, the Senate, county assemblies and county governors under this Constitution shall be held at the same time, within sixty days after the dissolution of the National Assembly at the end of its term.

(2) Despite subsection (1), if the coalition established under the National Accord is dissolved and general elections are held before 2012, elections for the first county assemblies and governors shall be held during 2012.

10. The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term.

123. It is these apparently conflicting provisions in the main body of the Constitution and in the Schedules that we must construe as a whole. As we have stated, the proper role of this court is to interpret these Articles in the body of the Constitution and those in the Schedule relating to the date of the first elections in a manner that sustains the entire Constitution. In dealing with the transitional provisions, we are aware of the fact that these provisions are intended to deal with the shift from the old constitutional order to the new one and in the event of conflict between the provisions in the main body and the transitional provisions, the transitional provisions would prevail as they are specific to the situation contemplated.

124. In support of this proposition, we quote **Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*** **(Oxford OUP, 2001)** at *page 95* where after referring to the maxim, *'generalibus specialia derogant'* goes on to state that, *"Acts often contain general provisions, which read literally cover a situation for which specific provision is made elsewhere in the Act. The more detailed a provision is, the more likely it is to have been tailored to fit the precise circumstance of the case falling within it, so that it should prevail over a general provision."*

125. The intention of the transitional provisions is to ensure a seamless and less disruptive transition from the old order to the new one. This means existing institutions, offices, appointments and laws are validated by the new Constitution until such time as that new Constitution takes full effect. The foundation of the

Sixth Schedule is twofold. First, **Article 262** provides that *'The transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date.'* Second, **Article 264** states that *'Subject to the Sixth Schedule, for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed.'*

126. This general principle that transitional provisions deal with a specific situation commends itself to us. The specific situation is contained in the transitional provisions that deal with the first elections after the promulgation of the Constitution. In our view, **section 9(1)** of the **Sixth Schedule** does not countenance any ambiguity as it refers to ***'the first elections ….. under this Constitution'*** and it is therefore to the **Sixth Schedule** that we must look in determining the date of the first elections under the Constitution.

127. Another reason we must look to the **Sixth Schedule** to determine the date of the first elections is that **section 2(b)** of the **Sixth Schedule** specifically suspends the operation of the whole of Chapter Seven and Eight, **Articles 129** to **159** of Chapter Nine, and the provisions relating to the devolved government until the final announcement of all the results of the first elections for Parliament under the Constitution. These provisions deal with the conduct of elections after the whole Constitution has come into force. Upon announcement of all the results of the first elections under the Constitution, the provisions of the **Sixth Schedule** concerning elections will be exhausted and the suspended articles will take effect.

128. The 2nd respondent, the CIC, has proffered the argument that Chapters Seven and Eight of the Constitution are not

suspended in light of **sections 2(1)** and **3(2)** of the **Sixth Schedule**. **Sections 2(1)** and **3(2)** provide as follows;

> ***2. (1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this Constitution––***
>
> ***(a) Chapter Seven, except that the provisions of the Chapter shall apply to the first general elections under this Constitution.***
>
> ***(b) Chapter Eight, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution; and***
>
> ***(c) Articles 129 to 155 of Chapter Nine, except that the provisions of the Chapter relating to the election of the President shall apply to the first general elections under this Constitution.***
>
> ***(2) The provisions of this Constitution relating to devolved government, including Article 187, are suspended until the date of the first elections for county assemblies and governors held under this Constitution.***
>
> ***3. (2) Sections 30 to 40, 43 to 46 and 48 to 58 of the former Constitution, the provisions of the former Constitution concerning the executive, and the National Accord and Reconciliation Act, shall continue to operate until the first general elections held under this Constitution, <u>but the provisions of this Constitution concerning the system of elections, eligibility for election and the electoral process shall apply to that election</u>.[Emphasis ours]***

129. CIC argues that the reference to the *system of elections*, *eligibility* and *election process* preserves the provisions of **Article 101, 102, 136, 177** and **180**. We disagree for the following three reasons. First, **section 2(1)** of the **Sixth Schedule** is very clear on the parts of the Constitution that are suspended and only take effect when the results of the first elections are announced. Second, since the elections will involve new entities, the senate and county governments, it follows that the terms of the elections, the *system, eligibility* and *process* must be defined by the Constitution. The former Constitution did not have these new levels of government. Third, the reference to *system, eligibility* and *process* does not apply to the date of the elections. To stretch the meaning of these words to include the date of the elections would require us to ignore the provisions of **section 10** of the **Sixth Schedule** which preserves the term of the National Assembly. This would be contrary to the principle of harmonisation. (See the case of ***Tinyefuza v The Attorney General of Uganda*** **(Supra)**)

130. The argument by CIC that **section 10** of the **Sixth Schedule** serves the sole purpose of clarifying that despite the fact that the Constitution makes provisions for a two-chamber Parliament until a proper two-chamber house is elected as provided for in the Constitution, the current National Assembly will serve the functions of the two chamber House is an argument built on quick sand. There is a specific provision for the National Assembly to perform the function of the Senate. **Section 11** of the **Sixth Schedule** is clear that, *'Until the Senate has been elected under this Constitution (a) the function of the Senate shall be exercised by the National Assembly ….'* Since there is no Senate, **section 11** merely gives efficacy to the Constitution where the actions of the Senate are required and the

term of the National Assembly is not tied to the function of the Senate imposed on it.

131. Irrespective of whether the National Assembly functions as the Senate, there must be a provision from which the term of the National Assembly with its functions as the Senate must be determined. That determination cannot be in the Constitution since it was only effective from 27th August 2010 and is not retrospective. (See ***Joseph Ihuro Mwaura and 82 Others v the Attorney General and Others*** **Nairobi Petition No. 498 of 2009 (Unreported)** *at para 26*). It would be difficult if not absurd to define the term of the National Assembly in reference to a Senate that did not exist on the effective date.

132. We also reject the argument by the 2nd, 3rd and 4th petitioners that the publication of the **Kenya Constitution Amendment Bill, 2011** demonstrates that the date for the first election under the Constitution is in August 2012. The publication of the Bill only evinces an intention to locate an election date convenient to the movers of the Bill. It is neither a decision nor can such an intention be used to fix an election date.

133. Taking these provisions together it is clear and unambiguous that the election date for the first elections under the Constitution must be determined in accordance with **section 9** and **10 of the Sixth Schedule**.

134. **Section 9(1)** of the **Sixth Schedule** provides that the first elections under the Constitution must be held within sixty days after the dissolution of the National Assembly. **Section 10** makes it clear that the existing National Assembly is neither

abolished nor dissolved by the promulgation of the Constitution but it continues for its unexpired term.

135. According to ***Black's Law Dictionary (8th Ed)***, a term is a *"fixed period of time."* A period of time commences on a date or time certain and ends at a specific time or on the happening of an event. Our task in determining the date of the elections is dependent on identifying the date of expiry of the term or the event that leads to the expiry of the term. It is not in dispute that the term of the current National Assembly, the 10th Parliament, commenced on the date it first sat, that is on 15th January 2008, as fixed by **Legal Notice No. 1 of 2008**.

136. The election date under **section 9(1)** of the **Sixth Schedule** is to be determined in reference to the term of the National Assembly bearing in mind that **section 10** preserved the National Assembly for the unexpired term. Since the existing National Assembly is a creature of the former Constitution, it follows that its term is fixed with reference to the former Constitution which was in place when that term commenced.

137. The term of Parliament under the former Constitution is determined by **section 59** which provides as follows;

> ***59.*** *(1) The President may at any time prorogue Parliament.*
>
> *(2)* ***The President may at any time dissolve Parliament****.*
>
> *(3) If the National Assembly passes a resolution which is supported by the votes of a majority of all the members of the Assembly (excluding the ex officio members), and of which not less than seven days' notice has been given in accordance with the standing orders of the Assembly, declaring that it has no confidence in the Government of Kenya, and the President does not within three days of the passing of that resolution either resign from his office or*

dissolve Parliament, Parliament shall stand dissolved on the fourth day following the day on which that resolution was passed.

(4) ***Parliament, unless sooner dissolved, shall continue for five years from the date when the National Assembly first meets after dissolution and shall then stand dissolved****.*

(5) At any time when Kenya is at war, Parliament may from time to time provide for the extension of the period of five years specified in subsection (4) for not more than twelve months at a time: Provided that the life of Parliament shall not be extended under this subsection by more than five years. ***[Emphasis ours]***

138. The import of **section 59** of the former Constitution is that the President could dissolve Parliament at any time as provided in **section 59(2)** hence the term was indeterminate but had an outer limit of 5 years in terms of **section 59(4)**. This would imply that under the former Constitution the term of the National Assembly had an outer limit of five years unless ***'sooner dissolved'*** by the President.

139. In order to understand **section 10** of the **Sixth Schedule**, it is important to consider its legislative history which may shed some light on its interpretation. The **Sixth Schedule** of the **Revised Harmonized Draft** prepared by the Committee of Experts provided:

> ***9*** ***(1)*** *The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term* ***unless it is dissolved earlier****.*

(2) *Sections 30 to 40, 43 to 46 and 48 to 58 of the old Constitution shall continue to operate until the first election for the National Assembly held under this Constitution but the provisions of this Constitution concerning the system of elections, eligibility for election and the electoral process shall apply to that election.*

(3) *Until the expiry of its term, Parliament may be prorogued or dissolved by the President* ***only with the agreement*** *of the Prime Minister. [Emphasis ours]*

140. **Section 9** of the **Revised Harmonized Draft** (renumbered **section 10** in the **Sixth Schedule**) had the phrase ***'unless it is dissolved earlier.'*** The intention of the framers was to remove the hand of the President in the dissolution of the legislature and provide for a fixed term. This intention is further solidified by the removal of **section 9(3)** of the Draft which removed reference to dissolution of Parliament by the President in agreement with the Prime Minister.

141. **Article 264** of the Constitution specifically repeals the former Constitution on the effective date subject to the **Sixth Schedule**. **Section 59** is not one of the sections of the former Constitution preserved by **section 3** of the **Sixth Schedule**. The Constitution does not provide for the dissolution of the legislature by the President except in **Article 261** where the President acts on the advice of the Chief Justice when Parliament fails to enact legislation as directed by the High Court under that Article.

142. In our view, the exclusion of **section 59** of the former Constitution automatically excludes the possibility that the term of the National Assembly can be brought to an end by an act of

dissolution by the President in the manner contemplated by that section of the former Constitution.

143. While **section 59** of the former Constitution is not saved, the term of the National Assembly had already been fixed when the 10th Parliament was elected. It was five years unless *'sooner dissolved'* by the President. The Parliamentary Select Committee also removed **section 9(3)** of the **Revised Harmonized Draft** which empowered the President to dissolve Parliament with the agreement of the Prime Minister.

144. We find that the powers of the President in relation to determining the term of the National Assembly no longer exist and therefore the *'term'* for purposes of the Sixth Schedule must refer to the term of 5 years from the time the National Assembly first met. This term is fixed by **Legal Notice 1 of 2008** as 15th January 2008. It therefore follows that the term expires on 14th January 2013.

145. In order to imply a shorter period and to locate the date of the first elections either in August or December 2012, we would have to imply the power of the President to dissolve Parliament. This is inconsistent with the Constitution for two reasons. First, the repeal of the former Constitution and the clear intention not to preserve **section 59** implies that the President does not possess such a power. Second, the purpose of the Constitution is to promote separation of powers by reducing presidential interference in the term of office of the legislature. The reduction of the President's power in relation to the legislature is a fulfilment of this objective.

146. We admitted into the record the opinion to the IEBC dated 20th July 2011, prepared by a member of the Committee of

Experts, Mr Otiende Amollo, supporting a December 2012 date where he opines, in part, as follows;

> *Thus , the COE debated all these issues including the possibility of fixing an exact date in December 2012 for elections …… but ultimately rejected the idea.* ***First, it would present immense difficulties as the "five year" terms of the President and Parliament are not co-extensive;*** *the former having been sworn in earlier. Second having preserved the Executive and Legislature, it was thought prudent to allow the evils inherent in the former system, including the unpredictability of the election date, to come with the system all the way to the grave, and start on a clean slate after the elections in 2012.*
>
> ***Thus, ultimately, the contemplation was, going by precedent that Parliament would be dissolved around October 2012, allowing for two months of usual preparation for election to be held between 27th and 29th December 2012. It could also be earlier if Parliament were dissolved earlier. Importantly, the elections were tied to the life of Parliament.***
>
> *What is important then is that the elections cannot spill over to 2013, nothing compels them to be held on the 2nd Tuesday of August 2012 either.* ***The schedules, precedent and tradition leads one to late December 2012****. [Emphasis ours]*

147. As we stated earlier, while we are entitled to have regard to the legislative history and the *travaux preparatoires* that led to the promulgation of the Constitution, ultimately it is our

responsibility to ascertain the meaning of the Constitution from the words of the Constitution in light of the provisions of **Article 259(1)** of the Constitution. What is clear to us from an examination of the Hansard of the Committee of Experts is that a firm date for the first elections was not fixed by the Committee of Experts and the Parliamentary Select Committee. Had they done so, this case would have been unnecessary. Our anchor, in determining the date of the first elections as required of us, are the words of the **Sixth Schedule**.

148. We must also point out that the term of the President is preserved by **section 12** of the **Sixth Schedule**. **Section 12(1)** provides that, *'The persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister respectively, in accordance with the former Constitution and the National Accord and Reconciliation Act, 2008 until the first general elections held under this Constitution, unless they vacate office in terms of the former Constitution and the Accord.'* This means that any problem that may have been caused by the incongruence of the term of Parliament and the President is cured by the fact that the President and Prime Minister in office remain until the first elections irrespective of the date of the election.

149. Secondly, the application of precedent and traditions cannot override the provisions of **sections 9** and **10** of the **Sixth Schedule** which provide for an election date to be determined in reference to the expiry of the term of the National Assembly. In any case, the objective of the Constitution is to promote the rule of law and create certainty in the running of the affairs of state. To permit precedent and traditions to govern the fixing of the election date would be to reintroduce the election date as a

"secret weapon" through the back door. We conclude that the intention of the Committee of Experts was to preserve the terms of the Executive and Legislature until the end of the expiry of the term of the National Assembly as provided by **section 10** of the **Sixth Schedule**.

150. We must now turn our attention to the provisions of **section 9(2)** of the **Sixth Schedule** which refers to the dissolution of the National Coalition. Unfortunately, the parties did not address us on the meaning of this section. According to the 1st petitioner, the ***National Accord and Reconciliation Act, 2008*** was dissolved in terms of **section 8** when the Constitution came into force. Prof. Ghai was of the view that there is nothing in the Act that leads to an election after dissolution of the coalition. Our task is to interpret the provision of the ***National Accord and Reconciliation Act, 2008*** in light of the provisions of **section 9(2)** of the **Sixth Schedule**.

151. The pertinent parts of the ***National Accord and Reconciliation Act, 2008*** provide as follows;

> ***6.*** *The Coalition shall stand dissolved if;*
> *(a) The Tenth Parliament is dissolved; or*
> *(b) the coalition parties agree in writing; or*
> *(c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party.*
> ***8.*** *The Act shall cease to apply upon dissolution of the tenth Parliament, if the coalition is dissolved, or a new Constitution is enacted whichever is earlier.*

152. Our reading of **sections 6** and **8** of the ***National Accord and Reconciliation Act, 2008*** is that it does not provide for

elections upon dissolution of the Accord. The purpose of the ***National Accord and Reconciliation Act, 2008*** was to provide for the management of the affairs of the National Coalition in light of the political stalemate following the tragic events of the 2007 general elections.

153. Its function was to provide stability because for all intents and purposes, if the coalition was dissolved, a vote of no confidence would have followed and Parliament would have to be dissolved in terms of **section 59(3)** of the former Constitution. Under **section 8** of the Act, the coalition would have come to an end on 27th August 2010 but the effect of **sections 12** of the **Sixth Schedule** is to save the National Coalition underpinned by the ***National and Reconciliation Act, 2008***.

154. We find nothing in the ***National Accord and Reconciliation Act, 2008*** that provides that the dissolution of the coalition would lead to an election. We therefore agree with Prof. Ghai that in fact there is nothing in the ***National Accord and Reconciliation Act, 2008*** that triggers dissolution of Parliament. But this does not end the matter as **section 9(2)** of the **Sixth Schedule** makes reference to an election in 2012 in relation to the coalition and dissolution.

155. In order to effect the purpose of the ***National Accord and Reconciliation Act, 2008***, the former Constitution was amended by inserting **section 15 A** which provided at **section 15 A(5)** that, *'The Act made pursuant to subsection (3) immediately following the commencement of this section shall, while in force, be read as part of the Constitution.'* **Section 15 A** is part of the former Constitution which is saved by **section 3(2)** of the **Sixth Schedule** which provides that, *'the provisions of the*

former Constitution concerning the executive, and the National Accord and Reconciliation Act, shall continue to operate until the first general elections under this Constitution ....'

156. A plain reading of **section 9(2)** points to the possibility of elections being held in the year 2012. It provides that, *'if the coalition established under the National Accord is dissolved and general elections are held before 2012 ...,'* This implies that the dissolution of the National Coalition would lead to general elections.

157. **Section 7** of the **Sixth Schedule** requires us to construe all laws, immediately in force before the effective date with alterations, adaptations, qualifications and exceptions necessary to bring them in conformity with the Constitution. For the purposes of **section 7** *'all laws'* includes the former Constitution which must be read in a manner consistent with the Constitution. Taking what we have stated into account, we hold that **section 9(2)** of the **Sixth Schedule** amends or modifies the provisions of the ***National Accord and Reconciliation Act, 2008*** to the extent that general elections can be held if, ***'the coalition established under the National Accord is dissolved and general elections are held before 2012.'***

158. We are also of the view that in so far as the positions of the President and the Prime Minister are saved by **section 12** of the **Sixth Schedule**, **section 6** of the **National Accord and Reconciliation Act, 2008** is amended or modified to exclude the possibility by one coalition partner withdrawing from the coalition by resolution of the highest decision making organ of that party. By preserving the position of the President and Prime Minister until the next general elections, **section 6(b)** of the Act

must be read to mean ***'the President and Prime Minister agree in writing.'***

159. We therefore find that if the coalition is dissolved in the manner provided in **section 6(b)** of the ***National Accord and Reconciliation Act, 2008, that is, if the President and Prime Minister agree in writing to dissolve the National Coalition*** then the general elections shall be held in the year 2012 and in terms of **section 9(2)** of the **Sixth Schedule**, the election for the first county assemblies and governors shall also be held on the same date during 2012.

160. It follows that the definition of '***unexpired term'*** under **section 10 of the Sixth Schedule** must include, ***'upon dissolution of the National Coalition in accordance with the terms of the National Accord and Reconciliation Act, 2008,'*** in order to give full effect to the words of **section 9(2)** of the **Sixth Schedule**.

161. We have referred to the **Revised Harmonized Draft** [para. 139 above] which contained **at section 9(3)** provision for, *'the President only in agreement with the Prime Minister to dissolve Parliament at the expiry of its term.'* It would seem that by removal of that clause, it was intended to remove the ability of the President in concert with the Prime Minister to dissolve Parliament, but such an intention is inconsistent with the obvious meaning we have given to the provisions of **section 9(2)** of the **Sixth Schedule**.

162. **Section 9(1)** of the **Sixth Schedule**, by providing that the elections are to be held *"within sixty days after the dissolution of the National Assembly at the end of its term"* suggests that the date of dissolution is known or readily ascertainable and as we

have demonstrated, that date can only be within sixty days from the fifth anniversary of the first sitting of the National Assembly or upon dissolution of the coalition in accordance with the **section 6(b)** of the ***National Accord and Reconciliation Act, 2008*** as interpreted in paragraph 158 and 159 above.

163. As we have stated, the election date for the first elections under the Constitution is provided under the **Sixth Schedule** and is not affected by the provisions of **Article 101** *et seq*, which deal with subsequent elections. Whatever date the first elections are held on, the next elections must be conducted on the second Tuesday of August of the fifth year from that date, hence the term for the next President, Members of Parliament, Governors and members of the County Assemblies may be shorter than five years as a consequence of the transitional provisions.

164. We therefore find and hold that the first elections under the Constitution can only be lawfully held as follows:

(a) In the year 2012, within sixty days from the date on which ***the National Coalition is dissolved by written agreement between the President and Prime Minister*** in accordance with **section 6(b)** of the ***National Accord and Reconciliation Act, 2008***.

(b) Within sixty days from the expiry of the term of the National Assembly on **15th January 2013**; ***or***

Which body under the Constitution is entitled to fix the election date

165. **Section 9 (1)** of the **Sixth Schedule** does not provide for which body or person is to fix the election date within the sixty days provided. We are therefore called upon in the circumstances to apply our mind to the provisions of **Article**

259(1) and decide which of the Constitutional organs, authorities and persons are reposed with this authority.

166. In the absence of express authority granted to the President, we are unable to infer such authority. Furthermore, given the primacy of the doctrine of separation of powers inherent in our constitutional structure, it would be inconsistent with the objective and purpose of the Constitution to repose such power in the President, executive or legislature.

167. We agree with counsel for the IEBC, that in light of the authority and powers conferred by **Article 88** to the IEBC to conduct and supervise elections, it is the IEBC that will fix the election date for the first elections under the Constitution. The IEBC is an independent body and in line with its mandate, it shall fix a date once it is satisfied that conditions and arrangements that ensure a free and fair election have been met but within sixty days of either of the two events referred to in paragraph 164 above.

168. Having found that the first elections under the Constitution shall be held within sixty days from the end of the expiry of the term of the National Assembly as provided or upon dissolution of the National Coalition, we hold that it is the responsibility of the 3rd respondent, IEBC, to fix any date within the sixty days thereafter.

Whether an amendment to the Constitution affecting the term of the President can be proposed or effected into law without a referendum

169. **Article 255** of the Constitution provides;

(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.

(3) The term of office of the President.

170. The 2nd, 3rd and 4th petitioners in Petition No. 185 of 2011 have sought to impeach the **Constitution of Kenya Amendment Bill, 2011** on the grounds that it contravenes **Articles 136(2)(a), 255, 256 257** and the **Sixth Schedule**.

171. In view of our finding on the first issue of the election date, we do not think it is necessary to express our view on the **Constitution of Kenya Amendment Bill, 2011** as it also deals with other issues that are not germane to these proceedings. As legislature is seized of the matter, it may take guidance from our decision or act within its constitutional mandate as it may lawfully wish to do.

Whether the unexpired term of the National Assembly incorporates the terms and conditions of service for the National Assembly

172. The terms and conditions of service of members of the National Assembly are governed by the ***National Assembly Remuneration Act (Cap 5)***. **Section 2** of that Act provides;

> ***2(1) The persons for the time being holding the several offices specified in the first column of Part 1 of the First schedule shall each receive salaries and allowances at the annual rates specified in relation to those offices in that schedule.***

In terms of the statute, Members of Parliament are paid salaries and allowances as long as they hold office. On dissolution or

expiry of the term of parliament, their salary and allowances cease.

173. The ***Parliamentary Pensions Act (Cap 186)*** provides for pension benefits for Members of Parliament. These benefits are calculated in accordance with the aggregate of all periods beginning or after the commencement of the Act during which one was or is a member of the National Assembly. A pension is payable when an MP has ceased to be a member of the National Assembly by reason of dissolution of Parliament.

174. The two statutes governing the benefits of Members of Parliament are saved by **sections 6** and **7** of the **Sixth Schedule** which preserve existing obligations of the state and preserve all existing laws subject to such alterations, qualifications an exception necessary to bring it into conformity with the Constitution. In our view therefore, the terms of service of Member of Parliament are to be determined in accordance with existing legal provisions.

175. For the avoidance of doubt, we hold that the terms and conditions of service of Members of Parliament are only applicable as long as they are in office.

Who is to bear the Costs of the Petitions as Consolidated

176. All the parties before us agree that the issue of costs is within the court's discretion. In the case of private litigation, the general rule is that costs follow the event.

177. In cases of enforcement of fundamental rights and freedoms and the Constitution, different considerations apply. We agree with the decision in ***Biowatch Trust v The Registrar,***

Genetic Resources and Others, **(Supra)** where the court stated, *'Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'*

178. The decisions of ***Biowatch Trust v The Registrar, Genetic Resources and Others***, **(Supra)** and ***Attorney-General of Lesotho v Mopa*** **(Supra)** to which we were referred were decisions of apex courts reached after consideration of various decisions of the superior courts in the respective jurisdictions. In this case, we did not have such an advantage and we resist any temptation to come up with broad guidelines on the determination of costs.

179. The intent of **Articles 22** and **23** of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, **Article 258** allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.

180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a

party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.

181. Our Constitution places a premium on the values of social justice and rule of law, patriotism and participation of the public. Without unhindered access by the public to the courts, these values would be undermined. An award of costs is also one of the remedies the court may consider in granting appropriate relief under **Article 23(3)** and **Article 258**.

182. Our approach to the issue of costs in cases concerning the enforcement of fundamental rights and freedoms and for the enforcement of the Constitution is that the court has discretion in awarding costs. Like all forms of discretion, it must be exercised judicially, in light of the particular facts of the case and giving due regard to the values set out in the preamble of the Constitution and **Article 10** in order to achieve the objects of **Article 259(1)**.

183. This litigation concerns the interpretation of the Constitution to determine the date of the election. Whatever the motive of the petitioners in bringing this case, the result has brought clarity to the affairs of the state. This case is not one where the state has failed in its responsibilities. No party has lost the case and every Kenyan has won in the sense that the case has clarified what are admittedly unclear provisions of the Constitution. It is one which involves the interpretation of a Constitution that was overwhelmingly approved by Kenyans. In our view, in the interests of fairness and justice, we think that this is a proper case where each party should bear its own costs.

Summary of Findings

184. We now set out a summary of our findings on the issues that were framed for determination as follows;

(i) We have jurisdiction to determine this matter and it is founded on two grounds. First, failure to hold the first elections on a date fixed in accordance with the provisions Constitution would be a threat to the Constitution and therefore any party is entitled to move the court under **Article 258(1)** for appropriate relief. Secondly, the Supreme Court in ***Constitutional Application No. 2 of 2011*** directed this court to determine the petitions before it having been satisfied that we have jurisdiction.

(ii) The date of the first elections under the Constitution is determined by reference to **section 9** and **10 of the Sixth Schedule** as follows;

(a) In the year 2012, within sixty days from the date on which ***the National Coalition is dissolved by written agreement between the President and Prime Minister*** in accordance with **section 6(b)** of the ***National Accord and Reconciliation Act, 2008***; ***or***

(b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by **Legal Notice No. 1 of 2008** as 15th January 2008. The term therefore expires on 14th January 2013. The elections shall be held within **sixty days** of **15th January 2013**.

(iii) Following the repeal of the former Constitution and together with it **section 59** thereof and in the absence of a specific provision entitling the President to dissolve

Parliament, the President has no power under the Constitution to dissolve Parliament.

(iv) The body entitled under the Constitution to fix the date of the first elections within sixty of the expiry of the term of the National Assembly or upon dissolution of the National Coalition by written agreement between the President and the Prime Minister in accordance with **section 6(b)** of the ***National Accord and Reconciliation Act, 2008*** is the Independent Electoral and Boundaries Commission.

(v) In accordance with **Article 255** of the Constitution, an amendment to the Constitution affecting the term of the President cannot be effected into law without a referendum.

(vi) The terms and conditions of service of Members of Parliament are governed by the ***National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya)*** and ***Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya)*** which are saved by virtue of the provisions of **section 6** and **7** of the **Sixth Schedule** upto the end of the term of the National Assembly or upon dissolution of the National Coalition.

(vii) The award of costs in matters concerning enforcement of fundamental rights and freedoms protected by the Bill of Rights under **Article 22** and **23** and enforcement of the Constitution under **Article 258** is in the court's discretion and in this particular case the court orders each party to bear its own costs.

Conclusion

185. We are conscious that our findings may be unpopular with a section of Kenyans who have preconceived notions about the elections but we hasten to remind Kenyan that our undertaking is not to write or re-write the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives. We are cognisant of the fact that the Sixth Schedule was a compromise political package arrived at between the various factions of politicians in order to ensure passage of the Constitution. We believe that we have discharged our constitutional responsibility and call upon all Kenyans to continue with the task of Constitution implementation and nation building.

186. Finally, we are grateful to all the counsel who appeared before us for their industry and well researched arguments.

DATED and **DELIVERED** at **NAIROBI** this **13th day January 2012**

Isaac Lenaola
Judge

Mumbi Ngugi
Judge

David Majanja
Judge

Appearances

Mr Mwangi and Mr Maina instructed by the firm of Maina Gakoi & Company Advocates, Nairobi for the 1st Petitioner

Mr Havi and Mr Osundwa instructed by Havi & Company Advocates for the 2nd, 3rd and 4th Petitioners

Ms Muthoni Kimani, Deputy Solicitor General, Mr Moibi, Mr Opondo and Mr Bitta instructed by the State Law Office for the 1st Respondent

Mr Koech instructed by Letangule & Company Advocates for the 2nd Respondent

Mr Nowrojee and Mr Nyamodi instructed by Nyamodi & Company Advocates for the 3rd Respondent

Dr Stephen Kimemia Njiru in person.

Mr Mungai for the 3rd friend of court