

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

*(Coram: A.C. Mrima, J.)*

**CONSOLIDATED CONSTITUTIONAL PETITIONS NO. E540 & E546 OF  
2021**

**-BETWEEN-**

1. KATIBA INSTITUTE
2. AFRICA CENTRE FOR OPEN GOVERNANCE (AFRICOG)
3. TRANSPARENCY INTERNATIONAL KENYA
4. PHILIP GICHANA NYAKUNDI.....PETITIONERS

**-VERSUS-**

1. INDEPENDENT ELECTORAL BOUNDARIES COMMISSION
2. NATIONAL ASSEMBLY
3. SPEAKER OF THE NATIONAL ASSEMBLY
4. ATTORNEY GENERAL.....RESPONDENTS

**-AND-**

1. THE LAW SOCIETY OF KENYA
2. THE COMMUNITY ADVOCACY  
AND AWARENESS TRUST.....INTERESTED PARTIES

**JUDGMENT**

**Introduction:**

1. Since the promulgation of the Constitution of Kenya, 2010 and the subsequent enactment of various legislations relating to elections and referenda, the *Election Campaign Financing Act* No. 42 of 2013 (hereinafter referred to as '**the ECF Act**') is yet to see any meaningful implementation.
2. The two Petitions in this matter, Petition No. E540 of 2021 *Katiba Institute & Another vs. Independent Electoral and Boundaries Commission & Others* and Petition No. E546 of 2021 *Transparency International-Kenya vs. The Speaker National Assembly & Others* are an attempt to by-pass the various hurdles which have impeded the realization of the ECF Act.



3. Through an order of this Court of 24<sup>th</sup> January, 2022 Petition No. E540 of 2021 and Petition No. E546 of 2021 were consolidated. I will henceforth refer to them jointly as **'the consolidated Petitions'**.
4. The consolidated Petitions are opposed.

**The 1<sup>st</sup> & 2<sup>nd</sup> Petitioners' case:**

5. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners' Petition is dated 17<sup>th</sup> December, 2021 and is supported by the Affidavit of *Christine Nkonge* deposed to on an even date.
6. Contemporaneously filed with the Petition was an application by way of a Notice of Motion under a certificate of urgency. Through the application, the Petitioners sought interim conservatory orders suspending the resolution of The National Assembly annulling the Gazette Notice setting limits for spending and contributions for 9<sup>th</sup> August 2022 General Elections pending hearing and determination of the application and the main Petition.
7. This Court directed that the application be subsumed in the Petition and be heard together.
8. In the main, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners pleaded that the power donated to Independent Electoral and Boundaries Commission (hereinafter referred to as **'the 1<sup>st</sup> Respondent'** or **'the IEBC'** or **'the Commission'**) to make regulations under section 29(1) is unconstitutional to the extent that it requires mandatory approval of the National Assembly, the 2<sup>nd</sup> Respondent herein.
9. As a result of the foregoing unconstitutionality, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners impugned the reasonableness and lawfulness of the National Assembly's failure to approve the Regulations developed by the Commission in the year 2016 as well the ones developed in the year 2020.
10. They pleaded that the requirement under section 29(1) of the ECF Act resulted in absence of rules regulating election campaign financing contrary to Sections 5 and 18 of the ECF Act which



obligates the Commission to make rules to regulate election campaign financing and the limits thereon not less than twelve months to a general election.

11. It was further their case that Section 29(1) of the ECF Act is inconsistent with Article 88(4) of the Constitution which bestows the Commission the responsibility to regulate of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election.
12. The Petitioners contended that Section 19 of the ECF Act entitles the Commission to publish in the *Gazette Notice* the nature of authorised items or activities including the cost of venue where campaign activities may be undertaken, publicity material for campaigns, advertising for the campaigns, campaign personnel, transportation in respect of campaign activities and any other justifiable expenses for which campaign expenses may be incurred.
13. In reference to the Final Report of the Constitution of Kenya Review Commission of 2005 that prescribed capping of expenditure of electoral campaigns, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners posited that the election campaign finance regulation is justified by the need to limit overspending and “crowding out” rival candidates who are modest spenders. They claimed that it also encourages greater participation in the electoral process towards the legitimacy of its outcome.
14. They further pleaded their case based on the findings of Independent Review Commission (IREC) (Kriegler Commission) to the effect that the absence of legislation or rules to regulate collection and expenditure of campaign funds rendered the then ECK toothless regarding the regulation of campaign finance, and politicians had the leeway to apply the law of the jungle in respect of finances.
15. The Petitioners posited that the foregoing was ultimately rectified and codified in Article 88(4)(i) of the 2010 Constitution.
16. In demonstrating unconstitutionality of section 29(1) of the ECF Act, the Petitioners claimed that IEBC has twice tried in vain to

bring before the National Assembly regulations on campaign financing for approval.

17. It pleaded that through The Draft Election Campaign Financing Regulations, 2016, the Commission published and submitted Regulations to the National Assembly for approval ahead of the 2017 general election but they were rejected and revoked, despite being in force by operation of the of law under section 15(2) of the Statutory Instruments Act.
18. It was their case that the National Assembly later on 16<sup>th</sup> January 2017 inserted Section 1A in the ECF Act suspending the entire Act until immediately after the 2017 general elections resulting in lack of rules on election campaign financing and expenditure limits for the 2017 elections contrary to Article 84 of the Constitution.
19. The Petitioners further pleaded that on 5<sup>th</sup> August, 2021 the Commission submitted the Election Campaign Financing Regulations 2020 to Parliament for approval for the general election scheduled for the 9<sup>th</sup> August, 2022.
20. Subsequently, they posited that on 9<sup>th</sup> August, 2021 the Commission, through Gazette Notice 8024 of 2021 published Contributions and Spending Limits for Political Parties and Candidates for the 9<sup>th</sup> August, 2022 General Election.
21. It was their case that upon being presented to Parliament, the Committee on Delegated Legislation tabled a Report recommending the National Assembly to annul the Gazette Notice and reject the publication of the Draft Election Campaign Financing Regulations, which it did in a motion voted to on 28<sup>th</sup> September, 2021.
22. The Petitioners pleaded that the National Assembly's resolution annulling and rejecting the Gazette Notice was communicated to the Commission.
23. In identifying the particulars of unconstitutionality of the impugned section, the Petitioners stated that it has the unconstitutional purpose and effect of shifting the constitutional



- responsibility to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election under Article 88(4)(i) from the IEBC to the National Assembly.
24. It was their case that mandatory approval of the regulations before Gazettement has the unconstitutional purpose of encroaching on IEBC's independent mandate contrary to Article 88(5) and 249(2) of the Constitution.
  25. They further pleaded that the National Assembly alongside other stakeholders have a right of public participation in the process but not the right to approve that which exclusively belongs to the Commission.
  26. The Petitioners asserted that the requirement under Article 29(1) of the ECF Act was further unconstitutional since it introduced an impermissible conflict of interest, requiring members of the National Assembly to approve rules governing their own election campaign financing contrary to Article 73(2)(b) and 75(1)(b) of the Constitution and Section 16(1) of the Leadership and Integrity Act, 2013.
  27. On a separate line of argument, the Petitioners pleaded that the National Assembly's consideration of the election campaign finance regulations under the Statutory Instruments Act, 2013 was *ultra vires* that Act because Article 88(4)(i) regulations are not "statutory instruments" but rather constitutional instruments as distinguished by Article 94(5) of the Constitution.
  28. The Petitioners drew parallels of the constitutional conferment of authority to IEBC to make provisions having force of law not to be subjected to parliamentary approval, with the power of the Chief Justice to make rules under Article 22(3) of the Constitution the power of the Supreme Court to make its rules and that of Salaries and Remuneration Commission to set and review remuneration and other benefits of all state officers under Article 230(4)(a) of the Constitution.
  29. The Petitioners reiterated that the National Assembly's resolution revoking and annulling the IEBC's ECF Regulations violated Article 81(e) of the Constitution on free and fair elections which



are “free from violence, intimidation, improper influence or corruption”, Article 88(4) of the Constitution and Sections 5, 12, 18 and 19 of the ECF Act on IEBC’s responsibility to develop election regulations.

30. The Petitioners also faulted the decision of the Parliament to annul and revoke the Regulations stating that it was not subjected to any meaningful public participation in violation of Articles 10 and 118 of the Constitution.
31. The Petitioners claimed that the National Assembly’s resolution was unreasonable, uninformed by intelligible reasons and in violation of Article 47’s requirement for reasons. They pleaded that the resolution to annul the limits and reject the Regulations (without options) was disproportionate and violated Article 24 of the Constitution and Section 4(1) of the FAA.
32. They asserted that National Assembly’s resolution was not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before it or the reasons given for it.
33. In conclusion, the Petitioners claimed that the National Assembly’s resolution unlawfully failed to distinguish the periodic gazette notices issued under Sections 12, 18 and 19 of the ECF Act with the Regulations under Section 29 of the ECF Act.
34. From the foregoing, it was their case that the IEBC’s decision of 8<sup>th</sup> October, 2021 in Gazette Notice 10723 of 2021 revoking Gazette Notice 8024 of 2021 was unconstitutional and invalid.
35. In the main, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners prayed for the following reliefs: -
  - a. *A declaration be and is issued that section 29(1) of the Election Campaign Financing Act, 2013 contradicts Article 88(4)(i) in so far as it requires mandatory approval by the National Assembly of regulations made by the IEBC under Article 88(4)(i) on “the amount of money that may be spent by or on behalf of a candidate or party in respect of any election”;*



- b. A declaration be and is issued that IEBC's decision under Article 88(4)(i) regulating "the amount of money that may be spent by or on behalf of a candidate or party in respect of any election" is a "constitutional instrument" and not a "statutory instrument" for the purposes of section 2 and 11 of the Statutory Instruments Act, 2013; c)
- c. A declaration be and is issued, further, that sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 do not require approval of the National Assembly as a condition precedent;
- d. An Order of Certiorari does issue removing into the court and to quash:
- (i) the National Assembly's resolution of 28th September 2021 to: (i) annul Gazette Notice 8024 of 2021 on Contributions and Spending Limits for Political Parties and Candidates for Purposes of the General Election Scheduled to be Held on 9th August 2022; and (ii) reject publication of the Election Campaign Financing Regulations 2020;
  - (ii) the IEBC's decision of 8th October 2021 in Gazette Notice 10723 of 2021 revoking Gazette Notice 8024 of 2021 on Contributions and Spending Limits for Political Parties and Candidates for the 9th August 2022 General Elections;
- e. An order of mandamus does issue compelling the IEBC to publish the Election Campaign Financing Regulations, 2020 within (14) days of the court's order;
- f. The Speaker and the National Assembly bear the costs of this petition for their repeated constitutional violations.

**The 3<sup>rd</sup> and 4<sup>th</sup> Petitioners' case:**

36. The 3<sup>rd</sup> and 4<sup>th</sup> Petitioners lodged their case through an Amended Petition dated 7<sup>th</sup> January, 2022. It was supported by the amended Affidavit of *Sheila Masinde*, deposed to on an even date.
37. The substratum of their case is largely as urged by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners save that they contended *inter alia* that the regulations



under Article 88(4)(i) of the Constitution were statutory instruments and not constitutional instruments.

38. They, however, hastened to add that the Preamble of both the IEBC Act and that of ECF Act call for effective operation and regulation of the amount of money that may be spent on any election by a candidate or party.
39. The Petitioners pleaded that IEBC has the mandate under Section 3(1) of the IEBC Act to set spending limits and enforce compliance, and verify sources of contributions to a candidate.
40. It was further their case that under Section 4 of the IEBC Act, the Commission has the mandate to investigate all matters relating to performance of its functions under the Act including request for information relating to part nomination expenses and election campaign expenses and have candidates and have them account for expenditure under Section 7 as read with Section 8 of the IEBC Act.
41. The Petitioners posited that Section 11 of the ECF Act prescribes for sources of funds for nomination and section 13 thereof prohibits anonymous contributions or contributions from illegal sources.
42. In respect of the foregoing provisions and the failed attempt by the IEBC to get the regulations approved, the Petitioners pleaded that the National Assembly failed to exercise its constitutional mandate and statutory authority in 2016, 2017, 2018, 2019, 2020 and 2021 when it did not to invite or summon the IEBC to either provide the Committee on delegated legislation with any information relevant to the Implementation of the ECF Act or to receive recommendations from the Committee on modifications necessary to make the regulations more effective and efficient.
43. It was their case that the failure by the National Assembly to approve the Regulations within the timelines contravened Section 15 of the Statutory Instruments Act of 2013 and Article 259(8) of the Constitution.



44. It asserted that the National Assembly's purported rejection of the regulations was inoperative since they had come into force by dint of Section 15(2) of the Statutory Instrument Act.
45. In respect of the amendment of Section 1 of the ECF Act that inserted Section 1A suspending the entire Act, it was the Petitioner's case that the National Assembly acted *ultra vires* and in contravention of Articles 2(2), 10(1), 73(1) and 2(c) and 94(4) of the Constitution.
46. On the foregoing factual and legal backdrop, the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners sought the following reliefs: -
- a. *A declaration be and is hereby given that the National Assembly has failed in its constitutional and statutory obligation to enact and election campaign regulations necessary to give effect to the Elections Campaigns Financing Act No. 42 of 2013.*
  - b. *A declaration be and is hereby issued that the Election Campaign Financing Regulations 2016 come into operation by dint of section 15(2) of the Statutory Instruments Act No. 23 of 2013.*
  - c. *A declaration be and is hereby issued that the publication of contribution and spending limits for political parties and candidates for purposes of a general election pursuant to the powers conferred to the Independent Electoral and Boundaries Commission by Article 88(4)(1) of the Constitution, Section 4(1) of the Independent Electoral and Boundaries Commission Act No. 9 of 2011 and section 12, 18 and 19 of the Election Campaigns Financing Act No. 42 of the 2013 does not require the approval of the National Assembly.*
  - d. *A declaration be and is hereby issued that section 1A of the Election Campaign Financing Act No. 42 of 2013 is unconstitutional.*
  - e. *An order of certiorari to remove into the Honourable Court to quash the Resolution of the National Assembly passed in its sitting on the 20<sup>th</sup> December 2016 purporting to reject the election Campaign Financing Regulation 2016.*
  - f. *An Order of Certiorari to remove into this Court and quash the resolution of the National Assembly passed in its sitting on 28<sup>th</sup> September 2021 purporting to annul in its entirety*



*the contributions and spending limits for political parties and candidates for purposes of the general election scheduled to be held on 9<sup>th</sup> August 2022 published in the Gazette Notice No. 8024.*

**The Petitioners' submissions:**

47. *Mr. Ochiel Dudley*, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners made oral submissions. His highlights were generally a reflection of the pleadings.
48. Counsel reiterated that the regulations made under Section 29 of the ECF Act were constitutional instruments and as such was not subject to the National Assembly's approval.
49. He stated that the National Assembly's failure culminated in violation of Article 38 of the Constitution on political rights.
50. It was submitted that Parliament did not subject its decision to revoke the Rules to public participation; an important step in the new constitutional dispensation.
51. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners, *Miss. Kimeu*, submitted that whereas *Petition E540 of 2021* was about failure by the National Assembly to approve the Regulations within twenty-eight days statutorily provided for under Section 15 of the Statutory Instruments Act, *Petition E546 of 2021* was about the consequences of the failure to approve the Regulations.
52. It was her case that campaign money must be regulated otherwise it corrodes Article 88 of the Constitution.
53. It was her submission that the non-action of the National Assembly extinguished its decision-making power and such power lapsed when it failed to approve the Regulations within 28 days of receipt by the National Assembly.
54. Counsel reiterated that the purported involvement of the National Assembly in the process was usurpation of powers of the IEBC.
55. She submitted that the capping of spending limit was to create a level playing ground for all Kenyans to take part in politics.



56. The 3<sup>rd</sup> and 4<sup>th</sup> Petitioners filed joint written submissions dated 18<sup>th</sup> February, 2022.

57. On failure to abide by statutory timelines and lapse of power of the National Assembly they relied on *Katiba Institute -vs- President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others {Interested parties}* (Petition 206 of 2020) [2021] where it was observed: -

a. *That upon the lapse of the fourteen days, in (a), above, without the 1<sup>st</sup> respondent having made the appointments, it shall be presumed that his power to make them has expired and his office become functus, so far as the appointments are concerned, and the six nominees shall be deemed duly appointed, effective from the date of default, as Judges of the Superior Courts for which they were recommended;*

b. *That subsequent to their being deemed appointed, under (b), above, the Respondent, in conjunction with the 1<sup>st</sup> interested party, shall be at liberty to take all necessary steps to swear the six Judges." (Emphasis supplied)*

58. Further reliance was placed on *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others {Interested Parties}* [2020] eKLR where the reasoning in *Law Society of Kenya v Attorney General & 2 others* (supra) was adopted in the following manner: -

148. *Even if the Respondent was to successfully argue that there is no timeline and, therefore, the President can take as much time as he likes without violating the Constitution, then he needs to be reminded of Article 259(8) which provides that:*

*If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.*

59. In submitting that the IEBC enjoyed independence clause under Article 249(2) of the Constitution, reference was made to the Supreme Court in *In the Matter of the National Land Commission* {2015} eKLR; Advisory Opinion Reference No. 2 of 2014 where it was observed: -

*Functional independence; this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies. This has also been referred to as administrative independence (See JSC Speaker of the National Assembly and Others; and the South African Constitutional Court decision in New National Party of South Africa.) Functional independence is in line with the general functions and powers of commissions, as provided under Articles 252 and 253 of the Constitution.*

60. As the Interested Parties supported the consolidated Petitions, I will deal with their respective cases.

**The 1<sup>st</sup> Interested Party's case:**

61. The Law Society of Kenya supported the Petition through the Replying Affidavit of *Florence Wairimu Muturi* deposed to on 1<sup>st</sup> February, 2022.
62. She deposed that a decision by the Commission in so far as its constitutional mandate under Article 88(4) (i) is concerned, is not examinable or subject to the Statutory Instruments Act.
63. She reiterated the argument that Section 29(1) of the Election Campaign Financing Act, 2013 contradicts Article 88(4)(i) in so far as it requires mandatory approval by the National Assembly of regulations made by the IEBC under Article 88(4)(i) on “the amount of money that may be spent by or on behalf of a candidate or party in respect of any election”; amounts to legislative superfluity and, therefore, unconstitutional.
64. It was her case that regulations made by the IEBC pursuant to its constitutional mandate under Article 88(4)(i) are not statutory instruments subject to parliamentary oversight within the meaning of the Statutory Instruments Act and the annulment of the Gazette Notice was in violation and unconstitutional separation of powers.
65. The 1<sup>st</sup> Interested Party further urged its case in its written submissions dated 31<sup>st</sup> January, 2022.
66. It was its submission that the IEBC was an independent organ of the Constitution as was held by the Supreme Court in *Re the matter of the Interim Independent Electoral Commission*; Supreme. Court Advisory Opinion No. 2 of 2011; [2011] eKLR and in *Communications Commission*

of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR), where independence of the constitutional institutions was observed as follows: -

[59] *It is a matter of which we take judicial notice that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...*

[60] *The several independent Commissions and offices are intended to serve as “people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the ‘independence clause.*

### **The 2<sup>nd</sup> Interested Party’s case:**

67. The 2<sup>nd</sup> Interested Party, *Community Advocacy and Awareness Trust*, (hereinafter referred to as ‘**Com-Trust**’) supported the Petition through the Replying Affidavit of *Daisy Amdany*, the Executive Director, deposed to on 8<sup>th</sup> February, 2022.
68. She described Com-Trust as a non-governmental and not-for-profit organization whose main objectives include the creation of awareness and pursuit of the interest of the marginalized and vulnerable members of the community with particular focus on the welfare and rights of women.
69. She deposed that pursuant to Article 88(4) of the Constitution as read with Sections 5 and 18 of the ECF Act there is bestowed upon the IEBC the responsibility to make rules for regulation of the amount of money that may be spent on behalf of a candidate or party in respect of any election.
70. To that end, she deposed that the 1<sup>st</sup> Respondent had twice discharged its constitutional obligation under Article 88(4)(i) in 2016 and 2020, but the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had frustrated and rejected the implementation of the Regulations on both occasions.



71. Com-Trust's case was that the making of rules for regulation of campaign financing is an express constitutional function of the IEBC and is neither subject to the Statutory Instruments Act, 2013 nor capable of being subjected to approval by National Assembly.
72. She further deposed that the failure to have regulations will make the elective positions for the upcoming general election scheduled for 9<sup>th</sup> August, 2022 a preserve for the rich thus excluding the poor and marginalized from political participation thus discriminating against women.
73. She deposed that the historical injustices of women being discriminated against in politics was going to be addressed by the Regulations as anticipated under Articles 10, 27 38, 81 and 100 of the Constitution.
74. She urged the Court to intervene by finding that Article 88(4)(i) Regulations are not statutory regulations and do not require parliamentary approval.
75. In its written submissions dated 8<sup>th</sup> February, 2022, the 2<sup>nd</sup> Interested Party reiterated its case as in the Replying Affidavit of the Daisy Amdany.

**The 1<sup>st</sup> Respondent's case:**

76. The Commission made its case through the Replying affidavit of *Chrispine Owiye*, its Legal Services Director, deposed to on 1<sup>st</sup> February, 2022.
77. He deposed that Kenya's pre-2010 constitutional dispensation was rife with weak regulation of campaigns that did not confer any power on any of its organs regulating campaigns.
78. As a result, he stated that Kenya's political culture was characterized by corruption and political expulsion especially during elections. The issue was addressed by the Constitution of Kenya Review Commission which recommended in its final Report that the IEBC should prescribe a maximum amount that a party



or candidate may spend on electoral campaigns in order to ensure that fairness in campaigns.

79. In reference to the Krieger Report, he deposed that the absence of rules to regulate collection and expenditure of campaigns funds by the Electoral Commission of Kenya had adverse effects on the 2007 elections.
80. Mr. Owiye further deposed that the Committee of Experts on Constitutional Review noted the importance of having a ceiling on the on spending during campaigns as it was consistent with the objects of good governance, enhanced transparency and reduced incentive of grand corruption for political campaigns.
81. Consequently, he deposed that the 2010 Constitution brought in the changes under Article 88(4)(1), 88(5) which mandated the commission to undertake the regulatory role.
82. It was further his case that statutorily the Elections Act in Section 109 empowers the Commission to make regulations with regard to financing of campaigns during a referendum or an election. He also referred to the ECF Act in section 5, 12 18, 19 and 29 to that end.
83. It was his case that pursuant to the foregoing, the Commission drafted Election Campaign Financing Regulations 2016 and refereed to the National Assembly for review and approval but is yet to receive feedback since then. The Commission, was as a result of the National Assembly's failure, unable to publish the Regulations.
84. He deposed that despite the failure by the National Assembly to approve draft regulations, The Commission went ahead to publish the spending limits as envisaged by section 5, 12, 18 and 19 of the ECF Act.
85. He stated that the foregoing suffered a setback when Parliament amended the ECF Act by inserting section 1A which suspended the application of the ECF Act.



86. In respect of the Campaigns Regulations, 2020, he deposed that it followed the process of subjecting the regulations to National Assembly and published Gazette Notice No. 8024 an upon subjecting to the National Assembly, the Committee on Delegated Legislation was of the opinion that the Commission had unjustifiably delayed in submitting the instruments and on that basis recommended to the House that they be annulled and revoked.
87. He deposed that among the reasons for rejection were the findings that it had issues of conformity with Statutory Instruments Act in respect of statutory timelines, drafting errors, failure to conduct public participation an existence of pending proposals from the Commission to amend the ECF Act.
88. In conclusion, he stated that the requirement under Section 29 of the ECF Act limits the Commission's power to make regulations.
89. The 1<sup>st</sup> Respondent further urged its case through written submissions dated 11<sup>th</sup> March, 2022.
90. It identified issues for determination as; *The interpretation of section 29 of the Elections Campaign Finance Act vis-à-vis section 11 of the Statutory Instruments Act; and The distinction between the Regulations made under section 29 of the Election Campaign Finance Act and the ceilings created under sections 12, 18 and 19 thereof.*
91. On the first issue regarding interpretation of Section 29 of the ECF Act and Section 11 of the Statutory Instruments Act, it was submitted that two sections indicate that the process of enactment of Regulations under the ECF Act is a two-step process. The first part involves the IEBC preparing draft Regulations and submitting them to the National Assembly for approval and the second part requires the IEBC, as the rule making authority, to submit the approved and published regulations to the National Assembly for tabling and laying in the National Assembly.
92. It was its case that the scenario obtaining in Section 29 of the ECF Act requiring that the IEBC must submit its draft regulations before Parliament is a unique one since there is no other rule



making authority which is obligated by Parliament to submit a “draft” of the regulations before they are published only to be reconsidered by the same Parliament under a different regime of law.

93. It submitted that the foregoing is an unreasonable fetter to the 1<sup>st</sup> Respondent’s exercise of constitutional functions. It was its position that the Regulations submitted to the National Assembly made pursuant to Section 29 of the ECF Act ought to have been approved with or without amendments.
94. On the second issue regarding the distinction between the Regulations made under Section 29 of the ECF Act and the ceilings created under sections 12, 18 and 19 of the Statutory Instruments Act, it was its case that since Section 29 empowered the IEBC to draft the Regulations under said provision, it followed that the same were to be forwarded to Parliament for approval to be legally compliant. However, it submitted, for the spending and contributions ceilings created Sections 12, 18 and 19, the IEBC, when exercising such powers does not seek or require the direction or permission from any other person or authority.
95. In his oral highlights, *Mr. Ocholla*, Counsel for the 1<sup>st</sup> Respondent pointed out the fact that the wording of Sections 12, 18 and 19 of the ECF Act was in mandatory terms for the use of the word ‘SHALL’.
96. Support was found in *Diana Kethi Kilonzo & Another -vs- Independent Electoral and Boundaries Commission & 10 Others* [2013] eKLR where it was observed: -
- we note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation.*
97. In respect of the place of Gazette Notices *vis-à-vis* Parliamentary approval, this Court was referred to *Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others* [2014] eKLR where it was observed that: -



*The core of the dispute before us is the resolution by the National Assembly to nullify the Gazette Notices issued by SRC, and the issuance of a certificate of nullification subsequent to the said resolution. The critical question for determination is therefore whether the National Assembly exceeded its mandate in quashing the Gazette Notices issued by the SRC....In our view, the SRC was doing its job, exercising its constitutional mandate and function with regard to the remuneration of State Officers, when it issued the Special Issue of the Kenya Gazette on 1st March, 2013. In moving to quash the Gazette Notice containing the remuneration and benefits of its members, the National Assembly stepped into the arena reserved for the SRC by the Constitution...*

98. On the foregoing the IEBC maintained that the buck stopped with it and not Parliament with regard to gazettelement of the ceilings of election campaign finance.
99. Remarkably, it submitted that if Parliament was aggrieved by the Gazette Notice, it ought to have challenged it in Court as opposed to arrogating itself the power of annulment which it did not have.
100. In the end, Mr. Ocholla observed that the given the timelines in the election, he prayed that the implementation of the regulations under Section 29 of the ECF Act which were annulled by National Assembly be postponed to the next general elections.

**The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case:**

101. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are *The National Assembly* and *The Speaker of the National Assembly* respectively. They opposed the Petition through the Replying Affidavit of *Jeremiah Ndombi*, the Deputy Clerk of the National Assembly, deposed to on 31<sup>st</sup> January, 2022.
102. It was his deposition that the import of Articles 94(5) and 95(5)(b) of the Constitution on the mandate of the National Assembly is to exercise oversight over state organs on which it has given power to make provisions having the force of law.
103. To that extent it was his case that the Petitioners were wrong to contend that the National Assembly does not have power to approve regulations made by the IEBC.

104. He deposed that the oversight function is a core democratic role and ultimate legislative power of Parliament meant to enhance democracy and accountability to the people of Kenya. The power is only delegated to the IEBC through statute by dint of Article 94(5) of the Constitution.
105. He deposed, therefore, that regulations made pursuant to Section 29(1) of the ECF Act and other rules or regulations made for purposes of implementing Sections 12, 18 and 19 of the ECF Act fall within the definition of a Statutory Instruments and as such are subject to the provisions of the Statutory Instruments Act.
106. It was his case further that various legal regimes regulating the conduct of politics in Kenya including the Elections Act, the IEBC Act and The Elections Finance Management Act among others have developed various rules and regulations on matters relating to elections and which have been considered and approved by Parliament.
107. He deposed that the National Assembly had not exercised impartiality, bias or demonstrated conflict of interest in their consideration, despite the regulations governing their own elections.
108. In responding to the Petitioners' contention that the annulment and rejection of the 2016 Draft Election Campaigns Regulation was irregular, he deposed that the Committee on Delegated Legislation considered and rejected it for being in contravention of Section 5 of the ECF Act and Section 13(a) of the Statutory Instruments Act, 2013.
109. As regards the insertion of Section 1A that suspended the operation of the ECF Act, it was his case that the suspension was occasioned by the lack of regulations in force to enable its enforcement during the 2017 elections.
110. He deposed that due to the requirement in Section 5 of ECF Act, the rules applicable to the general election are to be made before every general election because of the changing circumstance of political cycles. Consequently, the 2016 regulations would only be applied to the 2017 Elections, and the same would expire



thereafter. New regulations would then be formulated for the next general election.

111. In the end, it was its case that there was unjustifiable delay by the IEBC contrary to Section 5(a) of ECF Act and Section 13 of the Statutory Instruments Act, 2013. Further, that the said regulations contained errors contrary to section 13(m) of the Statutory Instruments Act. He deposed that the Regulations were the same ones that were submitted in the year 2016.
112. Fault was further placed at the IEBC's unprocedural publication of contributions and spending ceilings on 9<sup>th</sup> August, 2021 and failure to subject the regulations of 2020 to public participation.
113. In conclusion, it was his case that the contention by the Petitioners that the Regulations came into operation upon failure by Parliament to approve them was misplaced and in error as the said regulations failed to comply with Section 13(a) and (j) of the Statutory Instruments Act and Sections 5(a), 12, 18 and 19 of the ECF Act.
114. It urged the Court to dismiss the Petition and the application with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
115. In its written submission dated 18<sup>th</sup> March, 2022 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents urged their case as in the deposition of *Jeremiah Ndombi*.
116. In distinguishing legislative authority of the National Assembly and the electoral responsibility of the IEBC, it was submitted that under Article 88(4)(1) of the Constitution the Commission has the responsibility to conduct of referenda and elections as prescribed by an Act of Parliament.
117. It was further submitted that the foregoing provision cannot be interpreted to mean that IEBC is empowered to develop laws having the force of law without the oversight of Parliament.
118. In her oral highlights, *Miss Otieno*, Counsel for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents reiterated that by dint of the provisions of Article 88 (4)(i) of the Constitution, any subsidiary legislation emanating



from the ECF Act is a statutory instrument and is subject to the provisions of the Statutory Instruments Act.

119. It was her further submission that Article 88(4)(i) of the Constitution does not empower the IEBC to create “constitutional instruments” as interpreted by the Petitioners. Instead, all regulations formulated by the IEBC campaign financing are statutory instruments in accordance with the Statutory Instruments Act.
120. In rebutting the claim that Section 29 of the ECF Act was unconstitutional, it was submitted that delegation of powers to a state organ is allowed by dint of Article 94(5) of the Constitution, therefore, the provision of Section 29 of the Act is a direct result of the exercise of that power.
121. It was submitted that the National Assembly procedurally considered the ECF Act and has the responsibility of ensuring that the regulations submitted meet the parameters set out in Section 13 of the Statutory Instruments Act.
122. To that end, support was found in *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 Others* [2018] eKLR where the place of statutory instruments was discussed in the following manner: -

*Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, e.g. a Commission, authority or a Board. Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act, The Parent Act, The Statutory Instruments Act in that the Act requires: - (a) Consultation with stakeholders, (b) preparation of regulatory Impact Statement, preparation of explanation memorandum, tabling of statutory instrument in the House, consideration of the statutory instrument by the National Assembly Committee on Delegated Legislation.*

123. It was her case that the Regulations did not meet the requirement as provided in the foregoing precedent.
124. It was also submitted further that the Petitioners have not challenged the procedure of enactment of the ECF Act and have no evidence to show the manner in which the provisions of the impugned section violate their rights.

125. In conclusion, it was submitted that the consolidated Petitions were not merited and ought to be dismissed with costs.

**The 4<sup>th</sup> Respondent's case:**

126. The Attorney General opposed the Petition and the application through Grounds of Opposition dated 14<sup>th</sup> January, 2022.

127. In reference to Articles 1(1)(2), 94(1)(5) and 95(3) of the Constitution, Section 29(1) of the ECF Act and Section 11 of the Statutory Instruments Act, it was its case that the National Assembly retains the ultimate legislative authority to make provisions having the force of law, and is not estopped from altering previous or present statutes or statutory instruments when it deems fit.

128. The 4<sup>th</sup> Respondent held the same view as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents arguing that the draft Election Campaign Financing Regulations, 2020 as published by the 1<sup>st</sup> Respondent were subject to parliamentary consideration and approval.

129. It asserted that the Gazette Notice No. 8024 publishing the spending and contribution was null and void since they were be informed by the enactment of the Election Campaign Financing Regulations, 2020 which were revoked by the National Assembly.

130. In respect of the application, it was submitted that the Petitioners had not surmounted the strict interpretation of Article 23(3)(c) which requires relief for conservatory orders to be given only when there is a *prima facie* case and when a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

131. They prayed that the consolidated Petitions be dismissed with costs to the Respondents.

132. The 4<sup>th</sup> Respondent also urged their case through written submissions dated 3<sup>rd</sup> March, 2022 and further through the oral submissions of its Counsel *Miss Mutindi*.



133. The 4<sup>th</sup> Respondent reiterated the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' case urging that there was no public participation, that it was submitted late in the day, had drafting errors and were, therefore, null.
134. In respect of the drafting errors, it was submitted that that the citation read "*Campaign Financing Regulations, 2016*" whereas the heading read "*Campaign Finance Regulations 2020.*"
135. The Respondent maintained that the 2016 Regulations could not be relied on for the purpose of the 2022 general elections since by dint of Sections 12, 18 and 19 of the ECF Act, fresh Rules regulating election campaign financing are to be published 12 months before a general election.
136. To buttress the importance of public participation, it was stated that in *British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR, the Court of Appeal held as follows;
47. *It is clear that since the promulgation of the Constitution of Kenya 2010, the concept of public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels.*
137. On a new line of argument, Miss Mutindi in her oral highlights was emphatic that there is no such thing as *Constitutional Instruments* in the Kenyan legal framework. It was her case that the concept is foreign to the 2010 Constitution.
138. In the end, she claimed that the National Assembly involved the public in declining the Regulations.

**Issues for Determination:**

139. Having carefully perused the pleadings, the dispositions, the submissions and the various decisions referred to by the parties, I hereby discern the following issues for determination: -



- (a) *The principles of constitutional and statutory interpretation.*
- (b) *Whether the regulations contemplated under Article 88(4) (i) of the Constitution are ‘constitutional instruments’ or ‘statutory instruments’.*
- (c) *In the event the answer to (ii) above is that the Regulations contemplated under Article 88(4)(i) of the Constitution are statutory instruments, whether the Constitution and the law were complied with in relation to Election Campaign Financing Regulations, 2016 and Election Campaign Financing Regulations, 2020.*
- (d) *The constitutionality of Section 29(1) of the Election Campaign Financing Act in respect to whether Parliament usurped the powers of the Independent Electoral and Boundaries Commission in requiring the mandatory approval of the Regulations by the National Assembly.*
- (e) *Whether Sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 require the approval of the National Assembly as a condition precedent to implementation.*
- (f) *What remedies, if any, ought to issue?*

140. I will deal with the issues in *seriatim*.

**Analysis and Determination:**

**(a) The principles of constitutional and statutory interpretation:**

141. A brief look at the principles of constitutional and statutory interpretation will lay a basis for consideration of the rest of the issues herein.

142. The Constitution is a document *sui generis*. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.

143. In Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) **Okiya Omtatah Okiiti vs. Public Service Commission & 73 Others** (2021) eKLR, this Court discussed the principles of constitutional interpretation at length. It observed as follows: -

54. *As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).*
55. *Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.*
56. *Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21<sup>st</sup> December, 2011 in In the Matter of Interim Independent Electoral Commission [2011] eKLR discussed the need for Courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The Court stated as under: -*

*[86] ... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the **Preamble**, in **Article 10**, in **Chapter 6**, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. **Article 159(1)** states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*

*[87] In **Article 259(1)** the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and*



human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” **Article 20** requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

[88] ..... **Article 10** states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

[89] *It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.*

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:

*This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.*

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -

*...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete*



constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997) the Court was of the firm position that the Constitution should be read as an integrated whole. The Court observed as follows: -

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

60. In Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

[21] .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

· that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.

· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.

· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable



*or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.*

63. In Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

*...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.*

64. The Court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R -vs- Drug Mart (1985)* when it made the following remarks: -

*The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.*

65. The Supreme Court, while referring to the South African Constitutional decision in Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC), went further and stated that a purposive approach is 'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'

66. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S -vs- Zuma (CCT5/94) 1995* when it stated that in taking a purposive



approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

144. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No. 71 of 2014, **Institute of Social Accountability & Another vs National Assembly & 4 Others** [2015] eKLR remarked as follows: -

***[I]n determining whether a statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows: -***

*Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects*



have been looked to for guidance in assessing the legislation's object and thus the validity.

[59.] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in *Re The Matter of the Interim Independent Electoral Commission Constitutional Application* (supra) at para. 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

*The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and.... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.*

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997* (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in *The Speaker of the Senate & Another v Attorney-General & Another & 3 Others - Advisory Reference No. 2 of 2013* [2013] eKLR.

145. Recently, in Nairobi High Court Constitutional Petition No. E327 of 2020 ***Law Society of Kenya vs. The Attorney General and Another*** (2021) eKLR this Court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

110. I will also look at the decision in ***R. vs. Oakes***. The brief facts are that the Respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional



validity of s. 8 of the Narcotic Control Act. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s. 8 of the Narcotic Control Act violated s. 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(d) of the Charter had been violated, was the issue of whether or not s. 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter.

111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The Court came up with a three-pronged criteria. **First**, the objective which the limitation is designed to serve. **Second**, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. **Third**, the effect of the limitation.

112. On the **objective test**, the Supreme Court stated as follows:

67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ..... the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. **It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.**



113. On the **proportionality test**, the Supreme Court stated that: -

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, **in each case courts will be required to balance the interests of society with those of individuals and groups**. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

114. On the third test, that is the **effect** of the limitation, the Supreme Court stated that: -

71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. **The inquiry into effects must, however, go further.** A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. **Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on**



**individuals or groups, the measure will not be justified by the purposes it is intended to serve.** The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

146. Lastly, the Court of Appeal in **John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General** [2019] eKLR had the following to say on the constitutionality of statutes: -

27. *Here the question we have to answer is whether the learned Judge erred by not declaring Section 10 of the Political Parties Act unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, U.S v. Butler, (supra) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -*

*When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.*

Also in *The Queen v. Big M. Drug Mart Ltd*, 1986 LRC (Const.) 332, the Supreme Court of Canada stated that;

*Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have*



*been looked to for guidance in ascertaining the legislation's object and thus validity.*

28. *Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, Parliament is mandated under Article 92 to make Legislation to provide inter alia for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution.....*

147. The foregoing general discussion on the manner in which Courts ought to deal with the interpretation of the Constitution and the constitutionality of statutes suffices as a basis of the consideration of the next issue.

**(b) Whether the regulations contemplated under Article 88(4)(i) of the Constitution are 'constitutional instruments' or 'statutory instruments':**

148. **Article 88** of the Constitution is on the Commission. It provides as follows: -

- (1) *There is established the Independent Electoral and Boundaries Commission.*
- (2) *A person is not eligible for appointment as a member of the Commission if the person--*
  - (a) *has, at any time within the preceding five years, held office, or stood for election as--*
    - (i) *a member of Parliament or of a county assembly; or*
    - (ii) *a member of the governing body of a political party; or*
  - (b) *holds any State Office.*
- (3) *A member of the Commission shall not hold another public office.*
- (4) *The Commission is responsible for conducting or supervising referenda and elections to any elective body or office*



*established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for--*

- (a) the continuous registration of citizens as voters;*
- (b) the regular revision of the voters' roll;*
- (c) the delimitation of constituencies and wards;*
- (d) the regulation of the process by which parties nominate candidates for elections;*
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*
- (f) the registration of candidates for election;*
- (g) voter education;*
- (h) the facilitation of the observation, monitoring and evaluation of elections;*
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
- (j) the development of a code of conduct for candidates and parties contesting elections; and*
- (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.*

*(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.*

149. This issue endeavours a discussion on the nature of the regulations contemplated in Article 88(4) (i) of the Constitution.

150. In a snapshot, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners and the Interested Parties contended that the said regulations were constitutional instruments akin to the rules contemplated under Article 22(3) by the Chief Justice, the power of the Supreme Court to make its rules under Article 163(8) of the Constitution and the power of the Salaries and Remuneration Commission to set and review remuneration and other benefits of all state officers under Article 230(4)(a) of the Constitution. They vehemently opposed the



proposition that the contemplated regulations were statutory instruments.

151. The 3<sup>rd</sup> and 4<sup>th</sup> Petitioners and the Respondents and took the diametrically opposite position that indeed the said regulations are statutory instruments.
152. This Court recently dealt with the distinction between 'constitutional instruments' and 'statutory instruments' in Nairobi High Court Petition No. E073 of 2022 **Hon. Sabina Wanjiru Chege vs. Independent Electoral and Boundaries Commission** (unreported).
153. In a judgment rendered on 4<sup>th</sup> April, 2022, the Court under the rubric *Constitutional instruments, Statutes and Schedules thereto and Statutory instruments*, rendered itself as under: -

83. *This sub-issue is important in this case as it tends to bring forth the difference between Constitutional instruments, Statutory instruments and Statutes and Schedules to a Statute with a view to rightly classify where the various instruments referred into this matter fall.*

84. *The term 'constitutional instruments' is neither provided for nor defined in the Constitution and the law. It is a term which this Court has crafted for purposes of identifying such instruments which have the force of law, but do not include the Constitution per se, the legislations passed by Parliament or County Assemblies, the statutory instruments or subsidiary legislation, international instruments, common law or customary law.*

85. *In a general sense, constitutional instruments may be described as special kind of instruments which directly derive their basis and legitimacy from the Constitution and not from a statute.*

86. *The power to make such instruments is usually, directly conferred to a person or entity by the Constitution. The instruments are also not subject to the rigours of the law-making processes as provided for in the Constitution and the law.*

87. *The holders of the powers to formulate such instruments are usually not called upon to comply with the legislative processes provided in the Constitution and the law, but the resultant*

instrument must measure to the expected constitutional parameters and must embrace the spirit of the Constitution.

88. In Kenya, the Constitution makes provision for constitutional instruments. An example is in **Article 22(3)** which provides as follows: -

**The Chief Justice shall make rules** providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- (a) the rights of standing provided for in clause (2) are fully facilitated;
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- (c) no fee may be charged for commencing the proceedings;
- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

89. The above provision specifically mandates the Hon. Chief Justice to make certain rules. In coming up the said rules, the Hon. Chief Justice is, for instance, not called upon to subject the rules to parliamentary approval. Article 22(3) of the Constitution grants the Hon. Chief Justice the power to directly come up with the rules.

90. In the process of coming up with rules, the Hon. Chief Justice must, however, be alive to the calling that the rules must be within the Constitution. For example, the rules cannot make provisions which are in conflict with the national values and principles of governance or run contra the Bill of Rights or even usurp the powers of other constitutional entities.

91. In exercising the powers granted under Article 22(3) of the Constitution, the Hon. Chief Justice came up with the



Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which were published in the Kenya Gazette under Legal Notice No. 117 dated 28<sup>th</sup> June, 2013.

92. The above Rules are commonly referred to as '**the Mutunga Rules**'.
93. As it can be seen, the Mutunga Rules derive their basis and legitimacy directly from the Constitution and were not subjected to the law-making processes provided in the Constitution and the law. The Rules assume the character of a legal binding instrument which is between the Constitution and the laws. Such are the so-called 'constitutional instruments'.
94. On the other hand, **statutes** are the creation of Parliament and County Assemblies. Such must undergo specific processes in the Parliament and County Assemblies and can only assume the sanctity of the law with the assent of the President, in the case of national laws, and that of a County Governor in the case of a County legislation.
95. The Constitution may make provisions for Parliament or County Assemblies to make certain laws or the Parliament and County Assemblies may do so on their own volition and in discharging their cardinal mandates.
96. The statutes passed by Parliament or the County Assemblies which eventually become law may contain Schedules. There has been rival positions on whether such schedules are part of the statute or are subsidiary legislation.
97. The Court of Appeal has now settled the issue by affirming that a schedule to a statute is part of that statute. In Civil Appeal Nos. 74 & 82 of 2012 **Centre for Rights Education & Awareness & 2 Others v. John Harun Mwau & 6 Others**, the Court held as follows: -

It is clear to us that the above amendment made a specific provision for determination of duty on cigarettes. The appellant cannot validly ignore the amendment and rely only on sections 127 and 173 of the Act. It cannot be gainsaid that a schedule is an integral part of the Act with the same status as the other provisions of the Act. In other words, a schedule does not have any less status than a provision of the Act. The learned authors of Halsbury's



*Laws of England*, 4th Ed. Re-issue, para. 1399 at page 853 state thus:

“A schedule to an Act is to be construed by virtue of the functional construction rule, as an adjunct to the main body of the Act but nevertheless fully part of it. Any conflict between the inducing section (or any other section of the Act) and the schedule is to be resolved without regard to the fact that some of the relevant words are contained in the schedule rather than in the section.”

In *Centre for Rights Education & Awareness & 2 Others v. John Harun Mwau & 6 Others*, CA Nos. 74 & 82 of 2012 this Court reiterated **that a schedule is an integral part of the statute and must be given effect like all other provisions of the statute. Accordingly, we are satisfied that the learned judge did not err in holding that assessment of tax on cigarettes is to be determined as specifically provided for in Part II of the Fifth Schedule.**

The argument that the respondents cannot charge tax because of reference to “the fourth column” of the Fifth Schedule which did not in fact exist, is in our view disingenuous.

98. Speaking to a Schedule of the Constitution, the Court of Appeal in *Civil Appeal 74 & 82 of 2012 Center for Rights Education and Awareness & Another -vs- John Harun Mwau & 6 others* [2012] eKLR, the Learned Judges made the following findings: -

**Furthermore, the schedules including the Sixth schedule to the current Constitution were contained in the Proposed Constitution of Kenya which was approved in a national referendum.**

It follows therefore, and we hold, that the sixth schedule is an integral part of the current Constitution and has the same status as the provisions of the other Articles although it is of a limited duration.

99. Turning to **statutory instruments**, these are instruments deriving their basis and legality directly from Acts of Parliament or county legislations. The parent statute specifically grants the power to an entity or a person to come up with a subsidiary legislation or statutory instruments.

100. Statutory instruments are further subject to the Statutory Instruments Act, No. 23 of 2013.

101. Section 2 of the Act defines a '**statutory instrument**' to mean any rule, order, regulation, direction, form, tariff of costs or fees, letters, patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

102. An example of a statutory instrument in the form of Regulations is provided for in **Section 92(1)** of the Public Service Commission Act, No. 10 of 2017 as follows: -

(1) The Commission may make regulations prescribing anything required by this Act to be prescribed generally for the better carrying into effect the provisions of this Act.

103. In that case, an Act of Parliament (the Public Service Commission Act) grants subsidiary powers to the Public Service Commission to make regulations. The resultant regulations shall be referred to as subsidiary legislation or statutory instruments.

154. Turning to the matter at hand, **Article 82(1)** of the Constitution provides as follows: -

**Parliament shall enact legislation to provide for-**

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

(b) the nomination of candidates;

(c) the continuous registration of citizens as voters;

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

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

155. This Court is minded to interpret the Constitution in a manner as to promote the values that underlie an open and democratic



society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights.

156. The Court is further called upon to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

157. In discharging the above duty, Courts are further prompted to interpret the Constitution in a manner so as to favour a purposive approach as opposed to formalism. The Constitution must also be interpreted as a whole.

158. Perhaps at this point in time I must ascertain whether the regulations contemplated under Article 88(4) (i) of the Constitution have any bearing on elections.

159. The Elections Act in **Section 2** defines *election* in the following terms: -

*“election” means a presidential, parliamentary or county election and includes a by-election;*

160. The Black’s Law Dictionary, 9<sup>th</sup> Edition, Thomson Reuters Publishers, defines ‘**election**’ at page 595 as follows;

3. *The process of selecting a person to occupy an office (usually a public office), membership, award, or their title status.*

161. The Encyclopaedic Law Dictionary Legal & Commercial, Wadhwa and Company Publishers defines ‘**election**’ at page 551 to mean;

*An act or process of electing; the fact of being elected; the right, power or privilege to make a choice.*

162. Courts have held to the legal position that an election is a process and not an event.

163. The Supreme Court of Kenya in Petition No. 1 of 2017 ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** [2017] eKLR rendered itself on the issue as follows: -

[224] On our part, having considered the opposing positions, we are of the view that, the contentions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents ignore two important factors. One, that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. **Elections are not events but processes.** As Likoti, J.F. opines “[e]lections are not isolated events, but are part of a holistic process of democratic transition and good governance....”[101] Incidentally, IEBC’s own **Election Manual (Source Book)**[102] recognizes that an election is indeed a process.

[225] There are many other authorities which speak to this proposition. In **Kanhiyalal Omar v. R.K. Trivedi & Others**[103] and **Union of India v. Association for Democratic Reforms & Another**[104], the Supreme Court of India, for example, stated that the word ‘election’ is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.[105] Lady Justice Georgina Wood, the former Chief Justice of Ghana, made the same point and added other stages when she stated:

**“The Electoral process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country in to constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on”**[106]

And according to the European Human Rights Committee, the process also includes the right to challenge the election results in a court of law or other tribunal.[107]

[226] Here in Kenya, the issue of elections as a process was discussed in the case of **Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others**[108] where the High Court observed that:



***“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results....The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”***

164. In the above decision, the Supreme Court was precise that ‘the word ‘election’ is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; **campaign activities**; and the vote, count, tabulation and declaration of results.’
165. Deriving from the foregoing, it is apparent that the regulations contemplated under Article 88(4) (i) of the Constitution relate to elections in Kenya for the reason that they intend to control the amount of money that may be spent by or on behalf of a candidate or party in an election.
166. Having so held and in view of the provision of Article 82(1)(d) of the Constitution which calls upon Parliament to enact legislation to provide for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, there can be no doubt that the modest interpretation encompassing the cardinal principles of constitutional interpretation favours the position that Kenyans opted to donate the power to provide for the conduct and supervision of elections including the regulation of money to be spent in an election principally to Parliament through legislation.
167. It is on that basis that the Elections Act provided for the making of Regulations under **Section 109** providing for *inter alia* the *conduct of campaigns during a referendum or an election* and for



the financing of campaigns during a referendum or an election as well as **Sections 5, 12, 18, 19** and **29** of the Election Campaign Finance Act which accords the Commission powers to make regulations and rules.

168. It is for such reasons that this Court holds that the regulations contemplated under Article 88(4)(i) of the Constitution are *statutory instruments* and not constitutional instruments.
169. In the end, the contention that the regulations contemplated under Article 88(4) (i) of the Constitution are constitutional instruments fails and is hereby rejected.

**(c) Whether the Election Campaign Financing Regulations, 2016 and the Election Campaign Financing Regulations, 2020 complied with the Constitution and the law:**

170. As the Election Campaign Financing Regulations, 2016 (hereinafter referred to as '**the 2016 Regulations**') and the Election Campaign Financing Regulations, 2020 (hereinafter referred to as '**the 2020 Regulations**') are statutory instruments, I will briefly and, in the first instance, ascertain whether they were in compliance with the Statutory Instruments Act.
171. The Statutory Instruments Act is an Act of Parliament to provide for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith.
172. **Section 4** provides for the object of the Act, and as follows (with emphasis added): -

4. *Object of the Act*

*The object of this Act is to **provide a comprehensive regime** for the making, scrutiny, publication and operation of statutory instruments by—*

- (a) *requiring regulation-making authorities to undertake **appropriate consultation** before making statutory instruments;*



- (b) *requiring high standards in the drafting of statutory instruments to promote their legal effectiveness, clarity and intelligibility to anticipated users;*
- (c) **improving public access** to statutory instruments;
- (d) *establishing improved mechanisms for **parliamentary scrutiny** of statutory instruments; and*
- (e) *establishing mechanisms to ensure that statutory instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.*

173. **Part II** of the Statutory Instruments Act provides for consultations before making the statutory instruments and **Part IV** is on the Parliamentary scrutiny of statutory instruments.

174. Secondly, as will be seen in the latter part of this judgment, the regulations herein were to also be in tandem with ECF Act.

175. The third and most important requirement for validity of any statutory requirement is compliance with the Constitution.

176. Prior to looking at the compliance aspect in this matter, it is also in order to revisit how the 2016 Regulations and the 2020 Regulations come to being.

*The 2016 Regulations:*

177. According to the Commission's disposition, the Commission drafted the 2016 Regulations and referred them to the National Assembly for review and approval. The said regulations were never received back by the Commission.

178. Despite the failure by the National Assembly to approve the 2016 Regulations, the Commission went ahead to publish the said regulations pursuant to Sections 5, 12, 18 and 19 of the ECF Act.

179. It was further deposed that the National Assembly, however, amended the ECF Act by inserting Section 1A which suspended the application of the ECF Act to the next election cycle.

*The 2020 Regulations:*



180. The Commission deposed that it prepared and forwarded them to the National Assembly.
181. On the basis of the 2020 Regulations and pursuant to Sections 12, 18 and 19 of the ECF Act, the Commission had also prepared and published *vide* Kenya Gazette No. 8024 of 9<sup>th</sup> August, 2021 *the contributions and spending limits for political parties and candidates for purposes of the General election.*
182. On submission of the 2020 Regulations, the National Assembly's Committee on Delegated Legislation opined that the Commission had unjustifiably delayed submitting the instruments and on that basis recommended to the House that they be annulled and revoked together with the limits contained in Gazette Notice No. 8024.
183. The Committee also found that the regulations were not in conformity with Statutory Instruments Act in respect of statutory timelines, drafting errors, failure to conduct public participation amid the then existing pending proposals from the Commission to amend the ECF Act.
184. The House adopted the report of its Committee and revoked both the 2020 Regulations and the Gazette Notice No. 8024. The Commission issued a Gazette Notice to that effect.

On compliance:

185. Compliance with the Constitution and the law to ensure the validity of a statutory instrument is twofold. The first is on the part of the regulation-making authority and, secondly, on Parliament.
186. The requirements on the part of the regulation-making authority are provided for in **Section 5** of the Statutory Instruments Act. The provision makes it mandatory for the regulation-making authority to carry out consultation before making the statutory instrument.
187. The provision also provides for the parameters for carrying out the public engagement.



188. Did the Commission, as the regulation-making authority, undertake any public consultation before making the 2016 Regulations and the 2020 Regulations?
189. The Commission in its dispositions neither stated nor disclosed any evidence of public consultation in respect to any of the regulations.
190. Once the regulation-making authority undertakes public consultation, it is supposed to publish the intended instrument in the Kenya Gazette and thereafter, within 7 sitting days after the publication of the statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.
191. It is, however, to be noted that pursuant to **Section 29(1)** of the ECF Act the Commission was to forward the draft regulations to Parliament before gazettelement. The provision states as follows: -

*The Commission may make regulations for the better performance of its functions under this Act, and such regulations **shall** be laid before the National Assembly for approval **before they are published in the Gazette.***

192. The Commission duly complied with the Section 29(1) of the ECF Act and forwarded the draft regulations before gazettelement.
193. Be that as it may, still the Commission was to comply with **Section 5A** of the Statutory Instruments Act which states as under: -

**5A. Explanatory memorandum:**

- (1) *Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—*
- (a) *a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;*
- (b) *a brief statement of all the consultations undertaken before the statutory instrument was made;*



(c) a brief statement of the way the consultation was carried out;

(d) an outline of the results of the consultation;

(e) a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

194. Where no public consultation is undertaken for any reason, **Section 5A (2)** calls the regulation-making authority to explain why no such consultation was undertaken in its explanatory memorandum.

195. From the record, it appears that the Commission failed to comply with Section 5A of the Statutory Instruments Act. I say so since the letters forwarding the instruments to Parliament or a copies thereof were not adduced to enable the Court ascertain whether the said provision was complied with in either instance. Therefore, as matters stand, the Commission never carried out public consultations on the regulations and did not favour any justification thereto.

196. Next is whether Parliament complied with its part of the bargain.

197. On the 2016 Regulations, it is the position that no action was undertaken by Parliament on receipt of the regulations. In that case, **Section 15(2)** of the Statutory Instruments Act created a rebuttable presumption that the relevant considerations referred to in section 13 of the Statutory Instrument Act were met.

198. For clarity, the Section 15(2) states as follows: -

*Where the Committee does not make the report referred to in subsection (1) within twenty-eight sitting days after the date of referral of the statutory instrument to the Committee under section*



12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in section 13.

199. In respect to the 2020 Regulations, the National Assembly carried out its mandate as required under Sections 12 and 13 of the Statutory Instruments Act. It eventually revoked and nullified the regulations and the Gazette Notice No. 8024 for reasons contained in the Report.
200. One of the reasons for rejecting the 2020 Regulations and the expenditure limits was lack of public engagement.
201. Public participation is one of the constitutional imperatives in Article 10 of the Constitution. Expounding on Article 10 of the Constitution, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:

*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 enforced 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.*

*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.*



202. The importance of public participation cannot be gainsaid. The Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others** (supra) while dealing with the aspect of public participation in law-making process stated as followed: -

*The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.*

203. In **Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)**, the South African Constitutional Court stated as follows: -

*A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...*

204. The South African Constitutional Court in **Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5** discussed the importance of public participation as follows: -

*...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.*

205. From the above discussion, by placing the 2016 and 2020 Regulations, the Constitution and the Statutory Instruments Act side by side, it comes to the fore that the regulations did not pass the constitutional and legislative muster for *inter alia* want of public consultation.



206. I must clarify that even in instances where Parliament fails to consider the statutory instruments within the set timelines, like in the case of the 2016 Regulations, the presumption in Section 15(2) of the Statutory Instruments Act only becomes effective if the instruments comply with the Constitution.
207. It is, therefore, the finding and holding of this Court that since the 2016 Regulations failed to comply with the constitutional and statutory requirement on public participation, then Section 15(2) of the Statutory Instruments Act did not apply to the said regulations. In other words, the 2016 Regulations cannot be deemed to have complied with the Constitution whereas in reality they did not.
208. In sum, the 2016 and 2020 Regulations infringed Article 10(2) (a) of the Constitution and Sections 4, 5 and 5A of the Statutory Instruments Act for not being subjected to public scrutiny.
209. As a result of the foregoing unconstitutionality, the National Assembly's resolution of 28<sup>th</sup> September, 2021 annulling and revoking Gazette Notice 8024 of 2021, the resolution to reject the publication of the 2020 Regulations, the resolution of the 20<sup>th</sup> December, 2016 rejecting the 2016 Regulations as well as the Commission's decision of 8<sup>th</sup> October, 2021 in Gazette Notice 10723 of 2021 revoking Gazette Notice 8024 of 2021 were all valid and constitutional.
210. On the same footing, Section 1A of the ECF Act remains constitutional to the extent that it upheld and defended the Constitution from being impugned and in compliance with Article 3(1) of the Constitution.
211. Consequently, the National Assembly has not failed in its constitutional and statutory obligation to enact the Election Campaign Regulations necessary to give effect to the ECF Act.
212. In the end, the issue is answered in the negative.

**(d) The constitutionality of Section 29(1) of the Election Campaign Financing Act in requiring the mandatory**



**approval of the Regulations by the National Assembly  
before publication in the Gazette:**

213. The impugned Section 29(1) of the ECF Act states as follows: -

**29. Provisions on delegated powers**

*(1) The Commission may make regulations for the better performance of its functions under this Act, and such regulations shall be laid before the National Assembly for approval before they are published in the Gazette.*

214. As it has been held in this judgment that the regulations contemplated under Article 88(4) (i) of the Constitution are statutory instruments, there seems to be a procedural conflict between the impugned section and the requirement under the Statutory Instruments Act requiring the regulatory making entity to publish the intended instrument before it is transmitted to Parliament.

215. Since there is no provision under the *Interpretation and General Provisions Act*, Cap. 2 of the Laws of Kenya on what happens in such a state of conflict, recourse shall be to the Constitution.

216. This Court has already and elaborately dealt with the manner the Constitution and statutes ought to be interpreted.

217. As a brief recap, the Supreme Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others***, opined that a purposive interpretation should be given to statutes so as to reveal their intention. It was stated as follows:

*In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:*



*The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*

217. In determining the intention of a statute, the Court of Appeal in **County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu** [2015] eKLR held that:

*Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.*

218. In this case, the two conflicting statutes were passed by Parliament.

219. Responding to the whether the impugned section was unconstitutional, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argued that the Petitioners did not challenge the procedure of enactment of the ECF Act and that there was no evidence to demonstrate the manner in which the impugned section violated their rights.

220. This Court believes that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents avoided to respond to the issue. I say so because the Petitioners' pleadings and dispositions before are replete with the contention on unconstitutionality.

221. The Statutory Instruments Act came into force much earlier than the ECF Act. In fact, whereas the ECF Act came into operation on



24<sup>th</sup> December, 2013, the Statutory Instruments Act was enacted way back on 14<sup>th</sup> January, 2013. There is no doubt both statutes were passed by Parliament during the same term of the House.

222. In such a state of affairs, it was incumbent upon the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to favour the Court with the justification behind the intentional conflict between the two statutes. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not do so.
223. There being no basis for the said conflict, the only recourse this Court has is to ascertain which of the two provisions is in consonance with the constitutional imperatives in *inter alia* Articles 20 and 259 of the Constitution. The said provisions are on the manner in which the Constitution is to be interpreted and have already been dealt with in this judgment.
224. Whereas Article 88(1) of the Constitution establishes the Commission, Article 88(4) specifically mandates the Commission to conduct and supervise elections and referenda in Kenya.
225. The Constitution further and specifically, under Article 88(4)(i), grants the power to regulate the amount of money that may be spent by or on behalf of a candidate or party in any election to the Commission and not to Parliament. However, since the intended regulations are in the nature of statutory instruments, then the role of Parliament would be as provided for under the Statutory Instruments Act.
226. As already discussed in this judgment, in coming up with the regulations, the Commission is to first carry out public participation and then gazette the instrument. The instrument is then transmitted to Parliament for appropriate scrutiny.
227. Section 13 of the Statutory Instruments Act gives the parameters within which parliamentary scrutiny of statutory instruments is to be undertaken. It is indeed an elaborate one. It is, therefore, not clear whether the intention of Parliament under the ECF Act was for the regulations to be taken back to the House for parliamentary scrutiny after the approval of the draft by the same House and the subsequent gazettelement.



228. A further challenge is posed in that the parameters in the approval of the draft are not set unlike those in the scrutiny of the statutory instruments.
229. It is also to be noted that the impugned section creates a special category of statutory instruments whose drafts ought to be approved before gazettelement.
230. By requiring the approval of the draft regulations before gazettelement, Section 29(1) of the ECF Act places itself in the shoes of the Commission to the extent that what will eventually be gazetted will be what the Parliament would have come up and not the Commission. There is, hence, confusion on the accountability aspect of the regulations. That in effect amounts to Parliament usurping the role of the Commission.
231. The need to accord constitutional commissions and independent offices room to discharge their mandates cannot be gainsaid. That is the essence of the doctrine of restraint.
232. Compliance with Article 88(4)(i) of the Constitution and the Statutory Instruments Act, therefore, calls upon the Commission to come up with the regulations, publishes them in the Gazette and then transmits them for parliamentary scrutiny.
233. As Section 29(1) of the ECF Act seems to have placed the cart before the horse, the provision is not only contrary to Article 88(4)(i) of the Constitution, but also creates unnecessary conflict and confusion in the manner statutory instruments ought to be dealt with under the law. The impugned provision also creates an unjustified special category of statutory instruments.
234. The net effect of the provision is that it does not promote the values and principles of governance relating to good governance, integrity and accountability. The provision does not also pass the test in **R. vs. Oakes** case (supra) since its effect is to inhibit constitutionalism.
235. Having said so, it is this Court's finding that Section 29(1) of the ECF Act is contrary to Article 10(2)(c) and 88(4) of the Constitution.



**(e) Whether Sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 require the approval of the National Assembly as a condition precedent to implementation:**

236. For ease of discussion, I will reproduce verbatim Sections 12, 18 and 19 of the ECF Act.

**12. Limits to contributions.**

- (1) *The Commission shall, at least twelve months before a general election, by notice in the Gazette, prescribing limits on —*
  - (a) *total contributions;*
  - (b) *contributions from a single source;*
  - (c) *paid-up media coverage;*
  - (d) *loan forming part of a contribution, which a candidate, political party or referendum committee may receive during the expenditure period.*
- (2) *Except where contribution is from a candidate to that candidate's campaign financing account, or from a political party or a referendum committee to that political party's or referendum committee's campaign financing account, no contribution from a single source shall exceed twenty percent of the total contributions received by that candidate, political party or referendum committee.*
- (3) *The Commission shall prescribe the limit beyond which contributions received by a candidate, a political party or a referendum committee 11.0111 a single source may be disclosed.*

237. Section 18 states as under: -

**18. Spending limits.**

- (1) *The Commission shall, at least twelve months before an election, by notice in the Gazette, prescribe the spending limits including the total amount that a candidate, political party or referendum committee may spend during an expenditure period, including the limit for media coverage.*



- (2) *Except for contribution by a candidate into his or her own campaign financing account, any contribution from a person, organisation or any other lawful source contributed to a candidate, a political party or a referendum committee campaign financing account shall not exceed the limit of the total contribution prescribed under subsection (1).*
- (3) *The Commission may, by notice in the Gazette, vary the spending limits prescribed under subsection (1).*
- (4) *The Commission shall, in prescribing spending limits under subsection (1), take into consideration —*
  - (a) *geographical features and urban centres;*
  - (b) *the type of election;*
  - (c) *the population in an electoral area;*
  - (d) *the number of party members in an electoral area;*
  - (e) *the communication infrastructure in an electoral area.*
- (5) *Subsection (4)(d) shall only apply with respect to party nomination expenditure of a party candidate.*
- (6) *Where a candidate, political party or a referendum committee exceeds the spending limits prescribed under this section due to Unforeseeable and extraneous circumstances, the candidate, political party or referendum committee shall file a report with the Commission specifying the reasons for exceeding the limit, with such time as the Commission may prescribe and the Commission shall determine if such spending was justifiable.*
- (7) *A candidate who, or a political party or referendum committee which, exceeds the prescribed spending limits and fails to report this fact to the Commission commits an offence.*

238. In Section 19, the ECF Act provides that: -

**19. Authorised expenditures.**

*The Commission shall, at least twelve months before an election, by notice in the Gazette, prescribe the nature of authorised items or activities for which campaign expenses may be incurred, including the cost of—*

- (a) *venue where campaign activities may be undertaken;*



- (b) *publicity material for campaigns;*
- (c) *advertising for the campaigns;*
- (d) *campaign personnel;*
- (e) *transportation in respect of campaign activities; and*
- (f) *any other justifiable expenses.*

239. As a starting point, it is imperative to note that the above provisions can only be implemented after the election campaign financing regulations are enacted. In fact, the absence of the said regulations was what led to the enactment of Section 1A of the ECF Act thereby suspending the operation of the ECF Act.

240. The enactment of any Act of Parliament involves an elaborate process and includes public participation. It is the Parliament which must give its approval before a Bill is taken for Presidential assent. It is, therefore, in order to state that parliamentary approval is necessary for the enactment of any Act of Parliament.

241. The Statutory Instruments Act also places the burden of public engagement on the entity seeking to come up with the instrument. It further calls upon the Parliament to exercise scrutiny over the instruments. The House has powers to revoke any instrument. It is, hence, in order to assert that parliamentary approval is necessary for the enactment of any statutory instrument.

242. As said, once the statutory instrument in the nature of the election campaign financing regulations are in place, the Commission is then called upon under Sections 12, 18 and 19 of the ECF Act to come up with the limits provided therein.

243. In coming up with the limits, the Commission is still called upon to further promote constitutionalism.

244. Article 47 of the Constitution provides for fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

245. There is no doubt the public, especially those interested to take part in referenda and elections, will be in a way affected by the



intended limits under Sections 12, 18 and 19 of the ECF Act. As such, the limits are administrative decisions and are subject to Article 47 of the Constitution.

246. In that case, the procedure in coming up with such limits becomes of paramount importance. There is no doubt there ought to be public engagement.
247. The financial limits are a product of subsidiary legislation which must be in place 12 months to each general election. It, therefore, means that new limits ought to be put in place prior to each general election. The reasons thereof include the considerations in Section 18(4) of the ECF Act.
248. The nature of the limits definitely calls for public engagement. Once the Commission undertakes appropriate public engagement, there is no duty placed on the Commission to transmit the limits for parliamentary approval.
249. There are three reasons for such a position. The first reason is on the timelines. The spending limits are supposed to be in place 12 months before a general election. Looking at the principles for consideration in coming up with those limits in Section 18(4) of the ECF Act, it seems that for the limits to be realistic and effective, they ought to be put in place not far from 12 months from the general election.
250. In that case, since the Commission has no control over the parliamentary calendar, parliamentary approval is likely to expose the limits to the danger of delay.
251. The second reason is that the limits are a product of the regulations which regulations can only be in force with parliamentary approval. The limits are, hence, supposed to comply with the regulations, the law and the Constitution. As such, being products of the regulations, there seems to be no necessity of parliamentary approval.
252. The third reason is that Parliament may take part in the process of coming up with the limits by making their proposals during the public engagement.



253. It must also be noted that any person dissatisfied with the limits has the liberty of engaging the Commission since the Commission has powers to vary the limits under Section 18(3) of the ECF Act. Needless to say, a party also has the liberty to seek Court's intervention.

254. From the foregoing, it is this Court finding and holding that the Commission in coming up with the spending limits under Sections 12, 18 and 19 of the ECF Act must undertake public engagement, but such resultant limits are not subject to parliamentary approval.

255. This Court now answers the issue in the negative.

**(f) What remedies, if any, ought to issue?**

256. The consolidated Petitions have partly succeeded. Whereas the Petitioners have failed to prove that the regulations under Article 88(4)(i) of the Constitution are constitutional instruments and not statutory instruments and that the 2016 Regulations became effective by operation of law, the Petitioners have succeeded in proving various other issues.

257. Resulting therefrom, the following conclusions arise in this matter:

- (i) The regulations under Article 88(4)(i) of the Constitution are statutory instruments and not constitutional instruments.
- (ii) There was no public participation in the enactment of the Election Campaign Financing Regulations, 2016 and the Election Campaign Financing Regulations, 2020.
- (iii) The National Assembly did not contravene the Constitution in suspending the operation of the ECF Act *vide* Section 1A of the ECF Act.
- (iv) The National Assembly did not contravene the Constitution in annulling and revoking the Election



Campaign Financing Regulations, 2016, the Election Campaign Financing Regulations, 2020 and the Spending limits contained in Gazette Notice No. 8024.

- (v) The Independent Electoral and Boundaries Commission did not contravene the Constitution in issuing Gazette Notice No. 10723.
- (vi) Section 29(1) of the ECF Act is unconstitutional as it contravenes Article 10(2)(c) and 88(4) of the Constitution in requiring parliamentary approval of regulations before gazettment.
- (vii) There is no requirement to subject the spending limits in Sections 12, 18 and 19 of the ECF Act to parliamentary approval. However, such limits must be subjected to appropriate public engagement.

**Disposition:**

258. As I come to the end of this judgment, I hereby call upon the Independent Electoral and Boundaries Commission to proactively and timeously come up with the regulations contemplated under Article 88(4)(i) of the Constitution so that this country has in place the requisite regulations and the necessary spending limits. In doing so, the Commission will be *inter alia* promoting constitutionalism.

259. In the end and flowing from the above, the consolidated Petitions are hereby determined in the following manner: -

- (a) **A declaration do hereby issue that the regulations under Article 88(4)(i) of the Constitution are statutory instruments and not constitutional instruments.**
- (b) **A declaration do hereby issue that Section 29(1) of the Election Campaign Financing Act is unconstitutional as it contravenes Article 10(2)(c) and 88(4) of the Constitution in requiring**



parliamentary approval of regulations before gazettment.

(c) A declaration do hereby issue that the spending limits in Sections 12, 18 and 19 of the Election Campaign Financing Act do not call for parliamentary approval, but must be subjected to appropriate public engagement.

(d) The rest of the prayers sought in the consolidated Petitions are hereby disallowed.

(e) Each party do bear its own costs.

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 5<sup>th</sup> day of May, 2022.**



**A. C. MRIMA**  
**JUDGE**

**Judgment virtually delivered in the presence of:**

**Miss Nyaberi for Mr. Ochiel Dudley**, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners.

**Mr. Steve Ogolla and Miss. Kimeu**, Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners.

**Mr. Ocholla for Mr. Moses Kipkogei**, Counsel for the 1<sup>st</sup> Respondent.

**No appearance for Miss. Otieno**, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**Miss Kiramana for Miss. Mutindi**, Counsel for the 3<sup>rd</sup> Respondent.

**Mr. Evans Ogada and Miss. Wakesho Jillo**, Counsel for the 1<sup>st</sup> Interested Party.

**No appearance for Mr. Wambola**, Counsel for the 2<sup>nd</sup> Interested Party.

**Jared Otieno** – Court Assistant