REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. EOO2 OF 2022

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 2,6,10,19,20,21, 27, 35, 38, 56, 156 AND 260 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS

IN THE MATTER OF: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

IN THE MATTER OF: THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

IN THE MATTER OF: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER OF: THE POLITICAL PARTIES ACT, 2011

BETWEEN

CENTRE FOR MINORITY RIGHTS DEVELOPMENT (CEMIRIDE)..... 1ST PETITIONER

WILLIAM SIPAI..... 2ND PETITIONER

NOAH KITARPEI MATUNGE.....3RD PETITIONER

-VERSUS-

ATTORNEY GENERAL..... 1ST RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY.....3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioners herein are Civil Society Organisation focused on advocacy for the recognition of minorities and indigenous peoples and their rights in

political, legal, economic and social processes in Kenya and individual Kenyans belonging to pastoralist indigenous communities in Kenya.

2. The 1st Respondent is sued in his capacity as the principal legal advisor of the Government of the Republic of Kenya as provided under Article 156 of the Constitution of Kenya, 2010 while the 2nd Respondent is a State Office mandated to *inter alia*, regulate the formation, registration and funding of political parties in accordance with the Constitution of Kenya 2010, and the rule of law. The 3rd Respondent, on the other hand, is the Cabinet Secretary, Ministry of Information, Communication and Technology, a State Officer in charge of the State department responsible for matters relating to information technology, communication and media while the Interested Party, the Independent Electoral and Boundaries Commission ("the IEBC" or "the Commission") is created by Article 88 of the Constitution, for the management of the country's electoral processes and is conferred with the responsibility for conducting free, fair and transparent elections.

Petitioners' Case

3. According to the Petitioners, they brought this Petition on their behalf and in the public interest and is seeking orders to actualise the human rights provisions of the Constitution of Kenya, 2010 and to safeguard the fundamental rights and freedoms of minority and indigenous peoples in the Republic of Kenya.

4. The genesis of the petition, according to the Petitioners, was that on 10th November, 2021, the Integrated Political Parties Management System (hereafter referred to as the "IPPMS" or "the System") was launched on the State's e-Citizen platform by the Office of the Registrar of Political Parties in conjunction with the Ministry of Information, Communications and Technology (ICT) and its objective was the primary and only platform to manage the political parties' membership register and to particularly avail the following services to Kenyans; checking of membership status, joining a party of choice and resigning from a party. The development of the said system, according to the Government, was intended to enable Kenyans easily access the services afore stated and in so doing transform the government's service delivery to its citizens.
5. The Petitioners however, lamented that the digitisation of such cardinal services impedes the political rights of minorities and indigenous Peoples living in Kenya, a move that departs from Article 6(3) of the Constitution of Kenya, 2010. This is due to the fact that in a setting where minorities and indigenous peoples living in Kenya have been subjected to historical marginalisation and legislative discrimination over the years, and the majority of their population are locked out of internet access; the primary tool in accessing any digital platform. Accordingly, the IPPMS certainly exacerbates the situation by curtailing these communities' participation in

governance and the political landscape generally, since the Kenyan minorities and indigenous communities represent a section of the populace that is limited in access to technology, and the integration of the services to an online system will further disenfranchise these groups.

6. Based on the report on the 2019 census, it was pleaded that the statistical data reveals the stark reality of marginalisation in respect to access to the internet such that the proportion of population aged 15 years and above who searched and bought goods and services online was only 4.3%, most of whom reside in rural areas where the minorities and indigenous peoples are commonly found. In expounding on this, the Petitioners pleaded that as per the said Report, in Turkana County, largely populated by pastoralists, out of a population of 504,383 people aged 15 years and above, only 35,934 people, which translates to 7% were able to use the internet. In Garissa County, a predominant pastoralist county, out of a population of 453,170 of people aged 15 years and above, 18% (81,672 people) recorded use of internet. In Wajir, in a population of 383,424 of people above 15 years, only 4% (15,905 people) recorded use of internet. In Bunyala Sub County of Busia District, with a predominantly fisher community, only 7.8% of the 19,028 households reported use of internet, while in Suba North it was 10.1% of 29,662 of households. In Suba North out of 27,635 households, only 5.7% reported use of internet. This data demonstrates that a

significant population, largely consisting of minorities and indigenous peoples are inaccessible to internet use.

7. This Petition, it was pleaded, comes at a crucial time when the 2022 General Elections are closely approaching, with party primaries to nominate party candidates slated for April 2022. According to the Petitioners, the inability to access the IPPMS, to register for, or change party membership, will be greatly prejudicial to members of minorities and indigenous peoples, and thereby violate their right to participation. This, without any justifiable reason, discriminates against minorities and indigenous peoples, who by no choice of theirs, find themselves outside the internet use map, and grossly violates the Constitution.

8. In the Petitioners' opinion, apart from the expression of intention to digitise processes and procedures for ease of access, it was also incumbent upon the State to sensitise the electorate on the reforms it intended to implement prior to the roll out of the IPPMS as this would have adequately aligned with the Constitution's objective to ensure that every person fully and equally enjoys all rights and fundamental freedoms enshrined therein. To the contrary, the State proceeded to launch the IPPMS without public participation which action is retrogressive, and more so quashes the lifeline offered to minorities and indigenous communities through the promulgation of the Constitution, 2010.

9. In examining this Petition, this Court was implored to acquaint itself with the historical and institutional injustices minorities and indigenous communities in Kenya have endured, and at the same time consider the numerous strides taken to overcome these barriers.

10. In support of the petition, the Petitioners relied on the meaning of "marginalised community" and "marginalised groups" under Article 260 of the Constitution, Articles 2(5) of the Constitution as read with the African Charter on Human and Peoples' Rights that establishes the African Commission on Human and Peoples' Rights, therefore, making its decisions final and binding to the State parties. They also cited the decision in **Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya, 276/2003.**

11. According to the Petitioners, in its fourth periodic International Covenant on Civil and Political Rights (ICCPR) report submitted to the United Nations Human Rights Committee (UNHRC), under Article 1 on self-determination, the government officially recognises the existence of indigenous peoples in Kenya, noting that *they form part of marginalised communities,* and states that *they must be protected through specific affirmative action designed to ensure that they enjoy their human rights and fundamental freedoms on an equal footing with others.*

12. It was further pleaded that since 2010, Kenya's Human Rights record has been reviewed thrice by the United Nations (UN) Universal Peer Review (UPR) mechanism in 2010, 2015 and most recently 2020. In 2010, Kenya accepted a recommendation to implement the recommendations and decisions of its own judicial institutions and of the African Commission on Human and Peoples' Rights, particularly those relating to the rights of indigenous peoples. In 2015, among others, Kenya accepted key recommendations critical to indigenous peoples' rights; strengthen effectively the protection of the rights of indigenous peoples, including to their ancestors' lands; and continue implementing the legislation on the protection of the rights of indigenous peoples and their lands. In the latest review, Kenya accepted a recommendation to consider further measures to enhance the meaningful participation of indigenous peoples in all matters affecting them.

13. The petitioners further referred to **Rangal Lemeiguran & Others vs. Attorney General & Others [2006] eKLR**, where the High Court affirmed the existence of indigenous peoples in Kenya and ruled that they had the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. The High Court further observed that Representation is a clear constitutional recognition of a

positive right of the minority – to participate in the State's political process and to influence State policies.

14. For definition of, **"marginalised group"** the Petitioners referred to Article 260 of the Constitution of Kenya, 2010 and the Report by the UN Special Rapporteur Fransesco Capotorti in the context of Article 27 of the International Covenant on Civil and Political Rights (ICCPR).

15. The Petitioners also cited the definition of the terms "ethnic minorities" "special interest groups" in section 2 of the ***Political Parties Act, 2011*** and relied on The Preamble to the Constitution as regards the aspiration of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; Article 1 on the sovereign power; Article 2 and the application of the general rules of international law to Kenya and the place of ratified treaties in Kenyan legal system; Article 3 on the obligation to respect, uphold and defend the Constitution; Article 6(3), on access to State services in all parts of the Republic; Article 10 on the binding nature of the national values and principles of governance; Article 19 on the centrality of the Bill of Rights; Article 20(1) on the binding force of the Bill of Rights and the extent of the enjoyment of the rights and fundamental freedoms in the Bill of Rights Article 21 on the obligation of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in

the Bill of Rights and on all State organs and public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities; Articles 22(1) and 258(1) on the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention; Article 23 on the powers of the High Court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and to grant appropriate relief; Article 27 on the equality before the law and the right to equal protection and equal benefit of the law while including the equality to the full and equal enjoyment of all rights and fundamental freedoms as well as prohibition of the State from discriminating directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; Article 35(1) (a) on the right of access to information held by the state; Article 38(1) on the right of every citizen to make political choices including the right to form, or participate in forming, a political party, to participate in the activities of, or recruit members for, a political party or to campaign for a political party or cause; Article 48 on

the right to access to justice; and Article 56(a) on the State's obligation to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.

16. In addition, the Petitioners cited Sections 6 and 7 of the ***Political Parties Act***, on the process and procedure to be followed in applying for provisional registration of a political party and Section 14 of the ***Political Parties Act***, that states in part that a member of a political party who intends to resign from the party shall give a written notice prior to his resignation; to the political party, to the clerk of the relevant House of Parliament, if the member is a member of Parliament or to the clerk of a county assembly, if the member is a member of a county assembly.

17. In addition, the Petitioners relied on Article 1 of ***The Universal Declaration of Human Rights*** **("UDHR")** that all human beings are born free and equal in dignity and rights; Article 2 thereof which asserts that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and that no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-

self-governing or under any other limitation of sovereignty; Article 7 that states that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

18. In support of their petition, the Petitioners also cited ***The International Covenant on Civil and Political Rights*** **("ICCPR")** which provides in Article 2(1) requires each State Party to respect and to ensure to all individuals within its territory the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Petitioners further relied on Article 2(3) that commits states to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; Article 25 that states that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives; Article 26 that states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. According to the Petitioner, in this respect, the

law prohibits any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

19. As regards the ***International Covenant on Economic, Social and Cultural Rights,*** it was pleaded that Article 1(2) requires that States do undertake to guarantee that the rights enunciated in the Covenant be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Section 2 of the ***African Charter on Human and People's Rights*** **("ACHPR")** which expresses that every individual is entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Article 3 thereof, stresses that every individual is equal before the law and shall be entitled to equal protection of the law, while Article 9(1) guarantees to every individual the right to receive information. In order to ensure for all people equality before the law, Article 19 sets out equality before the law and respect for the rights.

20. In expounding on the above principles, it was contended that since Article 6(3) enjoins all national State organs to ensure reasonable access to its services in all parts of the Republic, the IPPMS does not afford the most members of minority and indigenous people's reasonable access to joining a political party, changing a political party or resigning from a political party. Further, the implementation of the IPPMS flagrantly breaches the values and principles in Article 10 to the extent that it does not promote democracy and participation of the minorities and indigenous peoples in politics. Since Article 20(2) states that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom, reducing the services under the Office of the Registrar of Political Parties to an online system does not guarantee equal enjoyment of political rights by the minorities and indigenous communities in Kenya, owing to their limited access to technology.

21. In the Petitioners' view, the State therefore, is overlooking the Constitution by presuming that the integration of such crucial services is at its best, an improvement of the government's service delivery to its citizens, while in fact, the IPPMS closes a section of the populace to enjoy their inherent right of political engagement. Article 27 is at the heart of this Petition and among other stipulations vetoes the State to discriminate

directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Therefore, a directive of the State to impose the IPPMS on Kenyans directly discriminates against the minorities and indigenous communities who neither have access to technological advancements nor have they been considered in the process of implementation in the very least.

57. Since Article 35 provides that every citizen has the right of access to information held by the State, it was pleaded that the launch of the IPPMS by the Office of the Registrar of Political Parties falls short of this requirement in the sense that only the privileged within society have unlimited access to the internet and will thereby be privy to such information. The minorities and indigenous communities again bear the brunt of being subjected to a discriminative legislation that is keen to frustrate their civic right.

58. To the Petitioners, Article 38, another bedrock to this Petition, states that every citizen is free to make political choices, which includes the right to form, or participate in forming, a political party, to participate in the activities of, or recruit members for, a political party or to campaign for a political party or cause. The continued operation of the IPPMS, it was pleaded is an infringement of this right and fundamental freedom as

minorities and indigenous communities are not beneficiaries of technological advancements within their geographic locations.

59. It was recalled that Article 56 imposes on the State a specific duty towards the minorities and marginalised groups (communities), to put in place affirmative action programmes designed to ensure that they participate and are represented in governance and other spheres of life. In light of the IPPMS, the State has not endeavoured to initiate collaborative efforts that will see the special interest group educated on this recent development. This information gap presents an imminent risk that minorities and marginalised communities will not be participants in the upcoming general elections.

60. Consequently, the Petitioners sought the following reliefs:

a) A declaration that the State is obligated to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

b) An Order that the Respondents be and is hereby compelled to suspend the Integrated Political Parties System, pending the formulation of adequate legislation and policy to specifically protect the political participation rights of minorities and indigenous peoples.

c) An Order directing the Respondents to put in place measures guaranteeing the full enjoyment of the fundamental rights and freedoms encapsulated under Articles 6(3),27, 35, 38 and 56 of the Constitution of Kenya, 2010 with specific attention to minorities and indigenous peoples.

d) Any other Orders or directions that this Honourable Court may deem just and appropriate to grant in the circumstances.

e) Costs be in the cause.

61. In support of the petition, the petitioners relied on the affidavits sworn by **Nyang'ori Ohenjo**, **William Sipai,** the 2nd Petitioner and **Noah Kitarpei Matunge.** According to them, on 10th November, 2021 they learnt from social media that the 1st and 2nd Respondents had launched on the State's e-Citizen platform ***the Integrated Political Parties Management System*** (hereafter referred to as the "IPPMS") which, according to them was to make the system the primary and only platform to manage the political parties' membership register and to enable an individual to check membership status, join a political party and change party membership. It was indicated the announcement by the State intended to enable Kenyans easily access the said services and in so doing transform the government's service delivery to its citizens.

62. In the deponents' view, contrary to this belief, this initiative dangerously impedes the political rights of MIPs living in Kenya and presents a potential risk to this group's political representation and participation in democracy. In light of that the Petitioners sought to have the issues which now fall for determination in this petition, addressed by the Registrar of Political Parties on 9th February, 2022 but no response was forthcoming.

63. According to the deponents, the outcome of this Petition bears a solemn impact directly and indirectly on the social, economic and political welfare of minorities and indigenous communities living in Kenya. In their views, the Constitution of Kenya, 2010, as the supreme law of Kenya, was intentionally promulgated to surmount historical and legislative discrimination faced by MIPs and the IPPMS consequently defeats the spirit of the Constitution. They lamented that the State is perpetuating discrimination against MIPs by introducing a retrogressive mechanism of political party membership and this Court has the power to cease such legislative discrimination. To them, the Respondents never undertook to put in place legislative measures effecting the implementation of the IPPMS hence rendering the IPPMS unconstitutional.

64. It was the deponents' view that the Kenyan minorities and indigenous communities represent a section of the populace that is limited in access to technology, and the integration of the services to an online system will further disenfranchise these groups. This, it was deposed, is due to the fact that a review of the 2019 census report reveals statistical data on the stark reality of marginalisation in the country in reference to the access of internet by the minorities and indigenous communities. From this data, it was averred that the inability of MIPs to access the internet will

unjustifiably lock them out from the electoral process of registering, freely joining a political party of choice and changing a political party.

65. The deponents some of whom represented Keekenyokia clan of the Maasai pastoralist community, a tribe of about 30,000 clan members and the Yaaku minority group, averred that the clan members do not have the technologies, gadgets and access to the internet to access the IPPMS yet they wish to take part in political primaries before the end date, confirm the status of their political party affiliation on the said system and change party membership before the upcoming party nomination. They were however apprehensive that due to lack of adequate time to comply, and lack of gadgets, technologies and internet connectivity, they would be locked out of such exercise for adequate time to comply, and lack gadgets, technologies and internet connectivity. Such an occurrence, according to them, impedes their ability to form a political party of their choice, nominate candidates of their choice from their community, or support candidates that are aligned to their personal or communal interests.

66. They asserted that this would be yet another instance of leaving the minority and indigenous people behind in governance through rapid adoption of inaccessible technologies and would disenfranchise them and curtail their participation in political activities. Since to them, the digital register of political parties has no measure to achieve equality, it violates

their rights as protected under Article 56 of the Constitution. They complained that the IPPMS therefore curtails their rights to self-determination, as they have been restricted in participation and ultimately controlling their political affairs through disenfranchisement by way of technological use.

67. According to them, the 1st and 2nd Respondents in failing to consult and engage their communities in public participation and civic education before launching the said IPPMS deprived them and their communities of opportunities for self-expression in their political affairs and that this systemic discrimination threatens their collective sense of belonging and deprives them of opportunities for self-expression in matters affecting their governance.

68. In a rejoinder to the replies filed in opposition to the petition, the Petitioners vide an affidavit sworn by **Nyangóri Ohenjo**, averred that the Respondents and the Interested Party appear to implement the registration of party members on the IPPMS in partnership with Political Parties, who may well be acting in their self-interest or interest of some constituency they consider their stronghold, and such discriminative process cannot be the framework for the realisation or limitation of the right of citizens to exercise their sovereignty. The deponent averred that the 2nd Respondent does not have a final register of any political party since illustratively, the

same Act also recognizes that Political parties have the power to deem some of their members to have resigned on numerous grounds under Section 14 of the Act without reporting obligations to the 2nd Respondent. To him, clearly the provisions of the Act, party membership registers are in flux, ultimately dependent on the conduct of party members.

69. He opined that the said replying affidavits are totally false in so far as the Respondent appears to presuppose that the manual and digital party registration systems are accessible, equal and similar alternative modes of party membership; and that with the two all Kenyan can access either registration systems. Further the cost, accessibility, reliability of manual registration in far-flung areas where marginalized minority groups reside makes it inaccessible, yet parties are not motivated to incur logistical costs. The alternative IPPMS system is inaccessible for these groups due to a lack of internet, gadgets, network and technological capabilities.

70. While not denying that the two systems are available for party registration, the Petitioners averred that the Respondent failed to demonstrate any affirmative measures taken on the implementation of the two mechanisms available to ensure minorities are not left behind, and that they are protected as provided under Article 91(e) and 56 of the Constitution. It was therefore his view that the 2nd Respondent has taken a minimalist approach in enforcing compliance by political parties and failed

to demand the political parties to meet their constitutional mandate, yet has used the same box-ticking approach to lockout marginalized communities from political participation. This mandate, it was averred, includes:-

(a) Article 23(1) under which the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(b) Article 10(2)(b) on the national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

(c) Article 56(a) which enjoins the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups— participate and are represented in governance and other spheres of life.

(d) Article 81(a) which requires that the electoral system ought to comply with the principles such as freedom of citizens to exercise their political rights under Article 38.

(e) Article 91(1)(e) to respect the right of all persons to participate in the political process, including minorities and marginalised groups.

71. It was reiterated that the intervening period between rolling out and implementation of the IPPMS was too short to achieve meaningful public participation for the 2022 April party nomination. Further, the evidence annexed to the 2nd Respondent's did not demonstrate how the people, whose right to political participation is impeded by the IPPMS, were involved as stakeholders.

72. It was noted that the 2nd Respondent has made registration to a political party a condition precedent to the exercise of their political rights and in the same breath failed to avail the viable option for effective participation to the marginalized and minority groups. In his view, the 2nd Respondent's duty to ensure that no person is a member of more than one political party is not an excuse to disenfranchise vulnerable section of the population in a manner not provided for under Article 24 of the Constitution. While appreciating that the Constitution provides for limitations, any limitation to the exercise of a fundamental right must be by law, reasonable and justifiable and must choose less restrictive means to achieve the purpose of the limitation. In this case, rather than unconstitutionally restrict the right to political participation by the marginalized groups, should instead choose the least restrictive means to enforce the law.

73. In the deponent's view, the 2nd Respondent in ensuring compliance by political parties that only those members registered to the political parties

participate in the primaries should charge any person found culpable in participating in a nomination they are not supposed to participate with an election offence which approach is less restrictive compared to locking out the entire population of marginalized communities.

74. It was noted that since there have been numerous nominations done before ***Political Parties Amendment, Act 2022*** that established the IPPMS, the apprehension by the 2nd Respondent that there will be anarchy if the IPPMS is not used in the forthcoming party primaries is unfounded and stretches reality to breaking point. In his view, party nominations can be conducted within the law, under due process whilst respecting the right to political participation of all citizens under article 38 until such a time that adequate legislation and policy are formulated to comply with Article 56.

75. It was further noted that the office of the 2nd Respondent has presided at the indiscipline and anarchy of the elected political party leaders who champion causes of other political parties that didn't sponsor them to offices they hold. However, the 2nd Respondent sardonically finds it convenient to be apprehensive of the unfounded possibility of a party member who does not appear in the certified party list might find their way to the nomination. Based on legal advice, it was averred that it is the ill-timed implementation of IPPMS that is a recipe for chaos, anarchy and

implementing a series of policies that discriminate, disenfranchise and exclude the exercise of Article 38.

76. In the Petitioner's view, the IPPMS is distinct from other digital platforms as it impacts the exercise of sovereignty protected under Article 1(2) of the Constitution on the right to elect representatives being the substratum of the suit. Unlike all other digital government platforms, IPPMS deals with the right to self-determination which is the right through which all other rights flow including the right to good governance, democracy, free and open society.

77. It was deposed that only one out of twenty Kenyans have access to internet connectivity while the Survey report by Kenya National ICT by communication commission of Kenya and Kenya National Bureau of Statistics indicate that the highest engagement with internet connectivity is 15.5% for urban areas while the lowest is 2.7 % for the rural population with all provinces except Nairobi having less than 10% coverage. In further response the Interested Party in their own statistics indicate that 11,155 polling stations lack 2G and 4G network coverage. While not denying that the two systems are available for party registration, it was averred that the Truth Justice and Reconciliation Report indicate that disparity in political representation and participation in decision-making processes and generalized access to and use of political resources is a key contributor and

indicator of marginalization of minority groups raised in the Petition. It was averred that the marginalized population constitute at least 20 per cent of the entire Kenyan population being a significant population to be left behind in the implementation of the IPPMS.

78. In the Petitioners' view, unless the IPPMS is declared unconstitutional to the extent that it does not promote the fundamental right to political participation, the minorities and indigenous peoples in Kenya will continue to face discrimination and disenfranchisement hence it is in the interest of justice that this Petition be allowed.

79. In their submissions, the Petitioners reiterated the foregoing and contended that the major controversy presented by the Petition and Application before this Court is the violation of the exercise of political rights and the right to participate in governance, through the adopted modes of implementation of the IPPMS resulting in a major negative impact on minority and marginalized groups, in violation of their sovereignty and self-determination. According to the Petitioners, their concern is the danger posed by the manner and mode of implementation of the IPPMS perpetuates continued violation of their political rights protected under Article 38 and 56 of the Constitution of Kenya, 2010; including the imminent threat to their ability to participate in the formation of political parties, party primaries, and governance. To them, they have

been locked out of participating in the party primaries owing to several challenges, including but not limited to, the lack of access to the internet, E-citizen IPPMS platform, inefficiencies and delays in the said system, inability of party members to resign and join other political parties, the closure of mass voter registration on the IPPMS by the Respondents.

80. The Court was urged to take judicial notice that Kenyans have decried foul the IPPMS for gross violation of privacy and political rights by finding themselves registered in political parties without consent or knowledge and that the chaos is exacerbated by the long and tedious uncertain process of deregistering from those parties, and only upon such successful deregistration can they finally join a party of their choice. In their view, the IPPMS system has authored confusion and uncertainty relating to party membership even for citizens with access to the internet while for the marginalized with no access to the internet, they have a much-limited chance of succeeding in this system.

81. According to them, while the election timeline for parties to submit names of nomination aspirants has been extended to also limit the participation of party members in the nomination by closing the party registers, the nature of the law is one that party members are allowed to indiscriminately leave and join any political party of choice by will.

82. It was submitted that the marginalized communities have not found a guardian to protect them from those who will betray their rights to political participation and equal benefit and protection of the law which limits their ability to improve their livelihood. They, it was contended, have never been extended equal opportunity to participate in governance, and this exclusion bars their involvement in electing representation, holding office, and voting on political decisions. As a general matter, this discrimination has made the marginalized people inherent inferior subordinates to the majority and majoritarian interests.

83. According to them, the fundamental deprivation in citizenship is manifested first and above all the deprivation of a political space and right which make opinion significant and actions effective yet a democracy must provide citizens an opportunity to participate as well as to allow them to have control to reform undemocratic authority structures by opening space for the marginalized to be involved in governance because Kenya is in participatory democracy. They lamented that bureaucracy faceless operations and conduct of the Respondents, based on desired efficiency, while operating in secrecy, closed down the opportunities for citizens to participate in political process through the over-reliance on technology. By so doing, the Respondents are emphasizing marked inequalities along class lines lowering the prospect of equal opportunity for political participation.

84. It was contended that it is not uncommon for a society with high inequality like Kenya to come face to face with the barriers and limitation to the exercise of political rights that is undermined by economic inequality that renders the participation in governance and political participation an empty ritual and frustrating process for the marginalized. The State must go further in making necessary measures to guarantee that the marginalized actually enjoy their right to political participation and are not side-lined. In their submissions, political equality is understood as a requirement that all individuals and groups have access to the political process. As such, large disparities in political influences is disfavoured. Since political equality is often undermined by social and economic inequality, it results in political decisions favouring those already enjoying an economically and socially privileged position. As such, in order for any democratic process to be fair, those who participate in the process need the capability to function politically. This is the foundation for the constitutional requirement for the enhancement of capability of the underprivileged groups.

85. According to the Petitioners, this petition and the orders sought herein are hinged on the centrality of the Constitution in promoting the Minority Rights, principles of governance such as inclusivity and equity necessary in Kenya's participatory democracy. Participatory democracy is the bridge

that has solidified the achievements of greater rights to the minorities and marginalized. In Kenya, it was submitted, the constitutional provision fortifies such capacities on social justice, inclusivity and addressing marginalization and fragility under to Article 10 of the Constitution.

86. The Petitioners narrated the constitutional history which according to them demonstrates the different understanding amongst various groups in Kenya on exclusivity and numerous efforts for dissent and challenges upon structural and institutional framework that enable exclusion through laws and without laws. It was submitted that the history of Kenyan elections has witnessed these communities that are numerically non-dominant groups and communities thereby find themselves pushed to the periphery in both elective and nominative positions as a result of conspiracies and lobbying by the majority for highly delicate and diplomatic positions. This exclusion is furthered by the adoption of policies and operational mechanisms that exclude their participation such as the use of technology and the internet without creating measures to safeguard and guarantee their participation.

87. Fortunately for these groups and communities, it was submitted, the Constitution is in a full gear to cancel the culture of entitlement among a few and promote shared prosperity that leaves no one behind. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices.

88. According to the Petitioners, the main challenge of the Respondents and Interested Party's response to the Petition is on the interpretation on law since, according to **Dworkin**, law is not just rules but principles. It was argued that the Court when faced with rules must also apply the principles accepted in law and therefore the interpretation must go beyond the mechanical reading of legal text to the principles. The Petitioners' submissions were based on the Constitution being a transformative Charter as described by **Karl E. Klare** and the case of **Royal Media Services Ltd vs. A.G Petition No. 346 of 2012.**

89. It was submitted that the Constitution mandates the State to put in place affirmative action programs designed to ensure that minority groups participate and are represented in governance and other spheres of life; are provided with special opportunities in educational and political fields for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. In support of the submissions, the Petitioners relied on the **Matter of the Kenya National Human Rights Commission [2014] eKLR** and the Court was urged to move far beyond abstract reading of the Constitution and look in context of Kenya's historical constitutional amendment culture, which reveals evidence of exclusion and marginalization of marginalized and indigenous groups. They also cited

Association of Retirement Benefits Schemes vs. Attorney General & 3 Others [2017] eKLR and it was contended that the transformative nature of the Constitution makes the Judiciary a key player in public policy formulation, politics and moral dispute resolution.

90. In the same vein, the Petitioners relied on **In the Matter of Principle of Gender Representation in The National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where the court noted that courts have the last words in determining the constitutionality of all government actions. Based on the foregoing, it was submitted that the judiciary has jurisdiction to examine and adjudicate policy and political disputes has a better chance of ensuring that power is exercised as precisely provided for in the law. Further, the Constitution legalized and justified the court to take an active role and take into consideration all prior constitutional changes in addition to the single constitutional change that it is currently reviewing. The court, it was urged, must determine an aggregated doctrine that would allow courts to review a specific amendment together with the surrounding legal environment with which it would interact.

91. Further reliance was placed on the ***International Covenant on Civil and Political Rights, Declaration on the Rights of Persons***

belonging to National or ethnic, Religious and Linguistic Minorities; Framework Convention for the Protection of National Minorities; the European Charter for Regional or Minority Languages; African Charter on Human and Peoples Rights; and ***Copenhagen Document*** are international or regional legal instruments which enjoin State Parties to undertake to guarantee to persons belonging to National Minorities the right of equality before the law and of equal protection of the law. In this respect, any document based on belonging to a national minority is prohibited. The Constitution, it was noted, enjoins the State to further enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms and that by dint of the Article 2 of Constitution of Kenya, 2010, these international and regional instruments are part and parcel of Kenya's laws and have binding force of the law under that provide that the Constitution provides that the general rules of international law shall form part of the law of Kenya. Further, any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.

92. It was submitted that the centrality of the national values and principles of governance in constitutional discourse is further reinforced by the interpretive clause of the Constitution which demands that the Constitution should be interpreted in a manner that promotes its purposes, values and

principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance in Article 259 of the Constitution. In the Petitioners' view, the principles of equality and equity are captured as a right-based principle under the right to equality and freedom from discrimination to the effect that every person is equal before the law and has the right to equal protection and equal benefit of the law. The objective of the right, it was submitted, is provided to include the full and equal enjoyment of all rights and fundamental freedoms. Particularly, the Constitution is loud on the need for non-discrimination on the basis of ethnicity or origin, culture, language, religion, including the right to equal opportunities in political, economic, cultural and social spheres. Accordingly, the Petitioners contended, the State is enjoined not to discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Further the state is further commanded to give the full effect of the realization of rights guaranteed including the duty to the state to take legislative and other measures including affirmative action programs and policies designed to redress any disadvantage suffered by

individuals or groups because of past discrimination under Article 56 of the Constitution.

93. The question presented by this issue, according to the Petitioners, is whether the State has fulfilled its duty to legislative and other measures including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination in the implementation of the IPPMS, and whether the absence of such legal and administrative affirmative framework is fatal for the use of the IPPMS in the upcoming party primaries. In this regard, reliance was placed on the case of **S vs. Zuma 1995 2 SA 642 (CC)** where the Constitutional Court affirmed that a right must be interpreted in a manner that seeks to realize the objectives of the right.

94. Affirmative action, it was submitted, stems from the historical perspective where marginalized groups experienced exclusion and underrepresentation in political, economic, social, and public service sectors. To remedy the situation, the Constitution enjoins the State and its organs to address the needs of vulnerable groups within society, including women, older members of society, and persons with disability, children, youth, members of minority marginalized communities, and members of particular ethnic, religious or cultural communities.

95. The State, it was submitted, is further enjoined to ensure that any measures taken under the above clause adequately provide for any benefits to be open on the basis of genuine need. In terms of political representation, the Constitution enjoins Parliament to enact legislation to promote the representation in Parliament of, among others, ethnic and other minorities and marginalized communities under Article 27(6) of the Constitution of Kenya, 2010.

96. The Petitioners however lamented that concerning the measures put in place for affirmative action program actions and policies especially in exercise of their human rights, the legislative and regulatory guidance is scant, at best. There is no legislative or regulatory framework governing the inclusion of marginalized groups in the main stream political social economic spheres. The state was accused of being derelict in their constitutional duty as the duty bearer to give effect to this right without just cause. As for the 2nd Respondent, the Petitioners submitted that it has taken a minimalist and textualist approach in resolving historical and present exclusion of marginalized participation within the political process, a situation far removed from Human Rights approach prescribed by the 2010 transformative charter. In their view, the use of the facially neutral IPPMS system by the Respondents has an unjustified adverse impact on members of the marginalized group violating the tenets of Article 6(3) of the

constitution that places a duty to ensure reasonable access to its services in all parts of the Republic. To them, the aim of the provisions of Article 6(3) and Article 56 is not discretionary but affirmative to the intent no one is left behind. It is irrelevant that the IPPMS was not intended to discriminate against marginalized populations, however in reality the impact disproportionately affects the marginalized and affected further excluding them from the political process.

97. It was therefore submitted that because of this disparate impact of the rolling out of IPPMS, the marginalized should be consulted in framing and implementation of this system and this is so because it has a direct impact on their political rights and justifies the adoption of affirmative measures to enable their participation in the electoral process. From the above, it was submitted that the 2nd Respondent has a duty to put in place affirmative measures as a means of reparation to facilitate participation in an effective and inclusive manner consistent with the exercise of the right. This, however, was not done in the rolling out and the use of the IPPMS to fill the past gap of exclusion. Reliance was placed on the **Federation of Women Lawyers Kenya (FIDA-K) & 5 others vs. Attorney General & Another [2011] eKLR** that the concept creates an obligation that minority should be given preference to make up for a history of discrimination that has placed them at an unfair disadvantage. It is

primarily a benefit to the recipient and seeks to distribute the benefit in a way that compensates for past injustices and its lingering effects. In the Petitioners' contention, these affirmative measures mean coming up with ways and methods alive to the potential challenges and opportunities that can be harnessed making use of flexibility to party membership and IPPMS for this key population. In this regard, they cited the Indian Case of **State of Bombay vs. F. N. Balsara 93 AIR 1951 SC 318 at p. 326** where the court quoted with approval the following extract from ***Professor Willis' Constitutional Law***, 1st Ed. At 578.

98. It was submitted that the Respondent's in implementing the IPPMS operated on the assumption that all Kenyans have the same social and economic status without creating a reasonable distinction. However, the marginalized groups for various factors ranging from historical are not in equal position to access these services are disadvantaged. The Petitioners submitted that contrary to the Respondents' notion, the solution to manage the political problem of exclusion of the marginalized cannot be adopting the most severe form of restriction to the exercise of the political right is warranted in the open and democratic society. In this case, the implementation of IPPMS has left the majority in the whims of political parties-those who control the state in any case. In their view, the Court will need to resolve whether this is a case that presents competing rights and

what the fair balance in resolving that competition is. For example- should a person wishing to resign from one party, but is unable to effect the change on the IPPMS before the closure of the register, be denied participation in the primaries of a party whose agenda they support? Should political parties with pending resignation notification from past members without access to the system limit their participation in other political parties? Is there a fair balance that the Court can strike that is proportionate?

99. Lastly and perhaps most critically, they posed, should citizens with no access to internet or the IPPMS who are enlisted in political parties without their consent be disadvantaged? Should the violation of their political rights under Article 38 persist unabated is the most relevant factor in court's ultimate decision?

100. Regardless, even if this Court finds that the lack of a regulatory framework safeguarding the rights of minorities cannot be a bar on the Respondent to implement the IPPMS entirely, the Petitioners are of the view that still the gaping holes in the legislative and regulatory fabric place a heavy burden on this Court in light to the ill-timed launch and reliance of the system for the 2022 election year.

101. As regards the Respondents' fear that there will be anarchy if the use of the IPPMS is suspended pending legislative and regulatory framework to protect the marginalized is a gross misstatement, it was submitted that this

is unfounded since there have been numerous nominations since the passing of the constitution without the reliance of the IPPMS. To the Petitioners, from the many mismatches and wrong entries, it is clear that this IPPMS is not ready to be used exclusively as the list determining the eligibility of voters to participate in the party primaries. Even of more concern is that much of the list rely on citizens using technology to access the portal where they can then resign or join a political party of choice.

102. The Petitioners noted that the Government, the interested party's, own data is showing that a big part of Kenya cannot access 4G network or gadgets to enable them register. Consequently, one can imagine what this means to the marginalized groups right to political participation under article 38 and the opportunity of minority candidates successfully going through party nominations with the massive dislocations of these citizens from voting.

103. It was contended that while in theory, legislation is a product of democratic action, public participation, and informed debate and that when implementation of laws and regulations is in a manner consistent with the values and principles of the Constitution, they provide crucial guidance for the Court as it carries out its duties; when State organs fail to carry out their legislative and regulatory duties – or do so in a slipshod manner – it requires the Court to engage in heightened scrutiny as to whether the

actions that are done in the absence of that framework comply with the letter and spirit of the Constitution.

104. In this case it was submitted that the Respondent in implementing the IPPMS failed to effectively and meaningfully conduct public participation among the marginalized and indigenous groups who are directly impacted through violation of their rights. It was submitted that meaningful participation has been emphasized by African Commission of People and human rights case **Centre for Minority Development Kenya and Minority Right Group International on behalf of the Endorois Welfare Counsel -vs-Kenya [2009] ACHPR.**

105. In appropriate circumstances, it was submitted that the courts have considered extent of actions and therefore rejecting the massive changes and requiring that they are postponed until after elections when the elections are close by. The courts have further protected the interests of the public in exercising their freedom to information as a direct result public participation that involves the dissemination of information for decision making, especially when there is no real urgency or hurry. In this regard reference was made to **Consumer Federation of Kenya (Cofek) vs. Minister for Information & Communications & 2 Others [2013] eKLR**.

106. In this case the Court was urged to take the law in the COFEK case into consideration as the contended failures of the Respondents to conduct meaningful and effective public participation in the implementation of the IPPMS, a process having far-reaching ramifications to the citizenry than digital migration as the constitution permeates all spheres of public life, comes at a time when the country is preparing for nominations in April 2022.

107. As regards public participation the Petitioners relied on **Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12/05** and it was submitted that the right to vote is an extension of an individual's right of self-determination in that a sovereign individual who agrees to join the civilization should, by right of being a human sovereign, have the right to affect the path the civilization takes that was created by the individual signing the to be Kenyans. Excluding minorities and pastoralists or the poor from participating in the party primaries, is instrumental in the rationalization, normalization, moralization, of the exclusion of other Kenyans. In this case, the evidence of purported IPPMS sensitization produced by the 2nd Respondent does not in any way indicate involvement of the marginalized communities, being an admission of lack of public participation.

108. It was the Petitioners' case that this Petition intervenes on behalf of most Kenyans, indicate that many citizens are grieved by an unfortunate turn of political and legal events that have over time systemically and institutionally discriminated and disenfranchised marginalized communities within the meaning of Article 260 of the Constitution the poor move no closer to the exercise of full citizenship through patron-client relationships that domesticate them and channel their important roles in electoral processes toward the interests of others. On the political patronage ladder the poor and marginalized remain poor. It moves the marginalized groups' problems out of sight if they do not have political representation. In the Petitioners' submissions, the adoption of the IPPMS system without public publication and sensitization enables systemic marginalization of a key segment of the population as data in court show no engagement to these populations. The digital registration has a huge impact on the community and violation of their political rights since the 2nd Respondent is yet to set up a framework to meet its obligations under Article 10, Article 56, and 91 (e) of the Constitution.

109. On the issue of costs, it was submitted that since it is trite law that costs follow the event the costs of this Petition should be borne by the Respondents.

1st and 3rd Respondents' Case

110. The 1st and 3rd Respondents filed the following grounds of opposition:

1. **THAT the Application is merely an attempt by the Intended Interested parties to revive the petitioners' Application dated 18th February, 2022 and obtain orders already denied by this Honourable court.**
2. **THAT the Applicants have not demonstrated that their purported interests will not be properly and accurately articulated unless they are enjoined in the proceedings to defend their cause.**
3. **THAT as correctly pointed out by the petitioners at paragraph 8 of the petition, the instant petition is a public interest case and not a claim for reliefs in personam. The judgment to be rendered by this Honourable court will be a judgement in rem thus the Applicants participation is of no significant effect.**
4. **THAT the Applicants case merely regurgitates the reliefs sought by the petitioners and does not demonstrate any exceptional conditions that would render their non-joinder prejudicial to their interests.**
5. **THAT the Applicants have not demonstrated a clearly identifiable interest proximate enough to be distinguished from anything that it merely peripheral to the matters in issue.**
6. **THAT the Applicants have not demonstrated that their submissions will be useful to the court and different from those of the petitioners so that their non-joinder will result in the incomplete settlement of all the issues raised in the proceedings.**
7. **THAT the Applicants' participation would only serve to delay the expeditious hearing of this petition and escalate litigation costs to the prejudice of the respondents.**

111. The 1st and 2nd Respondents also relied on a replying affidavit sworn by **Jerome Ochieng**, the Principal Secretary in the State Department of

Information Communication and Technology (ICT) and Innovation. In the said affidavit he expounded on the importance of digital technologies as the cornerstone of global interactions that, Governments and individuals must adapt to. He stressed that it is the government's policy that its services must be available online and that every Kenyan must have online access and the government's services must be delivered quickly and fully at the time and place they are needed.

112. It was deposed that as a result of the foregoing the 3rd Respondent had developed different digital platforms for use in national government in delivering services to its citizens and that IPPMS as a digital platform is not different from other digital platforms which are already I use by the petitioners in obtaining other government services. It was further averred that whereas the government is keen to improve digital literacy across all ages so as to enhance delivery of government services, the use of digital platforms has not entirely replaced the existence and use of manual records hence the petitioners have no reason whatsoever to be fearful that their political rights will be infringed.

113. Based on legal advice, it was deposed that the petitioners had not demonstrated any constitutional violation and or any prejudice they would or are likely to suffer as a result of the implementation of the IPPMS as the

said system cannot be said to disenfranchise or discriminate them simply because it does not suit their political interests to their taste.

114. He therefore prayed that the petition be dismissed with costs.

2nd Respondent's Case

115. In opposing the petition, the 2nd Respondent relied on a replying affidavit sworn by **Daniel Kinuthia** the Director of Compliance of the 2nd Respondent in which Section 33 of the ***Political Parties Act*** (hereinafter referred to as "the Act") was cited. It was averred that since Section 34 (da) of the Act requires the 2nd Respondent to keep and maintain a register of members of registered political parties, in ensuring compliance with the Act the 2nd Respondent is under obligation to verify whether a person wishing to join a political party meets the requirement specified in Sections 3(2A) and 34(f) of the Act. According to the deponent, Section 34 of the Act as read together with Section 28A of the ***Elections Act***, mandates the 2nd Respondent to verify and certify political parties' membership lists and subsequently maintain the same as the political parties' membership register under Section 34(da) of the Act. This register is the final record of the members of each political party for purposes of the circumstances prescribed by law including political parties' nominations. Consequently, political parties are under an obligation to submit their party membership

lists to the 2nd Respondent for verification and certification in accordance with the provisions of Section 34 of the Act.

116. It was further deposed that Article 91(1) (e) of the Constitution obligates every political party to respect the rights of all persons to participate in the political process, including minorities and marginalized groups while Section 4A (a) of the ***Political Parties Act*** imposes upon political parties the obligation to recruit and enlist members. Further, the political parties must ensure that the processes used in recruiting members, meet the Constitutional threshold under Articles 91(1)(e), and 27 of the Constitution; and do not discriminate any persons including the marginalized groups and minority communities and that political parties are allowed to recruit members through the following methods:

a) manual registration by completing recruitment forms as long as such members consent,

b) integrated Political Parties Management System (IPPMS) availed on the e-citizen platform, and web page link *ippms.orpp.or.ke* available for those who do not wish to use or have access to e-citizen account.

117. It was therefore deposed that every adult citizen who wishes to become a member of a political party is at liberty to use any of the mechanisms outlined above and that whichever way a party elects to enlist its members, such list must be submitted to the 2nd Respondent for verification and

certification (where required) to ensure compliance with the Act. In addition, Section 34B (1) of the ***Political Parties Act*** commands the 2nd respondent to establish a Political Parties Management Information System, an electronic system powered by technology, for the purpose of processing the political parties' records and data for the purpose of the Act.

118. According to the deponent, the IPPMS was developed with the involvement of all stakeholders including the political parties and the Political Parties Liaison Committee established under Section 38 of the ***Political Parties Act*** and that the representatives of the various political parties have undergone training on the use of IPPMS. In the deponent's view, the 2nd Respondent has developed the Integrated Political Parties Management System (herein 'IPPMS') for facilitate the efficient and effective management of political parties' records. The system is a web application developed to facilitate efficient and effective management of political party records and that all registered political parties have access to the IPPMS for the following purposes *inter alia*:-

a) upload party membership list to the 2nd Respondent, and

b) access reports on membership.

119. It was disclosed that coherent with the requirement of Section 34(1)(e) of the Act, which requires the 2nd Respondent to make public the political parties membership register, members of the public also have access to the

platform. Therefore, the services offered on the e-citizen are a component of IPPMS where citizens can register into parties, resign and check their party membership status. However, there is no requirement for the general public to register as members of a political party using the IPPMS since the processes available through IPPMS are also available manually such as:-

a) completing recruitment forms to register as a member of a party.
b) Resignation from a party by submitting a written notice to the political party and notifying the 2nd Respondent within 7 days.
c) Resignation from a party by submitting a written notice to the clerk of the relevant house of Parliament or County Assembly and notifying the 2nd Respondent within 7 days.
d) Confirmation of party membership status by accessing the political party membership records as verified and certified by the 2nd Respondent.

120. The deponent responded that vide his letter dated the 15th day of February 2022, he responded to the applicant's letter dated 9th day of February 2022 illustrating to the applicants the above manual alternatives. He however insisted that the IPPMS has revolutionized political party membership recruitment since its interception with the total number of members of political parties registered using IPPMS to-date being

24,198,622 and that indeed political parties have embraced and adopted the use of the IPPMS.

121. According to the deponent, the powers conferred on the 2nd Respondent are necessary to perform its functions under Section 34 (a) (d) and (f) of the Act and that during the verification process, the 2nd Respondent may make changes to the political parties' membership lists submitted by the political parties in circumstances envisaged by Section 34C of the Act such as:-

a) if a political party has been deregistered,

b) if a person resigns as a member of a party if a member dies,

c) if a member has ceased to be a citizen of Kenya,

d) if a member has been expelled from a party,

e) if political parties have merged,

f) if there are other events to justify a change in the register.

122. It was explained that in the event of a dispute, the aggrieved political party may submit the matter to the Political Parties Tribunal established under Section 39 of the Act for determination. Further, Section 34C of the Act requires that political parties intending to conduct party nomination shall acquire the certified party register for this purpose which certified party register contains the relevant information of every party member regardless of how he/she registered to be a member. Accordingly, it is the totality of both the party membership list submitted to the 2nd Respondent

by the political parties and the data of the persons who directly registered on the IPPMS platform. He asserted that any attempt to deploy a register not certified by the 2nd Respondent for the purpose of party nominations is contrary to the law and is a recipe for anarchy. It was therefore his view that since the law must be applied as it is, the Petition constitute an attempt to circumvent the provisions of the ***Political Parties (Amendment) Act, 2022*** particularly with respect to political party nominations.

123. The deponent averred that if this court was to bar the 2nd Respondent from using the digital register for the purpose of party nominations, the effect will be that there will be no political parties' membership register recognised by law for the purpose of party nominations and this is in view of the fact that verification and certification of the political membership lists, which is a requirement of law, can only occur through IPPMS. The Court was therefore urged to consider that certain legal timelines that will culminate in the General Elections to be held on the 9th August 2022 Elections have been triggered including:-

a) political parties to submit their party membership list to the 2nd Respondent on or before 26th March 2022.

b) the 2nd Respondent to verify and certify the party membership lists within 7 days of submission,

c) party nominations to be concluded by 22nd April 2022,

d) intraparty nomination disputes to be concluded by 22nd April 2022.

124. It was therefore averred that it will be impracticable to meet the above timelines if this court restrains the 2nd respondent from deploying the digital party register for the purpose of party nominations and that from the above explanation it is clear that the Petitioners have failed to appreciate the concept, deployment, use and function of the digital register on two fronts;

a) The interface between the digital register and the IPPMS

b) The existence of other alternatives to the IPPMS registration.

125. The 2nd Respondent, in its submissions relied on Articles 38(1), 91(1)(a), Sections 4A(a), 7(2)(a) and (b) of the ***Political Parties Act*** and it was submitted that Political parties must therefore ensure that the processes used in recruiting members, meets the Constitutional threshold under Articles 91(1)(e), and 27 of the Constitution and that they are precluded from discriminating against any persons including marginalized groups and minority communities. However, the role of the 2nd Respondent within the framework of the political party membership registration is to verify and certify the membership list provided by the various political parties under Section 34 of the Political Parties Act which sets out the functions of the 2nd Respondent under Section 34 of the ***Political Parties Act.***

126. According to the 2nd Respondent, in ensuring compliance with the ***Political Parties Act***, the 2nd Respondent is under obligation to verify whether a person wishing to join a political party meets the requirement specified in Sections 3(2A) and 34(f) of the ***Political Parties Act*** that the person must be an adult Kenyan citizen who does not belong to another political party.

127. In its submissions, the 2nd Respondent reiterated the foregoing and added that Section 34B of the ***Political Parties Act*** commands the 2nd Respondent to establish political parties' management information system for the purpose processing political parties data and records for the purposes of the Act. The purpose of this system, according to the 2nd Respondent, is to *inter alia* manage the data of registered political parties in Kenya including to register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act; ensure publication of audited annual accounts of political parties; verify and make publicly available the list of all members of political parties; keep and maintain a register of members of registered political parties; maintain a register of political parties and the symbols of the political parties; ensure and verify that no person is a member of more than one political party and notify the Commission of the findings; and certify that an independent candidate in an election is not a member of any registered political party.

128. It was submitted that it was in line with this, that the 2nd Respondent developed the Integrated Political Parties Management System (herein 'IPPMS') for facilitate the efficient and effective management of political parties' records.

129. According to the 2nd Respondent, it is a right of every adult citizen under Article 38(3)(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. It is however, the role of the political parties under Section 4A (b) of the ***Political Parties Act*** to nominate candidates for elections which may be direct or indirect. It was explained that where a political party conducts indirect party nomination by involving its members in the nomination process, Section 38C dictates that only the registered members of the political party be allowed to participate in the nomination process and for that purpose Section 38C (2) of the ***Political Parties Act*** mandates political parties who intend to conduct party nomination to acquire for their use, the certified party register.

130. In this regard the 2nd Respondent cited Sections 34, 38C(2) and (3) of the ***Political Parties Act*** and submitted that the certified party register contains the relevant information of every party member regardless of how he/she registered to be a member and that this is the totality of both the

party membership list submitted to the Registrar by the political parties and the data of the persons who directly registered on the IPPMS platform.

131. It was submitted that various options are available to the respective political parties for the purpose of recruiting members which options culminate into a non-discriminative procedure given that manual procedures are available. The 2nd Respondent however maintained that lack of internet access by Petitioners cannot be attributed to it. Reference was made to **Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR** and it was submitted the Petitioners failed to demonstrate that the IPPMS system discriminates against minorities and indigenous communities.

132. As regards the issue whether the State has endeavoured to initiate collaborative efforts that will see the special interest groups educated on the IPPMS, it was submitted that the IPPMS was developed with the involvement of all stakeholders including the political parties and the Political Parties Liaison Committee established under Section 38 of the ***Political Parties Act*** and that the representatives of the various political parties have undergone training on the use of IPPMS. According to the 2nd Respondent, the minorities and indigenous communities were well

represented as required under the provisions of Section 7(2)(b) and (c) of the ***Political Parties Act***.

133. Regarding the question whether this Court ought to interfere with the mandate of the 2nd Respondent as provided for by the ***Political Parties Act*** with respect to the use IPPMS, the 2nd Respondent referred to Section 33 of the ***Political Parties Act*** that establishes the Office of the Registrar of Political Parties and submitted that Section 33(5) of the Act protects the office of the 2nd Respondent and insulates it against the direction and control of anybody. Further, Section 34B (1) of the ***Political Parties Act*** having provided a framework for which the 2nd Respondent needs to develop an online platform to make political parties records and the 2nd Respondent subsequently developing IPPMS for this purpose, the Court's interference by allowing the 2nd Respondent to use any other means of managing such data will be to usurp the powers of a constitutionally established body by the court contrary to clear provisions of the law. Reference was therefore made to **Republic vs. Independent Electoral and Boundaries Commission Ex-parte Gladwell Otieno & Anor [2017] eKLR**.

134. Therefore, the 2nd Respondent urged the court to decline the invitation by the Petitioners to interfere with its mandate as provided for by the Act to

use the IPPMS to ensure that political party nominations are administered in a lawful manner.

135. Based on the foregoing, the 2nd Respondent prayed for the Petition to be dismissed with costs.

Interested Party's Case

136. The Independent Electoral and Boundaries Commission (the Commission) in its opposition to the petition relied on the following grounds:

1) **THAT the Petition as drawn and presented do not disclose any cause of action as against the Interested Party and is, therefore, bad in law, incompetent, frivolous, vexatious and is otherwise an abuse of Court process and should be dismissed *in limine* with costs to the Interested Party.**
2) **THAT the Petition as drawn and presented, go against the law as established by Statute, the Constitution as well as the jurisprudence of this Court, particularly Section 34 (da) of the Political Parties Act requires the 2nd Respondent to keep and maintain a register of members of registered political parties, Section 28A of the Elections Act, No. 24 of 2011 and Sections 23 and 24 of the Political Parties (Amendment) Act, 2022 on the use of technology and the method of conducting political party nominations.**
3) **THAT legally, the register of political parties' membership so maintained by the 2nd Respondent is the final record of the members of each political party for all intents and purposes and therefore the reference to "other alternative means" to be used by political parties to conduct nominations as used in the Application**

and the Petition is a strange concept in law as the law only prescribes the "use of certified register of members for nominations."

4) **THAT the Petition as presented has not met the criteria for the grant of the conservatory Orders sought by the Petitioners, particularly as against the Interested Party.**
5) **THAT the Petition as presented seek to get Orders against parties who have not been given an opportunity to be heard before any such Orders are issued against them, particularly Political Parties who will be greatly affected by such Orders.**
6) **THAT the Orders sought in the Petition if granted will only operate to hamper the ability of the 2nd Respondent to properly carry out its mandate as per the law which includes, *inter alia*, to ensure that political parties comply with the law in carrying out their activities, ensure and verify that no person is a member of more than one political party; verify and make publicly available the list of all members of political parties; regulate political parties' nominations.**
7) **THAT the suspension of the IPPMS will mean there are no political parties membership register accepted by law for all purposes, as the verification and certification of the political membership lists only occurs through the IPPMS as required by law.**

137. On behalf of the Commission, it was submitted that the crux of the Petitioners' case is that the digitization of the management of the political parties' membership register impedes the rights of minorities and indigenous peoples living in Kenya; that minorities and indigenous communities represent a section of the populace that is limited in access to technology, and the integration of services to an online system will further

disenfranchise these groups; that the digitization of the Political Parties' Register will impede minorities and indigenous communities from participating in the soon coming party primaries; that the State launched the IPPMS without public participation and sensitization of the electorate on the reforms it intended to implement as regards the IPPMS; that on the whole, the Respondents violated Articles 6(3), 10, 20(2), 21, 27, 35, 38 and 56 of the Constitution of Kenya.

138. The 2nd Respondent in response has opposed the Petition on grounds that the ***Political Parties Act*** mandates it to establish a Political Parties Management Information System, an electronic system powered by technology, for the purpose of processing the political parties' records and data; that the powers conferred upon it are necessary to perform its functions under Sections 34 (a), (d) and (f) of the ***Political Parties Act***, *to wit*: to regulate, monitor, investigate and supervise political parties to ensure compliance with the Political Parties Act; to keep and maintain a register of members of registered political parties; to verify and make publicly available the list of all members of political parties; to ensure and verify that no person is a member of more than one political party; and notify the 1st Interested Party of its findings.

139. At the core of the 2nd Respondent's case is the fact that the ***Political Parties Act*** requires political parties intending to conduct party

nomination to acquire the party register certified by the 2nd Respondent. Therefore, barring the 2nd Respondent from using the digital register for the purposes of party nominations is contrary to the law and the effect will be that there will be no political parties' membership register recognized by the law for the purpose of party nominations. This is also particularly in view of the fact that verification and certification of the political membership lists, which is a requirement of law, can only occur through IPPMS.

140. According to the Commission, it is now trite law that a Petition for allegations of violation of fundamental freedoms and rights such as this, must disclose, with precision, the rights and freedoms violated. This submission was based on **Anarita Karimi Njeru vs. Republic [1979] eKLR**, **Ben Kipeno & 6 Others –vs- Attorney General & Another [2007] eKLR** and **Husus Mugiri vs. Music Copy Right Society of Kenya & Another [2018] eKLR.**

141. In this case it was submitted that the Petitioners failed to demonstrate to with precision, the nature of their rights and or freedoms which have been violated and/or threatened and/or likely to be violated by the Respondents as is required in a Constitutional Petition.

142. The Petitioners have pleaded that their rights and fundamental freedoms under Articles 6(3), 10, 20(2), 21, 27, 35, 38 and 56 of the Constitution of

Kenya have been violated and/or are likely to be infringed by the Respondents. It was submitted that while the Petitioners may, in their Petition, have invoked several provisions of the Constitution, they have not demonstrated to the required standard how their rights and fundamental freedoms have been violated, infringed or are threatened to enable the Court give redress within the ambit of Article 23(1) of the Constitution.

143. As regards the issue whether the Court should grant the orders sought by the Petitioner and particularly whether the Court should suspend the operationalization of the Integrated Political Parties System, it was submitted that this Court should be guided by the express provisions of the ***Political Parties Act*** and the ***Elections Act*** on this issue and reference was made to Article 82(1) of the Constitution.

144. According to the Commission pursuant to the requirement in Article 82(2) of the Constitution that legislation required by clause (1)(d) must ensure that voting at every election (including the conduct of party primaries) is simple and transparent, Parliament has, accordingly, enacted several legislations including the ***Political Parties Act*** to provide for the regulation of political parties which Act is required by the Constitution to ensure that the nomination process of candidates by political parties is transparent. Reference was therefore made to Section 34 of the ***Political Parties Act*** and it was submitted that to effect this mandate, Section

34B(1) of the ***Political Parties Act*** empowers the 2nd Respondent to use technology and more specifically to establish a political parties' management information system through which it shall process political parties' data and records. This being the clear position in law, it was the Commission's submission that the launch and operationalization of the IPPMS is sufficiently grounded in and compliant with the ***Political Parties Act*** which prescribes in Section 38C that the register that parties must use in conducting party nominations must one that has been verified and certified by the 2nd Respondent.

145. The Commission contended that contrary to the Petitioner's prayers, the law does not envisage ***"other alternative means"*** for purposes of conducting nominations by political parties. This, to the Commission, is a concept that is not known in law and therefore grant of the orders prayed for by the Petitioner will amount to a nullity in law. In any case, the use of alternative means is antithetical to the constitutional requirement of transparency in the electoral process which includes the nomination of candidates.

146. It was noted that it is through the IPPMS that the 2nd Respondent verifies the register of members of political parties and without the system, the 2nd Respondent will not be able to verify nor certify the membership registers. The logical effect of this is that parties will not be able to conduct lawful

nominations as there will be no verified nor certified party membership registers. The ripple effect of the foregoing, according to the Commission, is that the 1st Interested Party may conduct elections on the basis of unlawful nominations and this in itself is a recipe for anarchy.

147. To the Commission, the role that technology plays in ensuring that elections are fair and transparent as it offers reduced risk of electoral malpractice and increased efficiency in the management of nominations. Further, the Laws empowering the 2nd Respondent to establish a political parties' management information system through which it shall process political parties' data and records is a very recent development in law and this is the first time that the said provisions are being subjected to challenge before a court of law. This Court was urged to set forward-looking precedence that align with the Country's legislation and jurisprudence which embrace the use of technology in the electoral process as it offers transparency, verifiability, accuracy, security and accountability.

148. Since the intention of the people of Kenya as expressed in the Constitution and national legislation in Section 34B(1) of the ***Political Parties Act*** is that the 2nd Respondent should use a management information system in the processing of political parties' data, it was argued that the orders sought by the Petitioners only seek to go against the will of the people of Kenya and the Court was urged to uphold the intention of

Kenyan citizens as expressed in legislation and implemented by the 2nd Respondent.

149. While appreciating that this is the first time these provisions of the ***Political Parties (Amendment) Act*** are being put to test before a court of law and that there isn't jurisprudence or precedence that is specific to the said sections of the law, it was submitted that the principles on the use of technology in the general elections as espoused in numerous decisions of this Court and the Courts above it, ring true and should be extrapolated to the circumstances before this Court. This is based on the fact that nominations are a precursor to the general elections and the integrity of the party primaries have a direct impact on the integrity of the general elections. On this principle reliance was placed on the Supreme Court's decision in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 others [2017] eKLR (Presidential Petition 1 of 2017)** where the Court found that elections are processes and not events; as such lack of compliance with the law at any stage of the electoral process will affect the validity of the election. The Commission also relied on **Katiba Institute & 3 Others v Attorney General & 2 Others (2018) eKLR** wherein the Petitioners challenged the constitutionality of the ***Elections Law (Amendment) Act 34 of 2017*** which sought to amend Section 39 of the ***Elections Act*** of 2011 so as

to diminish the role of technology in the conduct of elections by elevating manual result transmission over electronic transmission and the Court noted that physical transmission of results opened up mischief for possible adulteration and manipulation. In addition, the Commission cited **Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC Nairobi Election Petition 14 of 2017** in which the Court emphasized the intention to make the use of technology central in elections management in Kenya.

150. According to the Commission, the Supreme Court in ***Raila Amolo Odinga*** **(Supra),** while making reference to the Kriegler report pronounced itself on the use of technology in the electoral process.

151. While appreciating that some of the authorities relied upon speak to use of technology in transmission of election results and not necessarily use of technology in registration of persons as members of Political Parties, it was submitted that the underpinning principle in the Courts' findings is that the use of technology in the electoral process is key to upholding the integrity of the elections, including the political party nomination exercises.

152. As to the rights of minorities and indigenous communities to participate in party primaries, it was submitted that they are still able to participate in the same as political parties are allowed to recruit members through manual registration. Further, all registered political parties have access to

the IPPMS for purposes of uploading the party membership lists. It is at this point that the 2nd Respondent then verifies the membership lists on the IPPMS. It was therefore submitted by the Commission that the operation of the IPPMS by the 2nd Respondent does not impede minorities and indigenous communities from participating in party primaries.

153. According to the Commission, suspension of the IPPMS will impede the 2nd Respondent from carrying out its functions of verification and certification of the political parties' membership register, thus tainting the integrity of the nomination process. Further, there is no other register or alternative means recognized in law through which parties may conduct nominations other than through the certified register maintained by the 2nd Respondent and that any attempt to use any other register or means will be unlawful and void. The Court was therefore urged to allow the 2nd Respondent to carry out its functions as spelt out in the law without any interference.

154. Regarding the issue whether, the 2nd, 3rd and 4th Interested Parties are proper parties to this suit and whether this Court should give credence to the issues raised by them, it was submitted based the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012***, **Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 others, Petition No. 12 of**

2013 [2014] eKLR and **Judicial Service Commission v. Speaker of the National Assembly and Attorney General, High Court Constitutional and Human Rights Division Petition No. 518 of 2013, 2013 [eKLR]**, **Meme v. Republic [2004] 1 EA 124; [2004] 1 KLR 637**, **Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR**, that the presence of the 2nd, 3rd and 4th Interested Parties herein is not necessary and will serve no purpose in assisting this court adjudicate upon and settling the issues raised by the Petitioner and the Respondents in the matter. According to the Commission, the 2nd, 3rd and 4th Interested Parties are raising fundamentally new issues being, use of the Independent Electoral and Boundaries Commission (IEBC) register during the party register as opposed to the Party List which has not been raised by the Petitioners and that this is contrary to the legal principle that an interested party should not frame his own issues or introduce new issues for determination by the Court. It was nevertheless, submitted that legally, the register of political parties' membership so maintained by the 2nd Respondent is the final record of the members of each political party for all intents and purposes and therefore the preference by the 2nd, 3rd and 4th Interested Parties to the use of the IEBC voters register to conduct nominations has no legal foundation and is, thus, a strange concept in law

as the law only prescribes the "use of certified register of members for nominations."

155. It was submitted that the proposed use of the IEBC Voters Register for party nomination instead of the certified register of members will have the effect of allowing non-party members to take part in the nominations of the Political Party thereby directly influencing the affairs of members.

156. It was therefore submitted that the Petitioners had not demonstrated to the required standard how their rights and fundamental freedoms were violated, infringed or are threatened to enable the Court give redress within the ambit of Article 23(1) of the Constitution. Further, it had been established that suspension of the IPPMS will impede the 2nd Respondent from carrying out its functions of verification and certification of the political parties' membership register, thus tainting the integrity of the nomination process and that, there is no other register or alternative means recognized in law through which parties may conduct nominations other than through the certified register maintained by the 2nd Respondent.

157. The Commission therefore prayed that this Court dismisses the instant Petition with costs.

Determination

158. The facts of this petition is largely not in dispute. What provoked this petition was the launch of the Integrated Political Parties Management

System (hereafter referred to as the "IPPMS" or "the System") on the State's e-Citizen platform by the Office of the Registrar of Political Parties in conjunction with the Ministry of Information, Communications and Technology (ICT) on 10th November, 2021. That this system was launched is also not in dispute. According to the 2nd Respondent, the system is a web application developed to facilitate efficient and effective management of political party records in part fulfilment of the requirements of Article 82(1) of the Constitution that mandates Parliament to enact legislation to provide for:

> ***(a) ...***
> ***(b) the nomination of candidates;***
> ***(c) ...***
> ***(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; and***

159. According to the Commission pursuant to the requirement in Article 82(2) of the Constitution that legislation required by clause (1)(d) must ensure that voting at every election (including the conduct of party primaries) is simple and transparent, Parliament has, accordingly, enacted several legislations including the ***Political Parties Act*** to provide for the regulation of political parties which Act is required by the Constitution to ensure that the nomination process of candidates by political parties is

transparent. It was submitted that Section 34 of the ***Political Parties Act*** mandates the 2nd Respondent to *inter alia:*

a. ***Register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act;***
b. ***Verify and make publicly available the list of all members of political parties;***
c. ***Keep and maintain a register of members of political parties;***
d. ***Maintain a register of political parties and the symbols of the political parties;***
e. ***Ensure and verify that no person is a member of more than one political party and notify the Commission*** **(the 1st Interested Party)** ***of its findings.***

160. To effect this mandate, it was contended that Section 34B(1) of the ***Political Parties Act*** empowers the 2nd Respondent to use technology and more specifically to establish a political parties' management information system through which it shall process political parties' data and records. Therefore, it was contended that this being the clear position in law, the launch and operationalization of the IPPMS is sufficiently grounded in and compliant with the ***Political Parties Act*** which prescribes in Section 38C that the register that parties must use in conducting party nominations must one that has been verified and certified by the 2nd Respondent.

161. The complaint by the Petitioners however, is not that the system ought not to be developed. Their grievance is that it was developed without

putting into place the necessary infrastructure to ensure that the fundamental rights of those marginalized are taken into account. The petitioners' case is that the marginalized population constitute at least 20% of the entire Kenyan population and that a sizeable portion of the populace has no access to internet which is the mode through which the IPPMS operates.

162. It was the contended that the Kenyan minorities and indigenous communities represent a section of the populace that is limited in access to technology, and the integration of the services to an online system will further disenfranchise these groups. This, it was averred, is due to the fact that a review of the 2019 census report reveals statistical data on the stark reality of marginalisation in the country in reference to the access of internet by the minorities and indigenous communities. From this data, it was averred that the inability of MIPs to access the internet will unjustifiably lock them out from the electoral process of registering, freely joining a political party of choice and changing a political party.

163. Article 38 of the Constitution provides as follows:

(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

164. It goes without saying that for one to exercise his right to participate in the activities of a political party, he must of necessity be at liberty to decide which political party to belong to and when to leave a particular party and join another party if he so wishes. He also ought to have facilities that enable him to confirm which political party the records indicate that he belongs to. Accordingly, it is important that efficient mechanisms be put into place to enable the citizens enjoy this right.

165. The Petitioners contend that the development of the IPPMS as the only avenue through which one can check his membership status, join a party of choice and resign from a party, restrict if not completely deprive them of their rights under the said Article in light of the fact that they have no access to internet connectivity.

166. Article 6(3) of the Constitution provides that:

> ***A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.***

167. It goes without saying that the IPPMS is developed with a view to attaining efficiency in the service delivery to those who wish to access them. It therefore behoves the State to ensure that this service is availed to all parts of the Republic since the Article 38 rights inure to all citizens. In my view any system being developed for the purpose of service delivery must be aimed at the realisation of the constitutional principles including the Bill

of Rights which is expressed in Article 19(1) of the Constitution as an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Accordingly, any system geared towards the abridgement of the fundamental rights cannot pass the constitutional test.

168. In developing a system such as one the subject of this petition, the State must ensure that the circumstances of the citizens are catered for so as to avoid violation of the rights of a particular sector of the citizenry. Accordingly, the place of the marginalised in the society must be protected. Article 260 of the Constitution defines *"marginalised community"* to mean—

> ***(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;***
> ***(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;***
> ***(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or***
> ***(d) pastoral persons and communities, whether they are—***
> ***(i) nomadic; or***
> ***(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.***

169. The same Article defines *"marginalised group"* to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).

170. In **Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya, 276/2003,** the African Commission on Human and Peoples Rights' (ACHPR) noted at para 148 that indigenous peoples are communities that:

> **"...have not been accommodated by dominating development paradigms and in many cases, they are being victimised by mainstream development policies and thinking and their basic human rights violated...indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms."**

171. In **Rangal Lemeiguran & Others vs. Attorney General & Others [2006] eKLR**, where the High Court affirmed the existence of indigenous peoples in Kenya and ruled that they had the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. The High Court further observed that Representation is a clear

constitutional recognition of a positive right of the minority – to participate in the State's political process and to influence State policies.

172. Article 10 of the Constitution provides as follows:

> ***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***
>
> ***(c) makes or implements public policy decisions.***
>
> ***(2) The national values and principles of governance include––***
>
> ***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***(b) <u>human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised</u>;***
>
> ***(c) good governance, integrity, transparency and accountability; and***
>
> ***(d) sustainable development.***

173. It is therefore clear that protection of the marginalized is one of the national values and principles of governance espoused in the Constitution. In Nairobi Civil Appeal No. 224 of 2017 – **<u>Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others</u>**, the Court of Appeal was emphatic in paragraphs 80 and 81 that:

"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

174. Article 56 of the Constitution provides that:

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) participate and are represented in governance and other spheres of life;

(b) are provided special opportunities in educational and economic fields;

(c) are provided special opportunities for access to employment;
(d) develop their cultural values, languages and practices; and
(e) have reasonable access to water, health services and infrastructure.

175. The State is therefore obliged to ensure that where the prevailing circumstances disadvantage the marginalized, affirmative action programmes designed to ensure that minorities and marginalised groups, *inter alia*, participate and are represented in governance and other spheres of life are put in place. Therefore, where a system such as the IPPMS would have the effect of disadvantaging the marginalized, the Constitution places a duty on the State to ensure that there are in place such affirmative action programmes aimed at ensuring that minorities and marginalised groups are not thereby disadvantaged. I therefore associate myself with the views expressed in **Federation of Women Lawyers Kenya (FIDA-K) & 5 others vs. Attorney General & Another [2011] eKLR** that the concept creates an obligation that minority should be given preference to make up for a history of discrimination that has placed them at an unfair disadvantage and that it is primarily a benefit to the recipient and seeks to distribute the benefit in a way that compensates for past injustices and its lingering effects.

176. The question that begs answer is whether by developing the IPPMS the State did restrict the rights of those who are unable to access internet services due to lack of the necessary infrastructure from fully enjoying their

political rights. It is not in doubt that some parts of the country have no access to internet. It is the duty of the State to ensure that in the event that it wishes to develop a particular service that depends on internet connectivity, that service is availed to all parts of the country and if not then an alternative similarly efficient system is availed. If the government, under the guise of improving the efficient of its services purports to ignore a particular segment of the society and in the process violates their freedoms and fundamental rights, such an action cannot be justified on the basis of efficiency.

177. This must necessarily be so because Article 81(b) of the Constitution provides that the electoral system ought to comply with *inter alia*, the principle of freedom of citizens to exercise their political rights under Article 38. Therefore, while Section 34B (1) of the ***Political Parties Act*** commands the 2nd respondent to establish a Political Parties Management Information System, an electronic system powered by technology, for the purpose of processing the political parties' records and data for the purpose of the Act, in designing any system that is geared towards development or improvement of the electoral system, the State must at all times bear in mind that fact that the system must promote the rights under Article 38 as opposed to curtailing the same.

178. According to the 2nd Respondent, it is upon the Political parties to ensure that the processes used in recruiting members, meets the Constitutional threshold under Articles 91(1)(e), and 27 of the Constitution and that they are precluded from discriminating against any persons including marginalized groups and minority communities. However, the role of the 2nd Respondent within the framework of the political party membership registration is to verify and certify the membership list provided by the various political parties under Section 34 of the ***Political Parties Act.***

179. In this petition, however, it is not the actions of the political parties that is under scrutiny. Rather, it is the actions taken by the 2nd Respondent towards the furtherance of its legal mandate that is under interrogation. It is contended that the 2nd Respondent, in developing a system through which the citizens are expected to check their membership status, join parties of choice and resign, the 2nd Respondent contravened the rights of the Petitioners by unjustifiably restricting them.

180. It is noteworthy, according to the 2nd Respondent, that under the ***Political Parties Act,*** 2nd Respondent is under obligation to verify whether a person wishing to join a political party meets the requirement specified in Sections 3(2A) and 34(f) of the ***Political Parties Act*** which include the fact that a person does not belong to another political party.

181. It is true that under Article 91(1)(e) of the Constitution every political party must respect the rights of all persons to participate in the political process, including minorities and marginalized groups while Section 4A (a) of the ***Political Parties Act*** imposes upon political parties the obligation to recruit and enlist members and that in so doing the processes meet the Constitutional threshold under Articles 91(1)(e), and 27 of the Constitution; and do not discriminate any persons including the marginalized groups and minority communities. However, the IPPMS is a system developed, not by the political parties, but by the 2nd Respondent. Whereas the 2nd Respondent contends that the IPPMS was developed with the involvement of all stakeholders including the political parties and the Political Parties Liaison Committee established under Section 38 of the ***Political Parties Act*** and that the representatives of the various political parties have undergone training on the use of IPPMS, that does not suffice in so far as the citizens for whom the system is meant are concerned. I agree with the petitioners that the political parties may not necessarily act in the best interest of the members taking into account the fact that in this country the political parties are practically the properties of the leadership of the parties and they may well be acting in their self-interest or interest that are not necessary those of their members.

182. The Respondents however, maintained that the political parties are allowed to recruit members through manual registration by completing recruitment forms as long as such members consent and also through Integrated Political Parties Management System (IPPMS) availed on the e-citizen platform, and web page link *ippms.orpp.or.ke* available for those who do not wish to use or have access to e-citizen account. Accordingly, every adult citizen who wishes to become a member of a political party is at liberty to use any of the mechanisms outlined above and that whichever way a party elects to enlist its members, such list must be submitted to the 2nd Respondent for verification and certification (where required) to ensure compliance with the Act.

183. Although the Respondents contended that there are in place other digital platforms that serve the citizens, I share the Petitioners' view that the IPPMS is distinct from other digital platforms as it impacts on the exercise of sovereignty protected under Article 1(2) of the Constitution on the right to elect representatives and that unlike the other digital government platforms, IPPMS deals with the right to self-determination which is the right through which all other rights flow including the right to good governance, democracy, free and open society.

184. The Petitioners however contend that whereas Article 35 of the Constitution provides that every citizen has the right of access to

information held by the State, the launch of the IPPMS by the Office of the Registrar of Political Parties falls short of this requirement in the sense that only the privileged within society have unlimited access to the internet and will thereby be privy to such information. The 2nd Respondent did not place before the Court any evidence that it took any steps towards the sensitization of the public about the options available to the public as regards the checking of membership status, joining a party of choice and resigning from a party. It seems that the 2nd Respondent was satisfied with the fact that the political parties were aware of the said options.

185. In my view, by failing to sensitize the public about the available options the 2nd Respondent failed to comply with Article 35 of the Constitution. I agree that the 1st and 2nd Respondents in failing to consult and engage the petitioners in public participation and civic education before launching the said IPPMS deprived them and their communities of opportunities for self-expression in their political affairs.

186. This *modus operandi* epitomises our entrenched routine ritual by the bodies entrusted with election management and monitoring to go dormant, whether as a result of their own inaction or as a result of the actions or omissions of other state actors to only become active when the next elections are fast approaching. As a result, actions that ought to be taken well in good time are not taken until the eleventh hour thereby catching the

people unawares. Unnecessary time is thereby wasted in break-neck litigation of disputes that ought to have been solved well in advance. Such steps as legislative and regulatory reforms, training and developments and upgrading of systems ought to be undertaken fairly early in the electoral cycle in order to avoid running around like headless chicken at the eleventh hour. One might well be forgiven to believe that we relish the confusion which has become part of our electoral DNA and that the blame game that characterise the aftermath of every election is a permanent feature of our electoral cycle.

187. While our politicians start politicking immediately after one election, our institutions charged with the process are forgotten until the politicians realise that in order for their dreams or nightmares to be realised they need those institutions. Why, for example, can't we have the necessary laws and regulations in place in good time? Why can't we ensure that the electoral management body is sufficiently funded in good time?

188. We have developed a culture of procrastination in election preparations and only wait to be jumpstarted when the elections are round the corner notwithstanding the fact that the elections date is predictable and stone-carved in our Constitution. It is now well known when elections are to take place. The month and the day of the elections is well set out in the Constitution and is no longer a matter of conjecture or secret weapon of the

Head of State. In my view, one of the reasons behind expressly setting out the month and the day of the elections in such an important instrument as the Constitution itself was to create certainty in the electoral calendar and to enable those charged with electoral preparations to prepare themselves in advance and for the State to make necessary provisions for the realisation of the principles under Article 81 of the Constitution. That Article provides as follows:

> ***The electoral system shall comply with the following principles––***
> ***(a) freedom of citizens to exercise their political rights under Article 38;***
> ***(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;***
> ***(c) fair representation of persons with disabilities;***
> ***(d) universal suffrage based on the aspiration for fair representation and equality of vote; and***
> ***(e) free and fair elections, which are—***
> ***(i) by secret ballot;***
> ***(ii) free from violence, intimidation, improper influence or corruption;***
> ***(iii) conducted by an independent body;***
> ***(iv) transparent; and***
> ***(v) <u>administered in an impartial, neutral, efficient, accurate and accountable manner</u>.***

189. It has become customary for the political class to bay for electoral reforms after every election. However, that call dies down after some time and it is forgotten that there is a need for such reforms until a year or two to

elections when the country suddenly goes into overdrive about some semblance of reforms. It is at that time that it dawns on the politicians that the Electoral Management Body is not properly constituted; that the bodies tasked with either the management of elections or resolution of electoral disputes have no substantive Chief Executive Officers; that the transmission of the electoral results requires panel beating; and that we do not have in place necessary legislative and regulatory framework that are geared towards the achievement of the constitutional threshold prescribed in Article 81 of the Constitution. As a result, we embark on what the petitioners term as ill-timed amendments to the law and in the process fail to adhere to the requirements of Article 10 of the Constitution as the 2nd Respondent failed to do in this case.

190. For an election to meet the threshold of Article 81 of the Constitution, it must, *inter alia*, be administered in an efficient and accountable manner at every stage of the process. An electoral process that is conducted in firefighting manner cannot, in my respectful view, be efficient. When we conduct our electoral processes in that manner at every electoral period, to expect different results can only be termed as miraculous. It is therefore my view the petitioners' assertion that the launch of the IPPMS a few months to election was ill-timed cannot be said to be entirely without merit.

191. This, therefore, was a classic case in which, all things being equal, this Court would have suspended the Integrated Political Parties Management System until after elections. My position is supported by the decision in **Consumer Federation of Kenya (Cofek) vs. Minister for Information & Communications & 2 Others [2013] eKLR** where the court expressed itself as hereunder:-

> **'21...I am satisfied that the Petitioner has established that the citizens will be prejudiced by the digital migration and they will suffer irreparable injury which would never be adequately compensated in damages. I say so, for reasons that will be seen shortly.**
>
> **22. The Petitioners have clearly demonstrated that the citizens freedom of information will be limited by the digital migration. In my view, it is not enough for the Respondents to contend that they have fully sensitized the public on the import and created awareness of this digital immigration. It is equally not sufficient for them to allege that they have cushioned the consumers by subsidizing the costs of the set-top boxes to affordable amounts in order to make them accessible to a common Kenyan. The Respondents has not availed such evidence before this Court. I am satisfied that the Petitioner has clearly demonstrated that the consumers who have not acquired the required set-tops to receive the digital transmission will be heavily prejudiced by this migration which harm cannot reasonably can never be compensated in damages.**
>
> **23.Even though the Respondents have proven the extensive measures they have undertaken to create public awareness of this digital migration since 2006, I am in agreement with the Petitioner**

that the timing of the switch is not proper. As a country, we are in a crucial stage of the electioneering period. Accordingly, the consumers have the right to benefit from the information available in the broadcast media as well as the information available in other media forums to enable them make informed decisions. In any event, I do not see the hurry for the migration. I am fully aware that the Respondents and the government has everything set and is prepared for the digital migration especially in Nairobi and its environs. The rest of the country is unaffected."

192. I find that the State developed the Integrated Political Parties Management System without adhering to the provisions of Article 56 of the Constitution. Not only should it have ensured that the system did not curtail the rights of the marginalised by putting in place alternative avenues through which the said communities would still realise their democratic rights but that the said alternatives were sufficiently brought home to those affected in good time to enable them take advantage of the said options.

193. I also agree with the Petitioners that currently there is no sufficient statutory or regulatory regime dealing with the rights of the marginalised groups or communities in this country. It may well be the dearth of such regimes that has confined the minorities and the marginalised communities to the periphery. I agree that in order for the rights contemplated under Articles 10, 56 and 91 of the Constitution to be realised, the State ought to take appropriate steps to make provisions that give meaningful effect to the same. The State cannot continue paying lip service to the constitutional

provisions while the people for which the said provisions are meant to protect are treated as if they are outside looking in. In my view, without any statutory or regulatory framework effectuating the rights of the marginalised, the State is simply perfecting tokenism and it was the realisation that the State was not upholding the rights of the marginalised that the Constitution expressly provided for the same.

194. It was urged that this Court ought not to interfere with the functions of the 2nd Respondent. It is however, my view that where the 2nd Respondent fails to perform its functions or performs them in a way that violates the rights and fundamental freedoms of an individual, then this is the proper forum for the victim of such violation to have his grievances addressed. The very reason for establishing a new legal order and vesting power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened in this Court was to protect the rights of minorities and others who cannot protect their rights adequately through a democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people in our society. It is only if there is willingness to protect the worst and weakest among us, that all of us can be secure that our own rights will be protected. See **State vs. Makwanyane & Another (CCT3/94) (1995) ZACC3.**

195. Article 56 of the Constitution places a duty on the State to put in place affirmative action programmes designed to uplift the standards of living of the said persons. This is not a favour but a constitutional debt owed by those upon whom sovereign power has been delegated to those who have delegated that power including the minorities and marginalised groups.

196. That said, Article 23 of the Constitution provides that a court may grant appropriate relief when confronted with rights violations. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1997] ZACC 6**:

> **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."**

197. In **Hoffmann vs. South African Airways [2000] ZACC 17; 2001 (1) SA 1; [2000] 12 BLLR 1365 (CC) at paras 42-3,** the Constitutional Court of South Africa held that:

> **"In the context of our Constitution, 'appropriate relief' must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make 'any order that is just and equitable'. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed,**

it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness. Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination."

198. **Froneman J**, in **Kate vs MEC for the Department of Welfare, Eastern Cape [2005] 1 All SA 745 (SE)** at para 16 held that:

"All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting 'appropriate relief', 'just and equitable orders', and by developing the common law 'taking into account the interests of justice'. In a constitutional democracy such as ours, courts have to devise means of protecting and enforcing fundamental rights."

199. This Court in arriving at the appropriate relief must always consider Article 1(1) of the Constitution which provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance

with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names.

200. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

201. It is therefore my view, and I so hold, that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest

in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore, the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

202. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

203. I gather support from the case of **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** where the Court of Appeal set out principle of public interest;

> **"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm**

the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"

204. In this case, the Court cannot ignore the fact that the said Integrated Political Parties Management System has been used by many Kenyans in correcting their political party membership status. It may also have assisted them in choosing their parties by either joining or resigning therefrom. To suspend or reverse the system would mean that the crafty political party officials who enlisted Kenyans as members of their parties without their knowledge would have succeeded in beating the system and the law. That, in my view, would clearly be inimical to the wider public interest. In the circumstances of this case, it is not my intention to throw the baby with the bathtub.

205. Having considered the material placed before me in this petition, the orders that commend themselves to me and which I hereby grant are as follows:

1. **A declaration that the State is obligated to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.**
2. **An Order directing the Respondents to put in place measures guaranteeing the full enjoyment of the fundamental rights and freedoms encapsulated under Articles 6(3), 27, 35, 38 and 56 of the Constitution of Kenya, 2010 with specific attention to minorities and indigenous peoples.**

206. I further direct that the costs of this petition be awarded to the Petitioners to be borne by the 2nd Respondent.

207. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 4th day of April, 2022

G V ODUNGA
JUDGE

Delivered the presence of:

Ms Muthoni Nyuguto for the Petitioners
Ms Mutindi for the 1st and 3rd Respondents
Mr Edwin Mukele for the 2nd Respondent
Mr Omiti for the Interested Party
CA Susan