



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
PETITION NO. 576 OF 2015

*Paper filed by Hon.
Hassan Boman on
10/5/2017 @ 2:30pm
JCA
10/5/2017*

(AS CONSOLIDATED WITH PETITION 118 OF 2016 AND PETITION 148 OF 2016)
IN THE MATTER OF ALLEGED THREATS TO THE FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 47 AND 38 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLE 22, 47, 101(1), 177(4), 255, 256 OF THE
CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ARTICLES 22, 47, 101(1), 177(4), 256 OF THE CONSTITUTION
OF KENYA, 2010

AND

IN THE MATTER OF SECTION 3, 4, 5, 6, 7, 8, 9(3), 10, AND 11 OF THE FAIR
ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015)

IN THE MATTER OF RULES 3 AND 4(2) OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013

BETWEEN

ANDREW KIPLIMO SANG MUGE.....1ST PETITIONER
THE COUNTY ASSEMBLY FORUM2ND PETITIONER
RICHARD OUMA OGINDA.....3RD PETITIONER

AND

INDEPENDENCE ELECTORAL AND BOUNDARIES
COMMISSION.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

ISSUES FOR DETERMINATION

[1] By consolidated petitions, the petitioners seek a determination by the Court of the following issues:

1. The term of tenure the Members of Parliament and Members of County Assembly (hereinafter MCAs);
2. The constitutionally correct date for the next General Election,
3. Whether the MCAs will suffer loss of reduction of tenure by reason of the General Election being held on 8th August 2017 as scheduled; and
4. Whether the Petitioners are entitled to the reliefs sought in the petition."

[2] There was no appearance for the 3rd Petitioner on the date of hearing of the consolidated petitions. Nonetheless, the reliefs sought in the said petition are substantially similar to those sought in 2nd Petitioner's Petition No. 118 of 2016.

THE SPECIFIC RELIEFS SOUGHT

[3] The three consolidate petitions seek specific orders as follows:

PETITION OF ANDREW KIPLIMO SANG MUGE DATED 15TH FEBRUARY, 2016 (Petition No. 576 of 2016)

- a. *A declaration that there exists a conflict between Article 177(4) and Article 177(1) of the Constitution.*
- b. *A declaration that a County government Assembly is elected for a term of five years.*
- c. *A declaration that the next county government elections are election for members of a County Assembly is on or after 22nd 4th March, 2018 as per Article 177(4) of the Constitution.*
- d. *A declaration that the next election of Governors is on or after 4th March, 2018.*

- e. *A declaration that the next general election of Members of Parliament is on or after 4th March, 2018.*
- f. *An order prohibiting the IEBC from stating that the next election for members of County Assemblies is on August 8th 2017.*
- g. *An order prohibiting the IEBC from stating that the next General Election for Members of Parliament is on August 8th 2017.*
- h. *Costs of this petition.*
- i. *Any further relief, declaration or orders that this Honourable Court shall deem just and fit to grant.*

PETITION OF COUNTY ASSEMBLIES FORUM DATED 6TH APRIL, 2016

(Petition No. 118 of 2016)

- i. *THAT this Honourable Court be pleased to make a DECLARATION that the term of office of the existing members of the county Assemblies in the Republic of Kenya, ends on the 5th March 2018, being five (5) years from the date of the general elections held on the 4th March, 2013, in accordance with the provisions of Article 177(4) of the Constitution.*
- ii. *THAT this Honourable court be pleased to make a DECLARATION that holding the elections for the position and office of the members of the County Assemblies in the republic of Kenya, on 8th August, 2017, would be unconstitutional in consideration of the express provisions of Article 177(4) of the Constitution of Kenya.*
- iii. *THAT this Honourable Court be pleased to make a DECLARATION that holding the elections for the position and office of the members of the county assemblies in the Republic of Kenya, on the 8th August 2017, would constitute deprivation of their property without compensation, being the accrued terms of service of the existing members of the County Assemblies of Article 40 of the Constitution of Kenya.*
- iv. *THAT this Honourable court be pleased to order and direct the independent Electoral and Boundaries Commission, in discharge of its constitution and statutory mandate to set and provide a date for the next elections for*

members of the County Assemblies after the expiry of the five year term of the current County Assemblies.

- v. *IN THE ALTERNATIVE TO THE DECLARATIONS PRAYED FOR HEREINABOVE, this Honourable Court be pleased to award damages for loss and injury arising from the premature end of term of office of existing members of County Assemblies in the Republic of Kenya, should the next general elections for the position and office of Members of the County Assemblies, be held on the 8th August, 2017, as declared by the 1st Respondent.*
- vi. *THAT this Honourable Court be pleased to grant such other orders and directions that it deems fit in the circumstances.*

PETITION OF RICHARD OUMA OGUNDO (Petition NO. 148 of 2016)
DATED 23RD MARCH, 2016

- (a) A declaration that the term of the members of County Assemblies country wide is five years and same expires in the month of March, 2018.*
- (b) A declaration that the intention of the 1st Respondent to reduce term of petitioners as members of their respective county assemblies is unlawful.*
- (c) Costs of the petition*
- (d) Any other order that this Honourable Court may deem fit and proper to grant.*

THE RESPECTIVE CASES FOR THE PARTIES

- [4] The Petitioners' case is a challenge on the general election date with regard to the election of MCAs, appointed by IEBC as 8th August 2017, and is simply that the tenure of the Members of the County Assemblies (MCAs) unlike that of the Members of Parliament was fixed by Article 177(4) of the Constitution as a term of five (5) years. It is contended that the effect of the holding of the general elections on the 8th August 2017 as announced by the 1st respondent (IEBC) is unconstitutionally to reduce the term by a period of 8 months. The petitioners therefore sought the declaration that the IEBC had no mandate to cut short the term of the MCAs and therefore that the appointed election date

of the 8th August 2017 was unconstitutional. The petitioners asserted the interpretative jurisdiction of the High Court under Article 165 (3) (d) (iii) in seeking a determination whether the IEBC was acting within the Constitution in the administrative act of fixing the date of the election for the MCAs. The petitioners also set up a cause of action for violation of the fundamental rights of the right to vote of the MCAs and those who elected them under Article 38 of the Constitution and the right to property of the MCAs under Article 40, and, for the enforcement whereof, the Petitioners based their petitions under enforcement Articles 22 and 258 of the Constitution. The petitioners pointed to the apparent conflict of articles 177 (1) (a) which provides that election of MCAs be held on the same date as the election of Members of Parliament on the 2nd Tuesday of August of every fifth year and Article 177 (4) which provides for the term of the MCAs as a period of five years. In resolving the conflict, the petitioners urged harmonization of the constitution provisions to give effect to the one without destroying the other, and submitted that the appropriate election date for the MCAs would be 4th March 2018, five (5) years from the last election date. It was contended that in accordance with Article 255, the term of the MCAs term could only be altered by an amendment to the Constitution through a referendum.

- [5] The 1st Respondent Independent Electoral and Boundaries Commission's response is two-fold that the petitions are premature as the notice of the holding of the election had not been gazette in the Kenya Gazette and that the court lacks jurisdiction to deal with a question of the date for the general election, citing primarily Article 88 (4) (e) of the Constitution and sections 19 (2) and section 77 of 88 (4) (e) of the Elections Act, respectively. IEBC therefore opposed the petition primarily on its formal competence urging that the dispute was premature and unripe for determination as the election date had not been formally notified by gazette in the Kenya Gazette in accordance with section 19 of the Elections Act. Jurisdiction of the court to deal with the challenge on the election date was objected to by reference to Article 88 of the Constitution and section 74 of the Elections Act, (and Rule 109 of Legal Notice No. 139 of 2012 made under the Act) which provides for resolution of the election disputes, except election petitions, by the IEBC. It was contended that the Article 165 jurisdiction is exercisable when aggrieved with the decision of the IEBC. On the merits it was urged that the election date of 8th

August 2017 was in accordance with the provisions of Article 177 (1) (a) of the Constitution and therefore legal. Citing Articles 101 on the National Assembly and 136 on Presidential elections, it was maintained that elections for all elective positions in the national and County levels must be held on the same date. In response to the claim on deprivation of property of the MCAs, it was submitted that the responsible organ for the salaries and other compensation for state officers was the Salaries and Remuneration Commission under Article 230 of the Constitution and which had not been joined in the Petitions. As to prayer No. 5 of Petition 118 of 2016 for damages for premature end of MCAs' terms, it was contended that this was a matter of employment and labour under the jurisdiction of the Employment and Labour Relations Court in terms of Article 162(2) (a) and the High Court had no jurisdiction.

- [6] For the 2nd Respondent Attorney General, the petitions were seen as an unconstitutional means of amending provisions of the Constitution, whose constitutionality in terms of Article 2(3) cannot be subject of challenge in court. It was further contended that the matter before the Court were *res judicata* by virtue of the decision in *John Harun Mwau v. Attorney general & Ors. [2012] eKLR* and *Milton Mugambi Imanyara & Ors Attorney General & Ors Pet. No. 65 of 2011* on the election date for the 2nd general election under the Constitution of Kenya 2010. It was urged that the Court had a duty to adopt a harmonious interpretation of the provisions of the Constitution bearing in mind the transitional period from the former to the new Constitution of Kenya 2010. In conclusion, it submitted that the court could not order that which was unconstitutional as regards the election date.

DETERMINATION

Preliminary

- [7] Before the Court is clearly a question of interpretation of the constitutional provisions of Article 177 (1) (a) and 177 (4). It is not merely a dispute as to administrative act of announcement of the election date; it an interpretation question whether in appointing the 8th August 2017 as the date for the general election, the 1st respondent IEBC acted in accordance with the constitution, which is squarely within the jurisdictional competence of Article 165 (3) (d) (iii) as follows:

[8] The question of compensation in salary for the period by which the MCAs term is reduced by reason of the election being held on the date of 2nd Tuesday of August 2017 is not a matter for the Salaries and Remuneration Commission. The Salaries Commission has the functions as set out in Article 230 of the Constitution as follows:

“(4) The powers and functions of the Salaries and Remuneration Commission shall be to—

(a) set and regularly review the remuneration and benefits of all State officers;
and

(b) advise the national and county governments on the remuneration and benefits of all other public officers.

(5) In performing its functions, the Commission shall take the following principles into account—

(a) the need to ensure that the total public compensation bill is fiscally sustainable;

(b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;

(c) the need to recognise productivity and performance; and

(d) transparency and fairness.”

[9] The petition is not a question of determination of the *amount* of compensation to be paid for services rendered by the MCAs as state officers; it is purely a question whether for the reduced term of service of MCAs by reason of what they consider early elections, the MCAs are entitled to *damages for loss of income* for the period by which their term is consequently reduced.

[10] Having considered the decision of *John Harun Mwau & 3 Others v. Attorney General & 2 others* [2012] eKLR, I am certain that the court in that case did not deal with the question as to the term of the MCAs under Article 177 (4) of the Constitution. Accordingly, the decision therein cannot operate *res judicata* to these proceedings. The Court in *John Harun Mwau* dealt with the question as to the holding of the first elections under the Constitution as follows:

“163. As we have stated, the election date for the first elections under the Constitution is provided under the Sixth Schedule and is not affected by the provisions of Article 101 et seq, which deal with subsequent elections.

Whatever date the first elections are held on, the next elections must be conducted on the second Tuesday of August of the fifth year from that date, hence the term for the next President, Members of Parliament, Governors and members of the County Assemblies may be shorter than five years as a consequence of the transitional provisions.

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

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

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

[11] While I respectfully agree with the Court on the question of holding of the next general elections on the second Tuesday of August of the fifth year from that date of the first elections, the Court did not consider or determine the effect of Article 177(4) on the tenure of the MCAs.

[12] The dispute in the consolidated petitions is fresh and unrelated to the decision in that Court. Moreover, the court's view on the question of the date for second election under the new constitution was *obiter dicta*, the question before the court then being only the date of the first general election under the Constitution of Kenya 2010. It was clear from the first line of the judgment that "*This matter concerns, inter alia, the date of the first elections under the Constitution.*"

[13] The question of enforcement of rights and fundamental freedoms even touching on the employment and labour is within the jurisdictional competence of the High Court in its Bill of Rights Jurisdiction under Article 22 of the Constitution. The High Court has concurrent and coordinate jurisdiction with the Employment and Labour Court (ELRC) in the enforcement of the Bill of Rights *touching on labour and employment matters*. See *Patrick Musimba V National Land Commission & 4 Others* [2015] eKLR and *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others* [2016] eKLR.

Dispute resolution and threatened contravention of the Constitution

[14] Article 88 (4) of the Constitution provides that the 1st Respondent Electoral Commission will have jurisdiction for –

“(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.”

The petitions before the High Court are however not merely an electoral dispute arising from or touching on an election but a matter of constitutional interpretation of provisions of the constitution dealing with the election date and tenure of office of the MCAs.

- [15] Jurisdiction of the High court in enforcement of the Bill of Rights or other provisions of the Constitution, respectively under Articles 22 and 258 of the Constitution, is exercisable both for actual violations as well as threatened violation. For this reason, the respondent’s objection that the petitions are premature for want of official public notification by gazette in the Kenya Gazette is not well founded. Articles 22 and 258 give *locus* to a person to petition for redress in a proper case where the Constitution has not only been violated or infringed but also where it is *threatened* with violation or infringement, and it is, therefore, not a good answer to the petitioners’ case that the declaration of the election date for the 8th August 2017 had not been notified in the Kenya Gazette. The announcement of the date without gazette was sufficient to trigger the cause of action in *threatened* breach of the constitution.

- [16] In addition, there is no dispute that the 8th August 2017 has been appointed by IEBC as the date for the second General Election under the Constitution of Kenya 2010 including the election of MCAs.

What is the tenure of Members of Parliament and the Members of County Assembly?

- [17] In accordance with the decree of Article 102 (1) of the Constitution of Kenya 2010,-

“102. (1) The term of each House of Parliament expires on the date of the next general election.

(2) When Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than six months at a time.

(3) The term of Parliament shall not be extended under clause (2) for a total of more than twelve months"

Term of Parliament under the Former Constitution

- [18] This contrasts with the provisions of the former Constitution of Kenya (1969) where the members of Parliament had, under section 59 (4) thereof, a specific tenure of five years, subject to dissolution of Parliament by the President or upon a vote of no confidence as provided for in section 59 (2) and (3) as follows:

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

- [19] There has been a misconception that members of the Parliament under the Constitution of Kenya 2010 have a definite period of **five years**, which accordingly delimits their tenure and reduction of which by earlier elections should, therefore, attract compensation for the loss of months of their tenure. While the former Constitution provided for MPs tenure as a fixed term of five years, the Constitution of Kenya 2010 provides for a tenure for the Members of Parliament reckoned by reference to a date - being the second Tuesday in August, in every fifth year - rather than to a fixed term. For this reason, the holding in paragraph 163 of *John Harun Mwau* decision quoted above that *"term for the next President, Members of Parliament, Governors and members of the County Assemblies may be shorter than five years as a consequence of the transitional provisions"* appears to be erroneous. The President, MPs and Governors do not have a five year term under the Constitution of Kenya 2010.

- [20] There is, therefore, no tenure for the Members of Parliament after the "the second Tuesday in August, in every fifth year" unless Parliament in times of war extends the life of Parliament for upto 12 months in accordance with Article 102 (3) of the Constitution.

Tenure of the office of Members of the County Assembly

- [21] For the Members of County Assembly, the position is muddled by the provisions of Article 177 (4) of the Constitution, which provides for a fixed term of five years, as follows:

"177. (4) A county assembly is elected for a term of five years."

- [22] How do we resolve this apparent conflict in Article 177(1) (a) and Article 177 (4) of the Constitution? It is contended that the Offices of the MCAs do not become vacant until in accordance with Article 194 (1) (f) the tenure of office of an MCA expires as follows:

“194. (1) The office of a member of a county assembly becomes vacant—
 (f) *at the end of the term of the assembly;*”

- [23] In response, the 1st respondent argues that it would be discrimination to the offices of the President, Governor and members of Parliament. If we accept that one provision of the constitution cannot be unconstitutional as measured against another, the submission must fail. Importantly, there is, as argued below, a case for amendment of the constitution to align the terms of all elective offices but this does not mean that the provision defining the term of MCAs as five years is unconstitutionally discriminatory of the holders of other elective offices.

- [24] I find that the term of the office of the Member of the County Assembly is plainly set out in unambiguous constitutional text of Articles 177 (4) and 194 (f) of the Constitution so that “A county assembly is elected for a term of five years” expiring at “at the end of the term of the assembly.”

What is the correct date of the next General Election?

- [25] In accordance with the Mischief rule of interpretation of statute, the provisions of the Constitution for ascertainment of the election date are understandably geared towards certainty of the election date, lest it be used as in the past a secret weapon by the ruling political party against other parties to the election.
- [26] All the constitutional provisions for elections under the Constitution of Kenya 2010 appoint the second Tuesday of August of the fifth year as the election date and decree that all the elections for the various elective positions in the national and county levels must be held on the very same date. The general election cycle for Member of Parliament as set out in Article 101 of the Constitution as follows:

“101. (1) *A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.*”

[27] Article 136 for election of the President (and consequently the Deputy President by virtue of Article 148 (3)) similarly provides as follows:

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

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

[28] The election of County Governors is also required to take place with the elections of Members of Parliament as follows:

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

[29] For County Assembly, which is the subject of the petition herein, the election cycle is aligned to that of the member of Parliament by the provisions of Article 177 (1) (a) of the Constitution of Kenya 2010 as follows:

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

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

Constitutional chaos

[30] Any other interpretation would lead to constitutional chaos. The President, members of Parliament (National assembly and the Senate) and the county governors would be elected on one date while the county Assembly would have to await eight months for new MCAs to be elected, and the new governor, who would have a fresh mandate of the people, would serve under the accountability of old MCAs whose mandate traces back to the general elections of 2013. The constitution would not support such an absurdity.

[31] Harmony and consistency in constitutional provisions must dictate that the election date for all the elections of the general election under the Constitution be held as stipulated *“on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year”*.

Principle of harmony in purposive constitutional interpretation

[32] In interpreting the constitution, I recall the statement of this Court in Mombasa HC PETITION NO. 76 OF 2012, *SDV Transami Kenya Limited and 19 Others v. The Attorney General & 2 Others and Anor.* for purposive construction of the Constitution:

“Construction in purposive manner

34. Generally, the Constitution as a whole is to be interpreted in accordance with principles set out in Article 259 thereof, which requires a purposive interpretation as follows:

“259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.”

35. In *Attorney General of The Gambia v. Jobe* (1985) LRC 556, the Judicial Committee of the Privy Council (Lord Diplock, Lord Elywyn-Jones, Lord Keith of Kinkel, Lord Scarman and Lord Brightman) held that –

“A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons are entitled, is to be given a generous and purposive construction.”

36. This coincides with the view taken in *NDYNABO vs. ATTORNEY GENERAL* [2001] 2 E.A. 485 where the court said:

“The Constitution is a living instrument, having a soul and consciousness of its own it must be construed in line with the lofty purpose for which its makers framed it. A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document.”

[33] I consider it an aspect of purposive construction of the constitution, the rule of harmonious interpretation of constitutional provisions which must mean that where two or more provisions of the constitution conflict, the court must adopt a construction that

achieves a harmonizing balance to reconcile the conflicting provisions into a constitutional meaning that gives effect to the one without destroying the other. In the end the greater purpose of the constitution is achieved, which is the orderly governance of the state governed by the particular constitution in accordance with the cardinal principles of rule of law and constitutionalism.

[34] I respectfully agree with the High Court in *John Harun Mwau & 3 others V Attorney General & 2 others* [2012] eKLR and the Court of Appeal (*Centre for Human Rights Education and Awareness & 2 Ors. v. John Harun Mwau* [2012] eKLR) on appeal that the Constitution must be interpreted as an integral whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument. See also *South Dakota v. North Carolina* 192 U.S 268 (1904) and *Olum v. AG* [2002] 2 EA 508.

[35] It is not sought to have one constitutional provision declared unconstitutional as against another. The object of harmonization is to give effect to the both or more constitutional provisions in a manner that makes constitutional sense in terms of the purposes of the Constitution. If the two provisions the subject of this inquiry are put side by side, it will be clear that they cannot both be given effect at the same time. Yet they relate to the same constitutional transaction of the General Election: Article 177 (1) (a) provides that the elections for the County Assembly be held at the same time with the elections for Members of Parliament on the second Tuesday of August of every fifth year. Article 177 (4) requires a period of five years between the term of one County Assembly and another.

[36] The Court must look for the interpretation that does least damage to the Constitutional framework. If effect is given to the provision requiring five year tenure of the County Assembly, it would mean that the elections of the members of the County Assembly would always be held separately and after the elections of the members of Parliament, because the second Tuesday of August would always come before the expiry of the 5 year term. It would be impossible to give effect to Article 177(4) and maintain the election "on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;" as required by Article 177 (1) (a) of the Constitution.

[37] For example, whenever the Elections are held, the period of five years would always end after the Second Tuesday of August of the fifth year, that is on the day before the commencement of the same date five years later according to the provisions of reckoning time under Article 259 (5) of the Constitution which provides as follows:

"259. (5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—

(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;

(b) as months, the time period ends at the beginning of the day in the relevant month—

(i) that has the same number as the date on which the period began, if that month has a corresponding date; or

(ii) that is the last day of that month, in any other case; or

(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began."

[38] So five years from the 1.1.2013, for example, ends on midnight of 31.12.2018; 1.2.2013 on 31.1.2018, and so on. For the County Assembly elected on 4.3.2013 therefore their term of office in accordance with Article 177(4) of the Constitution ends on 3.3.2018. The second Tuesday of August of the fifth year from 2013 would remain in all instances the 8th August 2017 well before the expiry of the five year period from whatever date in 2013. The reason for this is that the fifth year prescribed by the Constitution will always begin at the end of the fourth year from the date of the previous election, and the month of August is the two months after the mid fifth year not at the end of it to allow it to coincide with the end of the five year term.

Do the Members of the County Assembly suffer loss of reduction of tenure?

[39] Article 38 (3) (c) of the Constitution in relation to elections provides for a right to hold elective office as follows:

"38 (3) Every adult citizen has the right, without unreasonable restrictions—

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office."

[40] The right to hold office is a right to property in the widest sense of the property including the salary and emoluments earned by virtue of holding such office and an aggrieved party would be entitled to claim damages for loss of property, or in proper case an injunction to stop the deprivation of property. See *A-G for The Gambia v. Jobe* (1985) LRC (Const) 556 where it was held that the term 'property' in the Constitution was to be construed widely.

[41] In this case, however, the loss may be ascertained and remedied in an award of damages for loss of income for the uncompleted period of the tenure of office.

Whether the petitioners are entitled to the Reliefs sought

[42] For the reasons set out above, I find that while the petitioners are not entitled to any order affecting the constitutionally ordained election date of the second Tuesday of August every fifth year, falling in the present case on the 28th August 2017, the Petitioners are entitled to an order for the payment as damages for loss of income for the uncompleted term of office cut short by reason of the elections being held before the expiry of their constitutional term of five years under Article 177 (4) of the Constitution.

CONCLUSION

A definite election date and tenure of office

[43] The Court must make determinations that help the Constitution to keep its constitutional promises under the doctrine of the rule of law and constitutionalism or limited government. The two promises of the constitution in this regard are: one, that the election date for elective positions in the national and local governments will be held on same date on a date ascertainable by reference to the second Tuesday of August every fifth year in accordance with Articles 102, 136 and 177 (1) (a) of the Constitution; and two, the promise of the right to vote that once elected the successful candidate will hold office for full the tenure of the particular elective office, in accordance with Article 38 (2) of the Constitution.

[44] The constitutional promises may be reconciled by upholding the desired same-known-date election to defeat any machinations for the use of the election date as the incumbent's or ruling party's secret weapon, while at the same time redressing the consequential loss of tenure for the MCAs who are the only affected cadre of the elected officials in the general election.

[45] How do we remedy the loss suffered by the MCAs? It must be by payment of in money of their opportunity cost resulting from the holding of the general election in accordance with the constitution before the expiry of constitutional term of office of the MCAs.

Assessment of damages for loss of income

[46] There is no need for joinder of the Salaries and Remuneration Commission as the amounts for the MCAs salary and other emoluments are known and ascertainable. What requires to be determined is the exact amount of compensation payable having regard to the fact some emoluments as disbursements and reimbursements will not become or remain payable in the case where the MCAs are not actively engaged in the daily running or operations of the affairs of their offices for the remainder of period of their tenure following the holding of the general elections of 8th August 2017. Such allowances must be discounted from the payments made to the MCAs for the remainder of the period of their constitutional term.

Appropriate relief

[47] To reduce the burden on the tax payer in public interest as in this case where the payments may not have been budgeted for in advance, the Court must direct that the damages for loss of income being the monthly salary and applicable emoluments for the remainder eight month period be paid not as lump-sum damages but as monthly dues in arrears in the same manner as the same manner as it would have been paid in the course of the MCAs' tenure had their term not been reduced by the general election.

Popular opinion to yield to constitutional guarantee

[48] In the final result, I wish to echo the words of the Court in *John Harun Mwau* that –

“We are conscious that our findings may be unpopular with a section of Kenyans who have preconceived notions about the elections but we hasten to remind Kenyans that our undertaking is not to write or re-write the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives.”

[49] The duty to pay for the loss of income suffered by the MCAs must be borne by the taxpayer. The public may understandably feel aggrieved that it is required to meet salaries and emoluments for MCAs for period for which they did not provide service as office holders. There is great public interest, however, in the observation of the Article 10 principle of the rule of law, which must mean that rights accrued under the Constitution and statute must be upheld. The MCAs suffer a reduced opportunity to remain in office for the full term of their constitutional tenure consistently with their right to hold office under Article 38 (2) of the Constitution and, for that reason, they are entitled to compensation for the lost income for the period.

Need for amendment to the Constitution

[50] There is, of course, need for amendment of the Constitution to align the tenure of the MCAs with that of the Members of Parliament and other elective state officers of the national and county governments in order not only to remove the liability to pay for the remainder of the MCAs term of office that will always remain unexpired when elections are held as they must be on the second Tuesday of August of every fifth year, but also to clarify the term of Office of MCAs to coincide with those of other constitutional elective state officers. The Constitution may be amended to delete the provisions of Article 177 (4) without affecting the provisions of Article 177 (1) (a) which provides for election of MCAs together with that of the Members of Parliament on the second Tuesday of August of every fifth year. Whether such amendment requires the referral to a referendum under Article 255 of the Constitution is not before the Court for determination.

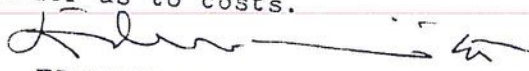
ORDERS

[51] Accordingly for the reasons set out above, Prayers (a) and (b) of Petition No. 576 of 2016 dated 15th February 2016 and Prayers Nos. (i), (iii) and (v) of Petition No. 118 of 2016 dated 6th April 2016 and Prayer (a) of Petition No. 148 of 2016 dated 23rd March, 2016 are granted and all other prayers of the consolidated petitions are dismissed.

[52] For avoidance of doubt, this judgement does not affect the holding of the general elections scheduled for the 8th August 2017, and the payment of salary and other applicable emoluments shall be per month in arrears at the end of every month for the period of eight months by which the tenure of the office of the Members of the County Assembly has been reduced.

[53] In accordance with Order 21 rule 8 (4) of the Civil Procedure Rules, 2010 the parties are at liberty to move the Court for settlement of terms of the decree of the court as to the payable emoluments consistent with circumstances of the case where the members of the County Assembly are not performing the daily operations of the Office.

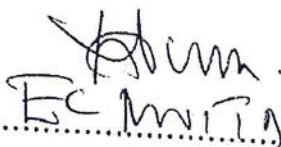
54.. There shall be no order as to costs.



EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 27th DAY OF APRIL 2017.


JUDGEAppearances:-

The 1st Petitioner in Person.

Mr. Amoko with Mr. Mbaluto and Mr. Njenga for the 2nd Petitioner.

No Appearance for the 3rd Petitioner.

Mr. Mukele with Mr. Juma for the 1st Respondent.

Ms. Gitiri for the 2nd Respondent.

