



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION 94 OF 2012

IN THE MATTER OF ARTICLE 89 OF THE CONSTITUTION

AND IN THE MATTER OF THE DELIMITATION OF CONSTITUENCY AND WARD BOUNDARIES

AND IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS ACT, 2011

AND IN THE MATTER OF THE

NATIONAL ASSEMBLY AND CONSTITUTENCIES AND COUNTY ASSEMBLY WARDS ORDER, 2012 (LEGAL NOTICE NO. 14 OF 2012)

AND IN THE MATTER BETWEEN

REPUBLIC

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

EX-PARTE

COUNCILLOR ELIOT LIDUBWI KIHUSA..... 1ST APPLICANT

COUNCILLOR SETH PARREN NAJOLI 2ND APPLICANT

EDWARD ESANYIA AMBEVA 4TH APPLICANT

COUNCILLOR GLADYS MADERE ANALO 5TH APPLICANT

EZRA IMBAHALE KEVERENGE 6TH APPLICANT

JUDGMENT

Preamble

1. The dawn of an era of accountability set in on 27th August 2010 when His Excellency President Mwai Kibaki promulgated the much awaited Constitution whose preamble places great pride in our ethnic, cultural and religious diversity. This Constitution is a covenant of the people to live together in peace and unity as one indivisible sovereign nation.

2. The Constitution is committed to nurturing and protecting the well-being of communities and the nation of Kenya and gives recognition to the sovereignty of the people stating in very clear terms in **Article 1(1)** and **(2)** that:

1 (1)All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2)The people may exercise their sovereign power either directly or through their democratically elected representatives.

3. **Article 159(1)** provides that judicial authority which is derived from the people is vested in and exercised by the courts. As Judicial officers we have sworn to uphold and show fidelity to the Constitution. It is in reverence to the Constitution that we undertook to complete hearing of the petitions and applications filed before us within the constitutional time frame. These cases were filed in response to the decision of the Independent Electoral and Boundaries Commission (“IEBC”) referred to in this judgment as **Legal Notice No. 14 of 2012** which was published in the Kenya Gazette of 6th March 2012.

4. We would not have completed this journey without the co-operation of advocates representing the various applicants, petitioners and interested parties; the IEBC and the Attorney General. We acknowledge the diligence exhibited by counsel appearing in this matter. We appreciate the extensive research and well written and eloquently presented submissions. If we have not referred to all the authorities cited or mentioned the names of individual advocates it is not due to disrespect or lack of appreciation for counsel’s industry. We owe a debt of gratitude to you all. Thank you.

5. We also thank members of the judiciary staff who worked tirelessly behind the scenes to enable us put this judgment together.

6. We acknowledge that the work of the IEBC has been difficult given that it inherited an incomplete task from the Interim Independent Boundaries Review Commission (“IIBRC”) and was required to complete the delimitation process of constituency and ward boundaries within a period of four months. The public demand and expectations on it have been enormous particularly given the legal constraints under which it was to carry out the First Review. The task we are called upon to perform does not in any way diminish the value of its work. Our work is an incident of the rule of law and is intended to complement the IEBC in the performance of its constitutional and statutory mandate.

7. As a court we are guided by the values and principles which respect the inherent dignity of the human being and commitment to social justice. In exercising our mandate we recognize that Kenya is a nation of diverse identities, cultures and beliefs. This diversity calls upon all Kenyans to accommodate one another by living together as brothers and sisters. From the material placed before us it is evident that boundary delimitation is a contentious and emotive matter yet it is an exercise that must be conducted according to the Constitution. Our responsibility is to evaluate what the IEBC has done and whether it complies with the Constitution. This judgment, which signals the end of the delimitation process, is a product of that evaluation.

Introduction

8. These proceedings are a culmination of the events that engulfed our country in December 2007 and January 2008. As a result of the 2007 contested elections, Kenya was drowned in a sea of unparalleled and unprecedented violence of the like never seen before in the history of our country. This violence

occasioned enormous loss of life and property which, as a court, we are unable to fully describe.

9. The issue was eventually settled with the intervention of the international community through the Panel of Eminent African Personalities and the signing of an Agreement on the Principles of Partnership of the Coalition Government between His Excellency President Mwai Kibaki and the Right Honourable Raila Odinga. Under this agreement and the principles of partnership of the Coalition Government, Kenyan leaders committed themselves to creating an environment conducive to partnership, mutual trust and confidence.

10. In order to address the deep seated and long standing divisions within the Kenyan society the Kenya National Dialogue and Reconciliation mediated by His Excellency Kofi Annan prepared a statement of principles on long term issues and solutions which was signed on 23rd May 2008. Amongst the issues covered in the statement was the leaders commitment to inter alia, the following;

(a) completing the long drawn constitutional review process;

(b) establishing and appointing two commissions; A Commission to investigate and make recommendations on the 2007 post-election violence later known as the **Waki Commission** and an independent review commission to conduct an inquiry into all aspects of the 2007 presidential elections and to make recommendations to improve the electoral process later known as the **Krieglar Commission**.

11. The **Krieglar Commission** reviewed the entire electoral process and made several recommendations to be implemented before the next general elections. These included the appointment of an independent and impartial interim electoral commission, an independent interim boundary commission and a review and consolidation of all electoral laws.

12. On the issue of delimitation, the **Krieglar Commission** noted that there were gross disparities in the voting populations of Kenya's constituencies and that this state of affairs breached the "one-person one-vote" fundamental equality principle of democracy enshrined in **section 42(3)** of the former Constitution. The Commission was of the view that this long standing discrimination in itself impaired the integrity of the electoral process.

13. The **Krieglar Commission** noted that, "*The delimitation of boundaries in Kenya as presently established does not respect the basic principle of the equality of the vote. The differences are unacceptable in terms of international standards. The Kenyan Legal Framework does not establish, as is the accepted international practice, the maximum possible departure from the principle of equality of the vote.*"

14. The **Krieglar Commission** further recommended that;

(a) The basic principle for the delimitation of constituencies should be the equality of the vote.

(b) The process of delimitation should be transparent and conducted in consultation with the public.

(c) Establish a Boundary Review Commission and remove constituency delimitation from the Electoral Commission of Kenya ("ECK").

(d) The first delimitation should take place as soon as possible and thereafter should follow the population census.

(e) Delimitation should be completed at least 18 months before a general election is held.

15. The **Krieglar Report** was accepted in a resolution passed by the National Assembly on 4th December 2008. In accordance with the resolution, the **Constitution of Kenya (Amendment) Act, 2008** was passed. It led to the dissolution of the then existing ECK and created two interim bodies; the Interim Independent Electoral Commission ("IIEC") and the IIBRC. These bodies, as their names suggest, were interim in

nature and it was intended that a new body would be formed once the constitutional review process was completed.

16. The IIBRC was established by **section 41B** of the former Constitution. The mandate of the IIBRC as set out under **section 41C** was as follows;

(a) Making recommendations to Parliament on delimitation of constituencies and local authority electoral units and optimal number of constituencies on the basis of equality of votes taking into account

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i. Density of population and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;

ii. Population trends;

iii. Means of communication;

iv. Geographical features and

v. Community interests

(b) Making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries and other units; and

(c) The performance of such other function as may be prescribed by Parliament.

17. It was expected that the IIBRC would complete its work and finalise the delimitation of constituencies and wards by August 2011. Due to its interim nature IIBRC was to stand dissolved two years after promulgation of the Constitution or within three months after the promulgation of the Constitution whichever was earlier.

18. In the meantime, the constitutional review process was completed by the promulgation of the Constitution on 27th August 2010. The IIBRC was preserved by **section 27** of the **Transitional and Consequential Provisions, Sixth Schedule** to the Constitution which provides as follows;

27.(1) The Boundaries Commission established under the former Constitution shall continue to function as constituted under that Constitution and in terms of sections 41B and 41C but-

(a) it shall not determine the boundaries of counties established under the Constitution.

(b) it shall determine the boundaries of constituencies and wards using the criteria set out in the Constitution; and

(c) members of the Commission shall be subject to Chapter Seven of this Constitution.

(2) The requirement in Article 89(2) that a review of constituency and ward boundaries shall be completed at least twelve months before a general election does not apply to the review of boundaries preceding the first election under this Constitution.

(3) The Boundaries Commission shall ensure that the first review of constituencies undertaken in terms of this Constitution shall not result in the loss of a constituency existing on the effective date.

19. **Article 88(1)** of the Constitution (reference to Article in this judgment refers to the Articles in the Constitution unless otherwise stated) established the IEBC with a broad constitutional mandate to conduct and supervise referenda and elections to any elective body or other office established by the Constitution or any other election as prescribed by an Act of Parliament. Under **Article 88(4)(c)** IEBC is responsible for

delimitation of constituencies and wards.

20. IEBC assumed greater significance because of strengthened guarantees to political rights. **Article 38** guarantees political rights which include the freedom to make political choices and the right to free, fair and regular elections based on universal suffrage and free expression of the will of electors for any elective public body or office established under the Constitution.

21. **Chapter Six** of the Constitution on representation of the people sets out how the right to vote is realized. **Article 81** of the Constitution also sets out the general principles for the electoral system which provide the bedrock upon which the legal mandate of IEBC stands. These principles are as follows;

(a) Freedom of citizens to exercise their political rights under **Article 38**.

(b) Not more than two thirds of the members of the elective public bodies shall be of the same gender.

(c) Fair representation of persons with disabilities.

(d) Universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) Free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

22. Under **Article 88(4) (c)** the IEBC has the responsibility for delimiting constituencies and wards in accordance with the provisions of **Article 89**. In order to operationalize the activities of the IEBC and as envisaged by **Article 88(5)** national legislation was passed namely; the **Independent Electoral and Boundaries Commission Act** (“the **IEBC Act**”). **Section 36** of the **IEBC Act** empowered the IEBC to resolve all issues relating the delimitation of boundaries of constituencies and wards arising from the IIBRC Report. The scope of issues for resolution was set out in the **Fifth Schedule** to the **IEBC Act**.

23. The IIBRC presented its report, “**Delimitation of Constituencies and Recommendations on Local Authority Electoral Units and Administrative Boundaries for Districts and Other Units**” (“the **Ligale Report**”) on 27th November 2010 which determined the names and details of the boundaries of the 290 constituencies. The IIBRC also published the names of the constituencies in the **National Assembly Constituencies Order No. 2 of 2010**.

24. Whereas it was mandated to determine the optimal numbers, names and boundary details of County Assembly Wards, the IIBRC was unable to deliver on this mandate on the ground that the county wards came into force when the Constitution was promulgated and long after it had held public consultations. The IIBRC recommended that the existing local authority wards established under the **Local Government Act (Chapter 265 of the Laws of Kenya)** serve as wards until County Assembly Wards are determined in accordance with the Constitution. The IIBRC noted that its workplan was to run upto June 2011 hence it was unable to conduct field surveys to confirm the maps for the 290 constituencies in line with the names and boundary details as determined.

25. The **Ligale Report** was adopted by the National Assembly on 16th December 2010. In the meantime **Ligale Report** was challenged in the case of **John Kimanathi Maingi v Andrew Ligale and Others Nairobi High Court Petition No.72 of 2010 (Unreported)**. In that case the Hon. Justice Musinga held that the IIBRC had the exclusive mandate to determine issues relating to delimitation. The court also disposed of the issue of whether the IIBRC could delimit the 80 additional constituencies created by the Constitution. The court held that this issue was put beyond doubt by the enactment of **section 27(1)(3)** of the **Sixth Schedule** to the Constitution. The court further held that in so far as the IIBRC had failed to publish the actual details of the boundaries of the constituencies, it had failed to comply with its constitutional mandate. The decision in the case was reached when the IIBRC mandate had expired and the outstanding issues were to be completed by the IEBC in accordance with **IEBC Act**.

26. In line with the recommendations of the **Krieglar Report**, the first review, which is the subject of these proceedings, was to be completed by the IIBRC. The mandate of the IIBRC under the former Constitution was advisory in nature but after the promulgation of the Constitution, Parliament deemed it necessary to make transitional arrangements for the completion of the IIBRC work. These transitional arrangements were contained in the **Fifth Schedule** to the **IEBC Act** that we now proceed to examine.

27. Though future delimitations are governed exclusively by **Article 89**, the first review which is a product of the work of the IIBRC was saved by the provisions of the **Sixth Schedule** to the Constitution and governed by the provisions of the **Fifth Schedule** to **IEBC Act** titled, **“Provisions relating to issues from the first review.”**

28. **Section 36** of the **IEBC Act** mandates the IEBC to **“resolve all the issues arising out of the first review relating to the delimitation of boundaries of constituencies and wards and publish its report within the period of four months from the date of its appointment under this Act.”** The Act lists the issues arising out of the first review as follows;

(a) Re-distribute such wards and administrative units in the affected constituencies as may be appropriate;

(b) Subject to the Constitution, addressing issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the Constitution, but at the same time ensure that such a process shall-

(i) Take into account the provisions of Article 89(7)(b) of the Constitution that requires progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for purposes of the first review;

(ii) Not to be subject to new definitions of urban areas, cities or sparsely populated areas or to new population figures;

(iii) Be subject to the use of enumerated national census figures and not projected figures.

(c) Addressing the issue of progressively advancing towards the population quota in protected constituencies in relation to neighbouring constituencies where appropriate.

29. In addressing the issues arising out of the first review, IEBC was restricted by the **IEBC Act** and **section 2(1)** of the **Fifth Schedule** to –

(a) Use as its primary reference material, the report of the former boundaries commission (IIBRC) on the first review as adopted by Parliament; and

(b) Use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission (IIBRC)

30. In conducting its work, the IEBC was required to:

(a) Prepare and publish a preliminary report outlining the proposed delimitation of boundaries of constituencies and wards, outlining specific geographical and demographical details;

(b) Avail the report to the general public for a period of twenty one days and invite representations from the public on the proposals;

(c) Review the public representations received within fourteen days after receipt of recommendations;

(d) Forward the revised report to Parliament; and

(e) Consider views from the National Assembly and revise accordingly before final print for publication in the Kenya Gazette.

31. **Section 6** of the **Fifth Schedule** to the **IEBC Act** requires the IEBC to apply the principles of public participation and involvement in its consultative processes. The IEBC was required to conduct public sensitization on the proposed boundaries and complete the final report on the delimitation within a period of four months from the date of appointment of the Commission.

32. The time-frames set out in the IEBC Act were triggered by the appointment of the Chairperson and members of the Commission on 8th November 2011 by **Gazette Notice Numbers 14091 of 2011** and **14094 of 2011** respectively.

33. During this time and in order to give effect to the devolution provisions of the Constitution, the Minister for Local Government appointed a Task Force on Devolved Government (“**TFDG**”) whose purpose was to help the government think through the implementation of the devolution process and advise it on policy and legal framework for devolved government. The **TFDG** made a recommendation, which was adopted by the IEBC, to cap the number of County Assembly Wards at 1450. This affected the re-distribution of wards by IEBC under the **Fifth Schedule** to the **IEBC Act**.

34. In accordance with the time schedules provided in the **Fifth Schedule** to the **IEBC Act**, on 9th January 2012, the IEBC published its **Preliminary Report on the First Review Relating to the Delimitation of Boundaries of Constituencies and Wards** (“**the Preliminary Report**”). On 9th February 2012, the IEBC published the **Revised Preliminary Report relating to the Delimitation of Boundaries and Wards** (“**the Revised Preliminary Report**”) which was presented to the Justice and Legal Affairs Committee of Parliament on the same date. On 2nd March 2012, the IEBC received the **Recommendations of Parliament on the Revised Preliminary Report**.

35. After considering the recommendations of Parliament on its **Revised Preliminary Report**, the IEBC published the **National Assembly Constituencies and County Assembly Wards Order, 2012** dated 6th March 2012 published in the Kenya Gazette as **Legal Notice No. 14 of 2012**. This Order is what contains the decision of the IEBC concerning delimitation of constituencies and wards.

36. As a result of publication of the final report and the **National Assembly Constituencies and County Assembly Wards Order, 2012**, complaints were raised regarding the manner in which the 80 constituencies and 1450 County Assembly Wards were created, their distribution, their names, boundaries and areas of allocation. Controversy was also generated by the movement of sub-locations hitherto situated in one constituency and moved to a new constituency proposed to be created. There were also grievances and controversies regarding the number of wards given to a particular constituency mainly on the basis of population, geographical, ethnic, clan, community and other interests and the adequacy of the wards allocated. Consequently the aggrieved parties filed cases raising various complaints and grievances. These are the matters that now fall for our determination.

The Applications

37. The cases filed, collectively referred to as applications, before us were filed in the form of petitions brought under **Article 22** and applications for judicial review under the provisions of **Order 53** of the **Civil Procedure Rules**. The applications filed in the Constitutional and Human Rights Division in the High Court, Nairobi were consolidated under **Nairobi Petition No. 91 of 2012** and those filed in the Judicial Review Division of the High Court in Nairobi were consolidated under **Nairobi JR Misc. 94 of 2012**.

38. The applications filed in other High Court stations countrywide were referred to the Chief Justice by the respective High Court Judges for constitution of a bench comprising not less than three judges under the provisions of **Article 165 (4)** as they were certified as raising substantial questions of law.

39. The matters were listed for directions before us on 23rd May 2012. We consolidated all the applications for purposes of being heard together in **Nairobi Petition No. 91 of 2012** and **Nairobi JR Misc. No. 94 of 2012**. We thereafter gave directions for the presentation of oral submissions. We also directed the parties to file and exchange their pleadings and written submissions and where necessary file further depositions.

40. On 28th May 2012 we heard an application lodged by the petitioners in **Nairobi Petitions Nos. 97 of 2012, 141 of 2012, 142‘B’ of 2012, 146 of 2012, 147 of 2012** seeking the recusal of Honourable Justice Warsame on the ground that he had delivered a ruling in **Nairobi Misc. Appl. JR No. 309 of 2010** which concerned the power of the Minister of Planning, National Development and Vision 2030 to nullify part of the 2009 population census results. In the applicants’ view, the 2009 population census was a material consideration in the matters of delimitation before us. We considered the application and held that there were no grounds to justify the application for recusal as there was no basis for finding that a reasonable person acquainted with the facts of that case would conclude that Justice Warsame would be biased.

41. The IEBC also lodged preliminary objections to applications they claimed were filed outside the time provided for in **Article 89(11)**. The IEBC argued that since the decision was published in the Kenya Gazette of 6th March 2012 then the last date of filing any application was 6th April 2012. We heard the application and held that, *“Considering Special Gazette Supplement of 6th March 2012 and the position taken by IEBC, the effective date of publication of the order is 6th March 2012, which means the first date of computation is 8th March 2012 and 30 days would end on 6th April 2012, which was Good Friday, a public holiday. The next date on which filing could be done fell on 9th April 2012 which was Easter Monday, a public holiday. The last effective date for filing the application for review was therefore 10th April 2012.”*

42. On 30th May 2012 we delivered a ruling in which we held that all applications filed on or before 10th April 2012 were filed within the requisite time. We also ruled that we lacked jurisdiction to extend time for filing an application under **Article 89(11)** as read with **Article 259(9)**. We observed that, *“Article 89 confers upon the High Court a special jurisdiction. The jurisdiction is specific and exclusively governed by Article 89(11). Article 259(9) contemplates that there is either specific authority to extend time or that the context of the provision entitles the Court to extend time. There is no provision under Article 89(11) granting the court authority to extend time for filing an application for review outside the period contemplated.”*

43. The parties requested and we agreed to hear some of the matters outside Nairobi. Our decision was guided by the need to fulfill the value of public participation and the right of access to justice enshrined in **Article 48**. The applications were heard in Nairobi on 4th, 5th, 6th and 14th June 2012, in Kisii on 11th June 2012, in Kakamega on 12th June 2012 and in Mombasa on 15th June 2012. After hearing the parties we reserved the matter for judgment.

44. In **Nairobi JR Misc. Application No. 94 of 2012**, the following issues were framed;

a. *Whether or not under **Article 89** of the Constitution of Kenya, judicial review is the proper mode of review of the decision of the IEBC published as the **National Assembly Constituencies and County Assembly Wards Order, 2012 (Legal Notice No. 14 of 2012)** (hereinafter “the said decision”).*

b. *Whether or not the said order is amenable to the judicial review Orders of Certiorari, Mandamus and Prohibition as prayed and if so on what grounds may the same issue and how would the orders be framed.*

c. *Did the IEBC make the decision in accordance with the **Article 89** of the Constitution?*

d. *What is the scope of this Honourable Court’s power and jurisdiction under **Article 89** of the Constitution and what reliefs are available in respect of the cases now before the court as regards the*

said report.

e. Whether or not the said decision is wholly or partly invalid and a nullity in any respect or at all on any of the following grounds for being inconsistent with the Constitution of Kenya, and if so whether such invalidity or nullity may be severed and to what extent:-

(i) The said Legal Notice states that it takes effect from 7th March 2012 whereas **Article 89(9)** states that it shall come into effect on the dissolution of Parliament first following its publication by the IEBC in the Gazette;

(ii) The IEBC reached its decision without consulting all interested parties under **Article 89(7)(a)** as read with **section 26** of the **IEBC Act**;

(iii) The IEBC Act has not published details of constituencies and ward boundaries under **Article 89(9)** as read with **section 39** of the **Survey Act (Chapter 299 of the Laws of Kenya)**.

f. Whether or not the said decision is invalid for being inconsistent with **sections 39 and 41** of the **Survey Act (Chapter 229 of the Laws of Kenya)** as read with **section 31(b)** of the **Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)**.

g. Whether or not the IEBC has Gerrymandered in the determination of boundaries of wards and constituencies the subject hereof and if so, in what manner.

h. Whether or not the IEBC is guilty of capricious disregard of the will of the people of Kenya and has willfully and deliberately disregarded competent testimony and relevant evidence which a person of ordinary intelligence could not have possibly disregarded and in doing so has come to a wrong determination under **Article 89** as read with the **Fifth Schedule** to the **IEBC Act**.

i. Whether or not the said decision contravenes **Article 47** or the rules of natural justice, is illegal and founded on unfair administrative action including procedural unfairness.

j. Whether or not the said decision failed to take into account the constitutionally prescribed criteria and principles for the delimitation of boundaries of constituencies and wards, to wit, population quota, geographical features, community of interest, historical, economic and cultural ties of the people and means of communication.

k. Whether or not the said decision is compatible with **Articles 10, 19, 20, 38, 40, 56, 174 and 259(1)**.

l. What is the constitutional validity of the said decision and has it been made in accordance with the prescribed constitutional guidelines and the **IEBC Act** including **section 29** thereof.

m. Whether or not the report is ultra vires the powers of the IEBC and if so, to what extent.

n. What is the Attorney General's responsibility in the said decision taking into account **Article 156** and **section 29** of the **IEBC Act**.

o. What should be the order as to costs.

45. In **Nairobi Petition No. 91 of 2012** the following issues were framed;

a. Whether the population quota used for constituencies and wards is the population quota envisaged by **Article 89(12)**.

b. Whether the information used in determining the population quota is reliable as provided for under **Article 35(2)**.

c. Whether the information used in determining the population quota is in accord with the right to fair representation and equality of votes as provided for under **Article 81(d)**.

d. Whether the manner in which some of the Constituencies and Wards were curved out and taking into account their respective populations contravenes the constitutional requirement of fair representation and equality of votes as set out in **Article 81(d)**.

e. Whether the number of inhabitants of Kenya for purposes of **Article 89(12)** in the Constitution is 38,610,097 as per the 2009 population and housing census announced and released on 31st August 2010 or 37,724,850 as declared in Parliament on 21st February 2012 by the Minister of State for Planning, National Development and Vision 2030.

f. Whether the delimitation by the IEBC has infringed the petitioners political rights set out in **Article 38(2)**.

g. Whether the IEBC has in the delimitation of boundaries for constituencies and wards taken into account **Articles 89(5), 89(6), 89(7)(b)**.

h. Whether the **National Assembly Constituencies and County Assemblies Wards Order, 2012** gazetted on 6th March 2012 is constitutional.

i. Whether the IEBC in reviewing Constituencies infringed the petitioners rights under **Article 89(7)(a)** as read together with **Article 47**.

j. Whether the consultation provided under the **IEBC Act** is consistent with the right to consultation under **Article 89(7)** of the Constitution.

k. Whether the IEBC in the delimitation of boundaries of constituencies and wards failed to take into account national values and principles set out in **Article 10**.

l. Whether the IEBC in the discharge of its mandate in delimitation of boundaries of constituencies and wards complied with the Constitution.

46. The IEBC filed its Principal Replying Affidavit sworn on 11th May 2012 by its Director, Legal and Public Affairs, Praxedes Tororey. The Affidavit was in eight volumes containing key documents and reports used in the delimitation process. The affidavit was supplemented by CDs containing maps and recordings of the public sessions. The IEBC also filed other affidavits in each matter dealing with specific complaints lodged by the applicants.

47. This judgment is in two parts. The first part deals with the general and cross-cutting issues. In the second part we shall consider each application and the specific issues raised therein.

PART ONE

General and Cross-cutting issues for determination

48. After hearing the matters we concluded that specific issues framed by the parties can be collapsed into two broad procedural and substantive issues which will now form the basis for our consideration of the general and cross-cutting issues;

(a) The jurisdiction and the powers of court in relation to delimitation and in particular the meaning and effect of review as envisaged by **Article 89(11)**.

(b) The criteria for delimitation under **Article 89** and application of these criteria in light of the provisions of the Constitution and the **IEBC Act**.

49. Before determining these issues, it would be appropriate at this stage to set out the provisions of **Article 89**;

89. (1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97 (1) (a).

(2) The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.

(3) The Commission shall review the number, names and boundaries of wards periodically.

(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.

(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner mentioned in clause (6) to take account of—

(a) geographical features and urban centres;

(b) community of interest, historical, economic and cultural ties; and

(c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas.

(7) In reviewing constituency and ward boundaries the Commission shall—

(a) consult all interested parties; and

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.

(12) For the purposes of this Article, “population quota” means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which

Kenya is divided under this Article.

Principles of Interpretation of the Constitution

50. In determining this matter we are called upon to provide an authoritative interpretation of the Constitution and it is important to recall some of the guiding principles of interpretation. The court is enjoined to be guided by the provisions of **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

51. Our Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (Unreported)** at *paragraph. 51* adopted the words of Mohamed A J in the Namibian case of **State v Acheson 1991(20 SA 805 (Page 813)** where he stated that, ***'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the "national soul" the identification of ideas andaspirations 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.'***

52. Apart from complying with the stipulation that the Constitution must be given full life, it is our duty in considering this matter to give effect to the Constitution as a whole. The various provisions that govern elections and the electoral process must be read together in a manner that gives full effect to the purposes of the Constitution. In this respect we fully adopt the principle of harmonization set out in the case of **Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi Petition No 16 of 2011 (Unreported)** where the Court, quoting other decisions, stated that, ***"In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation. In the Ugandan case of Tinyefuza v The Attorney General Constitutional Appeal No. 1 of 1997, the Court held as follows; 'the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.'*** A similar principle was enunciated by the United States Supreme Court in **Smith Dakota v North Carolina 192 v 268 [1940]** the court stated; ***'it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.'***

53. A constitution is intended to set a standard upon which present as well as future legislation is to be tested. The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote – a philosophy which is capable of explaining the past and animating the future. Practical considerations must be borne in mind in Constitutional interpretation. It must be sensitive to what is called the practical living facts to which a legislature must respond. This is nowhere more important than in considering the right to vote, where practical considerations such as social and physical geography may impact on the value of the citizen's right to vote. Dickson CJ., stated in **R v Oakes(1986) 1 S.C.R. 103,136**, ***"The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."***

54. **Article 89** cannot be read or interpreted in isolation and it is against the background of the provisions of the entire Constitution that the mandate of the IEBC must be read and the right to fair representation and equality of the vote determined.

Jurisdiction and review

Right of Review

55. For the first time in our political and constitutional history the process of delimitation of constituencies and wards is the subject of court review. **Article 89 (10)** gives the right to any person to apply to the High Court for review of a decision made by the IEBC under **Article 89, Section 4** of the **Fifth Schedule** to the **IEBC Act** provides that any person dissatisfied with the outcome of the decision of the IEBC under the **Fifth Schedule** may apply to the High Court for review of the decision. An application under the **Fifth Schedule** is required to be filed within thirty days of publication of the decision in the Gazette and shall be heard and determined within thirty days from the date within which it is filed.

56. Applicants questioned the constitutionality of **section 4** of the **IEBC Act** in so far as it purports to limit the time for the filing and determination of a challenge lodged under the **IEBC Act**. We are of the view that since **section 4** of the **Fifth Schedule** to the **IEBC Act** grants a person the right to apply for review either under the **IEBC Act** or the Constitution the purported limitation on this court to determine the matter within thirty days of filing the application is inconsistent with the provisions of **Article 89(11)** which provides that the application for review shall be heard and determined within three months of the date on which it is filed.

57. Before we adjourned this matter for judgment counsel for the applicant in **Nairobi HC Misc. Application No. 94 of 2012** suggested that this judgment was due for delivery on 26th June 2012 which is three months from the date the first matter was filed. With greatest respect we disagree with this suggestion. The matters concerning delimitation were all consolidated and as we held in our ruling dated 30th May 2012, the last day for filing the applications was 10th April 2012. We consider this date as the date for reference in computing the three months envisaged under **Article 89(11)** for delivery of judgment, the last day being 10th July 2012.

58. For purposes of this judgment there is no difference between the review under **Fifth Schedule** to the **IEBC Act** and that under **Article 89(11)** and we shall proceed to determine this case on that basis.

Scope of Jurisdiction

59. The nature, extent and scope of our jurisdiction in relation to the delimitation process was the subject of argument and we must satisfy ourselves that we have the requisite jurisdiction to entertain the application before us. The Supreme Court in the recent decision in **Re The Matter of the Interim Independent Electoral Commission (Supra)** at paragraphs 29 and 30 addressed itself to the issue of jurisdiction in the following terms; “[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited** [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “**I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.**” [30] The **Lillian ‘S’** case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

60. In order to determine the scope of the review provided under **Article 89(11)**, we recall that the High Court as established under **Article 165** of the Constitution has, inter alia, the following jurisdiction;

(a) Under **Article 165(3)(b)**, jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(b) Under **Article 165(3)(d)(i) and (ii)**, jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of –

(i) The question whether any law is inconsistent with or in contravention of the Constitution;

(ii) The question whether anything said or done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(c) Under **Article 165(6) and (7)**, the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. In exercise of its supervisory jurisdiction, the High Court may make such orders or give any direction it considers appropriate to ensure fair administration of justice.

61. Consequently, the jurisdiction of the High Court to review the boundary delimitation process is not granted by statute but is founded in the Constitution; it is the jurisdiction of the High Court to satisfy itself of the propriety of any act or decision done by any person or body pursuant to the Constitution and the law. The High Court sits at the apex of the delimitation process and makes the penultimate decisions as to the legality of the decision of the IEBC after hearing the applications for review brought under **Article 89(11)**.

62. **Black's Law Dictionary (Garner Eds, 8th Ed.)** at page 1345 defines review as “*Consideration, inspection, or re-examination of a subject or thing. Plenary power to direct and instruct an agent or subordinate, including the right to remand, modify or vacate any action by the agent or subordinate, or to act directly in place of the agent or subordinate.*” Thus in exercising its jurisdiction in relation to the delimitation process, the High Court is meant to correct, modify, verify, eradicate, amend, override or suppress any illegality or unconstitutionality committed by the IEBC in exercise of its mandate of delimitation under **Article 89**.

63. The IEBC is not independent from the powers of the High Court. It is not out of reach of the supervisory duty and responsibility of the High Court under **Article 165**. The High Court when called upon to exercise the power of review is meant to curb vague and delinquent exercise of constitutional powers by entities entrusted to exercise lawful powers. The yardstick of the constitutional authority of the IEBC is to exercise lawful and constitutional powers and to avoid instances of excess, ultravires and wrong use of powers in a manner detrimental to the purpose and objective for which it was created. The IEBC can only exercise a lawfully conferred power or such power as is incidental to its functions and objectives. It is for these reasons that we reject the arguments proffered by the IEBC that it is neither an inferior body nor a creation of statute and therefore outside the scope of the court's power of judicial review.

64. **Stroud's Judicial Dictionary of Words and Phrases (6th Edition)** states that, “**Jurisdiction is a dignity which a man hath by a power to do justice in causes of complaint made before him.**” It connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference to the subject matter of the issue or to the persons between whom the issue is found or to the kind of relief sought or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its powers to hear and determine issues which fall within its jurisdiction or as to the circumstances in which it will grant a particular kind of relief which it has jurisdiction. It is significant and fundamental as the subject matters for our determination touch on various rights accorded to and enjoyed by the applicants under our Constitution.

65. The applicants cannot be left at the whim, discretion or mercy of the IEBC. They are not without relief or remedy for the causes of action urged before us. No person or body can claim not to be subject to or beyond the powers of the High Court when it is alleged he or she has committed transgression in exercise of a legitimate power conferred by the Constitution and the law. We think that for their grievances disclosed, the applicants cannot be said to be without a remedy or answer from the High Court. In our understanding the jurisdiction of High Court can only be ousted by very clear and express

language in the Constitution.

66. The IEBC has argued, and we have noted, that **Articles 88 and 249** of the Constitution protect the independence of IEBC. In *Re The Matter of the Interim Independent Electoral Commission (Supra)* at paragraph 58, our Supreme Court addressed the issue of independence of Commissions. The Court stated as follows; “*The independence of Commissions is secured by **Article 249(2)** of the Constitution which provides that such Commissions and holders of offices therein (Article 248), are subject only to law and are independent and not subject to direction or control by any person or authority..... It is a matter of which we take judicial notice, 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*”

67. The court recognized that Commissions serve as custodians of the fundamental ingredients of democracy, such as the rule of law, integrity, transparency, human rights and public participation. The court further noted that although these Commissions are required to operate free of subjection to “*direction or control by any person or authority*” they must however, “*operate within the terms of the Constitution and the law; the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.*”

68. We appreciate that **Article 89** gives IEBC exclusive authority to deal with all matters arising or relating to the delimitation process in a manner and process consistent with its powers thereby enhancing the rights and interests of all the citizens of this country. It is part of the Constitution and where the IEBC performs its constitutional duty it must be clear that it is bound by the provisions of the whole Constitution. As a State organ, the IEBC is bound to apply the national values and principles set out in **Article 10**.

69. Apart from the values and principles, the Bill of Rights must also underlie any decision made by the IEBC. In this regard the provisions of **Article 19(1)** and **(2)** are instructive and provide that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies and the purpose of recognizing and protecting human rights is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Furthermore, **Article 21(1)** imposes on the State and every state organ the responsibility to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

70. The importance of the Bill of Rights cannot be overstated as the applicants before us have all alleged the violation of their fundamental rights protected under the Constitution. The right to vote is the cornerstone of any democracy. **Article 1** emphasizes the fact that sovereign power belongs to the people of Kenya to be exercised in accordance with the Constitution and exercised directly or through democratically elected representatives at the national and county level.

71. It must now be pellucid that the powers exercised by the IEBC are not unlimited, uncontrolled or unhindered; they must be exercised in a manner that does not contradict, override or destroy the various provisions of the Constitution. The powers must supplement and compliment the different and distinct provisions of the Constitution.

72. The IEBC cannot circumvent the wishes and aspirations of the citizens who have donated their power to IEBC to exercise and use on their behalf and for their benefit without justifiable cause or reason permitted by the Constitution and the law. In that respect it is the duty and solemn responsibility of the High Court to test and interrogate the correctness, validity, lawfulness and constitutionality of a power, when a challenge is mounted by a citizen of this country. This after all, is a fulfillment of the essential value of the rule of law and the other values of transparency, accountability and good governance.

73. While we have no doubt that the High Court has the full mandate to review the work of IEBC, the approach to its responsibility in carrying out a review is dictated by the fact that boundary delimitation is

primarily a task imposed by the Constitution on the IEBC. The IEBC is an Independent Commission with a specific mandate conferred by the Constitution and the Court will defer to the decision of the IEBC so long as it does not violate constitutional requirements. It is not the Court's duty to substitute the decision of IEBC with its own views but to use the Constitutional yardstick to evaluate the process and final decision of the IEBC and to declare and hold unconstitutional any decision or part thereof that does not comply with the Constitution.

74. In *Attorney General of Saskatchewan v Roger Carter (1991) CanLII 61 (SCC), 189* the Supreme Court of Canada held that in determining whether the legislature complied with the Canadian Charter of Rights and Freedoms the court ought not to find that there has been a violation unless “*reasonable persons applying appropriate principles could not have set the electoral boundaries as they exist.*” The court went further to state that the reason for exercising this caution is that the delimitation process is necessarily complex and the commissions are required to consider a myriad of factors. Balancing these factors within the limits of the law and the Constitution is the duty cast on the IEBC and the Court will respect the choices made if those choices accord with the Constitution and the law.

75. Counsel for the IEBC referred us to the case of *R v Boundary Commission for England, ex parte Foot and Others [1983] 1 All ER 1009* as authority that this Court should exercise deference. In that case the Court of Appeal considered whether the court could intervene in the recommendation of the Boundary Commission on the creation of constituencies. The Court found that there was no evidence that it had failed in its statutory obligation to ensure equality of votes. The Court noted that the Commission enjoyed a degree of flexibility on interpreting and applying its rules. This case is to be distinguished on several grounds. First, England does not have a written Constitution like we do. Second, the Boundaries Commission's role in England is merely advisory in nature. Thirdly, there is no right of appeal granted to a party aggrieved to challenge the advice of the Commission. The court in that case merely exercised the normal judicial review jurisdiction to ensure that the law is followed.

76. It is pertinent at this stage to note that **Article 89** cannot be addressed in isolation when the process and mechanism of delimitation is under review. **Article 89** must be read and interpreted together with the other provisions of the Constitution in order to derive the object and purpose of the said article. To do otherwise, would result in absurdity and irreparable injury to the aspirations and expectations of the people of Kenya. Consequently we adopt a holistic interpretation indiscerning the meaning and purport of **Article 89**.

77. **Article 89(11)** is what gives a person a right to apply for relief in respect of the decision of the IEBC in matters of delimitation. **Article 89** does not determine the Court's jurisdiction as this is a matter dealt with by **Article 165**. The purport of **Article 89(11)** is to make it clear that the process of boundary delimitation is not beyond the reach of the court and is a justiciable matter.

78. The Judiciary acts as the repository and watchdog and is enjoined to enforce and defend the Constitution. This court does not have concurrent jurisdiction with the body empowered to exercise jurisdiction under **Article 89**. What we have and exercise is supervisory or superior jurisdiction in terms of **Article 165**. For purposes of the First Review, the powers of the IEBC are extinguished upon publication of the decision under **Article 89(9)** in accordance with the **Fifth Schedule** to the **IEBC Act**. This is the point at which the jurisdiction and powers of the High Court kick in and when an application is made under **Article 89(11)**. In essence one can say that the High Court is meant to supplement or compliment the powers of the IEBC and enrich it in areas where there have been violations or contraventions of the Constitution and the law.

Remedies and Reliefs

79. We heard substantial arguments as to the kind and nature of relief that this court should grant should we find that the IEBC has contravened the law and Constitution. The first argument was that the “review” referred to in **Article 89(11)** is the “judicial review” contemplated where the High Court exercising jurisdiction under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** as read with **Order 53** of the **Civil Procedure Rules** where the court issues orders of certiorari, prohibition and mandamus.

80. Judicial review is available where a decision making authority exceeds its powers, commits an error of law, commits a breach of the rules of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its power. In the case of ***Kenya National Examination Council v Republic ex parte Githinji Civil Appeal No. 266 of 1996 (Unreported)*** the Court of Appeal considered the parameters for the grant of certiorari, prohibition and mandamus, it stated, “*Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or such like reasons*” and quoting ***Halsbury’s Laws of England, (4th Ed.)*** at page 1111 paragraph 89 regarding orders of mandamus stated, “*The order of mandamus is of a most extensive remedial nature and is in form, a common issuing from the High Court of Justice, directed to any person, inferior tribunal, requiring him or them to do some particular thing specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of Justice in all cases where there is a specific legal right and no specific legal remedy for enforcing that right ... The order must command no more than the party against whom the application is made, is legally bound to perform. where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way they mean that an order of mandamus will compel performance of a public duty which is imposed on a body ... by statute, where that body has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.*”

81. Applicants who had approached this court by way of judicial review stated that orders of judicial review are available to correct the errors of the IEBC in conducting the delimitation and where the court found an error then an order of certiorari would be issued to quash the decision and direct the IEBC by an order of mandamus to correct the error. The applicants also argued that orders of judicial review were available by virtue of **Article 23** where the court finds a breach of fundamental rights and freedoms.

82. The second argument is that of counsel for the IEBC, Mr Nowrojee, who submitted that in so far as the applications brought were in the form of petitions seeking relief for breach of fundamental rights and freedoms under **Article 22**, then the court’s responsibility was to consider the rights and fundamental freedoms breached and grant relief in accordance with the provisions of **Article 23**. In the event there is no breach, then the court could not issue any orders of judicial review.

83. According to the IEBC, a party who invokes the jurisdiction of the court to enforce fundamental rights and freedoms by petitioning the court under **Article 22** has a duty to set out clearly the sections or provisions it is claimed have been infringed or violated and show how these sections are infringed in relation to him or her. This principle has been established in a long line of cases since ***Anarita K Njeru v Republic [1979] KLR154*** and ***Meme v R [2004] 1 KLR 637***. The IEBC also submits that the orders of judicial review are not available to quash, compel or prohibit it for performing any of the functions in the manner proposed by the various applicants.

84. The third argument agitated on behalf of the Attorney General, was that the power to review a decision of the IEBC under **Article 89** is akin to that of the court exercising review jurisdiction under **section 80** of the ***Civil Procedure Act*** as read with **Order 45** of the ***Civil Procedure Rules***. The power of review under the ***Civil Procedure Act*** entitles any person aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or by a decree or order from which no appeal is allowed to obtain a review of the decree or order upon discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on that face of the record, or for any other sufficient reason.

85. It was argued that the court when exercising such power of review does not limit itself to the procedural aspects of the process but is concerned with both the process and the merits of the decision and if it is satisfied that the grounds for review exist then the court will review the decision. Ms Munyi and Mr Bitta for the Attorney General were of the view that the ordinary remedies of judicial review were not available and it would be proper for the court to deal with the matter with finality. On the other hand, the IEBC was of the view that the proper remedy for the parties in the circumstances was the grant of

declarations.

86. The arguments proffered were mostly coloured by the procedure adopted to commence these proceedings. In our ruling of 30th May 2012 where we dismissed the preliminary objections by the IEBC, we stated as follows, “*Article 89 does not prescribe a mode of approaching the court, it only refers to the filing of an application. Parties are at liberty to approach the court in any manner provided by the general rules of procedure. These modes include the filing of a Petition or commencing Judicial Review proceedings. Since the matter is one of Constitutional importance, it cannot be subject to the formal strictures of procedure.*”

87. Our approach to the issue of the nature and extent of the relief we can give is first and foremost governed by the values of the Constitution. As we have stated it is the intention of the Constitution to promote good, governance and the rule of law. In discharging the function of review contemplated by **Article 89(11)**, the court is not constrained by the statutory provisions or common law remedies. The duty is a constitutional duty and the relief must accord with the task at hand. The High Court has the powers to grant appropriate relief if contravention of the Constitution is established, even if the State and the IEBC were to be inconvenienced.

88. The review contemplated in **Article 89(11)** is a review of the procedures and merits of the delimitation exercise. Where an application is made to court the court assumes all the plenary powers necessary to ensure that IEBC has complied with the Constitution. The South African Constitutional Court defined the constitutional duty of the court in the case of ***Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248*** at paragraph 99, where it stated, “*The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*”

89. The Court further elaborated on the duty of the court to grant appropriate relief, “*I have no doubt that this Court has a particular duty to ensure that, within the bounds of the constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility and in this regard are obliged to “forge new tools” and shape innovative remedies, if need be, to achieve this goal.*” We agree with these sentiments.

90. It is on the basis of these sentiments that we must dismiss the argument made on behalf of the IEBC that the Court is not suited to determine matters concerning delimitation or limit the nature of relief that can be issued. It is true that the Court may lack the technical expertise of cartographers, statisticians, anthropologists and any other technical capacity to carry out the task of delimitation but this argument cannot stand in the way of the court in performing its constitutional obligation. The court has fullpower to call or summon any witnesses, expert or otherwise, call for and examine all or any documents and material in the power or possession of the IEBC and do all things necessary to ensure that the Constitution is complied with.

91. When considering the matters before us, we have full discretion in balancing the constitutional criteria that apply to delimitation of electoral boundaries bearing in mind that the IEBC is the repository of the power of delimitation of electoral units under the Constitution. The IEBC has throughout these proceedings cautioned us against going down the road of assuming the power of the IEBC, we must state as the United States Supreme Court stated in ***Reynolds v Sims (1964) 377 US 533 at 566***, “*We are*

cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”

92. Our view is that once **Article 89(11)** is invoked by any person, the High Court is imbued with such power as is necessary to issue any orders or directions, grant any relief or remedy as is necessary to ensure adherence to the Constitution by the IEBC in the discharge of its constitutional responsibilities.

93. We agree with the Attorney General that the review under **Article 89(11)** does not envisage sending back the process to the IEBC for remedial action and the court must not adopt a piecemeal approach to this review. Whether an application is brought by way of judicial review, petition, originating motion or any other known procedure, the court must give appropriate remedy to bring this matter to a close.

94. **Section 36** of the *IEBC Act* makes provision for the **Fifth Schedule** to address the issues arising from the first review. **Section 36(2)** provides that the section will lapse upon gazettelement of the final report in accordance with the **Fifth Schedule**. Since the **Fifth Schedule** has now lapsed by publication of **Legal No. 14 of 2012**, the court cannot grant relief that sends the matter back to the IEBC for resolution.

95. The review proceedings are a final act in the process of delimitation under the first review. No further action is contemplated by any other person or body after the IEBC has rendered its decision in accordance with the **Fifth Schedule** to the *IEBC Act* and after the High Court has rendered its decision. It is in this respect that we hold that any relief that the High Court may grant must be final and conclusive in nature.

Status of the First Review

96. Before we proceed to consider the general principles that govern delimitation, we must put to rest any doubt as to the constitutional basis of the first review. It was submitted that IIBRC did not have the lawful mandate to delimit the 80 new constituencies and that when it purported to do it did not actually delineate the units in accordance with **Article 89**. The argument rests on the fact that **Article 89(2)** provides that review of the boundaries of constituencies and wards shall be completed at least twelve months before the general election and that IEBC as constituted under **Article 88** could not delimit constituencies and wards for the next general election.

97. We have considered submissions to the effect that the IEBC as constituted under **Article 88** was not intended to deal with the first review and in our view **Article 88** cannot be read in isolation, it must be read with the **section 27** of the **Sixth Schedule** to the Constitution. It was held in the case of *Dennis Mong'are Mogambi v Attorney General Nairobi Petition No. 146 of 2011 (Unreported)* that the schedules to the Constitution are part of the Constitution and must be given full effect. The court observed that, “[54] *The transitional provisions contained in the Sixth Schedule are intended to assist in the transition into the new order, but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. These transitional provisions are as much a part of the Constitution and as much an expression of the sovereign will of the people as the main body of the Constitution.*”

98. The effect of these provisions is that the advisory role which the IIBRC was to perform under **section 41C** of the former Constitution is carried over to the Constitution by the **Sixth Schedule**. As Justice Musinga held in *John Kimanthi Maingi v Andrew Ligale and Others (Supra)* the requirement of **Article 89(2)** that the review of constituency and ward boundaries shall be completed at least twelve months before a general election does not apply to the review of boundaries preceding the first general elections under the Constitution. This leaves no doubt that it was intended that the first general elections under the Constitution be carried out based on the work done by the IIBRC. Therefore, the provisions of **Legal Notice No. 14 of 2012** take effect and apply to the next general elections.

99. Furthermore, the IEBC is in terms of **Article 88(5)** to perform its functions in accordance with the Constitution and national legislation. Thus the terms of the first review, not being the delimitation strictly contemplated by **Article 89**, is governed by the **Sixth Schedule** and the *IEBC Act*. **Section 2** of the *IEBC*

Act defines the first review as “ *the review conducted by the former Boundaries Commission taking into account any outstanding work of that Commission and issues arising from that review.*”

100. It was further submitted that that the **IEBC Act** deliberately turned the role of the IEBC into one of merely rubberstamping the work of the IIBRC, by the reference to primary and secondary material in the **Fifth Schedule** to the **IEBC Act**. The reference to primary and secondary material is a direct consequence of the nature of the first review. The IIBRC which was created under **section 41C** of the former Constitution was to make “*recommendations to Parliament on delimitation of constituencies and local authority electoral units ...*” After the recommendations came in the form of the IIBRC Report, Parliament was then to make a decision of what to do with the recommendation. The recommendations were acted upon by Parliament in the form of the report referred to as the Secondary material while the report of the IIBRC which was adopted by Parliament still remained the primary material for purposes of the first review. The word ‘reference’ does not necessarily imply ‘adoption’ of the content of the documents as the IEBC, in law, still remains an independent Commission. We do not find this approach inconsistent with the independence of the IEBC as IEBC was to be guided by the Constitution in reaching its decision.

101. As we understand it, the first review is a delimitation process warranted by the terms of the transition from the former Constitution to the Constitution and is governed by the **section 27** of the **Sixth Schedule** to the Constitution and the **Fifth Schedule** to the **IEBC Act**. On the whole therefore we do not find any inconsistency between the role of the IEBC under the **IEBC Act** and the Constitution.

Delimitation

102. The applications before us concern the interpretation of and application of the criteria for delimitation set out in **Article 89** as read with **section 27** of the **Sixth Schedule** to the Constitution and **section 36** of the **IEBC Act** as read with the **Fifth Schedule** to the Act. Before we proceed, it would be important to examine at the meaning and process of delimitation.

103. What is delimitation? According to **Black’s Law Dictionary (Supra)** at page 460 delimitation means, “*the act of marking a boundary or fixing a limit. A fixing of limits or boundaries.*” The term usually refers to the process of drawing electoral boundaries. It can also be used to connote the process of drawing voting areas for purposes of assigning voters polling places. Generally the term has been employed to describe the process of demarcating administrative boundaries such as counties, constituencies, wards, divisions, locations and sub-locations. From this definition it is clear that delimitation does not affect a person’s residence or access to services or movement. It does not involve moving people or property nor does it change the location of land. It only relates to drawing of electoral boundary units for purposes of representation in National Assembly and County Assemblies.

104. The internationally recognized and accepted principles of boundary delimitations are representativeness, equality of voting strength, independent and impartial authority, transparency and non-discrimination. The decision as to whether to delimit an electoral area and the means adopted depends on a country’s specific administrative, political, social conditions and financial resources available. It is also accepted that delimitation practices that work well in some countries will not work well in others. In applying international standards, the delimitation in Kenya must be done within the Kenyan context taking into account the circumstances of the people of Kenya within the Constitutional and legislative framework. Consequently, it is our view that the standards and mechanisms for delimitation adopted in other countries cannot be juxtaposed wholly without taking into account the local circumstances.

105. In Kenya delimitation has traditionally been carried out on the basis of sub-locations which are the smallest administrative units. Constituency and County Assembly Ward boundaries are delineated in accordance with the boundaries of these sub-locations and each electoral unit is a combination of sub-locations whose precise boundary descriptions are to be found in survey plans deposited with the Director of Surveys in accordance with the **Survey Act (Chapter 299 of the Laws of Kenya)**.

106. The applicants argued that **Legal Notice No. 12 of 2012** describes the boundaries of wards and

constituencies by reference to the sub-locations but the maps are not attached. They further argued that the failure to provide authenticated maps and plans to show and describe the particulars of each sub-location is a breach of not only the provisions of **sections 39 and 41** of the **Survey Act** but also **Article 89 (9)** which provides that, “*Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.*”

107. **Section 39** of the **Survey Act** provides that where the provisions of any written law require that for the purposes of any written law a notice shall be published in the Gazette or otherwise specifying the boundaries of any land or area, or the situation and extent of any land or area, or particulars necessary to identify any land or area, or defining or designating the boundaries or limits of any land or area, it shall be sufficient if such land or area is described by reference in such notice to a plan of such land or area authenticated, identified and deposited in the Survey Office in accordance with the provisions of **section 41**. Section 41 provides that a survey plan is deemed to be authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf and by the signature of the authority by whom the notice is given, to be the land or area to which the notice refers and it is identified by a reference number.

108. **Article 89(9)** only requires the IEBC to publish names and details of boundaries. The details given by the IEBC were the names of the constituencies and County Assembly Wards described by reference to sub-locations. The IEBC submitted that the boundaries of sub-locations were on the basis of maps supplied by the Director of Survey. A detail must be such that it is clear for any person to know the area or location of the ward or constituency and the boundary limits.

109. We think that for purposes of **Article 89(9)** the details of constituencies and wards by reference to sub-locations is sufficiently descriptive of a defined area. Throughout the delimitation process the submissions received by the IEBC and this Court have been on the basis of sub-locations. We also note that the 2009 census was carried out on the basis of sub-locations which are known entities. Where necessary, the sub-location can be referenced to the maps and plans kept by the Director of Survey in accordance with the **Survey Act**. We do not think that failure to reference survey plans is fatal to the IEBC decision but we expect that in future the Legal Notice shall make reference to the specific plans so that the members of the public are properly informed of the specific location and boundaries of the sub-locations.

110. Though the determination of administrative boundaries was not part of the IEBC delimitation process, we cannot ignore the complaints we have heard about administrative boundaries. Part of the mandate of the IIBRC which was not completed was to make recommendations regarding delineation of administrative boundaries. Parliament must address the comprehensive recommendations of the IIBRC to institute a structured review of the administrative boundaries in accordance with the values and principles of our Constitution.

111. We shall now proceed to consider the principles that underlie delimitation and the constraints that affect the process of delimitation. We shall also discuss how these principles are provided for under **Article 89** and other Articles of the Constitution.

The Right to vote, fair representation and equality of the vote

112. Delimitation by its nature is intended to achieve the object of fair representation and equality of the vote which in turn contributes to fulfillment of the purposes for which our Constitution was enacted.

113. The right to vote is a prerequisite of any form of democratic governance and interference with this right is sufficient to constitute a breach of the Constitution. At the very minimum, each citizen must have the right to vote, to cast that vote in secret, and to have that vote honestly counted and recorded. The fundamental tenet of democracy is recognized in **Article 21** of **Universal Declaration of Human Rights** which states that “*The will of the people shall be the basis of the authority of Government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall*

be held by secret vote or by equivalent free voting procedures.”

114. Kenya is part of the international community and our legal framework adopts international standards of representativeness, equality of voting strength, an independent and impartial boundary authority, transparency and non-discrimination. The ideal of a free and democratic society which is synonymous with the right to vote and effective representation is recognized and protected by the Constitution. In the Preamble to the Constitution the people of Kenya recognize the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. **Article 1** emphasizes the sovereignty of the people which may be exercised either directly or through their democratically elected representatives at the national or county level.

115. **Article 10(2)** provides that the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people. These principles apply to all State organs, officers and public officers whenever any of them apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions.

116. Our democratic system is further strengthened by the protection of political rights under **Article 38** which protect the right of every citizen to make political choices, which include the right not only to participate in political activities but also entitles every citizen the right to free, fair and regular election based on universal suffrage and the free expression of the will of the electors for any elective public body. The right and freedom of expression, association, assembly, demonstration, picketing and petition found in **Articles 33, 36** and **37** of the Constitution buttress the democratic foundations of our society. The IEBC is therefore bound to give full effect to these provisions of the Constitution.

117. In addition the IEBC is to be guided by the general principles of the electoral system set out in **Article 81** which include, **“universal suffrage based on the aspiration for fair representation and equality of the vote.”** The question that needs to be answered is whether in dealing with delimitation the IIBRC and the IEBC were bound to ensure fair representation and equality of the vote.

118. Equality of vote and fair representation are related concepts. Equality of the vote implies that the vote of each citizen bears equal weight in the sense that the population of each electoral unit should be equal. Fair representation means that constituents have an opportunity to elect candidates they feel truly represent them and this means that electoral boundaries should coincide with communities of interest as much as possible. The application of these concepts is complex and may differ depending on the electoral system adopted by a country.

119. A substantial number of applicants before us complain that the delimitation carried out by the IIBRC and IEBC undermined the “one-person, one vote” principle of equality of the vote. The high watermark of this principle is exemplified and best illustrated by the case of **Reynold v Sims (Supra at p. 506)** where the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment to the US Constitution rendered unconstitutional an Alabama redistricting scheme for congressional elections which was based on counties and not populations and which failed to provide for equality of voters of each district. The Court held, *“the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”* The Court rejected the argument that the absolute equality of voting should be tempered by other considerations. The Court maintained that, *“But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote, modern developments and improvements in transportation and communication make rather hollow, in mid-1960’s, most claims that deviation from population-based representations can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely populated areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part unconvincing.”*

120. The US Supreme Court has continued to adhere to this strict standard for congressional districting to the extent of voiding a redistricting plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons in the case of ***Karcher v. Daggett***, [462 U.S. 725 \(1983\)](#).

121. We recognize that the approach taken by the US in adopting a purely population standard for electoral apportionment is governed by its unique history and circumstances and the interpretation of the Fourteenth Amendment to the US Constitution. Furthermore, the US Constitution itself does not provide for the delimitation of electoral units process nor criteria for such delimitation that would entitle the court to require consideration of other factors affecting delimitation.

122. Other countries have taken a different approach to that of the United States. In Canada, the approach has been largely influenced by the Canadian Charter of Rights and Freedoms. **Section 3** of the Charter provides that, “*Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.*”

123. In the case of ***John Dixon v Attorney General of British Columbia***(1989) CanLII 248 (BC SC), the Supreme Court of British Columbia considered whether the one-man one-vote standard was applicable to Canada in light of the Charter. The court concluded that the historical and philosophical foundations which permit such a view were lacking in Canada and that the ideal of voting power must be modified by other factors. The court stated, “[A]bsolute voting parity has never been required in Canada. It has been recognized since Confederation that some degree of deviation is permissible where the other considerations so require.”

124. The Supreme Court of Canada was called upon to determine the meaning of section 3 of the Charter in relation to the right to vote in the case of ***Attorney General of Saskatchewan v Roger Carter*** (Supra), McLachlin J., expressing the majority position stated that, “[T]he purpose of the right to vote enshrined in s. 3 of the Charter is not the equality of voting per se, but the right to “effective” representation.” The court concluded that though parity of voting power is of prime importance, it is not the only factor to be taken into account in ensuring effective representation.

125. The Australian position was demonstrated in the case of ***Attorney General of the Commonwealth (ex rel Mckinlay) v Commonwealth of Australia***(1975) 135 CLR 1. The plaintiff alleged that the electoral divisions into which Queensland was divided did not comprise, and did not have at any material time since the date of the last distribution of that State into electoral divisions, electors whose respective total numbers were as nearly as is practicable equal. The court dismissed the equality of numbers principle as it was neither supported by the Constitution and statutes of Australia nor did the history and developments of Australia demand such an approach. Gibbs J stated, “*The argument that equality of numbers within electoral divisions is an essential concomitant of a democratic system, so that in any constitution framed upon democratic principles it must have been intended to guarantee that electorates would so far as practicable contain an equal number of people or of electors, is simply incorrect - it begs the question and ignores history. Neither in 1901 nor subsequently has there been a universal recognition of the so-called principle that electorates should be numerically equal.*”

126. What emerges from the examples from Canada and Australia is that the right to vote includes the right to fair or effective representation and that the equality of votes based on population while the basic factor in that consideration, is not the only factor for consideration. The factors taken into account vary from jurisdiction to jurisdiction depending on the historical, social, constitutional and legislative context.

127. In order to understand the context of the right to vote in Kenya, it is important that we relate it to our electoral history. The creation of electoral units in Kenya started with the creation of 117 constituencies in 1963 and by 1966 another 41 were created due to the abolition of the Senate. This followed an exercise which had been carried out by a Royal Commission in 1962 with the mandate, “*to divide Kenya into not substantially more or fewer than 100 parliamentary constituencies and no constituency is to form part of more than one Region.*” In carrying out that exercise, the Commission was required to consider;

(a) Each constituency shall return one member only to the lower house

- (b) Communications
- (c) Community of interest
- (d) The boundaries of existing administrative areas and
- (e) The need to ensure adequate representation of urban and sparsely populated rural areas.

128. At the time, delimitation involved the use of county council wards or locations and sub-locations where they existed, in order to delimit constituencies, particularly in the more densely populated areas. In sparsely populated areas or where sub-divisions did not exist, delimitation was largely based on administrative districts. In rural areas with high population density and good communication, constituencies were delimited with the populations above the mean figure. In certain cases, strong tribal affinities or a case of close community of interest induced the Royal Commission to delimit constituencies well below the mean figure.

129. The independence Constitution provided that, for the purpose of election of members of the House of Representatives, Kenya would be divided into constituencies not being more than 130 or less than 110, and having such boundaries as may be prescribed by an order made by the Electoral Commission. The Constitution provided that no constituency shall form part of more than one region or both the Nairobi area and a region. The other key parameters to guide the delimitation process were that, all constituencies were to contain as nearly equal number of inhabitants as it appeared to the Commission to be reasonably practicable, but the Commission had discretion to depart from that principle taking into account:-

- (a) Density of population, and in particular the need to ensure adequate representation of urban and sparsely populated areas.
- (b) The means of communication
- (c) Geographical features
- (d) Community of interest, and
- (e) The boundaries of existing administrative areas.

130. The review of the number and boundaries of the constituencies was to be undertaken at intervals of not less than eight but not more than ten years, provided that whenever a census of population would be held, the Commission had the discretion to review the boundaries as it considered desirable in light of the census. For purposes of determining the number of inhabitants in any part of Kenya, the Commission was to ascertain the number by reference to the latest census of the population held in accordance with the applicable law. These parameters for delimitation of constituencies generally remained in place until the constitutional amendment of 29th December 2008.

131. In 1996, the ECK undertook a review of the boundaries and names of constituencies from a minimum of 188 to the maximum 210 as prescribed by the Constitution. The ECK distributed the additional constituencies in proportion to the population of each province and published **Legal Notice No. 298 of 1996** which has remained in place ever since. The delimitation that followed the one of 1996 is now the subject of these proceedings.

132. When the IEBC held consultations with stakeholders and the public, it emerged clearly that Kenyans were dissatisfied by delimitation of electoral and administrative boundaries in the past. The majority felt that constituencies were not adequate, given the population increase and marginalization of minorities. Other issues of lack of infrastructure and poverty were also cited. The majority desired the use of local names in the constituencies, yet in some areas there was no agreement on the boundaries for constituencies and many residents suggested redrawing of boundaries on the basis of community of interest, geographical features, population trends and means of communication.

133. There were proposals varying from the creation or splitting of constituencies because of the high population, expansiveness of the land, ease of communication and community interest as well as community of interest. Even those who made representations for splitting of constituencies were not unanimous. In some instances, there were suggestions to redraw boundaries so that if a third constituency was suggested, it emerged from more than one constituency, and in some instances, the only change desired was in the name. A large number of communities wanted their constituencies split and also demanded for more sub-locations and locations. There was a general view that every constituency should constitute an administrative district. The concerns over drawing of boundaries expressed from these applications are attributed to historical, political, economic and cultural conflicts existing in the various parts of Kenya.

134. Some of the root causes of boundary concerns identified by the IIBRC in its report were listed as follows;

- (a) history of unfair fixing, review and alteration of electoral and administrative boundaries
- (b) insecurity including cattle rustling and organized violent groups engaging in tribal and clan warfare
- (c) historical injustices especially the abuse of human rights, water resources, land issues (including grazing areas) and other natural resources.
- (d) Past and present inequality and inequities in resource allocation
- (e) The diversity of cultures, races and ethnic groups

135. The historical developments in Kenyan elections that culminated in the events of 2007 cannot be ignored and must not be forgotten. They are well documented in the **Kreigler Commission Report** which we have alluded to earlier in this judgment and the **Waki Commission Report** which documented the events surrounding the 2007 post-election violence.

136. It is beyond doubt that the delimitation of constituencies preceding the 2007 elections and as presently constituted are unequal; constituency populations for the 1997 elections ranged as from as few as 3,635 in one constituency to another one of 301,558. Most constituencies were well below or well above the population quota of 102,271. For example, Embakasi Constituency had a 381% greater population than the quota, while Lamu had only 18% of the average. This meant that the weight of the vote cast by a Lamu voter was 19 times greater than that of the Embakasi voter. Admittedly there was an over representation of the more sparsely populated areas and the urban and more populated areas were under represented. This inequality coincided with the agitation for an end to the single-party era.

137. The need for change was informed by these inequities in the delimitation process and the Kenyan courts had addressed themselves to these issues. In fact the issue became the subject of litigation in two cases. In the case of the **Rangal Lemeingurian and Others v Attorney General and Others Nairobi HC Misc. App. 305 of 2004**, (*“the Ilchamus Case”*) the applicants representing members of the Ilchamus Community, a minority community resident in Baringo Central Constituency sought a declaration that the ECK, at its next boundary review should take into account the requirements of **section 41C** of the former Constitution to ensure adequate representation of sparsely populated rural areas, population trends and community of interest including that of the Ilchamus Community. In discussing the position of the Ilchamus as a minority community the court commented on the manner of delimitation and representation of minorities within the electoral system. The court observed, *“We fully endorse the observation in the **NJOYA Case** that to underweigh any citizen’s vote is to degrade his citizenship and that minorities of whatever hue and shade are entitled to protection and that representation must be effective. And that what is called for in our society is a balance between the majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process. Naturally the predominant principle of application should be majoritarianism but it is equally correct that accommodating minorities does not entail reversing the democratic equation by having minority dominance in representative forums. Indeed, the Ilchamus are not asking for dominance but for effective*

representation.”

138. In the case of ***John Michuki and Another v Attorney General and Others*** Nairobi HC Misc. App. No. 975 of 2001 (Unreported) the applicants case was that the ECK had no criteria for determining the size of the Constituency and no system of weighing the criteria set out in **section 42(7)** of the former Constitution. As a result of the arbitrary exercise of its powers, the applicants contended that the ECK infringed on the freedom of assembly, association and the principle of one person one vote had been compromised. The Court observed that, “*There are some constituencies in this country that have more than 100,000 voters and others with less than 10,000 voters. Yet in both cases, their representatives have the same or equal voice in Parliament. We agree with learned counsel for the applicant that as matters stand now there is some imbalance in representation.*” The court held that the applicants had made out a case against the delimitation of Kenya into 210 constituencies under **Legal Notice No. 298 of 1996**. It urged ECK to deal with the issues raised by the applicants.

139. ***The Krieglhar Commission*** recognized this fact and recommended that the basic principle of delimitation should be equality of the vote, and the maximum departure from the principle should be clearly defined in the law and suggested a deviation range of 5 – 20%. **Article 89(6)** now prescribes a margin of deviation from the population quota by reference to cities, sparsely populated areas and other areas.

140. The question for resolution in these matters can be summed up in one sentence, “To what extent, if at all does the right to vote stipulated in Constitution permit deviation from the one-person one-vote rule.” The answer to this question turns on what one sees as the purpose and object of **Article 89**. Those who start from the position that the purpose of **Article 89** is to guarantee equality of voting power support the view that only minimal deviation from that ideal principle is possible or permissible. On the other hand, those who start from the position that the purpose of **Article 89** is to guarantee effective and fair representation see the right to vote as indicative of or comprising many factors of which equality is but one.

141. It has been argued that the only deviation permissible from the ideal of equality under **Article 89** is that required by the practical problems of ensuring that the number of voters in each constituency or ward is mathematically equal on the day of voting. We have also been urged to find that the goal of **Article 89** is the equality of voting power as nearly as may be possibly achieved.

142. In this regard we fully adopt the sentiments of the Supreme Court of Canada in ***Attorney General of Saskatchewan v Roger Carter*** (Supra) where McLachlin J., discussed the right to vote. She observed, “*It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in Dixon v. B.C. (A.G.), 1989 CanLII 248 (BC SC), [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles -- legislative and what has been termed the "ombudsman role". What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation. But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors. First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible. Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to*

ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.”

143. The history and philosophy behind our delimitation process does not suggest the framers of our Constitution in enacting **Article 89** had the attainment of absolute voter parity as the ultimate goal. We think their goal rather was to recognize the right long affirmed in this country to effective representation in a system which gives due weight to voter equity but admits other considerations where necessary. Effective representation and good governance in this country compel that factors other than absolute voter parity such as geography and community of interest be taken into account in setting electoral boundaries. Historically, the drawing of electoral boundaries has been governed by the attempt to achieve voter equality with liberal allowances for deviations based on the kind of factors enumerated in **Article 89(5)**. Deviations must not be such as to deprive voters of effective and fair representation.

144. In the context of Kenya, the Court and the IEBC are to be guided by the Constitution as the North Star and the ideal of a free and democratic society. The right to vote must be expounded in the light of the entire Constitution and the values that it enshrines. The right to vote enshrined in our Constitution is not about equality of voting power *per se* but the right to “fair representation.”

145. The ideal situation is that each voter must be as much as possible be equal to every other voter. In essence there cannot be wide variations and deviations among the proposed 290 constituencies and wards. However, we recognize and appreciate that deviations are permitted by the Constitution where it can be justified as having a good effect to the better government of the people as a whole giving adequate consideration to the criteria set under **Article 89(5)**. The creation of electoral units must meet the necessary conditions and there must be a pressing and substantial need that is rationally connected to the concept that the creation will result in fair and effective representation while the differing representational concerns of urban and rural areas may be properly considered in drawing constituency and ward boundaries. It is incumbent upon the IEBC to take into account the mandatory conditions imposed under **Article 89(5)**.

146. The IEBC has the constitutional mandate to balance all the relevant factors and considerations in delimiting constituencies and wards. Consequently, when an application is made under **Article 89(11)**, this court has power to test the application of the Constitutional criteria employed by the IEBC and where found wanting the court will intervene to restore the proper constitutional balance.

147. We cannot turn a blind eye to the actual realities in our country. Sparsely populated and far flung places in our country require effective representation. The constitutional imperative of delimiting boundaries of constituencies and wards “as nearly as possible” which is the heart of electoral apportionment has from the beginning been tempered by other factors other than population.

148. We conclude that in Kenya, the one-person one-vote principle is tempered by the unique circumstances of our Republic and the specific provisions of the entire Constitution. The delimitation of the boundaries as required by **Article 89** requires the IEBC to take into account the criteria contained in **Article 89(5)** and **(6)**. For purposes of the first review, attention must be paid to the provisions of **section 27** of the **Sixth Schedule** to the Constitution and the **Fifth Schedule** to the **IEBC Act**.

Population and Population Quota

149. The applicants before us have based their arguments on the issue of population and population quota to impugn the decision of the IEBC. We shall now turn to these concepts as they are used in **Article 89(5), (6)** and **(12)** in order to guide our decision.

150. This term population quota finds expression in **Article 89(12)** and refers to number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards. In this regard, we must consider

(a) What is the Kenyan population for purposes of the first review?

(b) The population quota for constituencies and wards.

151. In order to establish the number of inhabitants the government conducts a census every decade. The conduct of a national census is the responsibility of the Kenya National Bureau of Statistics (“KNBS”) which is established under the **Statistics Act, 2006. Section 16** of the **Statistics Act** provides:-

The Bureau shall collect any statistical information estimates or returns concerning any matter set out in the First Schedule to this Act.

Section 17 of the same Act reads as follow:-

The Minister may, on the advice of the Board, by order published in the Gazette direct that a Population and Housing Census be taken for Kenya or for any part thereof or in respect of any class of inhabitants thereof, and any such directions may specify:-

(a) the date or dates on or between which the census is to be taken;

(b) the persons by whom the returns for the purpose of the census are to be made; and

(c) The information to be obtained in the census

152. The 2009 census was conducted in accordance with the **Statistics (Census of Population) Order, 2008** which at **section 3** provides that, “*There shall be a national census which shall be taken starting at midnight 24th/25th August 2009 and the enumeration in respect of which shall be completed by 31st August 2009.*”

153. **Section 2(2)(b)(iii)** of the **Fifth Schedule** to the **IEBC Act** provides that IEBC could only use enumerated national census figures. This figure could only be authoritatively provided by the statutory body. According to the IEBC, it relied on the **2009 Kenya Population and Housing Census Report** issued in **August 2010** where KNBS determined the population of Kenya to be **38,610,097**.

154. Anthony Kilele, the Director General of the KNBS, in an affidavit sworn on 10th May 2012 in **Petition No. 147 of 2012**, explains that the 2009 Population Census was conducted in line with the **Statistics Act** and the preliminary results were released on 31st August 2010. He states that these results were released in line with the “*United Nations (UN) Principles and Recommendations, whose ethics dictate that the population figures from a census are released as enumerated, and gave a total population of 38,610,097 people.*”

155. The preliminary results for counties in Northern Kenya; Turkana, Wajir and Mandera were stated to have inconsistencies in certain key indicators and the Minister for Planning, National Development and Vision 2030 (“the Minister”) purported to nullify the census count affecting in these districts. The results affected eight constituencies in those counties. This decision was the subject of challenge in the case of **Noor Maalim Hussein and Others v Minister of State for Planning, National Development and Vision 2030 Nairobi J.R. Misc. Appl. No. 309 of 2010**. After hearing the matter the court granted the following orders on 7th February 2012;

(i) That an order of Certiorari be and is hereby granted to move to the High Court and quash the decision of the 1st Respondent of 31st August 2010 cancelling the 2009 population and Housing Census Results for Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies (the Eight Constituencies).

(ii) That an order of Prohibition be and is hereby granted prohibiting the 1st and 2nd Respondents from publishing, issuing, or gazetting projected results of Lagdera, Mandera East Mandera Central, Mandera

West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies from circulating any other figures other than the published 2009 Population and Housing Census Results to any other organ of the Government, Constitutional commission, offices or organizations.

(iii) That an order of Prohibition be and is hereby granted prohibiting the 3rd Respondent, whether through its Commissioners, Secretariat, Officers, agents, employees or howsoever from acting on any other census data relating to Lagdera, Mandera East Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies other than the published 2009 Population and Housing Census Results in the determination of boundaries review and/or determination of new boundaries.

(iv) That costs of the Application be and are hereby awarded to the Applicant against the 1st and 2nd Respondents.

(iv) That the Interested parties shall bear their own costs.

156. The effect of the court orders was to void the Minister's decision to interfere with those results affecting the eight constituencies. The court determined that the Minister had no power to annul the results and in effect the census results released in the **2009 Kenya Population and Housing Census Report** in August 2010 were upheld. This decision is subject of **Civil Appeal No. 64 of 2012** which is yet to be heard and determined by the Court of Appeal.

157. On 21st February 2012, the Minister announced in Parliament that the 2009 census concluded that the number of inhabitants in Kenya was **37,724,850**. This figure was as a result of adjustment of the initial census figure by the KNBS. The adjusted figure was published in the **2009 Kenya Population and Housing Census Report** issued in **March 2012**. According to Mr Antony Kilele, the results released in August 2010 were only provisional and further analysis had to be carried out using international demographic methodologies and rationalization to reach the final outcome which is the final census figure. The difference between the preliminary figure and the final adjusted figure is **885,247**.

158. Some of the applicants have argued that the KNBS has given information showing the population of Kenya is about **885,247** people less than that used by IEBC in creating the constituencies and wards. The applicants contend that the IEBC was enjoined to use the final and official Population Census Results tabled in Parliament delimiting Constituencies and which are contained in the **2009 Kenya Population and Housing Census Report** issued in **March 2012**. It is on this basis that they argue that the population quota was calculated on the wrong basis and therefore the allocation and delimitation of constituencies was unconstitutional. For example, the International Center for Constitutional Research and Governance ("ICCRG"), the petitioner in **Nairobi Petition No. 147 of 2012** has submitted that following constituencies would be affected by the difference in the figures;

- i. Mandera West's population was 191,721 rather than 319,774 giving a difference of 128,054.
- ii. Turkana Central's population is 254,423 rather than 254,606 giving a difference of 183.
- iii. Lagdera Constituency's population is 147,174 rather than 245,123 giving a difference of 97,947.
- iv. Mandera Central's population is 251,267 rather than 417,294 giving a difference of 166,027.
- v. Wajir East Constituency population is 135,832 rather than 224,418 giving a difference of 88,586.
- vi. Mandera East Constituency's population is 175,977 rather than 288,687 giving a difference of 112,710.
- vii. Turkana North Constituency's population is 278, 238 rather than 374,414 giving a difference of 100,176.

159. Apart from the constituencies affected, the applicants contend there is significant deviation from the population quota in accordance with the adjusted figure. The result of this is that some areas have benefited at the expense of others. ICCRG gives the following examples,

- i. Mandera and Garissa Counties each have two constituencies they do not deserve.
- ii. Migori, Homa Bay, Busia, Vihiga, Bomet, Baringo, Samburu and Wajir Counties each has one constituency they do not deserve.
- iii. Kilifi County has two constituencies less than it deserves.
- iv. Nyamira, Bungoma, Kericho, Nakuru, Uasin Gishu, Trans Nzoia, Makueni, Meru, Kwale and Mombasa Counties had one less constituency than they deserve.

160. IEBC used a formula based on the provisions of **Article 89(12)** to derive the population quota calculated as follows, ***“The total population of Kenya divided by total number of Constituencies.”*** The IIBRC and IEBC used the population quota based on the preliminary census results contained in the August 2010 report which showed that the population as **38,610,097**. It was argued that the population quota based on the preliminary census figures went beyond the minimum and maximum permitted variations allowed by the Constitution in delimiting the constituencies and wards.

161. In resolving the issue of the population of Kenya, we must underscore the fact that we are not reviewing the decision or process of the KNBS in the conduct of the 2009 census. We are applying our minds to whether IEBC acted in accordance with the Constitution and the law in determining the population as a basis for determining the population quota. Neither the IIBRC nor the IEBC was mandated by law to carry out a census of the people of Kenya; that is the statutory mandate of the KNBS. Unless the mandate of the IEBC is changed to include conducting a census, IEBC must take the census figures provided by the statutory body empowered to conduct the census.

162. The First Review was carried out by the IIBRC and at the material time the only census figures that were available were those released by the Minister in the **August 2010** report and the IIBRC was entitled to use them in carrying out delimitation.

163. When the IEBC was constituted and instructed by national legislation enacted in accordance with **Article 88(5)** to deal with unresolved issues arising from the IIBRC Report, the only report available of the census was that issued on **August 2010**. Under the provisions of **section 2(b)(ii)** of the **Fifth Schedule** of the **IEBC Act**, the IEBC was required to use enumerated national census figures and not projected figures. By a letter dated 20th November 2011 the Chairman of the IEBC wrote to the Minister requesting him, *“to avail to the Commission, the enumerated Census results for the 2009 census report and any other materials relevant to that activity.”* The Minister duly responded by the letter dated 5th December 2011 wherein he enclosed, *“[F]our books showing the enumerated census results for 2009*” The Minister forwarded the **2009 Kenya Population and Housing Census Report** issued in **August 2010** to the IEBC.

164. These census results available at the beginning of the exercise and having been confirmed by the High Court decision in **Nairobi JR No. 309 of 2010** remain valid unless overturned. Additionally, **section 2(b)(ii)** of the **Fifth Schedule** to the **IEBC Act** enjoined the IEBC from using *“new population figures.”* In resolving the issues arising from the first review, IEBC could not refer or apply the population figures contained in the Census Report released on 12th March 2012 as the figures contained therein were *“new population figures”* within the meaning of the **Fifth Schedule** to the **IEBC Act**. In any case, by that time, the decision subject to our determination had already been made.

165. The issue for disposition then, is not what is the population of Kenya but what is the population of Kenya for purposes of the first review. The population of Kenya for purposes of the first review is that provided in the **2009 Kenya Population and Housing Census Report** issued in **August 2010**. The IEBC acted in accordance with the law and Constitution in relying on the figures provided by a statutory body

mandated to conduct the census. We are satisfied that the population figures used by the IEBC are legally recognized as containing enumerated figures in accordance with the **Section 2(b)(ii) and (iii)** of the **Fifth Schedule** to the **IEBC Act**.

166. The delimitation process is not so much a mathematical issue, but a practical one and within the demographic context and the IEBC acted accordingly. The applicants have asked us to consider the exact number of Kenyans. It is difficult to get the exact number of the people resident in a given area as people die, some move and other are born in the night after the census. This is not a matter for concern by the IEBC and is beyond the scope of review under **Article 89(11)**.

167. In reflecting on the provisions of **Article 89(5), (6),(7) and (12)** we must also consider that the provisions of **section 27** of the **Sixth Schedule** constrained the manner in which the first review was carried out. Though the IIBRC was required to carry out and complete the delimitation in accordance with the constitutional criteria, it was constrained in several ways. First, the Constitution sets a ceiling to the number of constituencies at 290. Second, it was limited by the fact that it could not determine boundaries of counties. This in effect meant that all constituencies were quarantined within county boundaries. Third, IIBRC had to carry out the delimitation in such a way that no constituencies were lost. The IIBRC completed its work based on the limitations imposed. IEBC inherited the work of the IIBRC and was bound to follow the legislative instructions contained in the **Fifth Schedule** to the **IEBC Act**. It is against this background that we will consider the mandate of the IEBC.

168. **Article 89(5)** provides that the boundaries of each constituency shall be such that the number of inhabitants in the constituency is as nearly as possible equal to the population quota in the manner specified in **Sub Article (6)**, taking into account certain enumerated factors which are stated in **Sub Article 5** and permitted deviations under **Sub Article 6 and 7(b)**.

169. These provisions empower the IEBC to make an informed and consultative decision. The main consideration in this regard is whether that decision was based on the legitimate expectation of the population. Our view is that indeed a wholesome reading of the aforementioned provisions points to the fact that the attainment of a relatively equal composition in terms of population quota can only be realised progressively and not instantly. Certainly, this is not achievable in the first review which is governed by restrictive and pre-existing conditions. In essence the Constitution imposes an obligation on IEBC to preserve pre-existing constituencies despite the provisions of **Article 89(6)**.

170. Demographic equality cannot be achieved instantly. The key words under **Article 89(7)** are “*progressively work towards ensuring that the number of inhabitants in each constituency and ward ...*” This position is replicated in **section 2(2)(b)(i)** of the **Fifth Schedule** to the **IEBC Act**. There is no obligation on the IEBC to achieve instant demographic parity.

171. The issue of population quota must also be considered in light of the provisions of **Article 81(d)** regarding universal suffrage based on the aspiration for fair representation and equality of vote which we have discussed. We agree with the sentiments expressed by Shore J., of the Federal Court of Canada in **Raiche v Attorney General of Canada [2004] FC 679** where he observed that, “*accordingly, relative parity of voting power is the first condition of effective representation, but other factors, for example geographical features, history, the interests of the community and representation of minority groups, had to be considered and could justify deviations from absolute voter parity.*”

Delimitation Methodology

172. We shall now examine the methodology used by the IEBC to calculate the population quota and distribute the constituencies and wards. **Section 2(1)** of the **Fifth Schedule** to the **IEBC Act** mandated the IEBC to use the IIBRC Report as its primary reference material in resolving all the issues arising from the first review. The formula used by the IIBRC and IEBC to distribute the constituencies is as follows;

National population quota of Kenya = Total Population of Kenya

Total number of Constituencies

173. Therefore taking the enumerated population of Kenya as **38,610,097** persons and dividing by **290 constituencies** resulted into a population quota of **133,138** persons.

174. After determining the population quota, the IEBC then calculated the deviations permitted to the population by **Article 89(6)** as follows;

VARIATION TO POPULATION QUOTA	CONSTITUTIONAL VARIATION TO POPULATION QUOTA	AREA TO WHICH VARIED QUOTA IS APPLICABLE
+40%	186,394	City
-40%	79,883	Sparsely Populated Areas
+30%	173,079	Other Areas (Upper Limit)
-30%	93,197	Other Areas (Lower Limit)

175. IEBC employed a scientific mathematical formula and applied the same to re-distribute the 290 constituencies within the existing provinces as follows;

Nairobi being the only city, its population was subjected to its population quota as follows;

$$(40\% \times 133,138) + 133,138 = 186,393.$$

Subjecting the population of Nairobi to the population quota for cities then:

$$= (3,138,369/186,393) = 17 \text{ constituencies.}$$

Subtracting the population of Nairobi from the national population

$$= (38,610,097 - 3,138,369) = 35,471,728$$

Subtracting the 17 constituencies given to Nairobi from the 290 constituencies

$$= (290-17) = 273$$

Dividing the remaining population by the remaining Constituencies

$$=(35,471,728/273) =129,933.$$

Subjecting the remaining provinces to this quota:

$$= \text{province population (X)/129, 933}$$

This gives a total of 291 constituencies. The 17 constituencies allocated to Nairobi were then subtracted from this figure of 291 and the result was 284 constituencies left. The Rift Valley is then reduced by 1 because of its large number of constituencies.

176. After determining the ideal number of constituencies for each province, the IEBC then determined the additional constituencies to be added to each province by subtracting from the number of ideal constituencies the number of existing constituencies in each Province as follows;

PROVINCE CONSTITUENCIES

	<i>Current No.</i>	<i>Additional Total</i>	
1. <i>Coast</i>	21	4	25
2. <i>Central</i>	29	4	33
3. <i>North Eastern</i>	11	6	17
4. <i>Eastern</i>	36	7	43
5. <i>Nairobi</i>	8	9	17
6. <i>Western</i>	24	9	33
7. <i>Nyanza</i>	32	9	41
8. <i>Rift Valley</i>	49	26	75
TOTAL	210	74	284

177. In applying **Article 89(5)**, the IEBC clarified that it ranked the 210 constituencies within their respective provinces according to the population. The constituencies with the highest population within each province were given priority for splitting. In doing so, it took into account the diverse cultural, historical and economic ties, community of interest, geographical features and urban areas in each region. It also took into account means of communication which were mapped out countrywide when dividing or ceding parts of the old constituencies to create the 290 constituencies.

178. In deciding which constituency would be divided and how it would be divided the IEBC also considered the memoranda and oral submissions presented to it from the inhabitants of a particular constituency or ward during the public consultation. The IEBC contends that due diligence was taken to make sure the divisions were done within the constitutional parameters as set out in **Article 89(6)**.

179. In order to give effect to the provisions of **Article 89(6)**, the IEBC was guided by the fact that according to the **2009 Population Census Report Volume 1A** the population density of Kenya is 66 persons per square kilometre and the only city in Kenya was Nairobi. In accordance with **Article 89(6)** IEBC grouped the existing constituencies as follows: **Cities** Nairobi; **Sparsely Populated Areas** being those constituencies with a reported population density below the national population density of 66 persons per square kilometre and **Other Areas** being areas not being cities or sparsely populated areas and with a population density greater than 67 persons per square kilometre.

180. This information was then used by the IEBC to classify the 210 constituencies noting that Nairobi City, due to its creation by Royal Charter, was recognized as the only legal city for purposes of the first review. This formula was then applied to all constituencies to have their population fall within the acceptable margin that was **79,883** to **186,394** persons per Constituency. This was subject to the provisions of **Article 89(7)(b)**.

181. **Section 27(4)** of the **Sixth Schedule** provided that no existing constituency would be lost during the first review thus protecting those constituencies falling below the permitted population quota. This

rendered twenty seven existing constituencies as protected and as such they were not subjected to delimitation. These constituencies were North Horr, Mvita, Lamu East, Taveta, Galole, Bura, Lamu West, Wundanyi, Mwatate, Voi, Saku, Laisamis, Isiolo South, Siakago, Kilome, Ndaragwa, Tetu, Othaya, Mukuruweini, Kangema, Mathioya, Samburu East, Samburu West, Keiyo North, Mogotio, Vihiga and Budalangi.

182. In determining the distribution of the constituencies, the protected constituencies were not considered addition or further subdivision. After determining the population quota, the IEBC then applied this quota to the population existing as captured in the census report for each province to determine the ideal number of constituencies per province.

183. Pursuant to the above methodology, the IEBC arrived at a determination on the distribution and delimitation of the two hundred and ninety constituencies as published in **Legal Notice No. 14 of 2012**. The IEBC submits that compelling cancellation or creation of a constituency shall have a negative multiplier effect that will destroy and invalidate the entire process throughout Kenya.

184. One of the criticisms leveled at the methodology provided by the IEBC is set out in the **Nairobi Petition No. 147 of 2012**, where the applicant, ICCRG, referring to a report prepared by one Mr Johnson Sakaja contends that the IEBC effectively used two population quotas for constituencies namely; 133,138 for all 290 constituencies and 129,933 for 273 constituencies after subtracting seventeen constituencies given to Nairobi despite the fact that the Constitution provides for one legal population quota as defined in **Article 89(12)**.

185. In **Nairobi JR 147 of 2012**, the applicants attacked the formula used by the IEBC based on an affidavit of Patrick Kenya sworn on 30th May 2012. Mr Nabutete asserted that the mathematical formula used by the IEBC was erroneous. In his view, the correct formula was to first subtract the 17 Nairobi constituencies and the 27 protected constituencies from the 290 constituencies and their populations from the national population. This results in a balance of 246 constituencies and a population of 33,521,687. The population quota is then calculated by dividing the remaining population by the remaining constituencies, which results in 136,267. To get the ideal number of constituencies per province, the following formula was proposed: *Province Population minus the population of protected constituencies in the province divided by the population quota (136,267)*.

186. This formula would then result in a total of 290 constituencies instead of the 284 that the mathematical formula applied by the IEBC yielded. According to Prof. Kenya a mathematical formula must give the exact desired result and the IEBC formula did not achieve its objective. It is argued that in applying the IEBC formula, the IEBC was left with discretion to apportion the six remaining constituencies which resulted in certain provinces benefitting at the expense of others.

187. We have considered these critiques and we appreciate the concern that this first review had protected constituencies to which the population quota was not applicable. The formula applied by the IEBC was however necessitated by the requirement to adhere to the IIBRC methodology. We also find that including the population of protected constituencies in the calculation of the population quota was not fatal taking into account the difference between the population quota used for constituencies of 133,138 and that proposed one of 136,267. On the issue of excluding the Nairobi City population from the calculation of the population we find that this was necessitated by the use of a different deviation margin of 40% to that population.

188. Under **Article 89(6)** the margins of deviation are defined by reference to “cities”, “sparsely populated areas” and “other areas”. The Constitution does not define “cities”, “sparsely populated” and “other” areas. It was therefore left to the IEBC to define these terms. One of the complaints by the applicants is that the method adopted by the IEBC disadvantaged highly populated urban areas. It was suggested that areas defined as municipalities under the **Local Government Act** ought to have been classified as cities.

189. Our role is to examine whether the process and result of the approach taken by IEBC was reasonable

in the sense that it complied with the law and intended to meet the objective of fair representation. The adoption of Nairobi as a city for the purpose of determining the population quota margins was consistent with the fact that Nairobi is the only urban centre characterized as a city under our law having been granted a Royal Charter in 1959. We do not think there would be any basis to elevate municipalities to that status particularly given that some municipalities occupy only part of a county or constituency. Nairobi as a city is an entire county and is recognized in law as such. We are also cognizant of the fact that **section 2(2)(ii)** of the **Fifth Schedule** to the **IEBC Act** enjoined the IEBC from considering new definitions of cities, urban centers and sparsely populated area for the purpose of the first review.

190. From our assessment and contrary to the arguments made by some applicants against the formula adopted by IEBC, densely populated areas were not disadvantaged in terms of the number of constituencies and wards as they were subjected to lower population deviation margin of 30% instead of 40% applied to the City of Nairobi. “City” or “Urban” areas are also not units of delimitation but a factor to be taken into account when considering variation from population quota. In our view, whatever formula adopted must result in fair and effective representation.

191. As regards sparsely and other areas, it is to be noted that for the purpose of the first review, sparsely populated areas were already part of the constituencies protected under **section 27** of the **Sixth Schedule** to the Constitution. Consequently apart from Nairobi and the other protected constituencies, all the constituencies fell within the definition of “other areas.”

192. The methodology used by the IEBC has also been challenged on the basis that it used provinces as a basis for delimitation and distribution of constituencies. Provinces are legally recognized territorial units under the **District and Provinces Acts** subject to the provisions of **section 17** of the **Sixth Schedule** to the Constitution which provides that the provincial administration shall be restructured within five years from the effective date. The first review was commenced by IIBRC when the Kenyan territory was divided into provinces and not counties. The IEBC could not vary the methodology adopted by IIBRC save to the extent limited by the **Fifth Schedule** to the **IEBC Act**. The use of provinces was intended to give effect to the principle of fair representation and to ensure that the 80 new constituencies were fairly distributed all over the country. We therefore find no basis for this complaint at least for the purposes of the first review.

193. We have evaluated the methodology used by the IEBC in conducting the first review, we do not detect any breach of the Constitution or the **Fifth Schedule** to the **IEBC Act**. What we need to examine is whether the IEBC applied the methodology in a manner that was consistent and not arbitrary in the delimitation of specific constituencies and wards. Where there was deviation from this quota, was there any rationale for such recourse in considering or taking into account the criteria of geographical features, urban centres, community of interest, historical, economic and cultural ties and means of communication as provided under **Article 89(5)(a)(b)** and **(c)**. These are the matters for determination.

Geographical features, community of interest and other factors

194. Apart from the population which is the primary factor, the right to vote is affected by other factors such as geographical features and urban centres, community of interest, historical, economic and cultural ties and means of communication. Effective representation and good governance, in this country compel that these considerations be taken into account in setting electoral boundaries outside the limits of the population quota.

195. **Article 89 (6)** recognizes that it is not possible to have the exact population in every constituency by reason of factors such as geography, urban centres, community of interest, historical, economic and cultural ties, population growth patterns, difficulty in communication hence the justification of deviations from voter parity in constituencies and wards.

196. Resorting to the criteria set out in **Article 89(6)** is justified on the ground that they contribute to better and effective governance of the populace as a whole, giving due weight to regional issues within the populace and geographical factors within the territory governed. The meaning of these factors are not

defined and in taking them into account the IEBC is required to address itself to their meaning and application. We shall now consider the meaning of these factors.

197. The IEBC considered these factors in paragraph 3.5 of ***Final Report of the Proposed Boundaries of Constituencies and Wards***. IIBRC and IEBC defined geographical features to include water bodies, valleys, mountains, cliffs and other elevations and features that may hinder communication and other human activities. The boundaries as far as possible were to be drawn in order to bring together geographically congruent zones that are able to facilitate communication, political activity and administration of elections in a manner that leads to the realization of the aspiration of fair and effective representation.

198. Delimitation of constituencies takes into account the importance of creating electoral areas that correspond as closely as possible to community interest. According to IEBC, “*Community interest assures that electoral units are cohesive with common interests related to representation in the county and national governments.*”

199. What is the meaning of community of interest? The IEBC adopted a meaning gleaned from Article 21 of the Constitution of the State of California in the USA which states;

A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for the purposes of fair and effective representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the electoral process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

200. The IEBC states that it effected the community of interest criteria by analyzing the information submitted to it through public fora and memoranda and delimited constituencies and wards based on the social-economic infrastructure such as schools, hospitals, abattoirs, water infrastructure and reservoirs, grazing land and market centres.

201. According to the IEBC historical ties were centred on the history of the particular electoral unit and the area, the origins and names of the area under which an electoral area falls, as well as cultural hegemony of the residents and the presence of significant cultural heritage sites and monuments.

202. We note that the community of interest as defined by the IEBC centred mainly on socio-economic factors and was narrow and restrictive. But a community may be defined by more than socio-economic factors. These factors may be consequences of shared history, values and traditions, culture, common ethnic or tribal background or a variety of ties that create a community of voters with distinct interests.

203. The consideration and application of these factors by the IEBC was highly contested by the applicants. Most of the concerns raised by the applicants centred on IEBC’s consideration of ethnic, sub-ethnic group or clan interests. A majority of applicants argued that as far as possible people of the same ethnic, sub-ethnic group or clan should be kept in one electoral unit. There was also concern that urban areas should not be put together with rural areas or that the IEBC failed to consider issues of economic or class interests.

204. The Constitution provides guidance on these issues. The preamble to the Constitution acknowledges that we the people of Kenya are “***PROUD of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation: RECOGNISING the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law***”

205. **Article 11** of the Constitution recognizes culture as the foundation of the nation and as the

cumulative civilization of the people of Kenya and obliges the state to promote cultural expression. **Article 32** protects freedom of religion while **Article 44(1)** protects the right to enjoy and express culture and language. The freedoms of expression and association protected by **Articles 33** and **36** respectively reinforce these rights.

206. **Article 56** obliges the State to put in place affirmative action programmes designed to ensure that minorities and marginalized groups participate and are represented in governance and other spheres of life. This can only be achieved by giving **Article 89** a purposive and liberal interpretation.

207. On the other hand the Constitution envisions that the main vehicles of political expression, that is political parties, must have a national character. **Article 91(1)** requires a political party to have a national character and promote and uphold national unity. **Article 92(2)** does not permit a political party to be founded on the basis of religious, linguistic, racial, gender or regional basis.

208. The effect of these provisions is that the Constitution recognizes that we are a diverse people and that each community must be given recognition within the context of building one united Kenya. This objective can only be achieved if we recognize and accommodate everyone in a manner that takes into consideration their rights and interests. Everybody must be under the shade and nobody should be left in the sun. In interpreting **Article 89(5) (a)(b) and (c)**, the IEBC is obliged to give effect to these provisions while effecting the delimitation process. One thing we are cognizant of is that delimitation is not intended to bring about conflict and divisiveness or to undermine the unity of the nation.

209. Community of interest is a difficult concept to define and like the Hindustan elephant it assumes a definition dependent on the person defining it. According to the available literature, “community of interest” has three dimensions (See generally *Helen Fulcher, “The Concept of Community of Interest” 1991* (available at <http://www.dlg.nsw.gov.au/DLG/Documents/CommissionsTribunals/bconcept.pdf> accessed on 7th July 2012). There is the perception function which is the sense of belonging to an area or locality which is clearly defined. It is personal and subjective in nature and in the proceedings before us it is what would be loosely referred to as “community interest.” There is the functional content of the definition which refers to the ability to meet with reasonable economy, the communities’ requirements for comprehensive physical and human services. This dimension takes into account the interactions of the community in light of common activities such as schools, trade centres and other economic and social activities. The political dimension of community of interest relates to the ability of government representation and the ability to represent interests and reconcile conflicts within a defined area.

210. In our view, it would be improper to define community of interest in a manner that will stultify the inherent flexibilities contained in the term. Our conclusion is that if the concept of community of interest is to be applied to delimitation of boundaries, then it must be conceived in a broad operational manner which will enable those who are elected representatives of constituencies and wards to respond to the needs of the inhabitants. It will not be possible if community of interest is conceived narrowly and defensively.

211. The approach adopted by the IEBC tried to fit the views of the people to a set and pre-determined definition obtained from a country and culture far removed from the local circumstances instead of the peoples’ views dictating what community of interest obtained in each case. It was like a doctor examining a patient and prescribing the wrong medicine because in his estimation that is what the patient desired. Since the IEBC is bound by the obligation to consult and engage the public, it must draw its definition and understanding of community of interest from the people.

212. We feel obliged to address the issue of clan identity as it relates to community of interest. In some Kenyan communities, the clan is the basic structure through which the social system, community welfare and political representation is organized, as community activities and loyalties are along kinship lines. We must emphasize and clarify that we do not endorse the exclusive affirmation of clan identity and clan-based political system, as it this can be an obstacle to the promotion of civic citizenship based on human rights and democratic principles. However, where the clan is shown to be a key factor in providing shared values of personal identity and security that are of high emotive value, then it is a relevant community of

interest that should be taken into account in the delimitation of electoral boundaries and weighed against the constitutional values and principles.

213. The definition chosen must be intended to attain a valid, objective, proportionate or appropriate to the ends desired. We have noted that the definition adopted by the IEBC is from American jurisprudence, which virtually requires absolute equality and voting power. It would be simplistic and wrong to infer, without more, that the American definition would achieve the same or similar result in our local context. It is vital to recognize that it is Kenya's, not America's, constitutional history, values and philosophy which must guide the IEBC. Our traditions, practices and values must accommodate significant deviation from the ideals of equal representation and we cannot turn a blind eye to the actual realities in our delimitation. It is also important to appreciate that the American tradition of one person one vote is absent in Kenya. Consequently a definition that addresses and meets the need of the American people cannot be transported to Kenya without careful consideration, variation and modification where necessary. To ignore community of interest in the creation of electoral units and to insist on a foreign definition would result in grave injustice. It will also lead to frustration and resentment among the voters.

214. The factors to be taken into account under **Article 89(5)(a)(b)** and **(c)** must be considered as a whole and not in isolation. The perimeter of a community of interest may correspond to a geographical feature like a river or valley; it may be an urban centre or separated by a means of communication. What the Constitution requires is fair and effective representation in the delimitation of constituency and ward boundaries. Whether the IEBC has taken them into account is a question of fact to be determined in each individual case.

215. We also take the view that the Constitution is forward looking. Communities change and evolve, new ties are formed and old bonds shaken and transformed by intermarriage, migration, education opportunities and economic interaction. With devolved government it is expected that where there were no roads, roads will be built and where there were no bridges, bridges will be constructed. Delimitation is not intended to ossify boundaries and communities into history, it is intended to give a voice to everyone in an effort to build a new Kenya. That is why **Article 89(7)(b)** requires that in reviewing electoral units the Commission is to *“progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.”* If electoral units were frozen in time, then the progression commanded by the Constitution would be impossible to achieve over time. The IEBC as an independent Commission is charged with balancing all these interests.

216. We must now correct the impression created that delimitation of electoral units will stop any individual from carrying on with their daily activities, from visiting their neighbor, from fishing in the lake, from grazing their cattle or from using the water pan. Boundaries are not fences. No Kenyan will be required to possess a passport to cross from one constituency to another or from one ward to another. The Constitution is committed to the protection of the fundamental rights and freedom of every person and binds the state and every person. **Article 32** protects the freedom of conscience, religion, thought, belief and opinion. **Article 36** protects the freedom of association. **Article 37** protects the freedom of assembly. **Article 38** protects political rights. **Article 39** entitles every Kenyan to reside anywhere in Kenya. **Article 40** protects the right of every person to acquire and own property of any kind anywhere in Kenya. **Article 44** protects the right to use one's language and to participate in cultural life. The exercise of all these rights is not affected by the delimitation of electoral boundaries.

217. Electoral boundaries are intended to secure effective representation of the citizens and are just one aspect of the total architecture of the organization of government and must be seen as such. Delimitation is not an end in itself.

218. The issue of community of interest, historical, cultural and economic ties is closely related to the rights of minorities and marginalized groups. It is therefore our view that delimitation does not necessarily erase clan identity or historical and cultural ties. We consider this a very important issue which we shall now address.

Minorities, the Marginalized and Discrimination

219. We have heard that as a result of the delimitation of some constituencies and wards, some communities will become minorities and suffer discrimination. Other groups state that they are minorities and as such deserve recognition by having a ward or constituency of their own. Some applicants claim that the delimitation resulted in discrimination against minorities or that certain ethnic groups or clans were marginalized. In addressing the question of marginalized and minority communities, we must pay regard to the use of these term in their ordinary meaning and as provided in the Constitution.

220. To marginalize means to place at the edge, far from the source or to give secondary or minor importance, people with a measure of difference. A **minority** is a small number or a relatively small group of people, differing from the majority in race, religion, language, culture and is treated differently. It also refers to a group having fewer controlling number of votes. *The Black's Law Dictionary(Supra)* at page 1086 indicates that, “some courts have held that the term minority in this sense is not limited to a group that is outnumbered, it may also be applied to a group that has been traditionally discriminated against or socially suppressed, even if its members are in the numerical majority in an area.”

221. **Article 260** of the Constitution of Kenya defines “marginalised community” to mean;

(a) A community that because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) A traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or

(d) Pastoral persons and communities, whether they are -

(i) Nomadic; or

(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

“Marginalised group” means a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).

Article 27(4) provides as follows:-

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to

redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

224. **Article 100** of the Constitution obliges Parliament to enact legislation to promote representation in Parliament of ethnic and other minorities and marginalized communities. Any process carried out by the IEBC must promote representation of ethnic and other minorities and marginalised communities in Parliament and County Assemblies within the parameters prescribed by **Article 89**.

225. The principle regarding equal participation by special groups finds expression in various international instruments; the *Universal Declaration of Human Rights*; *International Covenant on Civil and Political Rights* (ICCPR) as well as the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). The OAU (now AU) *Declaration on the Principles Governing Democratic Elections in Africa* (2002) and the most recent one, the *African Charter on Democracy, Elections and Governance 2007* impose an obligation on the State to ensure enjoyment and enforcement of the rights in these instruments. These instruments also prohibit the exclusion of special groups from participating in the political process.

226. Many of the applicants have argued that tribe and clan is what forms a nation and is what defines a community. What we must consider is whether these principles applied by IEBC expose accepted international best practices which include, inter alia, fair representation, transparency, equality of the vote, inclusion of the minority and marginalized groups and universal suffrage of the electorate, in a manner consistent with the Constitution.

227. The applicants have submitted that they are not advancing parochial tribal interests because tribe is a fundamental aspect of the community and is what defines our identity and pride. We have been urged to consider the *Illchamus Case* when taking into account minority interest and how the issue of tribe or clan affects the people. Simply put the dominant argument is that by either failing to set aside electoral units for the minority or marginalised communities or by moving one ward to another constituency or realigning the constituency boundaries by moving sub-locations or merging them, the people from minority or marginalised communities have been disenfranchised. It is argued that by moving boundaries of electoral units, the IEBC created minority communities and subjected them to discrimination and marginalization.

228. IEBC is accused of violating the provisions of **Articles 89(5)** and **Article 38(2)** which protect political rights of every Kenyan. According to the applicants, the minority and marginalised communities' right to fair representation and equality is affected and the only way to ensure meaningful participation is for this court to review IEBC's decision.

229. We were urged to recognise that counties have diverse ethnic, cultural and religious diversity and that each electoral unit created must ensure that these diverse groups are accommodated and made to feel that they are represented within Parliament or the County Assembly. It was therefore submitted that if a group is large enough with distinct ethnic, religious or cultural identity it ought to be recognised by creating a constituency or ward for it. Conversely, if a community constitutes a minority or marginalized group then to promote their rights, an electoral unit must be created for them.

230. IEBC's response is that it was obliged to articulate the national values and principles set out in **Article 10** of the Constitution and that it could not make public policy decision based on regional or sectional interests. It also stressed that delimitation cannot and must not be based on exclusiveness of a community and in delimiting electoral units it had to balance diverse community interests while ensuring that the aspirations of the marginalised and minority communities were met.

231. There is concern expressed regarding clan co-existence and effective representation pegged to history, politics and economics. Is this clear co-existence or separation based on fear of being in the minority or simply joining strengths so as to vote as a block? Whereas there is unity in diversity, can we shut our eyes to instances where there is also unity and fairness in putting the minority together so as to enable them enjoy the benefit of political representation where there are specific issues affecting residents? Where does economic and political marginalisation fit in this equation of minority and marginalised communities?

232. Indeed a distinction must be drawn between economic and political marginalisation versus existing economic ties established for purposes of convenience. The place of the minority and marginalised when interpreting the constitutional rights must as of necessity be to promote the values that underlie democracy based on human dignity, equality and freedom. This interpretation must be generous taking into account social conditions, experiences and perception of the Kenyan people so as to give true measure to fundamental rights. We must also make a distinction between the marginalised and minorities as recognised in the Constitution from those wearing the brand of marginalisation or minority purely on the basis of resistance to cohesion and co-existence or for convenience.

233. The former is the group which has been subjected to unequal benefit of protection of rights and political and economic participation by virtue of their special circumstances whilst the latter merely seeks equality in terms of sameness and their perspective is a mere localized close knit community. For the former group, the discrimination and disadvantage they have suffered in the past has led to their being unable to benefit from opportunities available to the majority communities so that where necessary, there may be justification on positive discrimination or affirmative action so as to lift the recognised minority and marginalised communities to a position of equal worth as members of the human race under **Article 27**.

234. We must examine the concept of equal protection and situations where equality is achieved by virtue of differentiation. This is the only way in which perhaps a satisfactory explanation would be achieved regarding why some areas have been merged to create wards or constituencies for persons deemed to fall on the constitutionally recognised minority/majority communities, whilst in some areas wards and constituencies have been split, boundaries re-aligned to “share out” some communities who would otherwise form a majority in a ward or constituency.

235. In the Indian Case of ***State of West Bengal v Anwarali* [1952], SCR 284, 335**, it was held that “*Classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained and cannot be made arbitrarily and without any substantial basis.*” We can do no better in this regard than to draw from the case of ***Magoun v Illinois Trust Bank (1898) 170 US 283*** which stated, “*The rule of equality permits many practical inequalities. And necessarily so A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequality..... When a law is challenged as offending against equal protection the question of determination by the court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object.*”

236. We bear in mind that fairness requires a consideration of interests of those affected by a decision, but it must be viewed in light of the impact that discrimination has on the affected object and whether the discrimination impairs the human dignity of that community. Our view is that protection of the marginalised and minority communities by the various articles in the Constitution is intended to ensure that people under like circumstances and conditions are treated equally, that is, equality among equals. Where there is an imbalance, due to distinct attributes which places a community at a disadvantage, then such inequality can only be achieved by eliminating the mischief and avoiding an approach which would otherwise be considered as favouring the minority community.

237. To reiterate the words expressed by the Supreme Court of India in the case of ***State of Kerala and Another v N M Thomas and Others* 1976 AIR 490**, “*The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is applying an approach differentiating between different*

persons in different circumstances. The circumstances which govern one set of persons..... may not necessarily be the same as those governing another set of persons..... so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.... persons who are not by nature, attributes or circumstances, in the same position and their varying needs require special treatment.”

238. So there we have it; equality does not connote absolute equality where a classification based on rational distinction free from artificiality and arbitrariness can be made. **In our diversity, we recognise the need to fulfil our national anthem, regarding living in unity, reflecting homogeneity while equipping the disadvantaged minorities with opportunities to participate in our national development. The effect of treating the marginalised and minority communities in the exact same manner as the larger communities in the delimitation process, would be far more discriminatory, and would never eliminate the mischief intended to be reduced by provisions of Article 27 and would undermine the achievement of social justice.**

239. We are conscious of the fact that if we were to apply the strict meaning of the term equality in the delimitation process, constitutionally recognised minority and marginalised communities will suffer grave injustice. In any case as we have stated before, strict equality of the vote is neither required nor desirable within the constitutional scheme of things. Our position is that in certain instances and circumstances inequality does not per se amount to discrimination prohibited by **Article 27** unless it can be demonstrated that such selection is unreasonable or arbitrary.

240. What this means is that when we cast our gaze upon the actions by the IEBC with reference to these groups of persons, we must take into account why they provided a different yardstick to what may appear to be factually similar if a strict definition of the term marginalised and minority was to be given as it has to act within the four corners of the **Article 89, section 27** of the **Sixth Schedule** to the Constitution and the provisions of the **Fifth Schedule** to the **IEBC Act**.

241. We recognise the existence of factual historic injustices and imbalance which need to be addressed so as to resolve the concerns expressed in the **Kriegler Report** regarding gross disparities in the voting population of Kenya’s constituencies, which breached the fundamental equality principle of democracy. The report was an indictment to our long standing discrimination of the marginalised and minority communities which in itself impaired the integrity of the electoral process.

242. The IEBC has a margin of discretion in taking into account the rights of minorities and marginalized groups while exercising its mandate particularly in how it applied the criteria set out in **Article 89(5)(a) (b) and (c)**. How and to what extent the IEBC has departed from its mandate in taking into account the historically marginalised or minority communities is what must be determined in light of each case.

243. We must caution that taking into account the rights of the minorities and marginalized does not mean that the IEBC is obliged to create sectorial, ethnic or clan enclaves. What must be discouraged is the concept of exclusive constituencies and wards being formed on the basis of sectorial interests that do not meet the objectives of the Constitution. We must emphasise once again that delimitation of electoral boundaries is not the only means by which the problems of minorities and the marginalised will be solved.

244. The State is obliged to make necessary interventions and take specific policy, legal and other measures in areas of political, social and economic engagement. The Constitution provides mechanism for realization of the rights of the marginalized and minorities through specific interventions in the rights of representation under **Article 100** and **197**. The number of constituencies and wards is not infinite; it is severely constrained by the number of electoral units that are available for distribution in order to achieve an objective level of fair and effective representation for all citizens of Kenya. The rights of minorities and those marginalized must be realized within these parameters.

245. Kenya comprises various communities who form the team. The success of Kenya depends on the team comprising all citizens even minorities are part and parcel of the Kenyan team. If you want them to play and participate you must recognize their worth and give them a number. One cannot expect them to contribute and be part of the team without recognizing their worth and according them a team number. It is not the strongest or tallest who always contribute to the strength of the team. Minorities and marginalized play a vital role in the success of the Kenya team. Some teach while others defend our borders. Consequently to underestimate or ignore their contribution would be tantamount to pushing them to the edge. In our view if all human beings are worthy of respect regardless of who they are or where they live then it wrong to treat them as mere second class citizens with any rights.

246. It is our view that defending the rights of minorities is defending human rights. We intend to give a number in order to recognize their human rights.

County Assembly Wards

247. One of the issues to be addressed by the first review is that of the delimitation of County Assembly Wards. When the IIBRC was formed, the devolution provisions of the proposed Constitution had not been fully conceptualized and only became known once the Constitution was promulgated. By this time, the IIBRC had completed the public consultation program of delimitation of Constituencies hence the recommendation that the existing civic wards under the **Local Government Act** be used as County Assembly Wards. The issue of wards was therefore part of the issues arising out of the first review to be addressed by the IEBC. This was to be done by way of “*redistribution of wards or administrative units.*”

248. In order to determine the optimal number of County Assembly Wards, the IEBC resolved to adopt the recommendation of the **Report of the Task Force on Devolved Government (“Mutakha Kangu Report”)** which recommended the capping the number County Assembly Wards at 1450. According to the IEBC this decision was reasonable, prudent and within its constitutional mandate to adopt the recommendations of a public task force duly mandated which had consulted widely including holding public fora to collect views on delimitation of County Assembly Wards.

249. In this respect two issues raised by the applicant’s need to be addressed;

(a) Whether the IEBC could delimit County Assembly Wards; and

(b) Whether the IEBC could properly limit the number of wards to 1450.

250. Some of the applicants contend that the IIBRC’s mandate was to delimit constituencies and wards and because it failed to fulfill its mandate, IEBC could not delimit the wards as it was not mandated to conduct the first review. In considering this issue we are obliged to have regard to the provisions of the whole Constitution concerning representation within the county as an important element of devolution.

251. **Article 1(3)** contemplates that the sovereign power of the people of Kenya is delegated inter alia to the legislative assemblies in the county government. **Article 6** provides for devolution and divides the territory of Kenya into 47 counties. These provisions are further underpinned by the values of sharing and devolution of power and **Chapter Eleven** sets out the framework for devolution. **Article 177 (a)** provides that each County Assembly consist of members elected by registered voters of the wards. The combined effect of these provisions is that devolution is a fundamental part of our Constitution and must be given full effect. The provisions regarding devolution will come into force at the next general election and it is therefore a constitutional imperative that County Assembly Wards be delimited in accordance with the Constitution in readiness for the next general election.

252. The IEBC had to give effect to the provisions of the Constitution by resolving all issue concerning delimitation of County Assembly Wards in order to give effect to the devolution provisions of the Constitution. Whereas there were civic wards in existence and which the IIBRC recommended to be County Assembly Wards, the IEBC was given the mandate through national legislation to re-distribute the existing wards to form County Assembly Wards. In delimiting the County Assembly Wards the IEBC

was carrying out its obligations under the Constitution. Neither the Constitution nor the **IEBC Act** limits the number of County Assembly Wards but the IEBC in exercising its mandate is required to determine the number of wards to distribute.

253. Some of the applicants' also claim that the IEBC is independent entity and could not be bound by the **Mutakha Kangu Report**. In answering this question we take guidance from the Supreme Court in the case of **Re Interim Independent Electoral Commission (Supra)** where the court stated, "*Indeed for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in public interest. Constant consultation and co-ordination with other organs of government, and with civil society, as may be necessary, will ensure a seamless, and an efficient rendering of service to the people*" Thus the IEBC was well within its mandate to have regard to the work of other government entities.

254. The **Task Force on Devolved Government** was a public task force formed pursuant to **Legal Notice No. 12876** dated 25th October 2010 and whose mandate was inter alia to make proposals on appropriate legislation to anchor and implement the devolved government. The membership of the task force was diverse and in carrying out its work, the task force was guided by the values of public participation and consultation. We have read the report and are satisfied that it carried out its work in accordance with values of the Constitution.

255. On the issue of the number of County Assembly Wards, the **Mutakha Kangu Report** at page 71 after setting out various views and arguments concluded as follows; "*The Task Force on Devolved Government has determined that for a County Assembly to effectively fulfill representation and oversight functions, and then it required to have a minimum of twenty-five (25) members. It has also considered the political reality that while wards are the electoral units for purposes of County Assembly elections, they are also constituent units of constituencies. There (sic) boundaries will therefore be determined by the existing boundaries of constituencies. Under Article 89(1), the Constitution provides that there shall be two hundred and ninety constituencies for the purposes of the election of members of the National Assembly provided for in Article 97(1)(a). Given that these have been defined and determined according to the constitutional provisions for purposes of determining the number of wards per county, is of the view that each constituency should [have] five (5) wards. This will serve to maintain a relative equality between wards and the number of electors. The numbers will then be adjusted by allowed deviation from the population quota to allow for a minimum of 25 county assembly members.*"

256. The Task Force suggested that County Assembly Wardsshould be demarcated to follow locations but having, regard largely to community interest and historical ties. Further, that due consideration be given to the interest of the minority and marginalized groups. On the question of population, the report observed that the public proposals ranged from figures of 5,000 to 25,000per ward. The predominant view was that there was a need to offer a close and effective representation while at the same time maintaining sustainable units which would not drain resources. Consideration was also given to whether using the current location boundaries would reduce unsustainable wards and fulfill the desire for sustainable management. The report recommended that a more enlightened approach would be to observe and borrow constituency requirements on parliamentary representation boundaries formula which would lead to a merging of current local authority wards so as to establish more realistic boundaries forCounty Assembly Wards.

257. The methodology, criteria and formula utilized by the IEBC in delimitation of County Assembly Wards took into account the county population quota and the requirements of **Article 89 (5),(6) and (7)**. This county population quota is arrived at by dividing the total population of the county by the number of constituencies in the county pursuant to the delimitation of constituencies. The formula given by IEBC in distributing the wards within the counties is that the total number of constituencies in the county, was multiplied by the ideal number of county wards per constituency being five as recommended by the **Mutakha Kangu Report**.

258. Each constituency population within a particular county was then divided by the county population

and the result multiplied by the number of County Assembly Wards awarded to the county to arrive at the number of the County Assembly Wards awarded to a constituency. In apportioning wards, the IEBC states that it considered memoranda and oral submission presented to it from a particular constituency or ward during consultation, taking into account that parameters as set out in **Article 89(5),(6) and (7)**.

259. IEBC acknowledges that although it applied the criteria set under **Article 89(5)** to the delimitation of wards, the number of wards per constituency varied, resulting in different numbers of County Assembly Wards in respective constituencies but it explained that this was because the methodology, criteria and formulae used took into account the county population quota.

260. This county population quota was arrived at by dividing the total population in the county by the number of constituencies in that county pursuant to the delimitation of constituencies. IEBC explained that this formula was used because primary consideration was given for equity in representation in the county. According to the IEBC, this approach was plausible because it enables the respective counties to effectively fulfill their representation and oversight functions. Thus IEBC computed the number of wards based on the **Article 89 (12)** as follows;

National Population census 2009 that is $38,610,097 = 26,628$

Total Number of wards 1450

261. By applying this formula, IEBC argued that even the smallest county has adequate number of County Assembly members to perform its functions so that the higher the population of a constituency, the higher the number of County Assembly Wards. It also defended this approach as one that takes cognizance of the interests and inequalities in the population of various counties and the imbalances in each constituency.

262. Our view is that the IEBC was not restricted by the Constitution in the number of wards it could create neither could it restrict itself to creating five wards per constituency. However, it adopted an objective, rational and valid process of determining the number of County Assembly Wards in line with the mandate imposed by the **IEBC Act** on it to resolve outstanding issues from the first review. Moreover, its approach to the task and reliance on the **Mutakha Kangu Report** was intended to achieve the objects of devolution ensuring that there was fair representation in County Assemblies across the country.

263. None of the applicants before us have offered or demonstrated an alternative objective methodology in which the number of wards would be determined bearing in mind the factors which the Task Force considered.

264. In dealing with the complaints the court will have to consider whether the IEBC used the formula adopted in a uniform manner throughout the country. Some applicants are aggrieved by the delimitation of wards and their distribution across the country and within the constituency. They are concerned that some constituencies have more than five wards while some have as few as three. In some cases the complaints involve the creation of new wards by amalgamating administrative units that were previously separate. The answers to these questions shall be determined in each individual case.

265. We must also clear the misconception created by the IIBRC when it recommended that the civic wards then existing under the **Local Government Act** be considered as the County Assembly Wards. There is a difference between civic wards as they exist under the **Local Government Act** and the proposed County Assembly Wards. The new electoral units within the counties for the election of members of the county assemblies were introduced by the constitutional provisions on devolution. **Article 177** provides that each County Assembly shall consist of inter alia members elected by registered voters of the ward, each ward constituting a single member constituency. **Section 2** of the **Elections Act (Act No. 24 of 2011)** defines “electoral area” as a constituency, a county or a ward and a “ward” is defined as an electoral area within a county delimited in accordance with **Article 89**. Civic wards are, on the other hand, units within municipalities, counties, townships delimited in accordance with the **Local Government Act**.

Constituency and Ward Names

266. Another area where complaints arose is in the naming of constituencies and wards.

267. The applicants complain that the names given by the IEBC to constituencies and wards did not accord with the submissions presented to them by the public. We must consider whether the IEBC was obliged to name electoral units along the lines suggested by the area inhabitants. During his submissions in *Kisii JR 13 of 2012*, Mr Kajwang posed the question, “*what is in a name?*” Would we decline the request of those persons who are aggrieved by the new names given to the electoral unit on the basis that, the name does not change its physical being or that it was given a name which had an offensive or scornful meaning?

268. It was argued on behalf of some applicants that a name is the sublime identity of everything and embodies character, principles and cultures. It is the shorthand for the identity of a community. A name may be so outrageous that it defies logic. It may embody discrimination of a minority or marginalized group. It may be misleading in certain instances. Our duty is to consider what informed the decision of the IEBC when it changed the name of an electoral unit.

269. **Article 89(3)** empowers the IEBC to review the number, names and boundaries of wards periodically while **Article 89 (8)** of the Constitution provides, “***If necessary, the Commission shall alter the names and boundaries of constituencies and the number, names and boundaries of wards.***” Furthermore, in resolving the issues arising out of the first review under the **Fifth Schedule** to the **IEBC Act**, the re-distribution of wards and administrative units may result in new electoral units such as may require naming.

270. On what basis is it necessary for the IEBC to rename an electoral unit and on what basis is a name adopted? We must bear in mind that a simple change of name does not mean that physical location of the constituency or ward has ceased to exist. In reviewing each case therefore, our obligation is to examine whether it was necessary for the IEBC to change the name of an electoral unit and the reason for the name change and in doing so whether the views of the inhabitants were taken into account and a decision made in a manner consistent with **Article 19(2)** which provides that, “***The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.***” In a nutshell what this boils down to is the principle of reasonableness by IEBC in exercising its constitutional discretion.

Consultation

271. In reviewing the constituency and wards boundaries, IEBC was required to consult all parties. The term consultation draws its existence from provisions of **Article 89 (7)(a)** which requires that the IEBC do consult all interested parties in reviewing boundaries. Consultation set out in **Article 89(7)(a)** must not be read in isolation. It draws its life from the provisions of **Article 10(2)** which lays out the national values and principles of governance. One of the values is that of democracy and the participation of the people.

272. As we discussed earlier in this judgment, one of the central themes of the Constitution is the theme of sovereignty of the people. Public participation which is achieved through consultative processes gives real and practical effect to the sovereignty of the people and the national values and principles. Public participation and transparency as values are relative to the context of the case. In this respect we would adopt the dictum of the Supreme Court of Appeal of South Africa in the case of *King and Others v Attorneys Fidelity Fund Board of Control and Another 2006(1) SA 474 (SCA)* where the court observed as follows, “*Public involvement might include public participation through submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become ‘involved’ in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base*

standard, but then leaves Parliament significant leeway in fulfilling it.”

273. In the case of **Minister of Health and Another v New Clicks (Pty) Limited and Others CCT 59/2004, [2005] ZACC 14**, the Constitutional Court of South Africa per Sachs J at paragraph 630 observed that, “*The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*”

274. The **Fifth Schedule** of the **IEBC Act** under which the IEBC was given the mandate to resolve issues arising out of the first review includes elements of public participation. The IEBC was required to prepare and publish a preliminary report which was to be made available to the public for a period of twenty one-days and invite representations from the public on proposals contained in the report. After reviewing proposals received from the public, the IEBC was required within fourteen days to submit the Revised Preliminary Report to the Parliamentary Committee. The Parliamentary Committee would consider the same within fourteen days of receipt and table its report to the National Assembly for consideration. We note here that the parliamentary process provided room for public participation. Thereafter and within seven days of tabling the report, the National Assembly was to consider the revised report and forwards its report to the IEBC. The IEBC was required within fourteen days of expiry of the period provided for scrutiny by the National Assembly, to take into account the resolutions of the National Assembly and thereafter submit the final report for publication in the Kenya Gazette. The entire process of the first review was required to be concluded within a period of four months from the date of appointment of the IEBC under the Act.

275. One of the major complaints by the applicants is that the IEBC did not consult the people in coming up with its final report. The term consultation has taken on a life of its own, and the applicants’ contend that (a) there was no consultation done by the IEBC or (b) although consultation was done, this was insignificant because IEBC ignored or disregarded the views and submissions made by the people. This calls for examination of the meaning of “*consultation*” and whether IEBC was bound to effect the wishes of the public following such consultation.

276. The Constitution does not define the term consultation. **Black’s Law Dictionary (Supra)** at page 335 defines consultation as, “**1. The act of asking the advice or opinion of someone 2. A meeting in which parties consult or confer.**” In **CREAW and Others v Attorney General Nairobi Petition No. 16 of 2011 (Unreported)**, Justice Musinga considered the meaning of the word “consult” as used in **section 24(2) of Sixth Schedule** to the Constitution which required the President to consult the Prime Minister in making appointment of the Chief Justice and other State officers. The court relied on the case of **Maqoma v Sebe & Another 1989 (1) SA 483** where the court considered the meaning of consultation which was not defined in the applicable legislation. Pickard J., stated, “*It seems that “consultation” in its normal sense without reference to the context in which it used, denotes a deliberate getting together of more than one person or party In a situation of conferring with each where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The “word” consultation in itself does not presuppose or suggest a particular form, procedure or duration for such discussion or debate. Nor does it imply any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.*” The court also referenced the case of **Agricultural, Horticultural And Forest Industry Training Board v Aylesbury Mushrooms Ltd [1972] 1 All ER 280, 284** where it was held that, “*The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.*” Justice Musinga concluded that on the evidence before him there was consultation but that the requirement of consultation did not require consensus or agreement by the parties.

277. What is clear to us is that whether or not there has been consultation is a matter of fact to be decided

in the circumstances of each particular case. In the context of the delimitation process and the first review, we note that the IIBRC before its tenure was cut short by the promulgation of the Constitution, took steps to consult widely and there is no complaint that the IIBRC failed in this respect having regard to its mandate. In fact in the case of **John Kimanthi Maingi v Andrew Ligale and Others (Supra)**, Justice Musinga found as a fact that, “[IIBRC] traversed all the constituencies and sought views of all Kenyans. People were even granted opportunities to make written representations ...”

278. The gravamen of the applicants’ case is that the IEBC proceeded to carry out its mandate to resolve the issues arising out of the first review without carrying out consultations. The applicants also complained that the IEBC did not take steps to consult the public as required by the **Fifth Schedule** within the twenty one day period provided for the ventilation of the preliminary report. We are satisfied on the basis of the material submitted that the IEBC did conduct an extensive programme of public consultation through invitation of public views at selected locations all over the country within the statutory time frame provided. The public were also given the opportunity to present written memoranda.

279. The applicants contend that the IEBC was given fourteen days to consider public representations and representations of the National Assembly. They also lament that the IEBC did not consult properly and adequately thereby to the extent that consultation was not meaningful. The other complaint is that the IEBC failed to take into account the recommendations of the National Assembly in preparing its final report.

280. These complaints, though legitimate, must be examined in light of each case. What we are clear about is that while the IEBC is an independent body which has wide latitude in considering of the matters submitted to it, it is not a slave beholden to public opinion. Its responsibility is to ensure that it adheres to the Constitution. It must balance and weigh the matter brought to it and make a rational decision consistent with the provisions of the Constitution and the law. Whether it has complied with the Constitution is a matter for this court to determine. The IEBC is required to show that it took into account the representations or submissions made to it in coming to a specific result. This is what our Constitution demands and anything less undermines good governance and opens the door for arbitrary decision making which is the antithesis of the rule of law.

281. In the case of **Jesse Waweru Wahome and Others v Kenya Engineers Registration Board and Others Nairobi Petition No. 149 of 2011** the court stated as follows, [12] *The culture imposed by the Constitution is one of justification, every act, policy, measure taken by the state must be disclosed and justified in terms of the Constitution and this court is obliged to assess that act, policy or measure to determine whether it complies with the standards and requirements of the Bill of Rights.* [13] *For the State and any of its entities to hide behind the plain letter of the statute tends to undermine the Constitution and its objectives. Furthermore, it denies this Court its proper role in adjudicating the petitioner’s grievances.*”

282. The requirement for justification is not a hollow requirement, it is by this court insisting on justification that will put an end to arbitrary decision making and subject the delimitation process to known standards. The importance of a transparent process was underscored by Dr. Lisa Handley in her contribution in the book, **Challenging the Norms and Standards of Election Administration (IFES, 2007)**. In the Chapter titled *Boundary Delimitation*, pp. 59-74, at 68 she states, “*Transparency is important for maintaining public confidence in the integrity of the delimitation process. Stakeholders are more likely to accept the outcome of the process-especially if the ramifications of the process are as political as they can be in delimitation-if they can scrutinize the process. To do this, they must have access to information on, and input into, the decisions of the boundary authority.*” (Emphasis added)

283. Among the factors Dr. Handley identifies when designing a delimitation process that is as transparent as possible is the requirement that, “*An explanation ... be provided for decisions made concerning the final assignment of the boundaries, particularly if objections to these boundaries have been put forward.*” (Emphasis added)

284. We therefore find and hold the IEBC is duty bound to ensure public participation in the process of

delimitation. The nature and extent of that participation is for the IEBC to determine provided it is meaningful and gives effect to the purposes of the Constitution, that is, to promote accountability, transparency and good governance. Giving effect to the principles of consultation and public participation means that the IEBC give great weight to public consensus where possible. In order to give effect to this value, the IEBC is obliged to consider the submissions made to it and give reasons for its ultimate decision. It is the giving of reasons that distinguishes an arbitrary decision from one that is founded in law.

285. The weight to be given to submissions, whether oral or written, is a matter to be considered in light of all the evidence available to the IEBC. The IEBC as a body specifically constituted to carry out delimitation must have the greater public interest in mind, rather than that of one individual who may be motivated by factors other than the law and the Constitution.

286. A question arose as to whether the IEBC was obliged to consult the Attorney General. **Section 29** of the **IEBC Act** provides that the Commission may request legal advice from the Attorney General. The position of the Attorney General was considered in ***Re The matter of the Interim Independent Electoral Commission (Supra)*** where the Supreme Court stated as follows, “[55] ... By Article 156(4), (5) and (6) of the Constitution, the Attorney-General is designated the principal advisor of the Government; he represents the national government in non-criminal proceedings, in Court: with leave of the Court, he may appear in civil proceedings as *amicus curiae*. The Constitution places an obligation upon the Attorney General to promote, protect and uphold the rule of law and to defend the public interest. It can be said that the Attorney –General bears the mantle of the “chief lawperson” of the Government in its diverse dimensions. The various departments of the Government have the liberty to seek the Attorney General’s opinion on any legal question of relevance to their day-to-day operations.”

287. As regards the operations of independent Commissions and Offices under the Constitution, the court noted that, “*seeking the advice of the Attorney-General, or being required to do so by a rule of procedure, does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office. While the applicant in obtaining advice from the office of the Attorney General is not necessarily bound by the same, the fact that such advice was sought in the first place, will demonstrate the applicant’s commitment, as well as fidelity to due process.*”

288. We find and hold that it is not fatal for the IEBC to fail to consult the Attorney General on the delimitation plan but as the Supreme Court has stated, consulting the Attorney General expresses fidelity to the law and could, in the future, lead to a result that reduces the scope of litigation.

289. What then is the result of failure to consult? We have held that for purposes of the first review, the court occupies the apex of the delimitation process. In the circumstances, even if in a particular case, we find and hold that there was lack of consultation, in fashioning the appropriate remedy we will consider the appropriate information, evidence and material that was placed before the IEBC against the principles and criteria set in the Constitution and the law make appropriate findings.

Costs

290. The issue of costs has been the subject of submissions by the parties herein. The applicants argue that the normal rule that costs follow the event should be applied to this case. Further, that this is a continuation of the delimitation process and the IEBC must bear the cost of public participation in this constitutional process. The IEBC on the other hand, argues that it is a public body and it has done the delimitation in accordance with Constitution and the law consequently it should not be ordered to pay costs.

291. In the case of ***John Harun Mwau & Others v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported)***, the court considering the issue of costs where the election date was in contention stated as follows, “*In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the*

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

292. This is a unique case in the history of Kenya. The applicants before us are not mere busy bodies but persons exercising an undoubted right founded in the Constitution. The result of their efforts is geared towards ensuring that the IEBC is held accountable to its constitutional and statutory mandate. It is a step towards establishing a state based on fidelity to the Constitution and the rule of law.

293. Costs remain in the court’s discretion and like all forms of discretion, it must be exercised judicially, in light of the particular facts of the case and giving due regard to the values set out in the preamble to the Constitution and **Article 10** in order to achieve the objects of **Article 259(1)**.

294. In the interests of fairness and justice, we order each party should bear its own costs.

295. Animals make sounds and sound indicate pleasure or pain but language, a distinctly human capacity is not just for registering pleasure or pain. It is about declaring what is just and what is unjust and distinguishing right from wrong and it is on this basis that we now proceed to declare what is just, what is unjust and to distinguish what is right from what is wrong in the various applications and petitions brought before us.

PART TWO

County No. 1 - Mombasa County

296. Judicial Review Application No. 30 and Constitutional Petition No. 26 of 2012- Mombasa

1. The two cases have been considered together as they raise identical issues as they both relate to delimitation of wards of the proposed Jomvu and Changamwe Constituencies.

2. In Petition No. 26 of 2012, the petitioners, residents of the proposed Magongo Ward, are aggrieved by the IEBC decision of making Magongo Ward part of Jomvu Constituency, and Miritini Ward part of Changamwe Constituency. They are further aggrieved that the name of Changamwe Ward was changed to Magongo despite the deep historical ties attached to the name.

3. They aver that the Changamwe area comprises various ethnic groups and clans that identify well with the name Changamwe. They submit that the name Changamwe originated from the Wachangamwe who are by origin the native inhabitants of Changamwe area. It is the petitioners’ contention that by renaming the area Magongo and removing it from Changamwe Constituency, the IEBC acted in complete disregard of the criteria set out under Article 89(5). The same argument is also advanced in regard to placing Miritini Ward in Changamwe Constituency.

4. The petitioners are further aggrieved by the alleged failure by the IEBC to take into account their views concerning the delimitation of wards in Jomvu and Changamwe Constituencies. They argue that despite the IIBRC report reflecting their wishes in regard to these wards, they have not been provided with a plausible explanation why the IEBC ignored their views and arrived at the impugned decision.

5. Similarly, the petitioners in Mombasa JRNo. 30 of 2012 argue along the same lines. They further argue that if the IEBC decision is not reviewed then the people of Miritini would be a minority in Changamwe.

6. On its part, the IEBC opposes the two petitions and avers that there were consultations but that consultations do not equate to consensus. It submits that there were chaos during the consultation meetings and the various groups presented their respective memoranda with competing views.

7. The IEBC submits that the allegation that the change of name would erode the cultural identity of the

residents of Changamwe sublocation is untenable as the same is just an administrative name. It also argues that splitting of the wards does not affect the cultural heritage of the people.

8. On what informed the delimitation as contained in the final report, the IEBC submits that since the Mombasa/Nairobi Road was diverted the Changamwe Estate became part of Jomvu area. Further, as the name would create confusion between the ward and Changamwe Constituency, it decided to rename the ward, Magongo.

9. The interested parties equally oppose the two petitions and aver that the residents of Miritini were happy to remain part of Changamwe Constituency. In echo to the submissions of the IEBC, the interested parties argue that the name change did not have any effect on the cultural heritage of the Wachangamwe.

10. We have carefully scrutinized the pleadings and the submissions filed in these two cases. The issues arising out of these cases are whether there were consultations carried out by the IEBC and whether the IEBC violated Article 89(5) in the delimitation of Magongo and Miritini County Assembly Wards of Jomvu and Changamwe Constituencies respectively.

11. As regards consultation, what is required of the IEBC in a situation of clearly competing views? It is the mandate of the IEBC to delimit or rename electoral units where appropriate in accordance with the Constitution and the IEBC Act. Consultation connotes giving the people an opportunity to participate in public affairs. When there are competing views the IEBC is required to state why it preferred one view over another. We have perused the documents supplied to us by the IEBC but we find no tangible explanation on why it chose one side of the competing views over the other. The IEBC does not address the specific grievances of the petitioners but contends that the name change and ward location would not impact on the historical and cultural ties of any people.

12. We are not convinced that the mere diversion of a road could inform the decision taken of placing these wards in the affected constituencies. The proposed Magongo Ward has only one sub-location namely Changamwe sub-location. In our opinion the petitioners have demonstrated the existence and essence attached to the name Changamwe. They have also demonstrated that the name has historical and cultural significance, and therefore changing it to Magongo without any reasonable basis cannot be entertained.

13. For the same reasons we also find that there was no reasonable basis for transferring Miritini Ward to Changamwe Constituency, and Changamwe Ward to Jomvu Constituency. We have also noted that Miritini Ward has traditionally been part of Jomvu area. Changamwe historically derives its name from the Wachangamwe people and to rename it Magongo Ward which was neither proposed nor discussed would be in contravention of the principle of consultation.

14. For these reasons we order as follows:

- a) That Magongo Ward is renamed Changamwe Ward and is transferred to Changamwe Constituency.
- b) Changamwe Constituency shall now comprise the following County Assembly Wards; Changamwe, Port Reitz, Kipevu, Airport and Chaani Wards with a population of 132,692.
- c) Miritini Ward to be removed from Changamwe Constituency and transferred to Jomvu Constituency.
- d) Jomvu Constituency will now comprise the following County Assembly Wards; Jomvi Kuu, Miritini and Mikindani Wards with a population of 117,487.
- e) The maps of Changamwe and Jomvu Constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and position.
- f) Accordingly Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

g) There shall be no order as to costs.

County No. 2- Kwale County

297. *Constitutional Petition No. 22 of 2012- Mombasa*

1. The petition concerns the delimitation of Pongwe Kikokeni County Assembly Ward in Lunga Lunga Constituency and Msambweni Constituency.
2. The petitioners through their petition describe themselves as residents of Kingwede/Shirazi and Funzi sub-locations within Kwale County. These sub-locations form part of Pongwe Kikoneni Ward of the proposed Lunga Lunga Constituency. The petitioners are aggrieved by the IEBC decision to make these sub-locations part of Pongwe Kikoneni Ward of the proposed Lunga Lunga Constituency instead of making them part of Msambweni Constituency contrary to the public views on the same.
3. The petitioners' case rests on the fact that the residents expressed views to the effect that the boundary between Lunga Lunga and Msambweni Constituencies be River Ramisi, and that the three sub-locations of Kingwede, Funzi and Shirazi be part of Ramisi Ward in Msambweni Constituency rather than the proposed Lunga Lunga Constituency. The petitioners aver that River Ramisi is a geographical and historical feature to the three sublocations and delimiting it in Pongwe Kikoneni Ward has deprived the residents of Funzi, Kingwede and Shirazi sub-locations of their historical identity.
4. Further, that the three sub-locations of Funzi, Kingwede and Shirazi whose residents are Washirazi risk being a minority in Lunga Lunga Constituency if they are not moved to Msambweni Constituency. The petitioners are therefore seeking orders from this Court to compel the IEBC to make Funzi, Kingwede and Shirazi sub-locations part of Ramisi Ward of Msambweni Constituency.
5. The IEBC on its part opposes the petition and submits that the amendment on the preliminary report to reflect the current status was instigated by the current Msambweni MP. It admits that there were conflicting views on the issue and they had the ultimate responsibility to make a decision. It states that it could "*not possible (sic) to please everyone.*"
6. We have considered the facts, pleadings and submissions and we are not convinced by the IEBC response. While it is true that such a process cannot achieve results that are entirely agreeable to everyone, the aggrieved party is entitled to know the reasons for a decision that affects his or her rights. This is an established good practice for a consultative process in the context of a decision made concerning the assignment of boundaries if objections to these boundaries have been put forward.
7. The IEBC is mandated by the Constitution to take into account other factors as set out under Article 89 (5) in addition to the population quota. It should be borne in mind as we have reiterated before that the respondent's mandate must be carried out in full promotion of all the principles and values that underlie the Constitution. In this case the IEBC has not provided any specific response to this claim in the filed documents.
8. Lastly, we have considered the effect of granting the prayers by the petitioners in terms of populations in both constituencies. Our analysis does not show any disparity that would lead us to decline the orders sought. The population of the three sub-locations of Funzi, Kingwede and Shirazi is 10,744, and their removal from Pongwe-Kikoneni Ward will result in a population of 41,098.
9. The removal of the three sub-locations will not affect the population of the proposed Lunga-Lunga Constituency. The population of Ramisi Ward will be 38,707 if the three sub-locations are transferred to the Ward, which is comparable to the population of the other wards in Msambweni Constituency.
10. In the circumstances we allow the application and reverse the IEBC's decision in regard to the affected sub-locations. We accordingly order as follows:

- a) That Funzi, Kingwede and Shirazi sub-locations are removed from Pongwe-Kikoneni Ward in Lunga Lunga Constituency and transferred to Ramisi Ward of Msambweni Constituency.
- b) Ramisi County Assembly Ward of Msambweni Constituency shall now comprise the following sub-locations; Vingujini, Milalani, Mivumoni, Kingwede, Funzi and Shirazi with a population of 38,707.
- c) Pongwe-Kikoneni County Assembly Ward of Lunga Lunga Constituency shall now comprise the following sub-locations; Majoreni, Mzizima, Shimoni, Wasini/Mwakiro and Bumbani with a population of 41,098.
- d) The maps of Lunga Lunga and Msambweni Constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes.
- e) Accordingly Legal Notice Number 14 of 2012 be and is hereby amended to this extent.
- f) There shall be no order as to costs.

County No. 3- Kilifi County

298. *Constitutional Petition No. 140 of 2012- Nairobi*

1. This petition concerns the delimitation of Ganze Constituency in Kilifi County.
2. The petitioners claim that Ganze is the poorest constituency in the country as a result of being marginalized for far too long by successive governments resulting in low education levels and alack of infrastructural development.
3. The petitioner claims that the residents of Ganze made the following proposals to the IEBC:
 - a) That the number of wards be increased from 4 to 5 as follows:
 - i. Bamba ward to include Mitangani, Bamba, Mutsara wa Tsatso locations;
 - ii. Ganze ward to include Ganze, Dungicha and Palakumi locations;
 - iii. Jaribuni to include Jaribuni, Kauma and Vyambani locations;
 - iv. Sokoke to include Sokoke, Dida and Bale locations;
 - v. Vitengeni to include Vitengeni and Mwabera locations;

And in the alternative, convert the 4 administrative divisions into wards as follows:

 - i. Jaribuni ward to include Jaribuni, Kauma and Vyambuni locations;
 - ii. Ganze ward to include Ganze, Dungicha and Palakumi locations;
 - iii. Bamba ward to include Bamba, Mutsara wa Tsatsu, Mitangani, Bandari and Ndigiria locations;
 - iv. Vitengeni ward to include Mrima wa Ndege, Dida and Sokoke locations;
4. The petitioners accuse the IEBC of disregarding these proposals and effecting a delimitation of the county assembly wards that make it difficult for people to access government services. For example, that Palakumi people will traverse the whole of Dungicha ward to get to their ward headquarters and access services from their government offices.

5. The petitioners also claim that the Kauma is one of the smallest sub-tribes of the Mijikenda and it is recognized to be marginalized. Further that one way of affording them their constitutional rights and protecting them is to create an administrative division for the said sub-tribe.

6. In relation to Dungicha ward, the petitioners assert that there is no justification to name the ward Dungicha or to take and transfer the administrative headquarters to Dungicha; that the name Ganze has a historical value and background to the residents.

7. The IEBC contends that it was guided in its functions by the provisions of the Constitution and not by the richness or poverty of a constituency, and that the delimitation of fewer wards than claimed by the petitioners does not in any way marginalize or disadvantage the petitioners in the allocation of resources. Moreover, the IEBC also contends that the location of administrative offices by the Government shall follow the outcome of the delimitation.

8. The IEBC states that it decided to adopt the name Dungicha ward as opposed to Ganze ward to avoid confusion as Dungicha ward is in Ganze Constituency and adopting the same name for the ward may spawn discontent and suspicion from the residents of other wards and constituencies. Further, that the adoption of the name Dungicha ward does not infringe on the constitutional rights of the petitioners neither does it prejudice them.

9. We have reviewed the material before us and we do not agree with the assertion by the IEBC that it has duty to protect the interests of marginalised groups. As a state organ it is bound to observe the provisions of the Constitution including those that protect minorities and marginalised groups.

10. We are cognisant of the petitioners' grievance about the lack of infrastructure and the difficulties in accessing service, but we are convinced that this argument is not strong enough to warrant interference with the decision of the IEBC in relation to Ganze constituency. The administrative units as they currently exist will be reviewed and streamlined in order to ensure effective delivery of services under the new devolved form of government. We therefore decline to interfere with the decision of IEBC on this ground.

11. We also agree with the contention by the IEBC that the delimitation of fewer wards does not in any way affect revenue allocation as this is governed by other constitutional provisions and is not affected by delimitation.

12. The decision to change the name of Ganze ward to Dungicha ward is within the IEBC mandate under Article 89 (8). We however find that the reasons given by IEBC are not sufficient to warrant a change of name, because there are many other wards not only in the country but also within the region that bear the same name as the constituencies in which they are located.

13. We therefore order as follows:

a) That Dungicha Ward in Ganze Constituency is renamed Ganze Ward and all other prayers are hereby declined.

b) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

c) The map of Ganze Constituency in Volume III of the IEBC Final Report be and is hereby altered and amended to reflect the above changes.

d) We make no orders as to costs.

299. *Constitutional Petition No. 122 of 2012- Nairobi*

1. This petition concerns the delimitation of the boundaries of Kilifi North and Kilifi South Constituencies of Kilifi County.

2. The Petitioners contend that the IEBC disregarded geographical, community, cultural and economic interests of residents of Mnarani and Takaungu sub-locations in the delimitation of boundaries of Kilifi North and Kilifi South constituencies.

3. They submit that the boundaries of Kilifi North constituency be reviewed as proposed in their presentations to the IEBC as follows:

a) To have Mida creek as the natural geographical boundary between Kilifi North and Malindi constituencies;

b) To have Kilifi creek as the natural geographical boundary between Kilifi South and Kilifi North constituencies;

c) By moving Mavueni, Takaungu and Mnarani sub-locations to Kilifi South constituencies;

d) Dabaso and Watamu sub-locations be moved to Malindi constituency.

4. The Petitioners further assert that in the revised preliminary report, the IEBC revised the boundaries between Kilifi North and Kilifi South constituencies to Shariani near Vipingo, which move did not take into account the geographical features of the constituency, but only applied the population quota in arriving at the final report.

5. They further claim that the Departmental Committee on Justice and Legal Affairs proposed to retain Kilifi creek as the boundary between Kilifi North and Kilifi South, which proposal was ignored in the publication of the final report. In the said report, the IEBC gazetted Kilifi North to include Mnarani county assembly ward comprising Mnarani, Takaungu, Mkomani/Mkwajuni/, Mavueni/Majajani and Kiriba Wangwani sub-locations.

6. The grounds that they cite in relation to community of interests are that Kilifi South is predominantly inhabited by the Chonyi and Kauma sub-clans of the Mijikenda. It is contended that the two sub-clans will be disadvantaged in terms of representation by moving Mnarani, Takaungu and Mavueni to Kilifi North, which is predominantly occupied by the Giriama.

7. Further, that Mavueni/Takaungu are administratively under Kikambala division which after alteration of the boundaries will be administered from Kilifi North constituency thus causing inconvenience to the residents of Mavueni/Takaungu. It was submitted that in order to retain administrative, cultural, economic and historical ties the two sub-locations should have been left as part of Kilifi South constituency.

8. In relation to geographical considerations, the Petitioners aver that the residents and voters of Kilifi North and South wanted Kilifi creek as the natural boundary and that the current boundary is unsuitable and unacceptable.

9. In terms of population quota, the Petitioners assert that IEBC disregarded the prevailing population numbers in the locations and county assembly wards; that Mnarani sublocation should have been delinked from Mnarani county assembly ward and joined to Sokoni county assembly ward, adding a population of 7, 300 to Kilifi North Constituency thus bringing it closer to the population quota; that Takaungu Location should be left as a county assembly ward of its own with a population of approximately 26,000.

10. The IEBC explained that shifting the boundaries between Kilifi North and South to Kilifi Creek as proposed would increase the population of Kilifi South to 204,982 which is above the national population quota. Moreover, they contend that the shifting of the boundary between Kilifi North and Malindi to Mida Creek will increase the population of Malindi to 218, 297 which is way beyond the national average.

11. The two proposed adjustments would result in the population of Kilifi North being 118, 627, thus widening the population disparities amongst the neighbouring constituencies. The IEBC stated that it is required to progressively work towards ensuring that the number of inhabitants in each constituency and

ward is, as nearly as possible, equal to the population quota, and that setting the boundaries in accordance with the proposals would not be in consonance with the spirit of the population quota.

12. As far as community interests are concerned, the IEBC maintains that from their visit to the constituency, they learnt that the Kauma, Chonyi and Giriama are all sub-clans of the larger Mijikenda tribe, and no prejudice would be occasioned by putting them in one constituency.

13. Having considered the pleadings and the material placed before us we find that the IEBC did in fact consider the issues of community of interest and geographical features and how they would affect the population quota of Kilifi North Constituency. Changing the boundaries of Kilifi North Constituency will have a domino effect and will entail changing the boundaries of all the constituencies in Kilifi County. We do not find that the IEBC failed to take into account matters it should have considered or that it took into account extraneous matters thus necessitating the intervention of the court.

14. Moreover, Article 89 should be read together with section 2 (2) (b) (i) of the Fifth Schedule to the IEBC Act which does not require demographic equality in each constituency and ward in the first review but rather that progressive efforts be made in achieving this equality.

15. The Petition is accordingly dismissed with no order as to costs.

300. *Constitutional Petition No. 32 of 2012- Mombasa*

1. This petition relates to the Jaribuni County Assembly Ward of Ganze Constituency in Kilifi County.

2. The Petitioners contention is that the IEBC delimited Ng'ombeni sub-location under Chasimba Ward in Kilifi South Constituency, which is predominantly occupied by Chonyis. In addition, the IEBC has added Palakumi sub-location to Jaribuni ward in Ganze Constituency which sub-location is dominated by Giriamas.

3. The petitioners assert that the IEBC, by its failure to consider the wishes of the people and putting Ng'ombeni sub-location in Chasimba Ward, took a great population of the Kauma people from Jaribuni Ward. The Kauma people therefore remain a minority both in Jaribuni and Chasimba wards. The petitioners seek the following prayers:

a) Ng'ombeni sub-location in its entirety be returned to Ganze constituency and Jaribuni ward in particular;

b) Palakumi sub-location be removed from Jaribuni ward and be placed in Dungicha ward in Ganze Constituency.

4. We have considered the pleadings and the submissions filed by the parties. We find that the existence of a ward boundary does not prevent the sharing and expression of cultural values and practices by the Kauma. Electoral boundaries are meant to determine political representation and not to create physical barriers between people. The complaints by the petitioners arise from the delimitation of Kilifi North and South Constituencies carved out of Bahari Constituency. Ganze constituency was not affected by this sub-division. There was no delimitation that was carried out by the IEBC which affected the applicants herein in so far as the proposed creation of Kilifi North and South Constituencies are concerned.

5. We have noted that the petitioners' complaints are based on what they allege to be historical misrepresentation concerning the administrative boundaries of the areas which they occupy, and which fall under two different constituencies. We cannot deal with the issues arising from the complaints of the petitioners since our powers are limited to matters of delimitation carried out by the IEBC.

6. The petition is accordingly dismissed with no orders as to costs.

301. *Judicial Review Application No. 27 of 2012- Mombasa*

1. The application concerns the delimitation of Jibana County Assembly Ward in Rabai Constituency and Kaloleni Constituency of Kilifi County.

2. The applicants are residents of Chilulu, Nyalani, Kwale and Tsagwa sub-locations, which have been delimited to be part of Jibana ward in Rabai Constituency. They are aggrieved by the IEBC decision to include the four sub-locations in Jibana Ward of Rabai Constituency instead of Kaloleni Ward in Kaloleni Constituency, and have approached this Court seeking orders of Judicial Review to reverse the decision.

3. The applicants complain that the IEBC failed to take into consideration the popular views of the residents of the mentioned sub-locations to be part of Kaloleni Constituency where they would be with their fellow Giriama and Jibana with whom they share a community of interest, historical, economic and social ties. They contend that they would be a minority in the Rabai Constituency and hence their right to participate and be represented in governance would be violated.

4. The applicants aver that the IEBC failed to take into account the geographical features in the region particularly that River M'bwaka has traditionally separated Kwale and Tswaga sub-locations on the one hand and Kikomani and Maereni sub-locations on the other hand. The applicants further aver that the resultant change will not affect the population quota.

5. The applicants also argue that historically the Jibana and Giriama, who are part of the Miji Kenda, are in Kaloleni whereas Rabai Constituency as currently demarcated by the IEBC has a Rabai majority. It is their contention, therefore, that retaining the sub-locations in Rabai would make them the minority.

6. In response, the IEBC contends that there were competing views with regard to the four sub-locations. The IEBC argues that shifting the four sub-locations whose total population is 16,437 will increase the population in Kaloleni Constituency to 157,739 and that Kaloleni Ward's population would increase to 56,026 which will exceed the national average for County Assembly Wards. It concludes that its decision was made to ensure balance and parity of the population.

7. We have considered the pleadings and submissions of the parties. The IEBC have raised the issue of population quota to justify their decision but this must be balanced against the consensus presented by the people of Jibana represented by the applicants, their community of interest and geographical features.

8. We note that Rabai Constituency was created as a result of the split of Kaloleni Constituency, and there was no obligation on the part of IEBC in conducting the first review to attain instant demographic equality. For these reasons we do allow the application to have the four sub-locations with the Jibana community moved to Kaloleni Constituency, as it is clear that they will be minorities in both the Jibana Ward and Rabai Constituency.

9. Since the four sub-locations with the Jibana community have now moved to Kaloleni Constituency, the name Jibana Ward is no longer tenable and shall be renamed Kambe/Ribe Ward derived from the names of administrative units located in the area. We therefore order as follows;

(a) Jibana Ward of Rabai Constituency is renamed Kambe/Ribe Ward.

(b) Rabai Constituency shall comprise the following County Assembly Wards; Rabai/Kisurutini, Ruruma, Mwawesa and Kambe/Ribe Wards with a population of 97,185.

(c) Kaloleni Constituency shall comprise the following County Assembly Wards; Kaloleni, Mariakani, Mwanawinga and Kayafungo with a population of 155,739.

(d) Kambe/Ribe Ward of Rabai Constituency shall comprise the following sub-locations; Pangani/Maereni, Chauringo and Kikomani/Mbwaka with a population of 17,311.

(e) Kaloleni Ward of Kaloleni Constituency shall comprise the following sub-locations; Chilulu, Tsagwa, Kwale, Nyalani, Birini/Mwamleka, Vishakani/Kaloleni, Kinani, Makamboani, Mikiriani and

Chalani/Mihingoni with a population of 56,026.

(f) The maps of Rabai and Kaloleni Constituencies in Volume III of the IEBC's Final Report be and are hereby altered and amended to reflect the above changes and position.

(g) Accordingly Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

(h) There shall be no order as to costs.

302. *Constitutional Petitions Nos. 116 and 145 of 2012- Mombasa*

1. These petitions concern the delimitation of Malindi and Magarini Constituencies of Kilifi County.
2. The petitioners in the cases are aggrieved by the decision of the IEBC in the delimitation of Malindi Constituency. Their complaints are that Sabaki has now been moved from Malindi to Magarini constituency, while Watamu ward has been moved from Malindi to Kilifi North Constituency. They are seeking declarations that the delimitation of boundaries for Malindi constituency and its respective county assembly wards is in contravention of the Constitution and the IEBC Act and consequential orders of certiorari and mandamus.
3. The Petitioners contend that the boundary between the Malindi and Kilifi North Constituencies should be the Mida Creek, and the boundary between Malindi and Magarini constituencies be the Sabaki bridge thereby bringing the total number of county assembly wards in Malindi to nine. They also want Malanga sub-location in Sokoke Ward in Ganze constituency to be part of Jilore Ward in Malindi Constituency.
4. We also note that the petitioners in ***Mombasa Petition 145 of 2012*** have additionally prayed for the return of Malanga village to Malindi constituency from Sokoke ward in Ganze constituency.
5. The petitioners state that the IEBC failed to follow the constitutional and statutory criteria set by failing to use the revised preliminary report of the IIBRC as adopted by the National Assembly as its primary reference materials, and the report of the Departmental Committee on Justice and Legal Affairs as its secondary reference material in coming up with its final report. They also assert that the IEBC never consulted or gave reasons as to why it unilaterally decided to disregard public representations, the IIBRC Report or the Report of the Departmental Committee on Justice and Legal Affairs.
6. The Petitioners argue that the Arabs/Bajuni communities in Watamu Ward and Malindi town have remained close to the Giriama people who live in Watamu, Gede and the larger Malindi constituency, whereas the Wachonyi people are found south of the Mida creek. It is also their contention that the boundary as gazetted has effectively divided Malindi town, which is an urban centre almost into two, thereby creating confusion on how the Malindi town will be governed. It is argued that the only logical way is that Malindi town ought to be one constituency.
7. In relation to cultural ties, they contend that the IEBC has failed to consider the historical, economic, and cultural ties of the communities hived off from the now Malindi constituency to Magarini, Ganze and Kilifi North constituencies. It is argued that moving Gede to Kilifi North would cause anxiety among tourists, displace the Giriama who occupy the area north of Mida Creek and force the residents of Watamu (now in Kilifi North) to find a new economic activity other than tourism.
8. In relation to means of communication, they state that the IEBC failed to consider the means of communication in relation to the new boundaries in that Sabaki Bridge remains the only means of communication by road between Malindi and Magarini constituencies. Further, that Malanga which has been hived off to Ganze has a well-developed road network maintained by the residents of Malindi. The inhabitants of Malanga therefore stand to lose if placed in Ganze, and those of Watamu will need a bridge constructed in order to cross to Malindi.
9. The IEBC opposed the petition on the ground that there is a misconception that the civic wards are the

same as the county assembly wards. They assert that it is not true that the Giriama people are closer to the Arabs and the Bajuni communities. Further, that the Giriama and the Wachonyi are two of the nine sub-tribes that make the larger Mijikenda tribe and share the same language, historical, cultural as well as ancestral ties.

10. The IEBC also averred that Gede and Watamu are outside Malindi town and on the border of Kilifi North. Moreover, Sabaki river runs through the Sabaki sub-location and there is an all-weather bridge linking Magarini to Sabaki sub-location hence the communication impediment does not exist. Finally, it maintains that the adjustment of wards is not considered an act of uprooting people as they continue with their normal existence as before.

11. We have considered the pleadings filed by the parties as well as other material on record and it is not clear how the IEBC consideration of the population figures worked in favour of moving Watamu to Kilifi North because the population of Kilifi North exceeds that of Malindi. The population of Watamu ward is 25,982; that of Kilifi North Constituency is 207, 587 while that of Malindi is 162, 712. For purposes of delimitation population must be considered with other factors.

12. Nevertheless, the IEBC is not required to achieve population parity in the first review and any disparities in populations across the county, unless shown to have been arrived at in contravention of the law, are not unconstitutional. We do not find the petitioners reasons to be compelling enough to necessitate a reversal of the decision of the IEBC.

13. As for Malanga, the petitioners claim that the residents will be disadvantaged by being put in Ganze constituency with a poor road network. In our view this is not a strong enough reason to warrant the intervention of this court. The devolved system of government should serve to improve means of communication and access to services in the various counties. We therefore decline to order that Malanga be moved back to Malindi constituency.

14. In relation to the request to have Sabaki bridge form the border between Malindi and Magarini constituencies, we are not satisfied with the arguments put forth as to difficulty of transport across wards because the delimitation of electoral boundaries has not served to erect physical barriers across wards or constituencies.

15. We therefore decline to grant the orders sought and make no orders as to costs.

County No. 4- Tana River County

303. Constitutional Petition No. 29 of 2012- Mombasa

1. The petitioners are residents of Galole Constituency in Tana River County. Their application is based on the grounds that the IEBC reduced the nine civic wards currently existing to the proposed four county assembly wards.

2. The petitioners allege that the Wardei and Orma communities who are minorities will be further marginalised as the boundaries, as delimited by the IEBC, splits them into different wards. As a consequence, they allege that the Pokomo have become a majority in Kanakomba, Mikindani and Chewani wards. They submit that the cultural values of the Pokomo are not shared with the Wardei and Orma communities. They are further aggrieved by IEBC's decision to name the Wards after majority tribes. Lastly, the petitioners allege that Wayu Ward does not have roads and hospitals.

3. The IEBC on its part denies that there was a violation of the Constitution and argues that it had no obligation to preserve the civic wards in the new delimitation. The IEBC also submits that the petitioners have failed to appreciate the difference between civic wards as currently established under the Local Government Act and the County Assembly Wards established under the constitution.

4. Lastly, the IEBC argues that it took into consideration the provisions of Article 89 (5) and in fact

applied a population quota that was still substantially lower to this constituency on average to the national population quota. The average population per ward in this constituency is 15,217 as opposed to the national average of 26,826.

5. We have considered the issues raised by the petitioners and find that there are insufficient grounds to support the petitioners' claims. We agree with the IEBC that the petitioners did not appreciate the difference between civic wards as currently established under the Local Government Act (Cap 265) and the County Assembly Wards established under the Constitution.

6. We have also considered the second issue of whether the Wardei and Orma have been marginalised or rendered a minority by the delimitation of the wards. The petitions lack particularity in respect of this grievance, and the petitioners have not demonstrated how the delimitation process would protect their status in terms of specific names, sub-locations or wards.

7. We also note that the population of Galole Constituency of 60,866 made it a protected constituency and entitled it to four wards applying the formula adopted by the IEBC in allocating County Assembly Wards.

8. For these reasons, we dismiss the petition with no order as to costs.

County No. 5- Lamu County

304. Constitutional Petition No. 28 of 2012- Nairobi

1. This petition relates to Lamu East Constituency in Lamu County. The petitioners contend that the IEBC omitted Mbwajumwali sub-location in Pate Island within Lamu East Constituency in its review and delimitation of the numbers, names and boundaries of county assembly wards. They claim not to have been consulted in breach of Article 89 (7) and that the IEBC did not comply with section 25 of the IEBC Act in fulfilling its mandate.

2. They are seeking an order of certiorari to quash Legal Notice No. 14 of 2012 and an order of mandamus compelling the IEBC to include Mbwajumwali sub-location in Lamu County. They also seek the increase of county assembly wards from 3 to 5 to be made up as follows:

- a) Faza ward comprising Shanga, Pate, Kwatongani, Tchundwa and Kwatini sub-locations
- b) Kizingitini ward comprising Kizingitini, Mbwajumwali and Myabogi sub-locations
- c) Ndau ward comprising Ndau and Kiwayuu both of which are islands forming Ndau sub-location of Lamu;
- d) Kiunga ward comprising Kiunga, Rubu/Mwabore and Mkokoni sub-locations
- e) Basuba ward comprising Mararani, Mangai and Milimani sub-locations

3. They assert that the review is not fair as it does not afford the citizens of Lamu East equal universal suffrage based on fair representation and equality of votes for the reason that Lamu East has only three wards whereas Lamu West has seven. Furthermore, they assert that the IEBC did not consider the issue of communication between sub-locations because it takes two to three days for one to sail from Kizingitini to Kiunga which is on the mainland.

4. The petitioners state that historically the people of Kizingitini, Mbwajumwali and Myabogi share the same culture but that the people of Kizingitini have no cultural ties with those of Kiunga, and that it is against the cultural rights of the people of Kizingitini, Mbwajumali and Myabogi for the IEBC to move Kizingitini to Kiunga ward.

5. They also point out that Ndau and Kiwayuu are small and sparsely populated sub-locations, and a

minority and that moving Ndaу sub-location to Faza ward will lead to the marginalization of the people of Ndaу and Kiwayuu. Lastly, they assert that the people of Ndaу and Kiwayuu share the same culture, and have in the past had a ward of their own and that they do not share any cultural ties with the people of Faza ward.

6. The IEBC maintains that consultation was done in accordance with its constitutional and statutory mandate. It further contends that an increase in the wards will lead to a substantial deviation from the methodologies used in the delimitation process.

7. We have reviewed the material before us and note that by their own admission, the petitioners took part in the consultation process and made representations to the IEBC on the delimitation process. There is no requirement that the IEBC should agree with their representations so long as they consider their views and arrive at a reasonable decision based on the established legal criteria.

8. The population of Lamu East Constituency is enumerated as 18, 841 and it has an area of 2, 314 km², whereas that of Lamu West Constituency is 82, 698 with an area of 4, 182 km². We find that the petitioners do not have a valid claim when they state that they are discriminated against because Lamu West Constituency has seven wards whereas Lamu East Constituency has three. It is clear that a consideration of population quota and area dictates that Lamu West have more wards. We have looked at the formula used to share out wards between constituencies as explained by the IEBC and we are satisfied that the distribution of county assembly wards was fair and rational.

9. After perusing the 2009 Population Census Report we note that Mbwayumwali is a location comprising Myabogi as its only sub-location, and Myabogi is already delimited in Faza Ward. The Petitioner's claim therefore fails in this aspect.

10. We note that in the Legal Notice No 14 of 2012, Ndaу and Kiwayuu sub-locations are described to be in Faza ward, and Kizingiti sub-location in Kiunga ward. However, the map in Volume III of the Respondent's Final Report shows Kizingiti to be in Faza ward while Ndaу and Kiwayuu sub-locations are indicated to fall in Kiunga ward. The population figures given of the two wards also do not correctly reflect the populations of the sub-locations comprising the wards.

11. Our observation has shown that Kizingitini is physically on Faza island and should therefore remain in Faza Ward. Ndaу and Kiwayuu are islands closer to Kiunga Ward than Faza Ward. In order to correct this error we direct and order that Legal Notice No 14 of 2012 be amended as follows:

a) Faza County Assembly Ward shall comprise the following sublocations; Kwatini, Kwatongani, Tchundwa, Myabogi, Siyu, Pate, and Kizingitini with a population of 13,524

b) Kiunga County Assembly Ward shall comprise the following sub-locations; Rubu/Mwabore, Mkokoni, Ndaу and Kiwayuu with a population of 4,265.

c) There shall be no order as to costs.

305. *Judicial Review Application No. 32B of 2012- Nairobi*

1. This application concerns the delimitation of Lamu County. The applicants seek an order of certiorari to quash the provisions of Legal Notice No. 14 of 2012 on the grounds that IEBC has reduced the number of wards in Lamu County from nineteen to ten and that the reduction of the number of wards was unilateral and without due regard to the established guidelines with the effect Lamu which, in view of its special geographical features, will be denied fair representation. The applicants also complain that the vast majority of indigenous Lamu people live in the islands where the number of wards has been reduced by more than 50%.

2. The IEBC averred that Lamu County has two constituencies which are protected by the Sixth Schedule to the Constitution. In applying the formula for allocating county assembly wards, it stated that Lamu

East Constituency is entitled to two county assembly wards but was given three wards to cater for Boni ethnic minority. This also informed the reduction of proposed wards in Lamu West Constituency from eight to seven. IEBC maintained that any additional allocation of wards to Lamu County would adversely affect the national quota and cause disparities in the two constituencies within the county.

3. Having read the application together with the supplementary affidavit and the submissions on both sides, we do find that the applicants in this case are under a misconception that they should be awarded as many county assembly wards as they had civic wards. The civic wards were created under the Local Government Act, while the County Assembly Wards are created under the Constitution in accordance with the provisions of Article 89. The formula as set out by the IEBC entitled Lamu East Constituency to two wards, but they were awarded an extra ward to cater for the Boni minority. This is a justifiable reason to reduce the wards in Lamu West Constituency from eight to seven.

4. The application is therefore dismissed with no order as to costs.

306. *Constitutional Petition No. 33 of 2012- Mombasa*

1. This petition concerns the delimitation of county assembly wards in Lamu West Constituency of Lamu County.

2. The petitioners through their petition express grievances with the IEBC decision in regard to the delimitation of wards and ward boundaries in Lamu West Constituency. The petitioners allege that the IEBC did not comply with constitutional principles and criteria. Their other grievances are as follows;

a) The IEBC breached political rights of the petitioners when it created Shella Ward with a population of 3,274 only and Mkomani with a population of 19,092;

b) The IEBC left out Witu sub-location in its decision and thus discriminated against the people of Lamu West;

c) The IEBC failed to consider the issue of the locals being a minority in their ancestral land because of the uncontrolled “influx and intrusion” in Lamu County by people from other counties;

d) The IEBC failed to promote and recognise the culture of the people of Lamu West Constituency;

e) The IEBC failed to consider communication between the Su -locations of Mkomani, Langoni, Matondoi and Kipungani in its review and delimitation of County Assembly Wards in Lamu West;

f) The IEBC failed to give consideration to the minority and marginalised groups in Lamu West Constituency especially the Orma Community of Chalaluma and Moa Sub Locations

3. The petitioners argue that the delimitation resulted in an imbalance with Shella Ward having a population of 3,274 and Mkomani Ward with a population of 19,092. This, they submit, does not afford equal suffrage based on fair representation and equality of votes. To cure the imbalance, they urge this court to exercise its powers under Article 89(10) and create an extra ward known as Langoni through the splitting of Mkomani Ward. In the alternative they propose moving of Langoni Sub Location from Mkomani to Shella Ward.

4. The IEBC opposes the petition. It argues that it took into account the proposed maximum wards per constituency working with the 1450 County Assembly Wards in total. Specifically in regard to Lamu County, the respondent submits that it was obliged to adjust the number of wards in the two constituencies so that it could cater for the Boni who are a minority.

5. Consequently, Lamu East got three wards instead of two and Lamu West got seven down from eight. This, they submit was a fair and equitable decision in the circumstances considering they were working with a capped number of 1450 for the County Assembly Wards in Kenya.

6. We have considered the pleadings, submissions and material before us. The population quota, though the primary factor, is not the only factor to be taken into account and in this particular case we find the respondent's decision to be reasonable in the delimitation of Shella and Mkomani County Assembly Wards. Considering the geographical location of the two wards, which are separate islands, the respondent reached a reasonable decision irrespective of their population differences.

7. We have already dealt with the issue of the allocation and distribution of Wards in Lamu County in ***Mombasa J.R Application No. 32 B of 2012***, and ***Mombasa Petition No. 28 of 2012***, and adopt our decisions therein on this issue. Those decisions shall apply *mutatis mutandis* to this application.

8. In the result the application is dismissed with no order as to costs.

County No. 6- Taita/Taveta County

307. Judicial Review Application No. 141 of 2012- Nairobi

1. The applicants seek orders of certiorari to quash Legal Notice No. 14 of 2012 in so far as it relates to Voi, Wundanyi, Taveta and Mwatate Constituencies and consequential orders of mandamus and prohibition.

2. The applicants state that that in the revised preliminary report published by IEBC on the 9th of February 2012 the proposed boundaries of Constituencies and Wards were in two volumes. Volume I indicated the respective sizes of the Constituencies as follows:

a. Voi -10,348Km²

b. Taveta - 4, 205 Km²

c. Mwatate -1,873 Km²

d. Wundanyi -702 Km²

Volume II of the report set out the boundaries as follows:

a. Voi - 3, 269Km²

b. Taveta - 3, 501.80 Km²

c. Mwatate -9, 611.90 Km²

d. Wundanyi - 701.20 Km²

3. The figures in Volume II were the ones published in Legal Notice No. 14 of 2012. According to the applicants, there are unexplained changes in the area covered by the said constituencies. The applicants allege that the said changes were done capriciously, without jurisdiction and without any reasonable cause.

4. The IEBC in grounds opposing the application did not deal with the applicants' case. It stated that the application was motivated by issues relating to revenue collection.

5. Makueni County Council sought to be enjoined in the suit as interested parties. They contend that the application is misconceived and if there were the boundary changes effected, it would affect the Makueni County boundary, which will be in contravention of the Constitution. Further, they assert that the applicants are only challenging the IEBC report on the issue of sizes of their constituencies which does

not fall within the grounds set out in Article 89.

6. We have considered the material before us, and we note that all the four constituencies of Taita/Taveta County are protected within the meaning of Section 27 of the Sixth Schedule. We also note that their boundaries are not in dispute and were not subject to delimitation. It was not within the mandate of IEBC to interfere with the areas of protected constituencies as they were not available for delimitation.

7. Our analysis of the material before us, discloses discrepancies between the figures contained in the IIBRC report, the IEBC Revised Preliminary Report and the IEBC Final Report with respect to the four subject constituencies. In addition, the IEBC Principal Replying Affidavit in paragraph 53 sets out the areas of protected constituencies, which differ from those stated in Legal Notice No. 14 of 2012 with respect to the four subject constituencies.

8. We have calculated the area for the Taita/Taveta County from the 2009 Population and Housing Census Report and our conclusion is that particulars of the area for Taita/Taveta County as contained in Legal Notice No. 14 of 2012 is the correct one. We however note that Tsavo West Sublocation whose population and area are factored in Mata Ward is not contained in Legal Notice No. 14 of 2012. We also find that the Map appearing on Vol. III of the IEBC Final Report does not reflect Tsavo West and Ndilidau sub-locations in Mata Ward of Taveta Constituency.

9. We therefore direct and order as follows;

- a) That Legal Notice No. 14 of 2012 be corrected to include Tsavo West sublocation in Mata County Assembly Ward;
- b) The Map for Taveta Constituency appearing in Vol. III of the IEBC Final Report be amended to reflect Tsavo West and Ndilidau sub-locations in Mata Ward.
- c) Subject to the aforesaid order, the application is dismissed with no order as to costs.

308. *Judicial Review Application No. 34 of 2012- Mombasa*

1. The applicants are dissatisfied with the respondent's decision contained in Legal Notice No. 14 of 2012 in regard to the delimitation of boundaries of Taita Taveta County and in particular Wusi/Kishamba and Ronge Wards of Mwatate Constituency.

2. Their grievances can be summed as follows:

- a) That there has been a boundary dispute between Taita Taveta, Makueni and Kajiado Counties which the IEBC failed to resolve despite the public views submitted;
- b) The IEBC failed to take into account geographical features and urban centres, community of interest, historical, economic and cultural ties and means of communication of the Taita Taveta vis-à-vis the Durumas in Kwale County, the Kambas in Makueni County and the Maasais in Kajiado County in delineating the boundaries of Taita Taveta County; and
- c) The fundamental rights and freedoms of the Taitas, Tavetas and Wakishambas would be violated if the decision is not reversed. Specifically they allege that they stand to suffer want of equal political representation, erosion of their culture and loss of land, resources and revenue.

3. In support of the grievances set out in the filed documents, the applicants submit that Taita Taveta County has suffered loss of revenue from Mackinon Road and Mtito Andei towns to the benefit of Kwale, Makueni and Kajiado Counties. They further submit that Taru and Mackinon Towns were transferred to Kwale County on 23rd May 1961 and the IEBC ought to have acted on their concerns to alter the boundaries.

4. In regard to Kishamba and Ronge Wards, the applicants submit that the IEBC failed to take into account the geographical features separating the Wakishamba of Mengo and the Ronge in delineating the boundaries of these two wards. Further, they submit that the Ronge and the Wakishamba have divergent dialectical and cultural practices, and that they are geographically separated by Mto wa Mwangodi River.

5. In response, the IEBC submits that it did not have any mandate to alter county boundaries and hence did not have the power to address the issues raised by the applicants in respect to the counties in question. We have considered the pleadings, evidence and submissions, and we hold that by virtue of Section 27 (1) (a) of the Sixth Schedule to the Constitution, IIBRC did not have the mandate to adjust county boundaries. The question then arises whether the IEBC in its mandate to “resolve all issues arising from the first review” could do that which was not within the powers of the IIBRC to do. We conclude that the IEBC was not mandated to review county boundaries. The IEBC has no authority to alter county boundaries. The respondent’s claim to this extent fails.

6. As regards Wusi/Kishamba and Ronge Wards of Mwatate Constituency we find that there is no basis to grant any relief in this respect and we see no reason in interrogating this issue further.

7. The application is dismissed with no order as to costs.

County No. 7- Garissa County

309. Judicial Review Application No. 120 of 2012- Nairobi

1. This application relates to the delimitation of Balambala and Dujis Constituencies of Garissa County.
2. The applicants are aggrieved that the constituency and ward names and details of Garissa County have been altered without any demand and without realistic justification for creating the new Balambala constituency, and moving the Alango-Arba and Medina Wards to that new constituency.
3. In summary, the petitioners want the decision to move Alango-Arba and Medina wards to Balambala to be reversed, for Dujis constituency to be renamed Garissa township since Dujis sub-location is now in Balambala constituency, and that Legal Notice No. 14 of 2012 be amended to incorporate their views. It is the petitioners’ case that moving them to Balambala means that they will not be able to freely exercise their political and social rights, and that they will be a minority voting bloc.
4. The petitioners contend that the IEBC decision failed to take into account community of interest, historical, economic and cultural ties of the people of the Auwliyahan clan and the people of Garissa County in general; that the decision therefore generates unnecessary political and social tensions in Garissa County. Further, that the National Assembly also resolved that the decision to move Medina and Alango-Arba to the new Balambala constituency be reversed.
5. The IEBC maintains that the Abduwak, Auwliyahan and Abdalla clans are one people of the Ogaden clans of the Ogaden community. They are the same people with similar historical, economic and cultural ties. There are no distinguishing features save for the fact that they all belong to different sub-clans. Therefore, in order to demonstrate that the community interests of the Auwliyahan clan were not considered, they have to establish that the Auwliyahan clan has a common grievance that is not shared by the members of the other clans who constitute Balambala constituency.
6. Further, that the sub-clans all belong to the Ogaden community, and are therefore not entitled to a distinct electoral unit. The IEBC also aver that the political interests of the inhabitants of Alango-Arba will be protected whether it forms part of Balambala or is transferred to Dadaab constituency.
7. The IEBC reason for departing from the views given at the public hearings on the 16th of January 2012 and the resolution by Parliament to reverse the move by Medina and Alango-Arba to the new Balambala constituency was that the population of Balambala Constituency would fall below the minimum threshold of 79,883 for sparsely populated areas. If Medina and Alango-Arba sub-locations are removed from the

proposed Balambala constituency, its population would be 73,109.

8. We note that the basis of the sub-division of Lagdera and Dujis Constituencies to form Balambala and Dadaab Constituencies was a carefully negotiated settlement between the clans of Garissa County. We are cognizant of the fact that clan interests form a strong community of interest in Garissa County and it was incumbent on the IEBC to explain why it departed from this settlement, particularly in view of the provisions of section 2 of the Fifth Schedule to the IEBC Act which did not require that demographic equality be obtained instantly while conducting the first review. Article 89(7) also requires that the population quota be obtained progressively.

9. The IEBC should have considered the proposal to have Dujis Constituency renamed Garissa Township; since Dujis sub-location is now in Balambala, and retaining the name Dujis for the constituency can be misleading. Article 89(8) gives the IEBC mandate to alter names of wards where necessary and we find that it should have exercised that discretion in this case. We find that this claim is genuine and we uphold the same.

10. We therefore allow the applications and order as follows:

a) That Dujis Constituency be renamed Garissa Township Constituency.

b) That Medina sub-location be and is hereby removed from Sankuri Ward in Balambala Constituency and transferred to Galbet Ward in Dujis Constituency.

c) Galbet Ward will now comprise the following sub-locations; Galbet and Medina sub-locations with a population of 43,244.

d) That Alango-Arba sub-location be and is hereby removed from Sankuri Ward in Balambala Constituency and transferred to Dertu Ward in Dadaab Constituency.

e) Dertu Ward will now comprise the following sub-locations; Alango-Arba and Dertu with a population of 15,013

f) Sankuri Ward will now comprise the following sub-locations; Balicha, Simbir, Sankuri, Raya, and Athleleyey with a population 10,719

g) Legal Notice Number 14 of 2012 be and are hereby amended to this extent.

h) The maps of Dujis, Balambala, and Dadaab Constituencies in Vol III of the IEBC Final Report be and is hereby altered and amended to reflect the above changes and position.

i) We make no order as to costs.

310. *Constitutional Petition No. 124B of 2012- Nairobi*

1. The proceedings in this matter relate to the delimitation of Dujis Constituency and the proposed Balambala and Lagdera Constituencies in Garissa County.

2. The petitioners are seeking, *inter alia*, orders to compel the IEBC to amend Legal Notice No. 14 of 2012 to comply with the IEBC Preliminary Report in regard to the boundaries of the proposed Balambala and Dadaab constituencies and an order for a review and delineation of the boundaries of Medina and Alang-Arba sub-locations under the proposed Dujis and Dadaab constituencies respectively.

3. The Petitioners were satisfied with the Preliminary Report on the First Review relating to the Delimitation of Boundaries of Constituencies and Wards in which it was proposed that Lagdera and Dujis constituencies each be split to create Dadaab and Balambala constituencies respectively. The Petitioners are however aggrieved that in both the Revised Preliminary Report and Legal Notice No. 14 of 2012 both

Alango-Arba “location” and Medina “location” are now part of Sankuri Ward in the proposed Balambala constituency, instead of being in Dadaab and Dujis constituencies respectively.

4. The main grounds for the Petitioners’ cause are that the carving out of Alango-Arba sub-location from Dadaab constituency and Medina sub-location from Dujis constituency and into Balambala constituency was not in the economic and cultural interests of the relevant communities; that the delimitation created units that were not feasible due to the large distances created. Further, that there were no means of communication between Alango Arba and Balambala, and Medina and Balambala. It is also claimed that the communities in Alango-Arba and Medina locations would be marginalised in future elections as they would be minorities. The Petitioners seek that the present Dujis Constituency be named Garissa Constituency as there was a town in Balambala Constituency called Dujis.

5. In regard to community interests, the Petitioners explained the pastoralist nature of the communities in the region and of the attendant competing interests stating that over the years, a fragile peace had been maintained by confining the various competing clans to defined administrative and political units. Further, the Petitioners alleged that the IEBC Revised Report of 9 February 2012 moves his community to a constituency inhabited by a different community with whom they have historically been on bad terms. The petitioners’ desire for the boundaries being defined along administrative and political units stem from, to quote the petitioner, “*peace has only been sustained by living in peace in our different administrative, political units and long established traditional governance.*”

6. The Petitioners claim that their clan would be further marginalised and disenfranchised with regard to government services and recruitment into public service, which recruitment is based on population, community setup and settlement. Further, that no member of their clan, would have the opportunity to be elected into leadership positions. The Petitioners also fear that their community would face intimidation, violence and displacement, given the past history of the communities in pastoralist Garissa County.

7. The IEBC opposed the petition stating that after conducting public consultations, there was no objection to the creation of Dadaab and Balambala constituencies and IEBC proceeded to determine their respective populations. The IEBC averred that reverting Alango-Arba sub-location to Daadab Constituency from Balambala Constituency would diminish the population of Balambala. The IEBC contended that it cannot determine the delimitation process on the basis of clan rivalries and interests, and that it was within its mandate to delimit the boundaries on the best constitutional and statutory considerations dictated by the circumstances of each case.

8. Hassan Abdullahi Arale, an interested party filed a Replying Affidavit on behalf of himself and 99 others, objecting to the petition on grounds inter alia that the IEBC had acted within the law and its mandate in creating Balambala constituency and that in granting the prayers sought in the petition, the delimitation of Balambala constituency would not comply with the law. Further, that the Constitution and other laws adequately protect the interests of the inhabitants of both sub-locations whether they form a part of Balambala, Dujis or Daadab constituencies provided they are within Garissa County.

9. The Interested Parties explained the clan dynamics in Garissa County comprising the Abdwak, Auwliyahan and Abdalla which are sub-clans of the Ogaden community. They also asserted that Medina sub-location is not a clan settlement area but is cosmopolitan. The Interested Parties averred that the Petitioners were wrong to assume that Balambala constituency was created for the Abdwak clan and alleged that it was the Auwliyahan who would be numerically superior to the Abdwak in Sankuri Ward, hence contradicting the Petitioners’ claims of minority and disenfranchisement.

10. We note that the issues raised in this petition are the same as those in ***Nairobi J. R Application No 120 of 2012***, and our findings and orders therein shall apply *mutatis mutandis* to this petition.

311. Judicial Review Application No. 118 of 2012- Nairobi

1. The application concerns the delimitation of Balambala and Dujis Constituencies of Garissa County.

2. The applicant seeks an order of certiorari to quash the IEBC decision concerning Medina sub-location in the proposed Balambala constituency, and an order to compel IEBC to take Bulla ward from Balambala constituency to Dujis constituency in order to accord with the unanimous decision of the residents of Dujis constituency

3. The applicant states that there are clan and community factors in the new constituency involving land issues and thus making the issue emotive. They state that the IEBC ignored the popular views of the people of Dujis constituency; that the economic interests have been ignored, that socially there is a separation of families and clans which are the building blocks of the Dujis constituency; that the decision was biased as it gave Abudwak clan preference over Auwliyah clan; that the IEBC acted unreasonably by ignoring well settled geographical principles.

4. The 102 interested parties in their submissions opine that the applicant's views were received by the IEBC and he cannot be heard to say that they were not considered simply because they were not implemented. It is their opinion that the applicant's claim is clan-based but disguised as a matter of community of interest. They claim that the clans live peacefully together and all form the Ogaden community and acceding to it will set a bad precedent as it is not possible to create electoral units based on the clan system. They urge that the application be dismissed.

5. The IEBC avers that it took into account the views presented and that it was not guided by such extraneous considerations as clanism or such parochial interests. It also avers that the creation of the six constituencies in Garissa County was unanimous and that they could not possibly satisfy the aspirations of all the residents with respect to the boundaries. The aspirations had to be balanced with parameters such as population quota.

6. The IEBC further points out that electoral boundaries are meant for determining representation and not to create physical barriers between clans or people and that the mandate of the commission does not include creation of boundaries based on clans as this would hamper national cohesiveness.

7. They also aver that having Bulla ward in Dujis would have the effect of diminishing the population of Balambala and increasing that of Dujis, and therefore diminishing voting strength of the residents of Balambala. The IEBC also avers that quashing the decision with respect to Dujis constituency will have a domino effect in all the constituencies in Garissa County.

8. Having considered the pleadings and submissions made herein, we note that Bulla is a civic ward in Medina sub-location and to that extent our findings and orders in ***Nairobi J. R Application No 120 of 2012***, apply *mutatis mutandis* to this matter. Orders accordingly.

312. *Constitutional Petition No. 130 of 2012- Nairobi*

1. The petition concerns the delimitation of Fafi and Ijara Constituencies.

2. The Applicants allege that IEBC ignored both the primary and secondary source materials thereby arriving at a wrong and erroneous decision. Further that the IEBC deviated in most instances from the population quota to the disadvantage of the people of Ijara in regard to electoral wards.

3. They seek a declaration that Boni community is a minority and marginalized group and needs to have its own representative in the County Assembly.

4. In regard to delimitation of boundaries, the Applicants argue that the same was done in accordance with the 3-mile rule that was used during the colonial era and thus denying the people of Ijara access to waters from Tana River.

5. The IEBC opposed the application on the basis that it does not have a constitutional mandate to alter county boundaries between Tana River County and Garissa County. IEBC further argues that Fafi and Ijara constituencies were not eligible for splitting as they would fall below the population quota. In so far

as wards were concerned, IEBC contends that it could not create more wards on demand because there is a cap on the number of wards nationally and at the constituency level.

6. Having addressed our mind to the issues raised by the Applicants, we are unable to grant the orders sought due to the insufficiency of the materials presented. It is not clear to us how a ward is to be created for the Boni community. In the absence of sufficient details from the applicants on the exact location of the Boni Community and their population, this court is unable to answer and intervene on their behalf.

7. We analysed the wards as delimited taking into account the populations and the geographical locations of the various Sub Locations and possibilities available. We understand that the Boni Community occupy Hadi sub-location of Hulugho ward which has a population of 14,584. This sub-location forming part of Hulugho ward lies between Elkambere, Garabe and Hulugho Sub-locations to the North and Koranhindi sub location to the west, all part of Hulugho ward. Therefore delimiting Hadi as a ward has the effect of cutting some sub-locations from the rest of Ijara constituency which cannot form a ward on their own owing to the limits on the number of wards as explained earlier.

8. Taking all factors into consideration and having examined all the available information, we regret that the rights of the Boni as a minority cannot be enforced through this delimitation process, but through the constitutional provisions on representation of the minorities and marginalized under Article 177.

9. We also find that the IEBC has no mandate to readjust the boundary between Ijara District and Tana River District. Readjustment or delimitation of any other units other than wards and constituencies is not part of the mandate of IEBC under Article 89.

10. The petitioner's claims for an additional ward for the Abdalla clan are unsupported for the reasons we have set out above. Similarly, the claim for an additional constituency has no legal foundation. We hereby dismiss the application in its entirety with no orders as to costs.

313. *Judicial Review Application No. 119 of 2012- Nairobi*

1. The application concerns the delimitation of Balambala and Daadab constituencies in Garissa County.

2. The applicants are aggrieved by the IEBC decision to make Alang'o Arba part of Sankuri Ward of Balambala Constituency. They argue that there was lack of consultation in "taking" Alango Arba from Daadab Constituency to Balambala Constituency. They contend that the residents had expressed views in support of being part of the proposed Daadab Constituency rather than Balambala constituency.

3. They allege failure to take into consideration requirements of Article 89 and seek orders of certiorari to quash the decision of IEBC from effecting the delimitation of Alang'o Arba as part of Sankuri ward of Balambala constituency, and an order of Mandamus compelling it to delimit Alang'o Arba as part of Daadab constituency.

4. The IEBC avers that the applicants were given an opportunity to present their views. IEBC argues that Abdwak and Auwliyahan sub clans of the Ogaden clan share community interest with the residents of Alang'o Arba. It further, submits that majority of the residents are in agreement with the delimitations. The interested party supports the position of IEBC.

5. Having considered the arguments made in this petition, we note that the issues raised herein are the same as those in ***Nairobi J. R Application No 120 of 2012***, and our findings and orders therein apply *mutatis mutandis* to this petition. Orders accordingly.

314. *Constitutional Petition No. 131 of 2012- Nairobi*

1. This petition concerns Lagdera Constituency in Garissa County. The Petitioners contend that the IEBC did not use the minimum population quota criteria for the Maalimin region and that the merging of Maalimin and Ilan sub-locations is unnecessary as the Maalimin sub-location already had the required

population quota.

2. The petitioners also claim that the Rer-Kassim sub-clan which is a minority sub clan will be disenfranchised as it will be overshadowed by the Rer-Ali clan that occupies Ilan sub-location and argue that electoral unit boundaries should coincide as much as possible with the community of interest. The petitioners pray that the boundaries of Maalimin Ward be reviewed.

3. The IEBC on the other hand argues that the Petitioners' application opposing merger of the two wards is not grounded on constitutional parameters and the IEBC Act. Further that, the resolution of inter-clan disputes is not part of the mandate of the IEBC and that it cannot create electoral units for each ethnic group in Kenya.

4. We have considered this petition in light of what we have stated in *Nairobi J. R Application No 120 of 2012*, and particularly that the delimitation of the constituencies in Garissa County followed a carefully crafted formula agreed upon by the various clans in the County. Following our findings in *Nairobi J. R Application No 120 of 2012* we are unable to interfere with the decision of the IEBC.

5. For the reasons expressed above, the petition is hereby dismissed with no orders as to costs.

315. *Judicial Review Application No. 98 of 2012- Nairobi*

1. This application relates to Ijara, Fafi and Dujis constituencies in Garissa County.

2. The Applicants contend that the IEBC decision was in breach of the Constitution by failing to take into account the views of the residents. They argue that the people of Hulugho Division comprising Galmagalla, Bulagolol and Gubis sub-locations were never taken into consideration.

3. The applicants contest the decision of the IEBC to transfer Hulugho to Ijara while retaining Galmagalla, Bulagolol, Gubis and Garasweino. They argue that the curving and creation of wards for Abdalla community in Ijara, Fafi and Dujis were unfairly done resulting in marginalization of the community. They further argue that the IEBC decision gave Abdiwak clan more Wards although it has a smaller population than Abdulla clan.

4. The applicants request that Hulugho division be retained in totality in Fafi constituency as per original status (which reflected diversity of the clans of Abdalla, Abduwak and Auwlyahan) or transfer Hulugho division in totality to Ijara constituency (the latter transfer, complete with Bula Golol, Galmagalla and Gubis) to Ijara as the second option will also lay foundation for the creation of Hulugho constituency in the subsequent review.

5. The applicants also argue that Garissa Town has Dujis constituency which has been split into two giving rise to Balambala constituency predominantly occupied by the Abduwak clan, hence increasing representation of the Abduwak clan in Parliament through Dujis, Balambala and Fafi constituencies. They also complain that by scrapping the Biashara ward, the IEBC effectively disenfranchised the interest of the Abdalla community in Dujis constituency. That while Abduwak will be represented in Fafi, Dujis and Balambala and Auwlyahan in Lagdera and Dadaab constituencies, Abdalla will only be represented in Ijara.

6. The applicants submit that by hiving back Hulugho Division, which was the face of Abdalla in Fafi to Ijara, Fafi was rendered an exclusive constituency for Abduwak community negating the principle of cohesion, diversity and integration and that the subdivision of Hulugho Division in the proposed manner would perpetuate clanism, ethnic suspicion over ownership of land and conflict over grazing rights and that the people of Ijara constituency are unable to access natural resources due to the three mile strip rule affecting the Tana River particularly at lower Ijara.

7. The Interested Parties in this case oppose the application arguing that they are likely to be adversely affected in their individual capacity and collectively as members of the indigenous community of

Galmagala, Bulagolol, Gubis, Garasweyno and Mansabubu sub-locations of Fafi constituency if the orders are granted. They also contend that both constituencies are protected and that there is no way that the IEBC could adjust the boundaries as alleged.

8. The IEBC opposes the application on the grounds that it did not make any decision concerning the alleged locations and sub-locations. The IEBC also contends that it did not adjust the boundaries and had no powers to do so since both constituencies were protected.

9. We have considered all the documents and material filed by the applicants, the IEBC and interested parties. We find that there is no evidence to demonstrate that IEBC acted contrary to the Constitution and the IEBC Act, more particularly because the constituencies are protected constituencies under the provisions of section 27 of the Sixth Schedule of the Constitution.

10. In the circumstances we find no basis for granting the orders sought and accordingly dismiss the application with no orders as to costs.

316. *Constitutional Petition No. 92 of 2012- Nairobi*

1. This Petition relates to Daadab, Balambala and Dujis Constituencies in Garissa County. The petitioners seek orders of this court to review the boundaries of Balambala constituency so as to have Alango Arba location moved to Dertu County Assembly Ward in Dadaab Constituency and Medina location to Township Assembly Ward in Dujis constituency.

2. The Petitioners allege that the IEBC disregarded the resolutions of the National Assembly as well as the interests, recommendations and suggestions of the stakeholders in the delimitation of boundaries in these areas. They also assert that in the first IIBRC report, Balambala had 81, 662 registered voters where the minimum population quota is 79, 882 for the region.

3. The petitioners further contend that by placing Alango Arba and Medina in Balambala, the IEBC ignored natural geographical features, means of communication and failed to cluster together geographically congruent zones that would facilitate communication and political activity. They claim that the residents of Garissa County are dissatisfied by IEBC's decision to retain Medina location in Sankuri County Assembly Ward and that the moving of Medina location to a new Constituency is contrary to the wishes and expectations of residents.

4. The petitioners argue that Medina location is part of Garissa Town and moving it to Balambala Constituency is in disregard of community interests as the residents would be forced to move more than 140 Kms for services and that by placing Alango Arba and Medina in Balambala, the IEBC ignored natural geographical features, means of communication and failed to cluster together geographically congruent zones that would facilitate communication and political activity.

5. They further contend that Medina and Alango Arba locations have no economic ties with Balambala Constituency due to the poor infrastructure and that therefore the decision to move Medina sub location to Balambala (mostly comprising of Abdwak Clan) would disempower and disenfranchise the Auwliyahan Clan. The petitioners also point out that Waberi County Assembly Ward as gazetted has a population of 20,617 and 170 square km excluding Alango Arba location while revised preliminary report had same population and area in square kilometres including Alango Arba location and argue that this is not practical or feasible.

6. The IEBC on the other hand opposes the petition arguing that it is untrue that the IEBC made a decision to take Alango Arba from Dadaab Constituency to Balambala. They contend that both Dadaab and Balambala are newly created constituencies carved out from Dujis and Lagdera constituency. The IEBC further argues that it acted within its mandate when it decided to split Dujis constituency to create the new Balambala Constituency and that the Petitioners have not shown how its decision contravenes Article 89. Further, that the petitioner's claim is clan based on community of interests as opposed to the Constitution, and that Medina location is cosmopolitan and not a clan inhabited area as alleged by

petitioners.

7. The IEBC asserts that the Constitution and other laws equally protect the political rights and other interests of the inhabitants of Alango Arba and Medina Sub-location whether it forms part of Balambala Constituency or is transferred to Dujis/Dadaab Constituency provided that both constituencies remained part of Garissa county.

8. We have carefully examined all the arguments advanced by the parties and we note that the issues raised in this petition are the same as those in *Nairobi J. R Application No 120 of 2012*, and our findings and orders therein apply *mutatis mutandis* to this petition.

County No. 8- Wajir County

317. *Constitutional Petition No. 97 of 2012- Nairobi*

1. This petition concerns delimitation of Wajir South and Eldas constituencies.

2. The Petitioner in this case seeks *inter alia* a declaration that the petitioner's fundamental rights have been violated under Articles 35 and 38 of the Constitution. It also seeks an order of *Mandamus* compelling the IEBC to increase the number of wards for Wajir South constituency so as to accommodate the Hambalashsub-location on the basis that its population was not reflected in the census.

3. The petitioner claims that the IEBC failed to consider the vast territory of Wajir South in the delimitation of constituency and county assembly ward boundaries in Wajir County and that this will cause underrepresentation of the residents in the area.

4. It is the petitioner's contention that the *2009 Population and Housing Census* failed to enumerate the population of Hambalashsub-location and that therefore, the information relied upon by the Kenya Bureau of Statistics to determine the population of Wajir South was unreliable, misleading and inaccurate.

5. The Petitioner also wishes to retain the number 037 which they claim has been the number for Wajir South since independence and which has now been given to Eldas constituency.

6. We have considered the arguments raised by the Petitioner regarding the 2009 population census. We have considered the issue in the Part One of this judgment and have held that the population of Kenya for purposes of First Review under Article 89 is that provided in the 2009 Population and Housing Census Report issued on August 2010. It is on this basis that the petitioner's grievances must be considered.

7. We have also held that an application for review under Article 89 is not a forum for litigating or examining the validity of the population census. Accordingly the arguments and prayers based on the validity of the census are dismissed.

8. In regard to the arguments relating to the creation of additional constituencies, we reiterate what we have stated earlier that there are only 290 constituencies available for delimitation across the country. These constituencies were distributed in a fair manner across the country to give effect to the right of fair representation to every Kenyan citizen. The creation of additional constituencies by the IEBC was constrained by the provisions of section 27 of the Sixth Schedule to the Constitution which protect constituencies that fall below the population quota.

9. We have considered the petitioners request to retain the constituency number. The IEBC is constitutionally mandated to review the number, names and boundaries of wards periodically and unless the Petitioner can demonstrate to this court on how the change in number infringes on the constituents fundamental rights, a higher standard than mere 'sentimental' attachment, we find no reason to interfere with the IEBC mandate in changing the number.

10. Regarding the contention that Wajir South is under-represented, we have considered the population of

Wajir County as a whole and the distribution of County Assembly wards. According to the IEBC formula for allocation and delimiting county assembly wards, Wajir County was entitled to thirty county assembly wards which were distributed as follows; Wajir South – six, Wajir West – five, Wajir East – four, Wajir North – seven, Tarbaj – four and Eldas – four.

11. Taking the population into account and applying the IEBC formula for allocation county assembly ward, Wajir North and Wajir West constituencies each received an additional ward. Wajir South covers 21,595.70 km² while Wajir North and Wajir West cover 8,303.80 km² and 9,010.70 km² respectively. Wajir South has a population of 130,070 while Wajir West has 91,143. We also note that Wajir West was split into two. Considering all these factors we are of the view Wajir South is under represented and was most deserving of an additional ward to balance representation within the County. We think that the IEBC did not take into account relevant guiding factors in delimiting county assembly wards in Wajir County.

12. In order to balance the population in order to give effect to the principle of fair representation we merge Wagalla with Ganyure Assembly Ward to create Wagalla/Ganyure County Assembly Ward in Wajir West to create a new ward in Wajir South. Gerille, Hambalash and Salalma and Diif sub-locations of Wajir South Constituency are merged to Diif County Assembly Ward. A new county assembly ward Dadajabula shall comprise Dadajabula sub-location.

13. Accordingly we order as follows;

a) Wajir West Constituency shall comprise the following County Assembly Wards; Ademasajida, Hadado/Athibohol, Arbajahan and Ganyure/Wagalla.

b) Ganyure/Wagalla County Assembly Ward shall comprise the following sub-locations; Bamishe, Ganyure, Bojiheri, Kukale and Wagalla with a population of 23,913.

c) Wajir South Constituency shall comprise the following County Assembly Wards; Habaswein, Bename, Lagbogol South, Ibrahim Ure, Burder, Diif and Dadajabula.

d) Diif County Assembly Ward shall comprise the following sub-locations; Gerille, Hambalash and Salalma and Diif with a population of 15,692.

e) Ibrahim Ure County Assembly Ward shall comprise the following sub-locations; Kulaaley, El Adow, Ibrahim Ure and Handaki with a population of 19,926.

f) Dadajabula County Assembly Ward shall comprise Dadajabula sub-location with a population of 8,693.

g) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

h) The maps of Wajir West and Wajir South Constituencies in Vol III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and positions.

i) We make no order as to costs.

318. *Judicial Review Application No. 101 of 2012- Nairobi*

1. This matter concerns Wajir South Constituency of Wajir County.

2. The Petitioner seeks relief in respect of delimitation of Wajir South constituency by the creation of two extra constituencies on the basis that Wajir South constituency has a population of 130,070 and covers 21,595.70 square kilometers which is bigger than the area of Nyanza and Central Provinces combined.

3. It is the petitioner's case that the voters of the constituency are underrepresented. The Applicants further aver that despite receiving public views, the IIBRC failed to create an extra constituency and fear that residents of Wajir South Constituency will be under-represented unless this petition is allowed as

prayed hereof. They claim that a voter in one Ward will need to travel about 300 Kilometres for counting of the ballot papers at the constituency tallying centre.

4. The issues in this petition have been dealt with in *Nairobi Petition No. 97 of 2012* and we adopt the decision in that case to apply *mutatis mutandis* herein.

319. *Judicial Review Application No. 148 of 2012- Nairobi*

1. The applicants filed an application seeking orders of Certiorari, Mandamus and Prohibition in regard to the IEBC decision and specifically the delimitation of wards and ward boundaries in Wajir East and Wajir South. The Applicants are particularly aggrieved by the IEBC's decision to make Wajir Bor part of Wajir East rather than Wajir South.

2. The applicants allege that Wajir Bor was retained in Wajir East Constituency against the wishes of the community of Wajir Bor who want to be placed in Wajir South constituency.

3. The applicants' main grievance is based on the allegation that the IEBC failed to take account of community of interest, historical, economical, geographical factors, culture, traditions and means of communication of the residents of Wajir Bor in arriving at the impugned decision. To support their claim, the Applicants allege as follows:

a) Wajir Bor is inhabited by Ogaden Clan which also occupies Wajir South;

b) The people of Wajir Bor have suffered for over 40 years and their views have been ignored by various commissions because of political interference;

c) Wajir Bor is 45 kms from Wajir Town; and

d) The *Ligale* Commission did not visit Wajir Bor even when they had time on the second day to do so.

4. IEBC contends it complied with provisions of Article 89. It argues that it undertook public consultations contrary to the claims by the applicants and that delimitation does not solve issues regarding representation of marginalised groups.

5. The response by IEBC does not address the grievance advanced by the Applicant being that it did not take into consideration the wishes of the Wajir Bor community to be in Wajir South. We have dealt with the mandate of the IEBC in our preliminary observations above and just to reiterate, the mandate of delimitation of electoral areas must be delivered with the aim of achieving fairness. Fairness will cure marginalisation and hence give effect to the principles and values of the Constitution.

6. The question here therefore is whether the community of interests of the residents of Wajir Bor will be adversely affected if they remain part of Wajir East. By the applicants' own admission in the pleadings, Wajir Bor is part of the Ogaden clan that also resides in some parts of the Sub-Locations in Khorof-Harar Ward. It is not clear why the Applicants want Wajir Bor to be part of Wajir South and yet admit that the Ogaden clan is spread in the whole of Khorof-Harar Ward. The question the Applicants fail to address is how the Wajir Bor's community of interests are different from those of the other inhabitants of Khorof-Harar Ward who are all part of the Ogaden clan. We find the reliefs sought unsupported by the facts.

7. Further, in exercise of its mandate, the IEBC had to consider all the necessary factors under Article 89 (5). Importantly, if the wishes of the Wajir Bor Residents as alleged had been granted and Wajir Bor remains part of Wajir South, then the same had the effect of cutting off the Sub-Locations of Riba Balbala, Konton/Abakfin and Khorof –Harar/Dawyare of Khorof Harar Ward from the rest of the remaining Wajir East. This is an important geographical factor that is evident from the map of Wajir East.

8. A further scrutiny of the populations of these Sub Locations that make part of Khorof –Harar shows that the Wajir Bor Sub Location has 9,160 whereas those of Riba, Khorof and Konton are 9,176, 4,929

and 3,601 respectively. The residents of Wajir Bor are clearly not a minority and besides the applicants have not made out a case on how they will be disadvantaged if they remained part of Khorof-Harar where they are part of the Ogaden clan. In any event, Wajir Bor has always been a part of Wajir East Constituency.

9. In the circumstances, we dismiss the application with no orders as to costs.

320. *Constitutional Petition No. 118 of 2012- Nairobi*

1. This claim relates to Wajir North Constituency. The petitioners are aggrieved by the decision of the Respondent to delimit the boundaries of Batalu County Assembly ward, placing Buna sub-location in Batalu as opposed to Malka Gufu, on the grounds that the IEBC ignored the representations and recommendations of both the residents and the Parliamentary Departmental Committee on Justice and Legal Affairs.

2. It is their contention that Malka Gufu, like all the other five wards is mostly populated by the Ajuran clan. They claim to be members of the Degodia clan and that Batalu ward as currently constituted does not take into account the interests of the Degodia.

3. The IEBC avers that it complied with the provisions of Article 89 and the IEBC Act. It also asserts that the Petitioner did not give material particulars of how its decision in placing Buna sub-location in Batalu ward contravenes Article 89. Further that in terms of the population in sub-locations, Buna has a population of 9, 102 and if placed in either Batalu or Malka Gufu, it will substantially affect the population quota of either ward.

4. The Interested Parties agree with the boundaries as drawn and assert that the Degodia are only trying to marginalise the Ajuran clan to which they belong in an area that they have historically occupied. Their assertion is that the petitioners attempt to have locations moved to Wajir East are unsupported. They claim that the area in question has historically been occupied by them and dismiss the petition as a smokescreen for a wider scheme of annexation of Ajuran ancestral land by the Degodia. They state that democracy is the rule of the majority and see the decision by IEBC as having given effect to the wishes of the majority.

5. The petitioner's claim is based on their allegation of being a minority. They are therefore required to demonstrate that they are indeed a minority and that their rights have not been taken into account and therefore the intervention of this court is warranted. We find that the petitioner has not demonstrated to this court the population of the Degodia clan that reside in Batalu ward. Thus we are unable to infer that their rights have been violated and that delimitation would assist in resolving their grievances.

6. We therefore decline to grant the orders sought and dismiss the petition, but make no orders as to costs.

321. *Constitutional Petition No. 141 of 2012- Nairobi*

1. The petitioners are residents of Wajir South Constituency. They filed a petition before this Court on 5th April 2012 where they allege that Section 27(4) of the Sixth Schedule of the Constitution is inconsistent and in conflict with Articles 82, 88 and 89 of the Constitution and hence the Ligale report is unconstitutional. In a nutshell, the petitioners argue that IIBRC did not have powers under Article 82, 88 and 89 to delimit the boundaries.

2. The petitioners further allege that section 2 of the Fifth Schedule to the IEBC Act is void for being inconsistent with Articles 88 and 89 as read with Section 27 of the Sixth Schedule.

3. The petitioners further dispute the population quota used by both IIBRC and IEBC arguing that the correct one should have been based on the revised census results issued by the Minister for Planning, National Development and Vision 2030.

4. The petitioners also pray for a new constituency to be known as Wajir Central constituency comprising of Kulalely location from Wajir South constituency; Elnur, Wagalla, Ganyure, Kukala and Bojiheri locations from Wajir West constituency; and Central Division from Wajir East constituency. They also request a review of the boundaries of Wajir North, Wajir South, Wajir Central, Wajir West and Wajir East.

5. The IEBC argues that the Sixth Schedule at Section 27 saved Sections 41B and 41C of the former Constitution and therefore there is no inconsistency with Articles 82, 88 and 89. Further that the 2009 census results were upheld by the High Court in Misc. App. No. 309 of 2010. It also submits that the IEBC Act at Section 4 of the Fifth Schedule recognizes the right of a person to apply to the High Court for review.

6. We have already dealt with the issue of the number of constituencies in part one of this judgement and find no basis to entertain the petitioners request for an additional constituency. We also find no basis to interfere with the boundaries of the affected constituencies as prayed by the petitioners.

7. On the issue of the Constitutionality of the Ligale Report, this Court held in High Court Petition No. 72 of 2010 that the IIBRC process was in accordance with the law. Further, the Sixth Schedule under Section 27 saves Sections 41B and 41C of the former Constitution.

8. The question of the validity of the census results and the other issues raised in this petition have been addressed in the earlier part of our judgement and this claim is therefore without basis and is therefore dismissed with no orders as to costs.

322. *Constitutional Petition No. 142 'B' of 2012- Nairobi*

1. This petition concerns the delimitation of constituencies in Wajir County and in particular Wajir East Constituency.

2. The petitioners' case is that Wajir East constituency is sparsely populated, and because of the influx of people to Wajir Town because of drought in other parts of the region the population within and around Wajir town is high. It is their contention that Wajir Town should be the nucleus of any new constituency carved out of existing constituencies in the County.

3. The petitioners complain that Wajir East has been delimited in a way that makes Wajir Town part of a rural hinterland of over 150 km from Wajir Town to Khorof–Harar on the Kenya Somali border. Apart from this grievance, the petitioners raise general issues regarding the constitutionality of the 2009 census and the First Review conducted by the IEBC under the IEBC Act.

4. Based on these facts and the population figures released by the Minister in February 2012, the petitioners aver that Wajir East deserves one new constituency carved of the two it was allocated and that this constituency should be delimited so as to be the focal point of Wajir. The Central constituency should be created by curving various parts of the existing Wajir East, Wajir South and Wajir West constituencies such that Wajir Central should comprise Central Division from Wajir East, Kulaaley Location from Wajir South and Elnur, Wagalla, Ganmyure and Kulala Location of Griftu Division of Wajir West.

5. The IEBC opposes this petition on the ground that the delimitation was done in accordance with the law and the constitution and the constituency delimitation in Wajir County was in accordance with the views of the people of Wajir County. Furthermore IEBC avers that the petitioners' proposal is untenable as it is not based on actual enumerated population figures as required by the law but on the new figures released by the Minister for Planning in February 2012.

6. We have considered the pleadings, evidence and submissions. We note that substantial arguments in the petition have been dealt with in the first part of this judgment and we have made our finding on most of the issues raised. We reiterate that the basis for calculating the population of Kenya for purposes of the first review is the census report issued in August 2010. It is the basis on which the delimitation of Wajir

County constituencies was done. In so far as the petitioners' case proceeds from "new or projected" census figures, it lacks a firm foundation. Implementing the said proposal would also mean that Wajir County loses one constituency, which is untenable.

7. We have also considered whether Wajir East should be renamed Wajir Central. The question must be determined in light of the configuration of constituencies in Wajir County. The constituencies are aligned in a North-South, East-West configuration and we therefore find no basis to interfere with the decision of the IEBC in naming the constituency.

8. In the result the petition is dismissed with no order as to costs.

County No. 9- Mandera County

323. Judicial Review Application No. 91 of 2012- Nairobi

1. This case concerns Mandera North constituency of Mandera County. The petitioners' case is that the IEBC disregarded community, cultural and economic interests of the residents of Guticha and Shirshir locations by merging them with Olla and Sarman locations in the larger Guticha County Assembly wards.

2. The petitioner also propose that the boundaries of Guticha County Assembly ward be reviewed by Motingolla and Sarman locations to Marothile County Assembly Ward and Guticha to comprise Guticha and Shirshir locations only.

3. It is the petitioner's case that the IEBC failed to take into account the residents proposals that an additional ward be created in Mandera North bearing in mind the distances between the proposed wards and the lack of development and marginalization in the ward. The petitioners also contended that the proposed delimitation would lead to internal Degodia clan conflicts and that their proposals would take into account the interests of the Dumal, Ragain, Idriis and Jibrail sub-clans.

4. The petitioners also contend that the proposal contained to the IEBC final report failed to take into account Guticha ward with a population of 33,658 has an area of 3,082.70 square kilometers in contrast to Merothile County Assembly ward with a population of 13,550 covering an area of 643.60 square kilometers.

5. Apart from the principal affidavit, the IEBC did not file a supplementary affidavit opposing the petition. The IEBC proposal was however suggested by an interested party who contended that the petitioners' proposal was untenable. He contended that Sarman sub-location does not share a boundary with the nearest point in Marothile ward and including it in Merothile ward would be a communication nightmare as there is no direct route.

6. We have considered the petition and in our view the matter must be decided in light of the fact that Mandera County was the beneficiary of two additional constituencies; Banissa and Laffey to take into account the population and the area. The area and distances are comparable to other constituencies and wards in the County and region.

7. On the whole we do not find merit in the petition and it is dismissed with costs.

324. Judicial Review Application No. 117 of 2012- Nairobi

1. The applicant seeks orders to the effect that Wargadud East, Quramdhaw and Sukela Tifna locations of Mandera County should not be part of Ashabito ward in the new Mandera North Constituency but rather they should be part of Wargadud Ward in the new Mandera South Constituency.

2. The applicant alleges that the IEBC failed to consult the inhabitants before reaching its decision and that it also breached the provisions of Article 89 and the IEBC Act. The applicant further argues that by moving the wards the IEBC violated section 2(2) (b) of the Fifth Schedule of the Act, which requires the

IEBC to take into account the provisions of Article 89(7) (b) which call for “progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for the purposes of the first review.”

3. The IEBC contends that it complied with the Constitution and the IEBC Act in carrying out the delimitation. The interested parties supported the IEBC position and opposed the application on grounds that it was intended to lead to an improper motive of achieving clan purity.

4. We have considered the application and all the issues raised by the applicants to satisfy ourselves whether the grievances warrant interference with the IEBC decision. Having addressed our mind to all the issues, it is our finding that the application lacks merit. Consequently the same is dismissed with no orders as to costs.

325. *Judicial Review Applications No. 114 and 116 of 2012- Nairobi*

1. Both of these applications relate to delimitation of Wards in Mandera East and Lafey Constituencies. We shall determine the two applications together as they raise similar issues.

2. The applicants herein moved the court claiming they were aggrieved by the IEBC decision and sought the following orders, inter alia,:

a) an order of mandamus to compel the IEBC to delimit the Arabia county assembly ward and Libehia County assembly ward as falling within Lafey Constituency;

b) an order of Mandamus to issue to compel the IEBC to reinstate the current civic wards of Gadudiye, Khalalio, Bella, Karow, Garba Qoley and Hareri Hosle as county assembly wards within Mandera East Constituency.

3. They assert that the IEBC did not take into account relevant considerations as stipulated in the First Schedule to the IEBC Act. Further, that the IEBC failed to take into account the need to undertake affirmative action to ensure that minorities and marginalized groups are represented in governance and other spheres of life. It is also the applicants case that the IEBC did not take into account the fact that Arabia and Libehia wards are comprised of the majority tribes forming part of Lafey constituency, and that they have representation in both to the detriment of the minority tribes.

4. It is also the applicants’ contention that the IEBC did not take into account the fact that the population of Mandera East constituency is 178,831 and were Arabia and Libehia wards to be removed, the population quota would still be met.

5. The applicants claim that the IEBC did not properly address the criteria in Article 89(5) and the principles and values contained in Article 27. They further contend that the IEBC failed to take into account the need to alleviate the disadvantages suffered by the minority ‘*Corner tribes*’ due to past discrimination, thereby breaching their right to fair representation in recognition of their minority status contrary to the Constitution.

6. According to the IEBC, the Final Report reflects the general consensus of the people who gave their views at the public hearing. The contentious Arabia ward appears to have been moved to the Mandera East constituency because of the proximity to Mandera town (it is 30 km from Mandera town) whereas it is 90 kms from Lafey town. The arrangement does appear to promote interests of communication and better service delivery.

7. We have evaluated the pleadings on record and submissions filed by both sides. This case is centred on whether the corner tribes are indeed minorities and whether or not the IEBC properly took their interests into account.

8. Going by the Constitution and the decision in the *Il Chamus* case, the corner tribes are indeed a minority tribe. This fact is confirmed by a UNDP report titled *'Dynamics and Trends of Conflict in Greater Mandera'* published on the 2nd of May 2010, which states at page 8:

“Corner tribes brings together between four and nine numerically small clans, of diverse origins, who live around Mandera town and in the small triangular corner that makes the Ethiopia, Kenya and Somalia border. The tribes that have lived together, cooperated and operated as one clan from around 1959 to the extent that they pay the “Mag” (blood fine) together. The tribes include Shirmogge, Shekhal, Gobawein, Shabele and Leisan. The others are the Waraabeeye, the Ogaden and the Herti, and the Ashraf and Hawadle.

9. We note also from the affidavit deposed to by the applicant that the corner tribes are recorded as being freed slaves of the major tribes and that these tribes look down upon them and do not see them as equals. In fact, in the Mandera District Record book that is cited by one applicant, these corner tribes are sometimes referred to as *“adone”*, a Somali word meaning slave. It is clear that, despite the dismissal by the interested parties and the IEBC of these claims as attempts to create clan enclaves by the corner tribes, they do not stand on equal footing with the other tribes. In light of the above, we cite what the court said in the *Il Chamus* case:

“The cornerstone of nationhood is the ability to achieve cohesiveness in diversity. Fair treatment of minorities is essential to social peace and stability, special measures to accommodate minorities provide cultural diversity from within, thereby enriching the wider society. The diversity in turn challenges the dominant ideas and values of society...It is in the light of the above that we hold that minorities such as the Il Chamus have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves.”

10. We find that the corner tribes, who form a distinct unit whose interests are peculiar and not taken care of by the larger tribes, have the right to be represented by people belonging to the same social cultural and economic context as themselves.

11. As we have stated the IEBC must take into account the rights of minorities and marginalised groups where possible in the delimitation process. It is clear that the IEBC did not take into account the interests of the corner tribes therefore we must interrogate the decision to delimit the wards in the two constituencies. The IEBC did not properly appreciate the other factors that necessitate the departure from the principle of population equality. We think a reasonable departure from the population quota is valid where the rights of minorities and marginalised are taken into account as provided by the Constitution.

12. The applicants also allege that the merger of five wards into one in the Mandera East constituency has served to make them minorities in relation to representation in the wards. This combined with the reallocation of Arabia and Libehia to Lafey serves to make them minorities both at the constituency and at the ward level.

13. According to the factual information before this court, the Mandera Somali divide themselves traditionally into five ‘clan’ groupings as Garre, the Murulle, the Degodia, the Corner Tribes and the Marehan with the Murulle being the most populous clan group dominant in the rural parts of Mandera East.

14. In order to give effect to the rights of minorities in Lafey and Mandera East we now make the following orders:

a) That Libehia County Assembly Ward in Mandera East Constituency be moved to the proposed Lafey Constituency to be merged with Sala County Assembly Ward to form the new Libehia County Assembly Ward.

b) The new Libehia County Assembly Ward shall comprise the following sub-locations; Sala,

Libehia/Kuradeer, Gumbisu, Hareri and Aresa with a population of 45,377.

c) Lafey Constituency shall comprise the following County Assembly Wards; Libehia, Fino, Lafey, Waranqara and Alango Gof with a population of 149,425.

d) We decline the prayer to move the proposed Arabia ward to Lafey. Consequently the said ward will remain in Mandera East Constituency.

e) That there be created a new County Assembly Ward in Mandera East Constituency named Bulla Mpya comprising the following sub-locations; Bulla Mpya, Kamor, Bokolo/Barwako, Hareri Hosley/Bida/Kamor Elle and Shaf Shafey to provide for the minority corner tribes with a population of 39,537.

f) That there be created a new Neboi County Assembly Ward in Mandera East Constituency comprising the following sub-locations; Neboi, Bur Abor/Sharif and Bula Haji/Figho with a population of 15,039.

g) That there be created a new Khalalio County Assembly Ward in Mandera East Constituency comprising the following sub-locations; Khalalio, Gududiye, Bella, Gingo, Karo and Garba Qoley with a population of 11,081.

h) Township County Assembly Ward of Mandera East Constituency shall comprise the following sub-locations; Township, Central, Bulla Nguvu/Bulla Jamhuriya/Bulla Power and Border Point One with a population of 45,358.

i) Mandera East Constituency will now comprise the following County Assembly Wards; Arabia, Khalalio, Neboi, Township and Bulla Mpya with a population of 139,262.

j) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

k) The maps of Mandera East and Lafey Constituencies be altered and amended to reflect the above changes and positions.

l) There is no order as to costs.

326. *Judicial Review Application No. 144 of 2012- Nairobi*

1. The applicants in this case moved the court, seeking *inter alia*, an order of certiorari to remove into the High Court for purpose of quashing Legal Notice No. 14 of 2012 concerning Mandera West, Banissa, Mandera North and Mandera South Constituencies.

2. The applicants contend that the IEBC failed to take into account the wishes of the Degodia Community to have Mandera North Constituency include Malkamari and Guba Wards from Banissa Constituency and that the Wargadud Division (Quramathow, Sukela Tifna, Wargadud East, Elele and Wargadud Town Sub-Locations) proposed for Mandera North constituency be shifted to Mandera South constituency.

3. According to the applicant, the distribution of population in Banissa shows the Gurreh who are Borana speaking people to be 70% while that of the Degodia who are Somali speaking people is 30%.

4. The Interested parties on the other hand oppose the application on the basis that the request by the applicants, if granted, will have the net effect of creating a Degodia enclave.

5. The interested parties assert that this would further lead to inter clan conflicts as they fight for resources such as water. In this scenario, they claim, the Degodia people would have the entire 80km stretch of River Daua to themselves to the exclusion of all other clans/communities as opposed to the current situation whereby about 50km stretch of the river is in Mandera North constituency and about 30km in Banissa constituency. Furthermore, they contend that if this Honourable court were to grant the

order, Banissa would lose the population quota that qualifies it for a constituency.

6. The IEBC opposes the application on the basis that it discharged its mandate in delimiting the three new constituencies namely, Banissa, Lafey and Mandera North, in accordance with Article 89. It also avers that it took into account community interests as expressed in public fora.

7. We have evaluated the facts and evidence before us and we conclude that the petitioners have not made out a case to warrant the interference by this court with the IEBC decision. The application is therefore dismissed with no orders as to costs.

County No. 10- Marsabit County

327. Judicial Review Application No. 121 of 2012- Nairobi

1. This application relates to Saku Constituency in Marsabit County.

2. The Applicants in this case are opposed to the IEBC action of what they describe as the hiving off of Leyai sub-location from Karare Ward and transferring it to the proposed Sagante/Jaldesa Ward. They argue that the 364 Kenyans who are Rendille living in Leyai sub-location will be marginalised by the dominant Borana communities in the ward.

3. The IEBC opposes the application stating that it could not create a ward for the Rendille alone as their population being only 364, falls far short of the national quota for wards and that doing so would have meant increasing the wards nationally from 1,450 to accommodate them.

4. We have considered the material before us and in our view the population of the applicants is too small to enable the IEBC to take into account their interests in delimiting a ward. In the circumstances the application is dismissed with no orders as to costs.

328. Constitutional Petition No. 148 of 2012- Nairobi

1. The petitioners seek orders to delimit North Horr Constituency to create two constituencies to enhance equitable and effective representation of minority groups.

2. The petitioners contend that IEBC ignored the Ligale Report which recommended that due to its size, North Horr should be subdivided. The IEBC contends that it took into account the provisions of the Constitution and the IEBC Act. According to IEBC, North Horr does not meet the population quota necessary for subdivision as it is sparsely populated.

3. We have considered the matter and we note that North Horr has a population of 75,196 persons and hence it could not be considered for subdivision as a protected constituency under the provisions of section 27 of the Sixth Schedule of the Constitution.

4. We also do not find any merit in the request for additional wards as North Horr has five county assembly wards which the optimum number is allocated to each constituency. According to the formula adopted by the IEBC for the allocation of county assembly wards North Horr was entitled to three wards but was awarded five taking into account its sparse population and large area. We therefore conclude that there is no justification for this court to interfere with the IEBC decision in this respect.

5. The application is therefore dismissed with no order as to costs.

County No. 11- Isiolo County

329. Judicial Review Application No. 109 of 2012- Nairobi

1. The proceedings in this matter relate to the delimitation of the boundary between Isiolo and Garissa Counties.
2. The applicants seeks orders of prohibition restraining the IEBC from treating the settlements of Tokojo, Eldera, Uchana (Kambi Samaki), Bullo centre, Garse, Burquqe and Chachu within Isiolo county as part of Garissa County; from setting up any polling stations or registration centres for voters from Garissa county in the settlement areas; and from mapping out these settlement areas as falling within Lagdera constituency in Garissa county.
3. They also seek an order of mandamus to direct the IEBC to respect and abide by the Districts and Provinces Act No. 5 of 1992 in regard to the boundary between Isiolo County and Lagdera constituency in Garissa County.
4. The applicant asserts that the boundary of Garissa and Isiolo County was Galana Gofa as defined in the second schedule of the Districts and Provinces Act and not the Isiolo-Wajir main road. He further explained that some residents from Garissa County had encroached and illegally settled in areas that fell under Isiolo County. The applicant asserted that Tokojo, Eldera, Uchana (Kambi Samaki), Bullo centre, Garse, Burquqe and Chachu should fall under Isiolo South constituency of Isiolo County. The applicant noted that some of the areas mentioned had been gazetted as falling within Sericho ward in Isiolo South constituency but were also included in Modogashe and Benane ward within Lagdera constituency, Garissa County. The applicant contends that he raised these concerns with the IEBC but it has deliberately failed to take them into consideration.
5. The IEBC has opposed this application on the basis that they complied with the provisions of the Constitution and the IEBC Act in delimiting Isiolo South of Isiolo County and Lagdera constituency of Garissa County. It also contends that delimitation was done in accordance with the existing administrative boundary divisions.
6. We have considered the material before us and note that the applicant appears to contest the location of the boundary between Isiolo County and Garissa County. This is not a matter within the mandate of the IEBC to consider. Furthermore, we were not furnished with any evidence to enable us determine whether the IEBC had exceeded its mandate by interfering with county boundaries in a manner that would entitle us to interfere with the decision.
7. In the circumstances the application is dismissed with no orders as to costs.

County No. 12- Meru County

330. Constitutional Petition No. 135 of 2012- Nairobi

1. This case concerns the delimitation of Kibirichia Ward in Central Imenti Constituency of Meru County.
2. The Petitioners are aggrieved by the manner in which the IEBC delimited Kibirichia Ward, and allege that the population quota is best realized in Meru County when Kibirichia Ward is part of Buuri rather than as part of Imenti Central constituency. That the population of Buuri constituency would be 134,653 when Kibirichia Ward is part of it whilst Imenti Central will have a population of 141, 768 when Kibirichia is part of it and Buuri 109, 803 inhabitants.
3. The petitioners' case is that they were not given an opportunity to present their case at the meeting convened by the IEBC at Kinoru Stadium, Meru County. They further argue that if geographical features and urban centres were to be taken into account by dint of Article 89(6)(a) it would favour Kibirichia being part of Buuri constituency due to the location of Mount Kenya forest which separates Central Imenti and Buuri constituencies.
4. The petitioners further argue that like the rest of the Wards comprising Buuri constituency, Kibirichia Ward is separated by a 10km wide stretch of Mount Kenya Forest and that Kibirichia Ward constitutes

part of the semi-arid land referred to by the Meru as “Buuri” and was originally communal land which served as a grazing region for the Imenti people and that considering means of communication favours Kibirichia Ward to be part of Buuri Constituency rather than Central Imenti constituency.

5. The petitioners also contend that Kibirichia Ward is a settlement area in which various clans of the Imenti sub-tribe of the Meru Community reside and further that residents of Kibirichia shared the same market/urban centres with other residents of Buuri constituencies but shared none with residents of Central Imenti constituency.

6. IEBC rejects the petitioners’ claim and defends its decision to retain Kibirichia Ward in Imenti Central Constituency on the basis that it was reasonable and rational and took into account the views of the public at the county hearings and that the petitioners were given an opportunity to be heard orally and through written memoranda. Furthermore, it contends that it was entitled to depart from the findings of the Ligale Commission that delimited Kibirichia ward in the proposed Buuri constituency.

7. After careful consideration of the parties’ arguments and applicable law, we find the Petitioners’ claim regarding the communication barriers to be valid. We note that the representations made by the residents of the area including the Memorandum by the residents of Kibirichia Ward to the IEBC dated the 23rd January 2012, proposing that Kibirichia ward be made part of Buuri. We also note that the Ligale Report showed Kibirichia Ward as being part of Buuri constituency. Though the IEBC was not bound by this report, it has not justified the reason for departing from it particularly given that the populations for the two constituencies are balanced and that it was not necessary to achieve demographic equality in the first review.

8. We also take into account the geographical features and means of communication and in particular the existence of Mt Kenya forest as a barrier between Kibirichia ward and Central Imenti constituency.

9. We therefore allow the petition and make the following orders:

a) Kibirichia County Assembly Ward shall be transferred to Buuri Constituency.

b) Central Imenti Constituency shall now comprise the following County Assembly Wards; Abothuguchi West, Abothuguchi Central, Mwangathia and Kiagu with a total population of 116,918.

c) Buuri Constituency shall be comprise the following County Assembly Wards; of Timau, Kisima, Kiirua/Naari, Ruiiri Rwarera and Kibirichia with a total population of 134,653.

d) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

e) The maps of Buuri and Central Imenti Constituencies be altered and amended to reflect the above changes and positions.

f) There shall be no order as to costs.

331. *Judicial Review Application No. 10 of 2012- Meru*

1. This application was lodged by residents of Igoki in South Imenti Constituency and it concerns the delimitation of Abogeta West and Abogeta East wards.

2. The applicants seek to quash Legal Notice Number 14 of 2012 concerning Abogeta East and Abogeta West on the grounds that their interests as the Igoki Community were not taken into account. They claim that they are part of a community founded by Chief Mutua Rugochi in 1923. They currently number about 22,800 and occupy several locations in South Imenti. Their wish is to be recognized by delimiting the wards in such a manner that will ensure they are represented. They also claim that they have been lumped together with residents of Abogeta East and Abogeta West and this has led to prejudice and discrimination.

3. The IEBC avers that the delimitation process was carried out in compliance with the law and that it took into account all the necessary factors prescribed. IEBC's position is that the Abogeta West and Abogeta East were properly delimited to take into account the populations. Abogeta West has a population of 30,338 while Abogeta East has a population of 33,848 which makes the two wards balanced.

4. The IEBC also argues that if the wards were delineated in accordance with the petitioners' wishes, Abogeta West would have a population of 21,880 and Abogeta East, 42,306 which would result in an imbalance and negatively affect all the other wards.

5. We have considered the matter and we note that the application concerns the minority status of the Igoki Community. However the applicants have not demonstrated, that in fact, the Igoki community are a minority or that its population is such that it can be taken into account in delimiting the wards to promote their interests and prevent marginalisation.

6. The evidence suggests that the Igoki community is spread across the two wards and their interests would be difficult to define and take care of by a process of delimitation of county assembly ward boundaries.

7. We therefore find that the application lacks merit and it is therefore dismissed with no orders as to costs.

332. *Constitutional Petition No. 6 of 2012- Nairobi*

1. This petition concerns the delimitation of county assembly wards in Igembe South Constituency of Meru County.

2. The petitioners in this case comprising residents and leaders of Amaku and Antubetwe Njouné sub-locations of Kiengu locations, moved this court seeking declarations that the inclusion of Amaku and Antubetwe Njouné sub-locations as part of Maua County Assembly Ward of Igembe South Constituency is unconstitutional and infringes on their rights. They also seek orders to compel the IEBC to delimit the two sub-locations to Igembe East ward of Igembe Central constituency.

3. They base their claims on the fact that the residents of Amaku and Antubetwe Njouné sub-locations have traditionally had close cultural, religious, social, economic and political ties with the rest of the Kiengu location. Further, they argue that they will form a minority group within the proposed Igembe South constituency and more particularly in the proposed Maua ward which is urban. They claim that residents of Kiengu location belong to two clans, Antuamukira and Amwathi which have lived together for a very long time and that an attempt to divide them will prejudice their social cultural rights.

4. They further contend that if they are not taken back to Igembe Central Constituency, they will not have any direct means of accessing the rest of Maua ward and/or Igembe South.

5. The Interested Parties, who are community leaders from different parts of Igembe East Ward from where the two sub-locations of Amaku and Antubetwe Njouné have been excised, support the petitioners' claim. They argue that the sub-locations in question share various cultural issues including *Njuri Ncheke* shrines and also economic activities. They further claim that the respondent failed to take into consideration the geographical features as Amaku and Antubetwe Njouné sublocations are naturally separated from the rest of Igembe South Constituency by the Kithetu Hills ranges.

6. The IEBC opposed the petition on the grounds that if Amaku and Antubetwe Njouné sub-locations in Maua ward are moved to Igembe Central or North, the population of Maua ward will reduce to 12,067, which is below the constitutional limits of population quota and that this will lead to imbalance in the distribution of county assembly wards in Meru County, and that of Igembe Central population will increase to 203, 942 which is above the constituency population quota.

7. Considering all facts and evidence by both parties, we note that the people of Amaku and Antubetwe share strong economic, social and cultural links with the people in Igembe East ward in Igembe Central constituency. We also note that this issue received attention in the Parliamentary Report on the IEBC Revised Preliminary Report which, based on the representations made, suggested that the IEBC should consider the delimitation of boundaries in Igembe Central and Igembe South constituencies in line with the geographical features and community of interest in that region.

8. We have also considered that the geographical features particularly the position of Kithetu Hills in the area were an important factor for consideration, apart from the population quota upon which the IEBC placed undue emphasis. We also note that the delimitation of the two sub-locations to Igembe South affects the contiguity of Igembe East ward and the rest of the constituency.

9. The population of Maua ward after removing the two sub-locations would be 22,617 and that of Igembe Central constituency will be 193,392 after adding the two sub-locations. The reason advanced by the IEBC for delimiting the two sub-locations was not justified as the two population figures are within the permitted deviations. In the circumstances, we direct as follows:

a) Amaku and Antubetwe Njohne sub-locations be moved from Maua County Assembly Ward in Igembe South Constituency to Igembe East County Assembly Ward in Igembe Central constituency.

b) Maua County Assembly Ward of Igembe South shall comprise the following sub-locations; Kithaene, Kathima, Ankurani, Amwathi, Kaibu and Gitura with a total population of 22,617.

c) Igembe East Assembly Ward of Igembe Central Constituency shall now comprise the following sub-locations; Kanjoo, Kitheo, Nthambiro, Nthare, Kalingene, Andiala, Kaurine, Amaku and Antubetwe Njohne with a total population of 44, 491.

d) The population of Igembe Central Constituency will now be 193,392 and that of Igembe South Constituency will now be 134,550.

e) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

f) The maps of Igembe Central and Igembe South Constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and positions.

g) There shall be no orders as to costs.

County No. 13- Tharaka Nithi County

333. Judicial Review Application No. 100 of 2012- Embu

1. The proceedings in this matter relate to the delimitation of Kithino, Tunyai, Murinda, Karocho, Turima, Kathuura, Tumbura, Mukothima, Kirundi, Thiiti, and Ntoroni Sub-locations in Tharaka Constituency of Tharaka Nithi County; former Nithi Constituency, the proposed Maara Constituency and Igoji West Ward of Imenti South Constituency in Meru County.

2. The applicants sought orders of certiorari and consequential relief to quash Legal Notice No. 14 of 2012 for failing to delimit and provide specific geographical positioning coordinates of Kithino, Tunyai, Murinda, Karocho, Turima, Kathuura, Tumbura, Mukothima, Kirundi, Thiiti, and Ntoroni Sub-locations in Tharaka Constituency of Tharaka Nithi County. They also seek orders to quash the purported transfer of Meru National Park from Tharaka Nithi County to Meru County and the gazettelement of the area generally known as 'Nkumbo' area between Maara River and Mutonga River ordinarily parts of formerly Nithi Constituency (but now in the proposed Maara Constituency) in Tharaka Nithi County to Igoji West Ward of Imenti South Constituency in Meru County.

3. The Applicants state that the IEBC effectively transferred certain sub-locations of Tharaka

Constituency of Tharaka Nithi County to Imenti South, Imenti Central, Imenti North and Tigania East of Meru County in violation of the law and failed to take into account the views of the residents and voters of Tharaka Constituency.

4. They asserted that the gazetted boundaries fail to delineate the actual boundary points in terms of geographic coordinates allowing for potential undue influence upon the demarcation process and its exploitation towards legitimising illegal and irregular land allocations in Kithino, Tunyai, Murinda, Karocho, Turima, Kathuura, Tumbura, Mukothima, Kirundi, Thiiti, and Ntoroni Sub-locations in Tharaka Constituency of Tharaka Nithi County to the disadvantage of residents thereof.

5. The Applicants averred that the IEBC has gazetted Meru National Park as a sub-location within Meru County yet the Park was hived off from Tharaka Nithi County in 1966 from the then Tharaka North Sub-Location which is the present day Tharaka North District. Before gazette, the land on which the park is situated was part of land set aside for the people of Tharaka North sub-location. They contend that the IEBC decision was pre-empting the work of the 'Transitional Mechanism' envisaged in the Transition to Devolved Governments Bill, 2012 and was therefore ultra vires and contrary to section 15 of the Sixth Schedule to the Constitution.

6. The Applicant explained that the boundaries between Tharaka Nithi and Meru Counties have been contested since independence, contentions which have resulted in serious ethnic clashes in the greater Meru area including the loss of life, and the unlawful eviction and displacement of the marginalised people of Tharaka.

7. The Applicants alleged that politically powerful persons have always resisted the implementation of universally agreed boundary delineations particularly as contained in the 1953 Colonial Government Map and the 1994-5 Report of the Njuri Ncheke. The Applicants further contend that though they presented their views to the IEBC, the IEBC failed to take them into account in the delimitation of the boundaries between Tharaka Constituency and their neighbours in Imenti South, Imenti Central, Imenti North, Tigania East and Igembe South constituencies.

8. The Applicants stated that Machabini sub-location in Tharaka North district in Tharaka Constituency, created in 1992, is missing from the gazetted sub-locations in Mukothima Ward in Tharaka Constituency of Tharaka County.

9. The IEBC contends that it at all times during the delimitation of the wards and constituencies, adhered to the constitutional and statutory guidelines. In regard to the controversial boundaries the IEBC averred that during the delimitation process, it adhered to the legal terms of reference by making use of the legally gazetted and administrative boundaries and therefore did not create any new boundaries. Further, that it used sub-locations as units of delimitation which were moved from one electoral unit to another but never split.

10. IEBC asserts that it has no mandate to alter county boundaries and in delineating Meru National Park as a sub-location in Igembe Constituency of Meru County it was guided by legislated reference materials including the legally gazetted administrative boundaries and the official Census results both of which identify Meru National Park as being located in Meru County. It further contends that it was not within its mandate to resolve any historical county boundary disputes.

11. As regards the applicants' contention that IEBC failed to gazette Machabini sub-location, the IEBC maintained that it was guided by legislated reference materials including the legally gazetted administrative boundaries and the official Census results none of which identifies the said sub-location as an administrative unit.

12. We have considered the material and evidence before us and we find that a valid delimitation of boundaries was done on the basis of existing sub-locations which had already been determined and for which coordinates are available from the Director of Survey.

13. The IEBC in conducting the delimitation is required to use sub-locations as units of delimitation and the Meru National Park was an existing sub-location in Igembe Central constituency. The IEBC has no mandate to change existing administrative boundaries. Furthermore the petitioners have not shown within which administrative unit in Tharaka-Nithi County the Park was and is situated. We are therefore unable to make a determination as to whether the Meru National Park was situated in Tharaka-Nithi County and whether the county boundary between Tharaka-Nithi and Meru County was changed.

14. We have also examined the 2009 Population Census Report, the IIBRC Report, the Preliminary Report of the IEBC, the Parliamentary Report on the Preliminary Report, the Revised Preliminary Report of the IEBC, and the Final Report of the IEBC from which we note that Machabini sub-location does not exist.

15. In the circumstances, the petition is dismissed with no orders as to costs.

County No. 14- Embu County

334. *Judicial Review Application No.55 of 2012-Embu& Constitutional Petition No. 120 of 2012-Nairobi*

1. The applicants and petitioner in the two above-cited cases moved the court seeking to quash the IEBC decision to the extent of the delimitation of the Mbeere North Constituency. This court found it prudent to consolidate the two applications as they both concern the delimitation of Mbeere North constituency.

2. The applicants' and petitioner's case is that the Mbeere people have for a long time been marginalised in all sectors including education, health and infrastructural development. The applicants and petitioners pray for 'equitable number' of wards so that the county government will be balanced.

3. The petitioner in ***Nairobi Petition No. 120 of 2012*** submits that during public presentations held at Embu county hall on the 23rd January, 2012, he presented a written memorandum to the IEBC wherein the residents of Embu County had proposed an additional ward for Mbeere North and two for Mbeere South so as to have equitable representation at the county level.

4. The petitioner further argues that the Mbeere people were unfairly treated with Evurore ward with 46,000 people while average wards within the county have 20,000. Further, the petitioner contends that the proposed Mbeere North constituency has the highest number of sub-locations and is highly marginalised. The petitioner also contends that the IEBC failed to take into account parliamentary proposals of amendments to the respondent's earlier report that six wards be allocated to Siakago constituency.

5. The petitioner averred that Embu County be given an additional four wards to make a total of twenty four arguing that this was within the constitutional limits.

6. The applicants in ***Embu JR Application 55 of 2012*** have similar claims. They contend that the IEBC's decision of merging the previous existing Kiang'ombe, Kanyuambora, Ishiara and Ndurumori civic Wards to create the Evurore county assembly ward is illegal for failing to take into account community interest, historical economic and cultural ties of the people of Mbeere vis-a-vis that of the Embu people.

7. According to the applicants, Mbeere North constituency has three wards as compared to six for Runyenjes constituency, six for Manyatta constituency and five for Mbeere South constituency. The applicants contend this is unreasonable and unfair and urge the court to intervene to ensure good governance by avoiding boundary disputes and clashes in the areas under question. The applicants also argue that the proposed Mbeere North constituency exceeds the geographical area for both Manyatta and Runyenjes constituencies.

8. The applicants urged the court to split the Evurore County Assembly Ward into two wards comprising Kiang'ombe and Kanyuambora locations in one ward and Ishiara and Ndurumori locations in the other to

make four wards in accordance with the residents' views made during the public hearing held on the 23rd January, 2012 at Embu.

9. The IEBC on the other hand argues that using the mathematical calculation, Mbeere North with a population of 89,035 could not qualify for four county assembly wards, as the population of Mbeere North constituency is below the 30% permitted deviation provided in Article 89(6). Further that Mbeere North constituency is protected under section 27(4) of the Sixth Schedule to the Constitution.

10. Further, it is the IEBC's contention that delimitation of fewer wards does not disadvantage the petitioners in the allocation of resources, as the duty of ensuring equitable distribution of resources lies with other state organs under the Constitution.

11. We have assessed the material before us and we note that we have been urged by the applicant in ***Embu JR Application 55 of 2012*** to create four extra wards in Embu County. We cannot grant this plea as the maximum number of wards to be distributed countrywide was 1450 all of which have been allocated in accordance with a formula that entitled Embu County to twenty county assembly wards.

12. These wards were distributed amongst the constituencies in Embu County in accordance with their respective populations. Mbeere North being a protected constituency has the least population and is entitled to three wards. In the circumstances we are unable to order the creation of additional wards or to split the Evurore ward in Mbeere North Constituency as proposed.

13. For these reason the application and petition are both dismissed with no orders to costs.

335. Constitutional Petition No. 136 of 2012- Nairobi

1. This Petition relates to Manyatta constituency in Embu County. The crux of the petition is that the IEBC used, adopted and replicated the Ligale Report in its Final Report contrary to the law yet it had every opportunity to carry out its mandate according to the law and that mandate cannot be delegated by adopting what is termed as a 'dubious' report.

2. The applicants also seek a declaration that the people of Embu County and specifically the inhabitants of Gaturi area are entitled to a new constituency being Nembure constituency as proposed during the public hearings. The petitioner further prays for a declaration that the process undertaken by the IEBC by publishing its Final Report was unconstitutional.

3. The IEBC on the other hand contends that it acted within its power in the law by using the Ligale Report as primary source of material and that the mere use of the report as a primary source cannot invalidate the delimitation which was done in accordance with the Constitution and the law.

4. We have already dealt with the issues raised concerning the constitutionality of the First Review. The applicants have not provided any satisfactory reasons why the Gaturi area merits a constituency. In any case, the maximum number of constituencies is provided by the constitution and we cannot increase this number. Further we appreciate that the IEBC was bound by the decisions and finding of the IIBRC in regard to the establishment of new constituencies under section 2 of the Fifth Schedule to the IEBC Act.

5. We do not find any merit in this petition and the same is therefore dismissed with no orders as to costs.

County No. 15- Kitui County

336. Judicial Review Application No. 129 of 2012- Nairobi

1. The proceedings in this matter relate to the delimitation of Mwingi East and Mwingi West Constituencies.

2. The applicants are seeking the change of name of the proposed Mwingi East constituency to be

renamed Mwingi Central. They are also seeking the name 'Maithyakani' in Central county assembly ward in Mwingi West constituency be replaced with the name 'Mathyakani'. They are seeking the removal of Central ward except Kavuvwani sub-location from Mwingi West constituency to Mwingi East constituency and Kavuvwani sub-location moved to Kiomo/Kyethani ward in Mwingi West constituency.

3. The applicants contend that the respondents decision to split Mwingi Town between two constituencies and two county wards is deeply unpopular in Mwingi since residents of Mwingi Town will now be served by two different members of parliament and ward representatives depending on what side of the road one is, since the IEBC identified the main Mwingi-Garissa road as the ward boundary. The applicants aver that their grievances have not been taken into consideration by the IEBC despite various memoranda.

4. The IEBC on the other hand avers that Mwingi East and Mwingi West are separated by various physical features including impassible hills stretching from Nuu to Nguni, impassible valley between Migwani and Mui, Kilulu Hills and gorges and Mbaika Nziu Hill, Makathini Hills and Ikoo Valley separating Mwingi West from Mwingi East and that therefore the proposed Mwingi Central Constituency would be a travesty to residents of Nuu, Mui and Waita who would have to travel long distances to access their district headquarters.

5. The IEBC further states that hiving off Kavuvwani sub-location from Central Ward would create administrative anomaly with Central Ward being in one constituency and Kavuvwani sub-location being in another constituency.

6. We have considered the submissions in regard to the proposed name change of the Maithyakani sub-location. Unfortunately the IEBC has no mandate to change the names of sub-locations. We also note that the name 'Maithyakani' appears in the 2009 Census Report as the name of a sub-location in Kanzanzu location of Mwingi West constituency. In the circumstances, we are unable to intervene and the applicants are urged to approach the relevant authorities to change the name of the sub-location.

7. The second issue is that of the renaming of Mwingi East to Mwingi Central and whether the town of Mwingi should be in one constituency as opposed to being divided into two. The IEBC misunderstood the submission by the applicants. What the applicants sought was not the creation of a new constituency but rather to merge the town in one constituency. There is a community of interest in an urban area and it was incumbent upon the IEBC to consider this factor and weigh it against the population.

8. Taking into account the wishes of the applicants and inhabitants, we find that the proposed changes would not affect the populations in either constituency or the wards. In the circumstances we direct and order as follows:

a) Kavuvwani sub-location of the proposed Central County Assembly Ward of Mwingi West be moved to Kiomo/Kyethani ward of Mwingi West Constituency.

b) Kiomo/Kyethani County Assembly Ward will now comprise the following sub-locations; Kavuvwani, Mbondoni, Kiomo, Kyethani, Kairungu, Karura and Wikithuki with a total population of 25, 897.

c) Mwingi West Constituency will now have a total population of 117,723.

d) Mwingi East Constituency be and hereby renamed Mwingi Central Constituency.

e) Central Ward in Mwingi West Constituency be moved to Mwingi East now renamed Mwingi Central constituency and shall comprise the following sublocations; Mwingi, Kalisasi, Maithyakani and Kanzanzu with a total population of 18,846.

f) Mwingi East Constituency, which is now renamed Mwingi Central Constituency will now comprise the following County Assembly Wards; Waita, Kivou, Mui, Nuu, Nguni and Central wards with a total population of 127,258.

g) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

h) The maps of the proposed Mwingi Central and Mwingi West constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above change and position.

i) We make no orders as to costs

337. *Judicial Review Application No. 108 of 2012- Nairobi*

1. The applicants sought orders relating to the delimitation of Kitui Rural and Kitui Central Constituencies regarding various county assembly wards. The applicants contend that the IEBC acted in total disregard of the proposals of the Yatta people not to be put together with the wards of Kisasi, Katulani, and Mbitini with whom they had no historical, cultural or historical ties with.

2. The petitioners contend that the people of Kisasi and Mbitini share no cultural ties with the Yatta people whose origin is in Machakos. That by including Kisasi, Mbitini and Katulani wards, the IEBC disregarded the community of interests and historical and cultural ties of the affected wards which were hived off from Kitui Central Constituency.

3. The applicants further argue that there is no means of communication or infrastructure linking the inhabitants of Kwa Vonza, Kanyangi Wards of Lower Yatta District with Kisasi, Mbitini Wards. That the taking of Kisasi district from Kitui Central and making it part of Kitui Rural Constituency is inconvenient to the Kisasi District people due to means of communication. The Applicants wish Kisasi and Mbitini County Assembly Wards excluded from Kitui Rural Constituency. They also pray for orders that the delimitation of Kitui Central constituency be revised so as to include the Kisasi and Mbitini county assembly wards in the constituency.

4. The IEBC on the other hand argued that contrary to the applicants' assertions, it used population quota as the primary consideration among other considerations in allocating Kisasi and Mbitini Wards to Kitui Rural Constituency. The IEBC further states that the total population of Kitui Rural constituency is 104,443 inhabitants, while that of Kitui Central is 131,715. Kisasi and Mbitini wards have a combined population of about 51,617. If this is moved to Kitui Central, the total number of inhabitants will be about 183,332 while that of Kitui Rural will remain at 42,826 inhabitants.

5. We have considered the materials before us. Kitui Rural Constituency was split from Kitui Central Constituency. The redistribution of population between the two constituencies was an important factor for consideration. The removal of Kisasi and Mbitini wards from Kitui Rural constituency as proposed by the applicants will result in an unviable constituency.

6. The combined population of the two subject wards is 51,617 while the total population of the proposed Kitui Rural Constituency is 104,443. The removal of the two wards would negate the intention of the inhabitants of Kitui County to have an additional constituency. Considerations of community of interest, historical and cultural ties in this instance cannot override the population considerations.

7. In the circumstances the application is dismissed with no order as to costs.

338. *Constitutional Petition No. 114 of 2012- Nairobi*

1. The proceedings in this matter relate to the delimitation of the Mwingi North and Mwingi South and the proposed Mwingi North, Mwingi East and Mwingi West constituencies of Kitui County.

2. The Petitioners seek a declaration that, inter alia, the boundaries of Mwingi East and West constituencies be reviewed by carving Mwingi Central out of the existing Mwingi North and South in line with the Ligale Report and the IEBC Preliminary Report; and that the boundaries of Central Ward of Mwingi West constituency and Kivou Ward of Mwingi East constituency, be reviewed so that a county assembly ward for Mwingi Township be created ensuring that the town falls within the same

constituency.

3. The petitioners seek relief on the basis that in disregard of the views of the residents of Mwingi, the IEBC created Mwingi East and Mwingi West constituencies, names that the Petitioners assert were not proposed at the forum convened by the IEBC on 18 January 2012, with boundaries cutting across the Mwingi urban centre in contravention of Art. 89(5) & (7).

4. The Petitioners state that the IEBC created two wards, Central and Kivou ward in Mwingi West and Mwingi East constituency respectively and whose boundaries cut through Mwingi Township. The petitioner's alleged that the IEBC acted in contravention of the principle of community of interest and did not take into account the historical, economic and cultural ties of the residents of the area.

5. The IEBC opposed the application and observed that Mwingi East constituency comprises mostly pastoralists and does not have cultural ties with Mwingi West which is inhabited by farmers. The IEBC further explained that Mwingi East and West were separated by impassable hills. It is contended that the geographical features will hamper communication between different parts of the proposed constituencies. The IEBC explained that the change of the names of the constituencies from Mwingi North and South to Mwingi East and West was done to reflect the current administrative districts.

6. An Interested Party, Councillor Stanislaus Musee Mulongo, supported the IEBC position stating that there was widespread support for the delimitation of Mwingi East and West constituencies.

7. We have considered the facts of this case and note that the issues raised are similar to those raised in **Nairobi JR Application 129 of 2012**, and we fully adopt our judgement in **Nairobi JR Application 129 of 2012** which applies to the application herein *mutatis mutandis*. Orders accordingly.

339. **Constitutional Petition No. 117 of 2012- Nairobi**

1. The petitioners moved the court alleging that they were aggrieved by the IEBC action of moving Katulani, Kwamuli, Kathungi and Itoleka sub-locations to Kitui Central constituency and the moving of Kwavonza/Yatta to Kitui Rural Constituency.

2. The Petitioners are seeking orders that Wikililye, Kyangunga, Katulani, Kwamuli, Kathungi and Itoleka sub-locations be moved to Kitui Rural Constituency from Kitui Central Constituency, and Kwavonza/Yatta sublocation moved from Kitui Rural to Kitui Central Constituency.

3. The petitioners are opposed to IEBC's action to move Kwavonza/Yatta to Kitui Rural constituency as they have no historical ties with the locations which they have been put together with in Kitui Rural constituency, as they have all along been in Kitui West constituency with their own district.

4. They argue that the IEBC ignored community interest. Kitui Central constituency comprises of two locations; Mulango and Kyangwitha locations. They state that the Mulango residents are mainly farmers and in rural set ups while the Kyangwitha residents are business people in urban set up which is more developed. It is the petitioners' case that if the IEBC's proposals with regard to Kitui Central constituency are implemented, four out of five wards will be from the Kyangwitha Location and only one Ward, namely Mulango will be from Mulango and that such a move will make the residents of Mulango a minority in the proposed Kitui Central Constituency.

5. The IEBC opposed the petitioners' claims stating that moving Wikililye and Kyangunga sub-locations from Mulango location would result in an administrative anomaly. That during public hearings the residents of Kyambiti sub-location which borders Wikililye and Kyangunga sub-locations to the West expressed satisfaction with Kitui Central. The IEBC also states that there would be difficulty relocating Wikililye and Kyangunga sub-locations to Kitui Rural as there will be no linkage between Kyambiti sub-location and Kitui Central constituency.

6. This case raises similar issues as those raised in Nairobi JR 108 of 2012. The primary consideration in

delimiting Kitui Central and Kitui Rural constituency was the demand for an additional constituency in Kitui County. That primary consideration could only be achieved by balancing the population figures, as we have set out in our decision in *Nairobi J.R Application No. 108 of 2012*. There is nothing special or peculiar in the petition herein that would make us depart from the findings in *Nairobi J.R Application No. 108 of 2012*.

7. We therefore adopt the decision in *Nairobi J.R Application No. 108 of 2012* its entirety and dismiss the petition with no order as to costs.

County No. 17- Makueni County

340. *Constitutional Petition No. 133 of 2012- Nairobi*

1. The petition concerns Kibwezi West and Kibwezi East Constituencies of Makueni County.
2. The petitioners are residents of Kinyambu sub-location in Kikumbulyu South County Assembly Ward in Kibwezi West Constituency and of Mukuyuni sub-location in Thange County Assembly Ward in Kibwezi East Constituency. They allege that the boundaries of Kikumbulyu South and Thange Wards have been demarcated by IEBC without considering the views given by the residents thereof.
3. The Petitioners are seeking orders that Kinyambu sub-location be moved to Thange Ward in Kibwezi East Constituency and Mukuyuni sub-location to Kikumbulyu South in Kibwezi West Constituency.
4. They further argue that the Mukuyuni sub-location residents do not have same cultural ties with the Thange Ward residents and belong to the family name known as Ngulia which is the family name of all the residents of Kikumbulyu South ward in exclusion of Kinyambu sub location residents.
5. It is the petitioners' contention that the Mukuyuni sub-location is separated from Utithi sub-location in Thange Ward by Chyulu National Park which has an electric fence thus denying them access to other parts of Thange Ward, and that this will also block them from accessing services. Further, that Kinyambu sub-location is separated from other parts of Kikumbulyu South Ward by a sisal plantation farm owned by Rea Vipingo.
6. The IEBC opposed the petition stating that the delimitation was guided by the need for Kibwezi East and Kibwezi West constituencies to each host a district headquarters namely Makindu and Kibwezi, both in Mukuyuni sub-location as a means of increasing access of the people to government services under the devolved government. Further, that the Petitioners' idea of swapping Mukuyuni and Kinyambu sub-locations to Kibwezi West and Kibwezi East constituencies respectively would have undermined the spirit of devolution that the IEBC was trying to entrench in the particular delimitation.
7. In response to the petitioners' claims that removal of Mukuyuni sub-location would distract the residents' social economic activities, IEBC contended that the boundary delimitation involved political boundaries and not social or economic boundaries as residents are not deterred from accessing or continuing with their interactions as neighbours.
8. Having considered arguments from both parties, we note that the IEBC took into account extraneous factors that are not included in the criteria set out in Article 89(5) to the disadvantage of valid geographical factors and community of interest. District headquarters nor access to services are not among the considerations to be taken into account in delimitation of electoral boundaries but instead those of fair representation and equality of votes as elaborated in Article 89(5).
9. We find that the applicants have demonstrated both geographical factors and a community of interest that ought to have been considered by IEBC, and note that the populations of Kikumbulyu South and Thange County Assembly Wards will be within the population quota margins if the two sublocations are moved as prayed by the applicants.

10. We accordingly allow the petition and order as follows:

- a) That Kinyambu sub-location in Kikumbulyu South County Assembly Ward in Kibwezi West Constituency shall be transferred to Thange County Assembly Ward in Kibwezi East Constituency.
- b) Thange County Assembly Ward shall now comprise the following sub-locations; Utithi, Thange/Part of Chyulu National Park and Kinyambu with a population of 32,130
- c) Kibwezi East Constituency shall now have a population of 132,196
- d) Mukuyuni sub-location in Thange County Assembly Ward in Kibwezi East Constituency to be moved to Kikumbulyu South County Assembly Ward in Kibwezi West Constituency.
- e) Kikumbulyu South County Assembly Ward will now comprise the following sub-locations; Mbui Nzau, Kalungu, Mukuyuni and Ngandani with a population of 25,892.
- f) Kibwezi West Constituency shall have a population of 116,508
- g) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.
- h) The maps of the proposed Kibwezi East and Kibwezi West constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above change and position.
- i) We make no orders as to costs.

341. *Judicial Review Application No. 110 of 2012- Nairobi*

1. The proceedings in this matter relate to the delimitation of county assembly wards of Nguu/Masumba, Emali/Mulala, Nzui/Kilili/Kalamba, Mbitini wards in Makueni Constituency of Makueni County.
2. The applicants are seeking orders inter alia to quash the decision of the IEBC in Legal Notice No. 14 of 2012 concerning the description of the said wards and the redistribution of the wards and administrative units in the affected constituencies from Makueni to Kibwezi West Constituency as had been provided in the Ligale Report for IEBC to comply with the population quotas and other criteria in the Constitution
3. The IEBC responded by explaining that in its Preliminary Report it had proposed that part of Makueni Constituency and part of Kibwezi Constituency be hived off to create a new constituency to be known as Kibwezi West Constituency as proposed by IIBRC. IEBC stated that this proposal was rejected by the people of Makueni County during the consultative meeting held at Wote town in Makueni on 20th January 2012. The IEBC further admitted that there were high levels of hostility between residents of Kibwezi and Makueni constituencies in the said meeting which degenerated into violence.
4. IEBC contended that as the people of Makueni had rejected its initial proposal, it decided to undertake its constitutional mandate and delimit the constituency with the larger population which was Kibwezi with a population of 248,219 into Kibwezi West and Kibwezi East.
5. Having perused and considered the pleadings and submissions of all the parties, we note that the population of Makueni is 243,219. The mandate of the IEBC in resolving the issues arising out of the first review was to adjust the population of constituencies in order to effect the principle of fair and effective representation. The population of the constituencies in Makueni County are as follows; Kibwezi East is 132,196, Kibwezi West, 116,508, Kaiti, 120,116, Kilome, 87,864, and Mbooni, 184,624, and when the population of Makueni Constituency is compared to the other in the County it demonstrates that the people of Makueni Constituency are under-represented. The populations of Kibwezi East and West constituencies stated above reflect our decision in ***Nairobi Petition No. 133 of 2012.***
6. We have emphasized the importance of effective representation, and have also noted that the

applicants' prayers are also similar to the proposals made by the Ligale Report and the IEBC Preliminary Reports. We have also noted that public consultations degenerated into violence, and IEBC has admitted that it was unable to get the views of the public. This does not discharge the IEBC from its constitutional duty to ensure effective representation of the citizens of Makueni Constituency. It had the full mandate under the provisions of the section 2 of the Fifth Schedule to the IEBC Act to redistribute such wards and administrative units as may be appropriate and to address the issue of population quota in order to meet the constitutional objectives.

7. In order to remedy this situation and taking into account the submissions and the two aforesaid reports, we think that the objective of fair representation will be met by moving Emali Mulala and Nguu Masumba County Assembly Wards of Makueni constituency to Kibwezi West Constituency in order to reduce the population of Makueni Constituency. Taken as a whole the population of the constituencies in Makueni County will be more balanced.

8. We have also considered that the residents of Emali Mulala and Nguu Masumba County Assembly Wards will still be retained in their respective wards. The redistribution of the said wards will reduce the burden of representation in Makueni Constituency. We have also taken into account the fact that the two wards are contiguous to Kibwezi West Constituency. The resultant effect of the redistribution is the promotion of fair and effective representation of the constituents in both constituencies, which is the primary goal of delimitation. We therefore order as follows;

a) That Emali/Mulala and Nguu/Masumba County Assembly Wards in Makueni Constituency be moved to Kibwezi West Constituency.

b) Makueni Constituency will now comprise the following County Assembly Wards; Mbitini, Nzau/Kilili Kalamba, Wote, Muvau/Kikumini, Kathonzweni, Mavindini and Kitise/Kithuki wards with a total population of 193,798

c) Kibwezi West Constituency will now comprise the following County Assembly Wards; Emali/Mulala, Nguu/Masumba, Makindu, Nguumo, Kikumbulyu North and Kikumbulyu South wards with a total population of 165,929

d) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

e) The maps of the proposed Makueni and Kibwezi West constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and position.

f) We make no orders as to costs.

342. *Constitutional Petition No. 128 of 2012- Nairobi*

1. This Petition relates to Makueni Constituency in Makueni County.

2. The petitioners allege that Makueni Constituency was unfairly treated in the delimitation process. It is the petitioners' case that Makueni constituency, with a population of 243,219 that exceeded the prescribed population quota by 83% was way too far from the maximum 30% allowed under Article 89(6)(b), and ought to have been split into two constituencies with an approximate population of 120, 000 inhabitants in each.

3. The petitioners argue that IEBC failed to take into account the people's views expressed during public fora to have the two constituencies, and assert that whereas Kibwezi Constituency, a sparsely populated constituency was split into two; Makueni which is densely populated has only one constituency. The petitioners contend that both the IIBRC report and the Parliamentary Report proposed that Makueni Constituency be split.

4. We have considered the issues in this matter, and find that they are similar to those raised in *Nairobi*

JR Application 110 of 2012. We also note that neither the IEBC nor this court can create additional constituencies above the 290 provided by the Constitution.

5. We are of the opinion that our decision in ***Nairobi JR Application 110 of 2012*** adequately addresses the issues raised by the petitioners, and subject to that decision, the petition herein is dismissed with no order as to costs.

County No. 20- Kirinyaga County

343. Judicial Review Applications No. 12 of 2012- Embu

1. The proceedings in this matter relate to the delimitation of Mukure Ward and Mwerua Ward in Ndia Constituency of Kirinyaga County.

2. The Applicants are seeking judicial review orders to quash Legal Notice No. 14 of 2012 with regard to the removal of Mwerua civic ward comprising Gitaku, Kianjang'a, Maitharui, and Kithumbu sub-locations and that said Mwerua ward be recognised as a county assembly ward.

3. They also seek orders that errors in representation of wards in the map in the IEBC Final Report be corrected, and the key and words in the said map be realigned as follows: Yellow – Kiine; Blue – Mukure; Pink – Mwerua; Green – Kariti. Lastly the petitioners seek a realignment of the wards to reflect the population size in the constituencies as follows: five wards for Gichugu, four wards for Kirinyaga Central, four wards for Ndia and seven for Mwea.

4. The application was based on grounds that, inter alia, the IEBC ignored the views of the people of Ndia constituency in regard to the delimitation exercise in that constituency. The Petitioners asserted that contrary to their popular views, Gitaku and Kianjang'a sub-locations have now been moved to Mukure ward and that Maitharui and Kithumbu sub-locations had been moved to Kiine ward.

5. Utilising the IEBC formula for allocation of wards across constituencies to Kirinyaga County, the Petitioners explained that Kirinyaga Central and Gichugu constituencies were correctly allocated four and five wards respectively; however, Mwea had been allocated eight instead of seven wards, and Ndia three instead of four.

6. The IEBC opposed the petition and stated that it did not make any mistake nor was Mwerua inadvertently removed through errors as alleged by the Applicants. The IEBC alleged that the people of Ndia and Mwea constituencies rejected the proposal that Mutithi ward be included in Ndia Constituency, and proposed that it be removed to Mwea Constituency. The IEBC also stated that it was in response to public opinion amongst the residents of Ndia that Mwerua civic ward sub-locations were delimited into the new county assembly wards.

7. We have considered the materials before us and note that Legal Notice No. 14 of 2012 describes the wards correctly and there is no reason for us to intervene, save that the map in Volume 3 of the IEBC Final report should be corrected to accord with Legal Notice No 14 of 2012 with regard to the identification of wards in Ndia Constituency. In delimiting Muthithi ward to Mwea Constituency we also note that the IEBC took into account the views of the residents of Ndia Constituency that Mutithi Ward be part of Mwea Constituency.

8. The application succeeds only to the extent that we order that the map of the proposed Ndia constituency in Volume III of the IEBC Final Report be corrected to accord with Legal Notice No 14 of 2012 with respect to the wards comprising Ndia Constituency.

9. There shall be no order as to costs.

344. Judicial Review Application No. 124 of 2012- Embu

1. This Application relates to Ndia and Mwea constituencies in Kirinyaga County.
2. The Applicants in this case allege that Ndia constituency was given only three wards, namely: Mukore, Kiine and Kariti, contrary to the wishes of the Kirinyaga people made during public forums and public memorandum given to the IEBC during public hearings. It is the Applicants plea that an extra ward be created to create four as expressed during public presentations and the Parliamentary committee- namely: Kariti, Mwerua, Kiine and Mukure.
3. The Applicants also claim that Mwea constituency is vast and ought to have been split into two constituencies as per the wishes of the Kirinyaga county residents to the IEBC. . To further advance their plea, the Applicants point out the fact that Mwea constituency has two District Commissioners for Mwea East and Mwea West Districts and it would therefore be prudent to have two constituencies for better political administration. The Applicants also contend that the situation in Mwea Constituency has been made worse by subsequent resettlements of people in the area.
4. It was the Applicants' contention that the situation in Mwea Constituency has been made worse by subsequent resettlements of people in the area. The Applicants alleged that the current population of Mwea constituency is over 300,000 persons in an area of 542.8 square kilometres.
5. We have considered the materials before us in this matter and conclude that IEBC was legally bound to use the enumerated census results and not projected figures. We note that the enumerated population of Mwea is 190, 512 residents. This is above the population quota limits for constituencies. However, as we have stressed earlier in our judgment, the delimitation of Constituencies must be looked at in full light of certain other factors including the maximum constitutional limit of number of constituencies in the country and the Constitutional provisions on 'progressively' working towards the population quota. In the circumstances this court cannot interfere with the delimitation of Mwea Constituency.
6. Regarding the applicants plea for an additional ward in Ndia Constituency, we refer to our holding in ***Embu JR Application No. 12 of 2012***, which applies *mutatis mutandis* to this application.
7. For the foregoing reasons we dismiss the application with no order as to costs.

County No. 21- Muranga County

345. Judicial Review Application No. 125 of 2012- Nairobi

1. These proceedings arise from the delimitation of wards in Mathioya Constituency of Murang'a County.
2. The applicants allege that the IEBC disregarded or ignored their views and that it failed to take into account the criteria set in the Constitution for delimiting wards in this constituency. It is the applicants' case that the IIBRC in its report had proposed the creation of wards in Mathioya constituency which included a ward by the name of Njumbi. The IEBC delimited the wards into Kiru, Gitugi and Kamacharia and transferred Gacharageini, Kagongo, Kiamuturi, Gatunguru, Nyakianga and Gikoe sub-locations from the Njumbi ward as proposed in the Ligale Report to Kiru and Gitugi county assembly wards.
3. The applicants accuse the IEBC of failing to take into account the means of transport in the area, historical ties of the affected sub locations and their economic activities. They also allege that the main trunk road does not connect the affected sub locations to Kiru and that facilities such as administrative centres and a hospital are not located in Kiiru. They contend that their main economic activity is small scale tea farming and that they will be disadvantaged since Gatunguri tea factory is now in Gitugi region. Finally, they allege that Mathioya River which separates Kiiru from other regions inhibits interactions.
4. The IEBC submits that consultations were done before a decision was made and that it complied with the provisions of the Constitution and the IEBC Act.
5. We have considered the facts in this matter and are of the view that the applicants case proceeded from

a misconception. The IIBRC recommended that the wards for purposes of the Constitution be the civic wards created under the Local Government Act. Njumbi Ward is a civic ward under the Local Government Act. After consideration by the IEBC, Mathiyoia, which is a protected constituency, was allocated three county assembly wards; Kiiru, Kamacharia and Getugi which were delimited accordingly.

6. As there is no complaint about the manner in which the County assembly wards were delimited, the application is hereby dismissed with no order as to costs.

County No. 22- Kiambu County

346. *Judicial Review Application No. 99 of 2012- Nairobi*

1. The applicants seek orders of Judicial Review against the respondent in regard to the delimitation of wards within Gatundu North constituency.

2. It is the case of the applicants that the IEBC ignored views of the people of Gatundu North in delimiting the wards and acted unreasonably by ignoring the criteria set out in Article 89. The applicants alleged that IEBC removed Ng'ethu and Ngorongo locations from Chania ward; removed Igegania sub-location from Mang'u ward to Chania ward; and took Ndiko sub-location to Gituamba ward to their detriment.

3. IEBC opposed the application stating that consultations were carried out with the area residents and that all necessary factors were considered before the decision was made.

4. We have considered the application and it is our view that the applicants have not established or demonstrated a case to warrant the intervention of this court.

5. IEBC submitted that the process of delimitation was carried out in a fair and transparent manner. The applicants have not proffered any evidence to demonstrate that the IEBC abused its powers. We therefore agree with the IEBC that it complied with the relevant provisions of the Constitution and the necessary statutory benchmarks it was obliged to observe.

6. We therefore dismiss the application with no orders as to costs.

347. *Constitutional Petition No. 126 of 2012- Nairobi*

1. The petitioners are aggrieved the IEBC decision delimiting the proposed Kiambaa and Kiambu Constituencies of Kiambu County.

2. In their petition they seek orders, *inter alia*, to declare the transfer of Kanunga and Ngegu sub-locations from Kiambaa to Kiambu unconstitutional. They also seek an order reviewing the decision moving Mahindi sub-location to Ndenderu ward instead of retaining the same in Kihara ward both of Kiambaa constituency.

3. The petitioner contends that the IEBC disregarded the Parliamentary Justice and Legal Affairs Committee's proposals and ignored the views of the public. It also failed to take into account and comply with the provisions of Article 89(5).

4. The Petitioners state that Kanunga and Ngegu have always been served by the District Officer in Kiambaa division, and that constituency and ward boundaries need not deviate substantially from administrative boundaries, more so since the IEBC had chosen the sub-location to be its unit for delimitation. They also aver that the proposed Kiambaa constituency will not have any boys' secondary school, as both Kanunga and Kiambu High Schools would be hived off in spite of investments by the Kiambaa constituents. Further that the economic activities of Kanunga and Ngegu are mostly done in Kiambaa. The petitioners further state that the geographical area of Kiambu will be far greater than that of Kiambaa Constituency, and River Riara would be the ideal geographical feature to divide the two

constituencies.

5. The IEBC opposes the petition on grounds that it held consultations with all affected parties who were given an opportunity to be heard before the delimitation was carried out. The IEBC further argues that the proposed amendment to the Parliamentary report was considered and rejected by the National Assembly and therefore they had no basis to rely upon that material.

6. The IEBC avers that the transfer of Kanunga and Ngegu Sub-locations from Kiambaa to Kiambu Constituency promotes homogeneity in Kiambaa and the new Kiambu Constituency on matters of economy, historical and cultural ties.

7. We have considered and analysed the evidence before us and we are satisfied that there was consultation with the interested parties and that the IEBC considered all the relevant material in delimiting the two constituencies. Kiambu and Kiambaa are delimited from Kiambu constituency and it was necessary to balance the populations of the two constituencies. We have considered the applicants' proposals, and removing Kanunga and Ngegu sub-locations from Ndumberi ward would leave the latter ward with a population of only 11,958 which is well below the county assembly ward population quota. As regards Mahindi sub-location, we find no justification for moving it to Kihara ward.

8. In the circumstances we find no merit in the petitioners' case and the same is dismissed with no order as to costs.

County No. 23- Turkana County

348. Judicial Review Application No. 140 of 2012- Nairobi

1. The proceedings in this matter relate to the delimitation of Turkana West and Turkana North Constituencies and in particular the delimitation of Nakalale County Assembly Ward in Turkana North constituency.

2. The applicants contend that the IEBC's decision to delimit Nakalale ward in Turkana North Constituency rather than in Turkana West constituency is contrary to Article 89(5), the views of the people of Nakalale ward and the IEBC Preliminary Report.

3. The Applicant's argued that under the proposed delimitation the people of Nakalale Ward will be unable to access social amenities due to the long distance they would have to travel in order to access the Lokitaung headquarters in Turkana North Constituency. They contend that historically and culturally, the residents of Nakalale trace their kin ties to Pelekech hills in Turkana West Constituency and that the IEBC's actions result in their being separated from their kinsmen.

4. They further argue that the IEBC altered the constituency boundary between Turkana North and Turkana West constituencies yet the Justice and Legal Affairs Committee did not alter Turkana West constituency and only recommended four additional wards for the County and that they were in shock at the final report that placed Nakalale ward in Turkana West constituency.

5. The IEBC opposes the applicant's claim on the basis that Nakalale ward whose population is 15,488, could not be in the newly created Turkana West constituency because Turkana North constituency whose population is 166,786 would have been left with a population way below the population quota, while Turkana West with a population of 207,080 would be above the permitted population ceiling.

6. The IEBC also submits that it took into account community of interest as the people of Nakalale are predominantly of the Ngisigir clan would have been marginalised if moved to the new Turkana West constituency largely inhabited by the Ngilukumong clan.

7. After evaluating the evidence before us and the applicable law, we find that the applicant's claim that they would have to travel long distances to access services from the district headquarters, though a

hardship, it cannot be a ground for invalidating the IEBC's actions. Furthermore, allowing the applicant's prayers would mean violating Article 89 of the Constitution on population quota.

8. More importantly, the delimitation of Turkana must be considered in light of the fact that the whole of Turkana County benefited from constituencies which had to be delimited in such a way that the population quota was reached in each constituency and ward.

9. The application therefore lacks merit and is hereby dismissed with no orders as to costs.

349. *Constitutional Petition No. 2 of 2012- Kitale*

1. The dispute in this case relates to Loima and Turkana South Constituencies with regard to the following wards; Kapedo, Napeitom, Kotaruk/Loibei, Kaputin, Katilu, and Lobokat all of which are in Turkana County.

2. The petitioners complaint against the IEBC are as follows:-

(a) That it altered the boundaries of the six wards and accordingly reduced the same by a total of 1546 km² and the same have been moved to Pokot and Baringo counties.

(b) That it failed to take into account community interests and the views of the people when it moved Akoret, Kapedo North, Kapedo West, Kapedo East areas to Tiaty constituency in Baringo county and Aniolem Nasolot, Sarmach Amater areas to Sigor constituency in Pokot County.

(c) That it changed the names of Epuke and Katamurkon areas to Apuke and Ompolori respectively without consultation with the community.

(d) That it shifted the boundary between Baringo and Turkana counties from Kapedo Post (beacon) to Akonet, thereby denying the Turkana Community geothermal resources, Kapedo Water Falls, Silale range and expected oil and other mineral fields.

3. The petitioner prays that all the changes effected by IEBC be cancelled and redone in accordance with the Constitution and the wishes of the Turkana Community. The petitioners aver that though the IEBC sought the views of the public and other stakeholders on the delimitation exercise, such views are not reflected in IEBC decision.

4. It is the view of the petitioner that the IEBC failed to take into account community interests, historical sites, infrastructure, mode of communication, language, norms and traditions in shifting boundaries, moving areas to other counties and changing names of areas which have a historical background and that by so doing, the IEBC abdicated its mandate.

5. IEBC opposes the petition on the basis that the delimitation exercise was carried out in accordance with the constitutional parameters contained in Article 89(5). The IEBC denies that it shifted the West Pokot-Turkana and Baringo-Turkana County boundaries. Similarly, the Interested Parties opposed the petition and supported the IEBC position.

6. We have considered the issues raised by the Petitioner. We note that the borders between Turkana and Pokot County are areas of constant conflict between the two communities based on allegations and counter allegations. We also note that there have been constant conflicts between the people of Turkana County and those of Baringo County. These conflicts have been over resources such as pasture and water with the Turkana people feeling that their interests have been put on the side lines over many years, hence their complaints in this petition. They feel that if the boundaries of the wards and counties are not aligned, they will continue to suffer historical injustices.

7. While we appreciate the position taken by the petitioners, we are satisfied that the IEBC considered the views that were made to it by the people of the affected areas. This fact is not denied by the petitioners.

We also find that the IEBC carried out the delimitation in accordance with existing sub-locations. It is not within the mandate of the IEBC to alter county boundaries. We are also satisfied that the IEBC considered the other parameters set out under Article 89 (5), (6) and (7) in delimiting the constituencies and wards in Turkana, West pokot and Baringo County.

8. Accordingly the petition is dismissed with no orders as to costs.

County No. 26- Trans Nzoia County

350. Constitutional Petition No. 143A of 2012- Nairobi

1. The dispute concerns Saboti and Kiminini Constituencies in general and Sikhendu Ward in particular of Trans Nzoia County. The Petitioner seeks to review the decision of the IEBC in respect of the three areas and orders to stop the transfer of Sikhendu ward of Saboti Constituency to Kiminini constituency.

2. The Petitioners contend that the particulars appearing in Legal Notice No. 14 of 2012 with regard to the boundaries of the Sikhendu ward in Saboti and Kiminini constituencies substantially departed from the IEBC Preliminary Report. The Petitioners further contend that they made presentations to the Departmental Committee on Justice and Legal Affairs which recommended that Sikhendu Ward remain in Saboti Constituency, and that the IEBC ignored these recommendations.

3. The Petitioners submit that if Sikhendu ward which has a population of 24,129 people is transferred to Kiminini constituency as proposed by the IEBC, then Kiminini Constituency will have a population of over 200,000 people while the Saboti constituency will have just above 100,000 people.

4. The petition is opposed by the IEBC who explained that the transfer of Sikhendu Ward from Saboti to Kiminini was done to achieve the community of interest concerns envisaged under the Constitution. The IEBC further submitted that during the hearings it transpired that the Saboti community who constituted a substantial component of the population in both Saboti constituency and the larger Trans Nzoia County and who are the indigenous community in the said county, had been over time disenfranchised by not having a Member of Parliament emanating from their community due to large numbers of immigrants from other communities.

5. The IEBC also submitted that the two wards that were moved to Kiminini constituency, namely Nabiswa and Sikhendu are predominantly populated by the Bukusu community who are also the majority in Kiminini constituency.

6. We have reviewed the pleadings, submissions and the relevant provisions of the law. We note that the motivation of the IEBC in moving Sikhendu Ward from Saboti Constituency to Kiminini Constituency was to empower the Saboti minority. As we have stated, the IEBC must take into account the rights of the minorities and marginalised where these can be taken into account in the process of delimitation. We have also considered that both Saboti and Kiminini Constituencies were part of the the large Saboti Constituency before the delimitation. We also note that though the population of Kiminini is higher than that of Saboti, the IEBC was not required to meet demographic equality in the first review. Finally, it is our view that the residents of Sikhendu Ward will continue to be entitled to representation at the County Assembly level.

7. It is for the above reasons that we decline to interfere with the decision of the IEBC. Accordingly the petition is dismissed with no order as to costs.

County No. 27- Uasin Gishu County

351. Constitutional Petition No. 2 of 2012- Eldoret

1. The petition concerns the proposed Kesses and Kapsaret Constituencies which have been delimited from the current Eldoret South Constituency.

2. The petitioners are agreeable to the names of the two constituencies as recommended in the IEBC Final Report, but fault the inclusion of Racecourse Assembly Ward in Kesses Constituency and Megun County Assembly Ward in Kapseret Constituency. The petitioners seek a variation of the IEBC Final Report and the IEBC decision to the extent that Megun County Assembly Ward be included in Kesses Constituency and Racecourse County Assembly ward be included in Kapseret Constituency.

3. The Petitioners also seek that Tarakwa sub-location remains in the proposed Tarakwa County Assembly Ward together with the larger Tarakwa and Lainguse sub-locations, and that Timboroa and Kipkurere sub-locations which are currently in the proposed Tarakwa ward form part of a new ward proposed by the Petitioners to be called Timboroa/Olanguise ward in Kesses constituency. Finally, the petitioners seek that the anomaly in the key to the map of Kesses constituency in volume 3 of the IEBC final report be changed to read Cheptiret/Kipchamo Ward instead of Simat/Kapseret Ward.

4. The reasons given by the petitioners are that IEBC ignored the views given to it to the effect that the proposed Kesses and Kapsaret Constituencies follow the current administrative boundaries of Kesses and Kapsaret Divisions, and that currently Racecourse ward falls within Kapsaret Division and the proposed Megun ward falls within Kesses Division. Further, that moving them as recommended by IEBC will affect the population threshold used to form the new constituencies, and if the number falls below the threshold may lead to the loss of constituencies, as Megun has a population of 12,836 and Racecourse of 29,555. The Petitioners also state that removing Tarakwa sub-location to Tulwet/Chuiyat Ward will also destabilize the rationale used to create the wards and will lead to a loss of wards.

5. IEBC response is that the delimitation of the boundaries of the proposed Kapseret and Kesses Constituencies was undertaken in accordance with the law and the Constitution. Further, that the proposed Kesses Constituency as created is still named Kesses constituency and not Tarakwa Constituency, and that considering the community of interest and all other factors enumerated under Article 89, Timboroa/Olloinguse ward as proposed could not be created.

6. IEBC considered that the area under delimitation of boundaries is a cosmopolitan one and that the residents have diverse historical cultural and economic ties. As far as geographical features and urban centres are concerned there are no matters which called for serious concern, while the means of communication is fairly well developed. IEBC also submitted that the Petitioner's contention that the Racecourse ward and Megun ward to remain in Kapseret constituency and Kesses constituency respectively is not tenable because of community of interest considerations most specifically Eldoret Town being an economic link to all residents of Uasin Gishu county, and in any event majority of the residents unanimously agreed that all constituencies touch Eldoret town.

7. Finally, the IEBC contends that the petitioners have not given any evidence to contradict the population figure used by it as a basis for its delimitation of boundaries for Kapseret and Kesses Constituencies.

8. After consideration of the positions put forward by the Petitioners and IEBC, we note that the Petitioners have no complaints about the names of the two constituencies and were content with the names Kapseret and Kesses Constituencies. We note that the IEBC did not address the obvious typographical error on the map of Kesses constituency that is published in Volume III of the IEBC Final Report showing a ward in the key named Simat/Kapseret Ward which does not exist in Kesses Constituency and is actually located in Kapseret constituency.

9. Regarding the prayers by the Petitioners that Megun ward be included in Kesses Constituency and Racecourse ward in Kapseret Constituency, we note that contrary to the Petitioners submissions dated 26th May 2012, the IIBRC Report had recommended that both wards be in Kapseret Constituency, while the recommendations in the IEBC Revised Preliminary report are the same as those in its IEBC Final Report.

10. According to the Legal Notice No. 14 of 2012, the population of Megun ward is 12,836, and that of Racecourse is 29,555. The current populations of Kapseret and Kesses constituencies of 121,178 and

135,979 respectively are within the population quota and/or acceptable variations. Further, there would be no adverse effect to the population quotas if the two wards were to be swapped. The reason given by IEBC to balance the urban areas, means of communication and community interests in all the constituencies in Uasin Gichu County is reasonable and within its constitutional mandate. We will therefore not interfere with its decision.

11. On the prayer for removing Tarakwa sub-location to Tulwet/Chuiyat Ward we note that there are two Tarakwa sub-locations in the map of Kesses Constituency in Volume III of the IEBC Final Report, one in Tarakwa ward and the other in Tulwet/Chuiyat Ward. Our understanding is that the Petitioners wish both sub-locations to be in Tarakwa Ward. Tarakwa sub-location is not listed as one of the sub-locations of Tulwet/Chuiyat Ward in Legal Notice No 14 of 2012, and after a calculation of the populations of the various sub-locations of the two wards, it is also the case that Tarakwa sub-location's population is not included in the population of Tulwet/Chuiyat Ward but in that of Tarakwa Ward. It is therefore the true position that the entire Tarakwa sub-location is in Tarakwa Ward.

12. We hereby order as follows:

a) That a correction be made to the key to the Kesses Constituency map in Volume III of the IEBC final report, and the name Simat/Kapsaret County Assembly Ward should be corrected to read Cheptiret/Kipchamo County Assembly Ward.

b) That a correction be made to the Kesses Constituency map in Volume III of the IEBC Final Report, and the entire Tarakwa sub-location be located in Tarakwa County Assembly Ward.

c) The Petition is therefore allowed only to the extent of the orders given in the foregoing, and there shall be no order as to costs.

352. *Constitutional Petition No. 4 of 2012- Eldoret*

1. The petitioners are questioning the failure of IEBC to create an Eldoret Town Constituency and the delimitation of Kapsaos ward in the proposed Turbo Constituency.

2. The Petitioners claim that IEBC has acted arbitrarily in the delimitation of electoral units without due regard to the provisions set out under Article 89, because Eldoret Municipality on which the proposed Eldoret Town constituency is premised has 14 wards with a population of 511,500, and Kapsaos ward has a population of 67,138, way beyond the population quota of 26,000 people and allowed margin of 40%.

3. The Petitioners claim that due to the erroneous and disproportional delimitation the two areas will be highly under-represented. The Petitioners are seeking orders from the court compelling IEBC to create an electoral constituency to be known as Eldoret Town Constituency and to subdivide it into two and create a new electoral ward from Kapsaos ward.

4. The IEBC states that the delimitation of the boundaries Turbo constituency was undertaken in accordance with the law and Constitution. In answer to the specific complaints raised by the Petitioner, IEBC stated that an Eldoret Town constituency could not be created because Eldoret Town is an economic link to all residents of Uasin Gishu County and it had been unanimously agreed by majority of residents that all constituencies touch Eldoret town.

5. Further, that the prayer seeking to have Kapsaos ward subdivided is erroneously advanced because IEBC considered the community of interest in Turbo Constituency in the sense that several amenities could not be disenfranchised only to one area and majority of the population are in transit since most of work there temporarily and subsequently move elsewhere.

6. IEBC also contended that it had to consider the population of the entire Uasin Gishu County in delimiting electoral wards, and that the Applicants have not given any evidence to contradict the population figures used by IEBC as a basis for its delimitation of Kapsaos Ward.

7. It was also averred that with its robust population the three applicants cannot be said to represent the interest of all the residents of Kapsaos ward effectively, neither is there any evidence to show that they are competent to bring the Application on behalf of the residents of Kapsaos ward and Turbo constituency.

8. Four interested parties also joined the proceedings and supported the IEBC position.

9. After consideration of the pleadings and submissions made, we find that the reasons given by IEBC with regard to the non-creation of an Eldoret Town constituency are reasonable to the extent that it has attempted to balance the different socio- economic and cultural interests of the inhabitants of Uasin Gishu County.

10. We however find that the delimitation of Kapsaos Ward as contained in Legal Notice Number 14 of 2012 shows the population of Kapsaos Ward is 67,138. The ward is made up of Kapsaos and Huruma sub-locations. This is almost double IEBC's own formula for the population quota for wards which is a maximum of 34,616 for other areas, having taken into account the 30% allowable margin.

11. We have considered the population trends in the other county assembly wards that comprise Turbo Constituency; Kiplombe, Ngenyilei, Tapsagoi and Kamugut wards have a population of 51,835, 30,805, 30,515 and 28,290 respectively. We note that the departure from the permitted margins to the population quota in Kapsaos ward would affect the principle of fair and effective representation.

12. It is therefore clear to us that the IEBC did not apply its formula for the allocation in of county assembly wards in the delimitation of Kapsaos Ward. The IEBC did not demonstrate any other factor that would form a basis for departure from the permitted population margins. IEBC's argument that the ward is occupied by transient residents is untenable because delimitation was done on the basis of a census carried out in that locality. Population is the primary consideration in determining electoral units.

13. In order to alleviate the population imbalance, we have looked at the entire county and in the process noted that moving a sub-location from Kapsaos ward to any of the other wards in Turbo Constituency would take them above the permitted margins of the population quota.

14. We have also considered that Turbo Constituency with its population of 208, 583 was allocated five wards instead of eight which it was entitled to under the IEBC formula. We then considered the number of wards allocated to the other constituencies relative to their population. Soy Constituency has a population is 171,941 and was entitled to six wards but was allocated eight wards. In Moiben Constituency the population is 138,409, and was allocated the five permitted wards.

15. The population of Ainabkoi Constituency is 118,089 and was allocated three wards instead of four. Kapseret Constituency has a population of 121,178 and was allocated the permitted five wards and lastly Kesses Constituency with its population of 135,979 was entitled to five wards but was allocated four wards.

16. It is thus our finding that Soy was the only constituency allocated additional wards contrary to the IEBC formula and without explanation. We are of the view that that one ward be taken from Soy Constituency and allocated to Turbo Constituency to achieve equitable and fair representation. We also observed that the population of Koisagat/Kapsang in Soy Constituency is 17,956, and fall below the allowed minimum population of 18,639. We hereby order as follows:

a) That the following sub-locations of Koisagat/Kapsang Ward in Soy Constituency be delimited in other wards of Soy Constituency as follows:

(i) The entire Koisagat sub-location to be placed in Segero/Barsombe County Assembly Ward, whose population will increase from 20,914 to 30,215.

(ii) Kapsang and Lolkinyei sub-locations to be placed in Ziwa County Assembly Ward, whose population

will now increase from 19,183 to 31,973,

b) Kapsoas County Assembly Ward in Turbo Constituency be split into two County Assembly Wards; Huruma County Assembly Ward comprising Huruma sub-location with a population of 38,545 and Kapsoas County Assembly Ward comprising Kapsoas sub-location with a population of 28,593

c) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

d) The maps of the proposed Soy and Turbo constituencies in Volume III of the IEBC Final Report be and is hereby altered and amended to reflect the above changes and position.

e) The Petition is therefore allowed only to the extent of the orders given in the foregoing and there shall be no order as to costs.

County No. 28- Elgeyo/Marakwet County

353. Judicial Review Application No. 28 of 2012- Eldoret

1. The Applicants are seeking an order of certiorari to quash the decision of IEBC to transfer Murkutwa Location comprising Rocho, Enou, Kisoka and Muruber sub-locations from Endo Ward to Sambirir Ward in Marakwet East Constituency.

2. The Applicant's complaint is that IEBC failed to take into account the geographical features that differ greatly between the two wards, in that Endo ward is located in the valley while Sambirir ward is located in the highlands, and that owing to these topographical differences any attempt to transfer Murkutwa Location to Sambirir shall force the residents to cover long distances to seek services than they are doing now.

3. Further, that the economic, political, cultural and social interests of the residents are different from those of Sambirir and that the communities residing in Endo ward share common resources, ambitions, forests and water with those which occupy Murkutwa Location, and that removing Murkutwa location from Endo ward would marginalize the residents therein politically and culturally. The Applicants also averred that if Murkutwa location remains in Endo Ward it will not interfere with the population quota as the same will remain within acceptable margins.

4. The IEBC states that the transfer of Murkutwa Location from Endo Ward to Simbirir Ward took into account the views and recommendations received from members of public. The IEBC denied the allegations that it deliberately failed to take into consideration the geographical features between Endo and Simbiriri Wards.

5. IEBC averred that the historical, economic and cultural ties existing between the communities comprising Endo Ward as is alleged by the Applicants, will not in any way be disrupted and that the Applicants' assertion appears to be founded on the gross misunderstanding that the delimitation of boundaries and the transfer of Murkutwa Location from Endo Ward to Simbirir Ward, is literally a physical movement of the said location from one geographical situation to another.

6. After consideration of the pleadings and submissions made, it is our finding that the population of Murkutwo location as provided in the 2009 Population Census report is 3,699. If the said population is removed from the population of Sambirir Ward in which the said location has been proposed to be placed, the population of the ward will be reduced to 17,886, below the allowed minimum population of 18,639 for a ward, while that of Endo Ward will increase to a figure of 25,318. The question for our determination is whether the population deviation would result in inequality of votes. The law permits deviations that are likely to result in a fair and effective representation.

7. In the instant case we are of the view that the deviation is warranted. Dominant topographical features such as valleys and hills are relevant in considering natural boundaries and/or for purposes of contiguity

and compactness, to ensure that that all parts of the ward are inter-connected. When such geographical features also impact on the economic and social interest of a community as shown by the inhabitants of Murkutwa location, these factors become material in delimiting electoral boundaries and in departing from the agreed population quota.

8. We therefore allow the application and order as follows:

- a) That Rocho, Enou, Kisoka and Muruber sub-locations be and are hereby removed from Sambirir County Assembly Ward and placed in Endo County Assembly Ward in Marakwet East Constituency.
- b) Endo County Assembly Ward will now comprise the following sub-locations; Kaben, Marich, Barkelat, Talai, Kisiwei, Kasemoi, Sagat, Sibow, Kakiputul, Olot, Ketut, Kapkondot, Rocho, Enou, Kisoka and Muruber with a total population of 25,318
- c) Sambirir County Assembly Ward will now comprise the following sub-locations; Maina, Metipso, Nyirar, Kapkuto, Chesoi, Kimuren, Chemworor, Tuturung, Chesiyu, Kipyebo, Mogil, Chugor, Chesetan, Lukuket, and Kombases with a population of 17,886
- d) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.
- e) The maps of the proposed Marakwet East Constituency in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and position.
- f) There shall be no order as to costs.

County No. 29- Nandi County

354. *Constitutional Petition No. 129B of 2012- Nairobi*

1. This matter arises from Nandi County and involves Kaptuiya County Assembly Ward.
2. The residents of the original Emgwen constituency had unanimously agreed for it to be split into two constituencies. The IEBC Preliminary Report placed Emgwen constituency as having a population of 130,084 and proposed four wards while Chemusei Constituency population was 130,752 had four wards proposed.
3. The petitioners seek orders directing the IEBC delimits, renames and redraws the boundaries of wards within Emgwen so as to give effect to the one-person one-vote principle in Nandi County by creating an extra county assembly ward out of the proposed Chesumei Constituency and name it Kiptuiya.
4. The petitioners' complaint is that the decision by IEBC to split Emgwen into two constituencies namely, Emengwen and Chesumei, and the placing of Kiptuiya civic ward in Chesumei was reached without consultations.
5. The basis for the prayers is that the delimitation has been done in a manner intended to create political gain and that IEBC disregarded its own formula on deviation of population. The applicant asserts that the delimitation was carried out in a manner that splits and divides the infrastructure of the area in a manner that disadvantages Emgwen residents, yet they contributed to these infrastructural developments.
6. The applicants also state that the Kaptuiya is inhabited by a large population of the Luhya community who share common cultural, social and religious ties with the people of Kapkangani who are in Chemusei Constituency, and that their demands are justified on the basis of need for better representation and communication.
7. The IEBC opposed the application on the basis that due regard was given to the constitutional

parameters set out in Article 89. Further that its decision was based on the principle of reasonableness to balance the interests of the majority and those of the minority groups following consultations.

8. We have considered that pleadings and material before us. There is no evidence led by the petitioners to demonstrate that the Luhya population in Kapkangani or Kaptuiya form such a minority to the extent that their status as minorities or marginalized can be remedied by delimitation of boundaries. We are of the view that the delimitation of the two proposed constituencies, which was supported by the residents of the area, will not interfere with their social, economic and cultural activities.

9. We therefore find no reason to interfere with the IEBC's decision and accordingly dismiss the petition with no order as to costs.

355. *Constitutional Petition No. 119 of 2012- Nairobi*

1. This matter concerns the newly created Tinderet and Nandi Hills Constituencies and county assembly wards.

2. The petitioners allege that the said Legal Notice violates the constitutional rights to vote and to a fair and effective representation of the residents of the two constituencies. The petition seek the following orders inter alia, declarations and an order of certiorari to quash Legal Notice No. 14 of 2012 and an order of mandamus directing the IEBC to re-align or redraw the boundaries between the two constituencies and the wards in a manner that gives effect to the principle of effective representation.

3. The petitioners' case is that their proposal made to the IEBC were not taken into account or ignored. It failed to consider the historical and present day boundaries while noting the sources of conflicts between the peoples of the upper region of Nandi Hills and the lower region of Tinderet. According to the petitioners state that the the four existing constituencies of Nandi County; Mosop, Aldai, Emgwen and Tinderet be delimited to create two new constituencies. The IEBC followed this proposal in respect of the consitencies but did not consider their view in respect of the proposed Tindirer and Nandi Hills Consitencies.

4. The petitioners complain that Chepng'etuny sub location of Ol'Lessos County Assembly ward does not appear in Legal Notice No. 14 of 2012. According to the Petitioners, the omitted sub location is supposed to be part of Ollessos ward which comprises the following sub locations: Keben, Koilot, Sochoi, Lolduga, Kapkorio, Ollessos, Mogoan, Sigilai and Cheptuing'eny.

5. The Petitioners further complain that it was wrong and illogical for the IEBC to delimit and amalgamate wards or sub locations from the highlands with those of the lowlands in view of the fact that the highlands and the lowlands are separated by the impassable Nandi Escarpment and the massive Kapchorwa and Kipkurere forests which render that two sections of the constituency inaccessible to each other. Further that unless this anomaly is corrected by this court, there will be a permanent disconnect between the highland and lowland areas of the same ward/sub location with the result that there will be ineffective delivery of service and respresentation.

6. The Petitioners also contend that by delimiting the affected areas in the way it did, the IEBC violated public policy and also ignored the already existing two administrative units, namely Nandi East District headquartered at Nandi Hills Township in the highlands and Tinderet District headquartered at Maraba Township in the lowlands.

7. They also allege that IEBC violated and ignored diversity of groups and community interests between the highlands and the lowlands with the highlands predominantly engaged in tea and maize farming while the lowlands are in a sugar cane and coffee growing area. The Petitioners say that the present delimitation will certainly cause a collision between the two areas, and cause unnecessarily difficulties between the farmers of the two constituencies who are engaged in different agricultural activities.

8. The IEBC opposed the petition on the ground that it was was guided by the provisions of theFifth

Schedule of the IEBC Act and the provisions of the Constitution. It avers that its decision was guided by the representations received.

9. We have now reviewed the evidence that has been placed before us. We note that both in their pleadings and their submissions, the petitioners are not saying that the IEBC did not adhere to proper constitutional methodologies and criteria in doing their work, but that they misapplied the same in respect of Tinderet and Nandi Hills Constituencies.

10. We also note from the written memoranda and the oral submissions of the people during the public hearings that the people of the two constituencies agreed on how the wards within the two constituencies were to be delimited, having taken into account the economic activities of the two constituencies and the geographical features separating the Nandi Hills constituency from Tinderet constituency. It is our view that this was a factor to be taken into account by the IEBC in delimiting the two Constituencies and the wards.

11. In it is our view that the two constituencies being well balanced in terms of population, the IEBC ought to have taken into account the geographical features which have a great bearing on the community of interest between the people in the highlands and those in the lowlands to achieve fair and effective representation. There is no dispute as to the composition of the wards in both constituencies and the proposed re-alignment does not affect their composition.

12. Accordingly and to give effect to this purpose we direct and order as follows;

- a) Nandi Hills Constituency with a population of 107,534 shall comprise the following County Assembly Wards; Ol'lessos, Kapchorwa, Nandi Hills and Chepkunyuk.
- b) Tindiret Constituency with a population of 100,691 shall comprise the following County Assembly Wards; Chemelil/Chemase, Kapsimatwo, Songhor/Soba and Tindiret.
- c) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.
- d) The maps of the proposed Nandi Hills and Tindiret constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and position.
- e) Legal Notice No. 14 of 2012 be and is hereby amended by including "Chepng'etuny sub-location" in Ol'lessos ward of the proposed Nandi Hills Constituency.
- f) We make no orders as to costs.

County No. 30- Baringo County

356. Constitutional Petition No. 14 of 2012- Nakuru

1. The petitioners are aggrieved by the decision of the IEBC to move Kiptoim sub-location from Eldama Ravine to Mogotio in Mogotio constituency. They rely on the 2009 census report in stating that Kiptoim was part of Esageri division in Eldama Ravine.

2. The petitioners claim that this move is detrimental to their political interests and that the decision discriminates against them as all the government infrastructure is located in Esageri division in Eldama Ravine. They claim that they have contributed financially to the infrastructure of Eldama Ravine and will not enjoy the services.

3. The IEBC opposed the application on the basis the the map used by the petitioners showing Kiptoim as being in Esageri in Eldama Ravine was unreliable as it was undated and its source undisclosed. It avers that the petitioners have not shown the extent to which the criteria set out in Article 89 were breached and that what the petitioners seek is the resolution of historical injustices.

4. We have considered the material placed before us by the parties. We do not agree with the petitioners when they state that the creation of electoral boundaries as proposed will result in losing their investments and affect their access to services offered by government and other organizations, as the delimitation of electoral units does not create physical barriers between wards or even constituencies.
5. We find that the petitioners have not demonstrated that they have suffered discrimination and that IEBC failed to take into consideration relevant matters or took into consideration extraneous matter in making its decision.
6. We find that the petitioners have not given this court any reason to review the decision of the IEBC relating to Kipsoim sub-location in Mogotio constituency and we decline to order that the boundaries be redrawn to place it in Eldama Ravine constituency.
7. The petition is therefore dismissed with no order as to costs.

357. *Constitutional Petition No. 145 of 2012- Nairobi*

1. This matter concerns Baringo East (renamed Tiaty) and Baringo North Constituencies in Baringo County.
2. The applicants want Saimo/Soi ward of Baringo North Constituency renamed “Loruk” ward so that the boundary of Baringo North Constituency which is populated by the Arror clan of the Tugen people is co-extensive with the whole of the Bartum and Ng’aratuko Adjudication sections. These lands are said to be populated by the Arror.
3. The applicants also want this court to adjust the boundary of Baringo South Constituency and of Ilchamus ward in particular to exclude these areas of land of the Bartum and Ng’aratuko occupied by the Arror.
4. The applicants contend that the IEBC did not consider and uphold the view of all interested parties that is the people of Baringo North and Baringo East constituencies and that they breached the provisions of Article 89.
5. The interested parties who supported the petition and asserted that the IEBC only considered the population quota and not the other factors that would affect the delimitation particularly to accommodate the various communities within the county.
6. The application is opposed by the IEBC on the ground that it carried out its mandate in accordance with the Constitution and the IEBC Act.
7. It is the case of the interested parties opposing the application that all the communities have traditionally enjoyed the use of the natural resources from Lake Baringo and that there is no reason to warrant a change in the status quo. They also state that the boundaries of the constituencies in Baringo County were properly delimited taking into consideration the interests of the various communities in the county.
8. We have reviewed the material placed before us by the parties and we find that no case has been made to enable us intervene to rename Saimo/Soi Ward as proposed. The reference to the Land Adjudication sections is not one for representation contemplated but rather one to identify specific land in accordance with the land law statutes.
9. The applicants have not placed before us any material to demonstrate the significance of the name “Loruk” in relation to the whole area delimited as Saimo/Soi County Assembly Ward or that the name is illustrative of a community of interest among all the inhabitants of the area. We have also noted that although there is reference in the primary and secondary material on this issue but in view of the two main communities in the constituency we decline to intervene as this would create conflict and IEBC took

this into account.

10. Accordingly the application is dismissed with no order as to costs.

358. *Constitutional Petition No. 12 of 2012- Nakuru*

1. The Petition relates to the Endorois community and the delimitation of Baringo South constituency. The Endorois community is a sub-tribe of the Kalenjin community and resides within Lobo, Kapkuikui and Sandai locations around Lake Bogoria.

2. The crux of this petition is that the Endorois community, being a minority group according to the Applicants have been historically marginalised. They argue that boundaries of the three wards namely Makutani, Ilchamus and Muchongoi as proposed by IEBC split the members of the Endorois community scattering them into different electoral wards inhabited by a majority of Ilchamus community.

3. They rely on the case of ***Rangal Lemeiguran & Others Vs Attorney General & Others (Supra) (the Ilchamus Case)*** to buttress their position. They argue that by splitting the members of the Endorois community which is a minority and marginalised group and scattering them to various electoral wards further diminishes their minority status and prevents them from participating in political leadership and other spheres of life.

4. They also allege that the delimitation neither took into account representations from the leaders and inhabitants of the area nor did it take into account the fact that the inhabitants of the area covered by the boundaries are ethnically, linguistically, culturally, historically and politically distinct and that the proposed delimitation will spur ethnic conflict and foster historical injustice on the Endorois community.

5. The applicants further seek the intervention of this court so as to have the name of the proposed constituency name “Baringo South Constituency” changed to Mochongoi as it is inappropriate and does not reflect the true geographical location of the area within the larger Baringo County and that the residents stand to suffer loss of their identity. On this point, they claim that by naming it “Baringo South Constituency,” it will be likened to that which was previously known by that name.

6. The IEBC maintains that it discharged its mandate in accordance with the Constitution and took into account all factors. The IEBC avers that it chose the name Baringo South instead of Muchongoi which is a Tugen name which name was not representative of the communities’ resident in the constituency in accordance with representation made during the public hearings.

7. The petitioners claim is that the Endorois occupy the area around Lake Bogoria. In order for the IEBC to give effect to their rights as a minority, they must establish that they occupy a specific and contiguous area that can be delineated to realise the aspirations of the applicant.

8. After thoroughly and meticulously considering all the material placed before us, we are unable to place the applicants in any clear and specific electoral area within the Baringo South Constituency. We are unable to determine the petitioners grievances on the insufficient and inadequate evidence provided.

9. Regarding the plea for change of name from “Baringo South” to “Mochongoi”, we note that the IEBC is mandated to review the names and number of constituencies, and in the circumstances of this case we find no compelling basis for interfering with the same.

10. The petition be and is hereby dismissed with no order as to costs.

County No. 31- Laikipia County

359. *Judicial Review Application No. 134 of 2012- Nairobi*

1. The applicant brought this application to challenge and overturn the decision of IEBC concerning

Igwamiti and Marmanet wards in Laikipia West Constituency. He seeks an order of certiorari to quash Legal Notice No. 14 of 2012 in relation to the two wards on the ground that proper representation and equitable distribution of resources in the various electoral units within Laikipia County was flawed and that his rights as enshrined and guaranteed in the Constitution have been violated.

2. It is the case of the IEBC that the suit is improperly instituted as its chairperson, who is sued, does not make decisions on its behalf and that the decisions of the IEBC are arrived at by a majority of the Commissioners. Consequently, the Chairperson is exempted from personal liability under section 15 of the IEBC Act.

3. We think that the applicant is properly before the court as the application is brought in exercise of the constitutional right conferred by Article 89(10) and we do not think that the application is incompetent. What is before the court is a challenge to the decision made under Article 89 and we will consider the application on that basis.

4. We have considered the application and the material placed before us and we note that it is not the case of the applicant that the IEBC conducted the process of delimitation of constituencies and wards in Laikipia County in a manner that was not transparent, consultative or in violation of the law.

5. Having gone through all the documents filed by the applicant, we do not find any evidence or material showing or demonstrating that the IEBC did anything wrong, illegal or unconstitutional. It is the case of the IEBC that it acted in good faith, having regard to the circumstances under which the process was undertaken. We find no evidence or material that the applicant's right to fair representation and equality of vote as provided for in the Constitution has been compromised. The supplementary affidavit and further affidavit by the applicant do not disclose that the IEBC took into account anything which is extraneous or outrageous to make us intervene on behalf of the applicant.

6. The function of pleadings is to give fair notice of cases so that the opposing party may direct its evidence or reply to the issues pleaded. We have noted that the applicant's advocate in his submissions raised revised issues which were not captured or disclosed in the affidavits filed by the applicants. It is elementary that pleadings must disclose the grievances and complaints by an aggrieved party in a comprehensive manner. It is pertinent to note that a party is bound by his own pleadings (See ***Wanyange v Commissioner of Lands & 4 Others Nairobi HCCC No.65 of 1996 (Unreported)***). No party in any pleading may make an allegation of fact or raise any new ground of claim inconsistent with the previous pleading.

7. We have nevertheless addressed our mind to the issues raised by the applicant in order to find any basis or reasons for intervention. The issues raised are without merit and cannot be a basis to interfere with the decision of the IEBC. The grievances and/or complaints are misconceived and untenable. Consequently the application is dismissed with no orders as to costs.

360. *Judicial Review Application No. 146 of 2012- Nairobi*

1. The application relates to the delimitation of constituencies and county assembly wards in Laikipia County.

2. The applicants seek orders to compel the IEBC to review its report in relation to Laikipia West, Laikipia East and Laikipia North Constituencies, Laikipia County Wards and Laikipia County.

3. The applicants contend that the IEBC created Laikipia North Constituency which has a population of 79,206 as compared to Laikipia West and East whose population are 203,459 and 116,562 respectively. They contend that Laikipia West is a rural constituency and the population quota is above the one provided for in the Commission's preliminary report on boundaries. The applicants' main grievance relates to how the IEBC delimited Laikipia North Constituency and it is their contention that the whole of Laikipia County should be divided into three equal constituencies in terms of population.

4. It is further contended that Igwamiti County Assembly Ward within Laikipia West constituency has a population 69,491 which is above the threshold for wards. It is further contended that Marmanet County Assembly Ward with Laikipia West constituency has a population of 42,629 which is above the threshold for wards. The applicants also complain that the proposed Laikipia North has an estimated population of 79,206.

5. It is the position of the IEBC that it conducted the process of delimitation of constituencies and wards in an open, transparent and consultative manner with the full participation of all interested parties, and that they did nothing wrong, illegal or unconstitutional to warrant the interference of this honourable court. It is also contended that the actions of the commission were in the national interest, in good faith and reasonable having regard to the circumstances under which the process was undertaken.

6. We have considered all the documents and materials presented to us by the parties. The question for our determination is whether the IEBC did anything or omitted to do anything which calls for our intervention. There is no evidence that the applicants have been denied the right of fair representation or any other right by the IEBC. It is clear the IEBC is constitutionally obliged to progressively work towards ensuring that the number of inhabitants of each constituency and ward is as nearly as possible equal to the population quota and this realization and/or goal cannot be realized overnight.

7. We also appreciate that it is not possible to please everyone through the delimitation of boundaries for constituencies and wards. We also appreciate that the right that each vote must be relatively equal to every other vote is an ideal and appropriate situation. In our understanding that is not to say that there cannot be a variation in population size between constituencies. Such variations or deviations can be justified on the basis of giving due weight to regional issues within a given population and geographical factors in the area where the delimitation is being carried out.

8. In that regard the IEBC is empowered to take into account vast and sparsely populated region which must be adequately represented even where the population of the sparsely populated area is less than half of that of a constituency in vast populated areas. To recognize such a principle is to recognize the reality of our citizens and being cautious of the needs and aspirations of all citizens of this country.

9. Having taken into consideration all the material presented by the applicants and the IEBC, we find and conclude that there is no evidence to show that the IEBC failed to observe the requirements of the law and proceeded to act beyond its powers. It is obviously unreasonable to expect the IEBC to achieve parity or create a constituency which is equal in population and size to another constituency. Consequently, it is our view that there is no merit in the application by the applicants.

10. The application is therefore dismissed with no orders as to costs.

County No. 32- Nakuru County

361. Constitutional Petition No. 11 of 2012- Nakuru

1. The proceedings in this matter relate to the delimitation of the proposed Tinet Ward in Kuresoi Constituency.

2. The applicants, numbering two hundred and thirty, are members of the Ogiek community and have brought this application seeking orders that Tinet Ward in Kuresoi South constituency be delimited to exclude Chepalungu, Chemaner, Kipsonoi and Tegat sublocations in order to protect the Ogiek community.

3. The applicants state that the manner in which the boundaries of Tinet Ward are delimited have substantially changed its representation and this will deny them the opportunity to obtain leadership positions. The applicants state that the Ogiek have suffered from a lack of effective community representation and exclusion in resource allocation and that the lack of clear delineated Ogiek community boundaries have led to community decimation and the assimilation of that community into the Maasai and

Kalenjin communities and subsequently to the loss of their unique culture, traditional beliefs and practices and the destruction of their social fabric.

4. They further asserted that that previously, Tinet Ward, consisting of Kuresoi South, Kapnanda and Tinet sub-locations, contained approximately 28,018 Ogiek inhabitants who were the majority whereas the enlarged Tinet Ward now contains 51,000 inhabitants mainly from the Kipsigis community from Chepalungu, Chemaner, Kipsonoi and Togat locations.

5. The applicants aver that there are only two wards in the country which enable Ogiek representation that is Mariashoni Ward in Njoro Constituency and Tinet Ward in Kuresoi and whereas Mariashoni Ward is intact, Tinet Ward has been interfered with.

6. The IEBC states that it carried out its mandate in accordance with the Constitution and the IEBC Act.

7. It is not disputed that the Ogiek Community are a minority and it was therefore incumbent on the IEBC to consider their special interests in delimiting the wards in the Constituency wherever possible. The Ogiek occupy specific and contiguous areas in Tinet ward and we think that this was a basis upon which the IEBC could consider their case and give effect to their rights so far as is possible, and it is our finding that the IEBC failed to consider the rights of this minority and marginalised group.

8. Taking into account the material before us and in order to give effect to the rights of the Ogiek we direct as follows;

a) Tinet County Assembly Ward of Kuresoi South Constituency shall comprise the following sublocations; Tinet, Kapnanda, Chepalungu and Chemaner with a population of 32,418.

b) Keringet County Assembly Ward of Kuresoi South Constituency shall now comprise Kipsonoi, Togat, Siwot, Chebaraa, Baraget, Milimet, Kapsimbeiywo, Silibwet and Ribot sublocations with a population of 35,738.

c) Legal Notice No. 14 of 2012 be and is hereby amended accordingly.

d) The map for Kuresoi South Constituency in Vol. III of the Final Report of the IEBC be and is hereby amended to reflect the above changes.

e) There shall be no order as to costs.

362. *Constitutional Petition No. 146 of 2012- Nairobi*

1. The petition in this case relates to Nakuru County. The petitioners contend that the IIBRC proposed that Nakuru County have five additional constituencies, namely Gilgil, Bahati, Nakuru Town West, Njoro and Kuresoi North bringing the total to eleven. The proposals contained in the IIBRC report were supposedly duplicated in the IEBC Preliminary Report. The Revised Preliminary Report proposed to delimit the wards in the constituency differently as set out in the petition.

2. The petitioners believe that the delimitation does not reflect the wishes of the residents of Nakuru County. They contend that the Minister of State for Planning stated in Parliament on the 15th of February 2012 that the official population of Kenya is 37,724,850 as opposed to the 38, 610,097 as indicated in August 2010 and used by the IIBRC. They state that they are aggrieved by the final report because:

a) The populations of Njoro and Naivasha Constituencies exceed the population quota;

b) Whereas the populations of Kiambu, Kakamega and Nakuru Counties are roughly within the same range, the first two have 12 constituencies whereas Nakuru has 11;

c) That in accordance with Article 89 (5) there is a compelling case for the creation of an urban

town constituency around Naivasha town to ensure meaningful representation for the cosmopolitan population there;

d) That the distribution of wards in Nakuru County is skewed in favour of rural constituencies and prejudicial to the urban ones;

3. They contend that the decision of the IEBC is discriminatory, violates human dignity, that they should have been given an additional constituency. Moreover, they assert that the IEBC should have considered a dispute to have arisen once the Minister made a statement on the population in Parliament which required solving, that the IEBC was enjoined to delimit constituencies in a manner that enhances political and socio-economic ties therefore Naivasha should have had its own constituency.

4. The petitioners seek the following orders:

a) The creation of a new constituency in Nakuru County to be named Longonot created after splitting Naivasha into Naivasha Town comprising Biashara, Lakeview, Viwanda and Malewa West wards and Longonot comprising Hellsgate, Mai Mahiu, Maeilla, Olkaria and Naivasha East wards.

b) The creation of a new ward in Molo Constituency by splitting Elburgon ward into Elburgon and Mutamaiyu;

c) The removal of Lare Ward from Njoro constituency and taking it to Gilgil constituency on the ground that Njoro constituency has exceeded the population quota;

d) The creation of an extra ward in Subukia ward called Ndungiri-Kirima by splitting Kabazi ward into two;

e) That Kapkures ward be moved from Nakuru Town West to Rongai Constituency;

f) That Mosop ward in Rongai Constituency be renamed Mosop/Kapkures;

g) That Barut and Rhonda wards of Nakuru Town West be merged to create Rhonda/Barut;

h) That Kaptembwa County Assembly Ward of Nakuru Town West be split to create Kaptembwa East and Kaptembwa West wards.

5. The IEBC position is that the delimitation carried was in compliance with the Constitution and the IEBC Act and that the petitioner has not shown any basis for impugning its decision.

6. We have considered the issues raised by the petitioners but we note that the delimitation process is a preserve of the IEBC to be carried out in accordance with the Constitution and the law. In carrying out its duties the IEBC is required to balance various considerations and for the court to interfere it must be shown that there is a breach of the law. This being the first review, the IEBC is not required to meet instant demographic equality and is constrained from so doing by the provisions of the Article 89(7) and section 27 of the Sixth Schedule to the Constitution.

7. We note that Kaptembwo County Assembly Ward of Nakuru Town West Constituency which has a population of 70,352 is a single sub-location and hence it could not be split given that the methodology of delimitation was to use the sublocations in existence.

8. In relation to Lare Ward of Njoro Constituency we find that moving Lare Ward to Gilgil Constituency would interfere with the contiguity between Njoro and Kihingo wards in Njoro Constituency. We therefore decline to allow the application to have Lare ward moved to Gilgil constituency.

9. The petitioners seek to have Kaptures ward moved from Nakuru Town Constituency to Rongai

Constituency with the aim of creating Mosop/Kaptures Ward in Rongai Constituency. In support of this prayer, they say that the population of Kaptures ward is below the population quota. This appears to be the same reason for wanting Kabazi and Elburgon wards in Subukia and Molo constituencies respectively split into two and Barut and Rhonda merged to create Barut/Rhonda.

10. Other than stating that the populations of those wards exceed the quota, we do not find that the petitioners have made a case for the splitting of the wards or merging others. The IEBC used the formula to distribute county assembly wards and this has not been infringed. The reason for having Kapkures Ward in Nakuru Town West with a population of 8,956 seems to be that the IEBC could not have interfered with Kaptembwo sub-location as it did not re-draw the boundaries of existing administrative units.

11. The petitioners have not demonstrated any basis for this court to intervene in the IEBC decision. We therefore dismiss the petition with no order as to costs.

363. *Constitutional Petition No. 10 of 2012- Nairobi*

1. This petition relates to Rongai and Subukia Constituencies in Nakuru County.

2. The petitioners seek a declaration that the process, manner and the decision in which the IEBC proposed Soin County Assembly Ward and the proposed Rongai Constituency be delimited was not in accordance with the Constitution.

3. They assert that the IEBC has placed them in Soin ward without consultations and that the name given to the ward was not informed by consultations. They complain that the IEBC did not take into account infrastructure and communication when proposing Soin ward for the petitioners who came from Kapsetek as they have to traverse three districts to get to the headquarters of the proposed Soin ward. They claim that the IEBC did not take into account the factors set out in Article 89(5).

4. The IEBC asserts that the delimitation was carried out in compliance with the law and Constitution and it maintains that the representations from the public were considered. In relation to the decision to move Kapsetek to Soin ward and not Visoi, it maintains that the IEBC was not mandated to delimit administrative boundaries and that the allegation that residents of Rongai would have to traverse two districts to get to a major town lacks merit as the delimitation did not result in the physical displacement of any geographical features. IEBC also contends the name chosen was informed by the views of the residents of Rongai.

5. We have considered the material before us and are satisfied that there is not merit in the application to change the name of Soin Ward as this is based on the request of one individual.

6. The petitioners have also not shown how their community of interest will be violated. They merely assert that the decision affects their community of interest. There is no basis for us to intervene in the IEBC decision.

7. We therefore dismiss the petition and make no order as to costs.

364. *Constitutional Petition No. 13 of 2012- Nakuru*

1. The petitioners seek a declaration that the process and manner in which the IEBC delimited the Nakuru West and Nakuru East is contrary to the Constitution. They assert that the effect of the delimitation is to create a very rural Nakuru Town West Constituency.

2. In support of their petition, they state that they gave their views to the Ligale Commission as to how they wanted Nakuru County to be split, based on existing infrastructure, communication, population quota and community of interest and attach their memorandum in that regard. They say that despite these views, the IEBC has chosen to discriminate against them by demarcating Nakuru West Constituency so

that it does not have any government infrastructure such as the Provincial and District Commissioners' offices and the Lands Office which are in Nakuru Town East.

3. They assert that effectively, all the major schools are in Nakuru East and that the IEBC failed to appreciate the importance of consultation and fairness in the demarcation of boundaries. They maintain that the government offices and Nakuru High School should have been given to them, and Menengai High School should have been taken to Nakuru Town East.

4. The IEBC avers that it never altered the boundaries of Nakuru West and/or Nakuru East or the wards and that in fact it adopted the delimitation proposed by the IIBRC. Moreover, having looked at the maps, it avers that the IIBRC also adopted the delimitation conducted under the Districts and Provinces Act, 1992 and that it is misleading for the petitioners to suggest that it did not take the views of the region into account. IEBC states that it was not practically possible to have all the views reflected in its decision as they had to consider other factors as stipulated in the Constitution.

5. We have considered the matter placed before us for determination and note that the petitioners are not alleging that the IEBC failed to take into account any of the criteria set out in the Constitution. Their contention is mainly that they want the administrative units that are currently in existence and a school to be brought into Nakuru Town West. They claim that this is what they presented to the IEBC and that to do otherwise would be to discriminate against them.

6. We do not think the assertions raised by the petitioners raise any serious questions that would justify a departure from the decision of the IEBC in relation to the delimitation. They have not shown how the IEBC failed to consider the criteria set out in Article 89 or that it considered extraneous matters which would render its decision invalid. The fact that the old administrative units are in Nakuru East is not a valid reason to overturn the decision. In any case, the administrative units that are in place will have to be reviewed in line with the devolved structure and streamlined in order to make service delivery more efficient. We also find that delimitation will not interfere with petitioner's access to services.

7. We therefore find the petition to be lacking in merit and dismiss the same with no order as to costs.

County No. 33- Narok County

365. Constitutional Petition No. 99 of 2012- Nairobi

1. The petitioners seek reliefs concerning the delimitation of Narok North and Narok East Constituencies with respect to Melili Ward in Narok North Constituency.

2. The gravamen of the petitioner's claim is that Narok County was delimited into six constituencies namely; Kilgoris, Emurrua Dikirr, Narok North, Narok East, Narok South and Narok West. Narok North and Narok East constituencies share boundaries. Indeed, the proposed Narok East constituency was curved out of the old Narok North constituency.

3. The total population of the old Narok North constituency was 258,544 people. The applicant contends that in delimiting the boundaries of Narok East constituency from Narok North constituency and in order to realise the principle of equality of the vote, it was obligation of the IEBC to ensure that the population of the two resultant constituencies was as far as possible equal and in any event, as close as possible to the population quota.

4. In its proposals the IEBC has allocated Narok North, with a population of 175,588, six county assembly wards, and Narok East, with a population of 82,956 four county assembly wards.

5. The petitioners aver that the residents of Narok North, at the public hearings, expressed the view that Melili Ward, with a population of 37,233 people be made part of Narok East constituency. The petitioners contend that had the IEBC adhered to these proposals both Narok North and Narok East would have had five wards each and a population 138,365 and 120,179 respectively hence moving closer to the principle

of equality of the vote than currently proposed.

6. The petitioners have also argued that there are issues of cultural ties among the people of Melili ward and their counter-parts in Narok East constituency. These ties would have been promoted by putting the Melili ward in Narok East constituency. Mr Ole Sururu claims that as cultural leader of the Maasai he presides over cultural activities including mobilizing the community and the Ilmairowuni formation. He states that the delimitation of Narok East to exclude Melili ward will interfere with his responsibilities.

7. The petitioners also aver that Melili Ward has easier transport and communication networks with the East and not the North. Consequently, if the people of Melili ward are left in the North, it would not be possible for them to access administrative and constituency headquarters in the North without passing through the Narok East.

8. The petition is opposed by interested parties who support the IEBC and Legal Notice No. 14 of 2012 in relation to the boundaries of Narok North and Narok East and the inclusion of Melili Ward in Narok North. They state that in the Ligale Commission Report, Melili ward was originally in Narok East but when IEBC released the preliminary report, upper Melili ward was delimited to Narok North Constituency. The interested parties were aggrieved by the delimitation contained in the preliminary report particularly because no issues arose from the Ligale Commission report.

9. The Departmental Committee of the National Assembly agreed with the position of the interested parties and recommended that Ligale Commission Report position be implemented. When IEBC published Legal Notice No. 14 of 2012, which delimited Narok East to consist of Mosiro, Ildamat, Keekonyokie and Suswa wards, and Narok North to comprise of Olposinioni, Olukurto, Narok Town, Nkarreta, Olorropit and Melili wards.

10. In response to the petition the IEBC confirms that it took into account the provisions of Article 89 at all times during the delimitation of wards and constituencies in Narok county. IEBC confirms that Melili ward in Narok North constituency is composed predominantly of the Purko clan while Narok East constituency, as currently delimited, is composed of predominantly the Kikonyokie and Ildamat clans and in deciding to allocate Melili Ward to Narok North rather than Narok East constituencies, considered the need for affirmative action in favour of the Kikonyoike and Ildamat clans.

11. While it acknowledges the infrastructural difficulties of Narok county, which have existed from time immemorial, IEBC avers that the delimitation process involved a consideration of mandatory constitutional criteria such as population quota, and factors such as communication, geographical features, community of interest, historical, economic and cultural ties which the commission balanced in arriving at its decisions.

12. The interested parties submit that the IEBC acted properly by transferring Melili ward to Narok North constituency and if the application is allowed it will result in a Purko Clan majority in Narok East Constituency, thereby defeating the overriding objective of crafting Narok East Constituency in the first place. The aver that the creation of Narok East constituency was the practical mechanism of addressing historical, economic, social and political domination of the populous Purko clan against the minority Ildamat and Keekonyokie clans.

13. The issue for determination is the delimitation of Melili Ward. The matter must be considered as a whole particularly in the light of the delimitation of the constituencies in Narok county where the additional constituencies Emurua Dikirr and Narok East which was split from the larger Kilgoris and Narok North constituencies respectively. The delimitation was guided by the need to maintain a population quota within the applicable constitutional margins and complex clan interests which must be balanced. It is not the case of the applicants that IEBC failed to take into consideration a pertinent and fundamental issue in undertaking the delimitation process.

14. Apart from using the population quota as a point of reference, IEBC also considered the historical, social, cultural ties and community of interest of the inhabitants. The inclusion of Melili Ward which is

predominantly occupied by the Purko clan, in Narok North, was intended to give the Ildamat and Keekonyikie clan a fair chance of representation within Narok County by delimiting Narok East. The inclusion of Melili ward in Narok East Constituency would clearly upset this delicate balance.

15. We have emphasized that delimitation does not interfere with the provision of services by government agencies, it concerns representation. Moreover, delimitation is not intended to interfere with daily activities and should not prevent the respective clans from conducting their cultural activities even outside their constituencies. Constituency and ward boundaries are not walls. Our Constitution protects the freedom of movement, practice of culture and religion and association. We would urge the residents of Narok East and West to co-exist peacefully; after all they are all Maasai!

16. Our analysis of the evidence and material demonstrates that the IEBC took into account all relevant factors and the petitioners have not discharged the onus that the delimitation was unconstitutional. In the circumstances the petition fails and is dismissed.

366. *Constitutional Petition No. 112 of 2012- Nairobi*

1. This matter concerns the delimitation of Kilgoris and Emurua Dikirr constituencies of Narok County.
2. The petitioners seek orders which effectively delimit both constituencies and the wards there to their specifications. The petitioners' contented that Kilgoris constituency was allocated six wards namely; Kilgoris Central, Keyian, Angata Barikoi, Shano, Kimintet and Lolgorian. Emurua Dikirr Constituency allocated four wards namely: Ilkerin, Ololmasani, Mogondo and Kapsasian. Kilgoris Constituency has a population of 180,417 and Emurua Dikirr has 94,115 people, hence making Kilgoris constituency almost twice as populous as Emurua Dikirr constituency.
3. The petitioners contend that that IEBC failed the constitutional test in the following respects;
 - (a) Kilgoris Central Ward in Kilgoris Constituency has a population of 41,977 which is beyond the permissible limit;
 - (b) Lolgorian ward in Kilgoris constituency has a population of 35,434 beyond the permissible limit
 - (c) Mogondo ward in Emurua Dikirr Constituency has a population of 35,434 people beyond the permissible limit.
 - (d) The geographical area covered by Kilgoris constituency is 2526 km² whereas that of Emurua Dikirr constituency is 320.50 km² making Kilogoris constituency almost 8 times larger than Emurua Dikirr constituency. So gross is the situation created that Emurua Dikirr constituency is smaller than Kimintet ward with an area of 813.50 km² and Lolgorian ward with an area of 600.70 km² in Kilgoris constituency.
 - (e) The boundary between Kilgoris and Emurua Dikirr constituencies as proposed by the IEBC did not follow any discernible geographical feature.
 - (f) After subdivision all the existing economic structures remain in Kilgoris constituency leaving Emurua Dikirr constituency without any noticeable economic mainstay.
 - (g) The proposal by IEBC effectively creates an ethnic enclave for the Kipsigis community constituency. This defeats the philosophy of nationhood, cohesion and national unity.
 - (h) The formula employed by the Commission in determination of the population quota per province is fundamentally flawed and inconsistent with the express provisions of the Constitution.
4. The petitioners rely on a report prepared by Dr James Katende dated 27th March 2012 titled,

“Mathematical Analysis of the IEBC Revised Preliminary Report of the Proposed Boundaries and Constituencies and Wards.” His supporting affidavit sets out various calculations to demonstrate serious deviations from the population quota in respect of the Constituency and wards. The petitioners’ case is also supported by interested parties.

5. The petition is opposed by the IEBC on grounds that it complied with the provisions of the Constitution. It avers that the delimitation was carried out after extensive public consultations. The IEBC is also supported by interested parties.

6. We have considered the petitioners case, and essentially what they seek is a fresh delimitation of Kilgoris and Emurua Dikirr Constituencies of Narok County, based on a series of mathematical calculations and formulas set out in the report of Dr Katende. While we appreciate the enormous work that has gone into preparing the said report, the process of delimitation is one conducted by IEBC in accordance with the Constitution and IEBC Act. It is not strictly a mathematical process as the IEBC is required to take into account various factors and make public consultations.

7. The delimitation of the two constituencies was broadly acceptable to residents and inhabitants of the area and was implemented by the IEBC subject to realigning the boundaries in accordance with the various parameters to be found in Article 89.

8. Furthermore, as we have stated in **Nairobi Petition No. 134 of 2012** concerning Narok West and South Constituencies, *“In our view, in conducting the first review the IEBC was to look at Narok County as a whole and make the necessary adjustments to the boundaries. This is a balancing act that requires it to balance various interests across the county particularly in Narok where there are various clan interests among the Maasai, the Kipsigis who occupy large parts of Transmara and the cosmopolitan urban areas. We do not think a case has been made for us to upset this fine balance of the communities.”*

9. Finally, we must emphasise that in the first review, it is recognised that it is not possible to achieve instant equality of population and population equality is to be achieved progressively.

10. Our review of the material before us does not disclose a case to warrant upsetting the Legal Notice No. 14 of 2012. We therefore dismiss the petition with no order as to costs.

367. Judicial Review Application No. 111 of 2012- Nairobi

1. This application concerns Lolgorian Ward of Kilgoris constituency of Narok County.

2. The Applicants seeks to quash Legal Notice No. 14 of 2012 to the extent that Naar-olong sub-location is curved out at Keyian Ward.

3. The applicants’ case is that IEBC never consulted the residents of Naar-olong sub-location. They contend that there was no demand for the people of the sub-location to be placed in Lolgorian ward hence the applicants were denied their rights to fair administrative action.

4. According to the applicants, the area used to have administrative issues addressed to Enoosaen town, which was the headquarters of Keyian Division which was accessible by foot within two hours. The distance to Lolgorian town is a walk of over four hours which is oppressive. Furthermore, between Lolgorian and Naar-olong, two rivers, Migor and Paka Nyeusi, burst their banks during the rainy season making travel difficult.

5. The applicants contend that even if the population is considered, Lolgorian has a population of 35,434 while Keyian has 26,673 and an area of 270.3 km² and 600.7 km² respectively therefore removal of Naar-olong would not make a difference to the quota margins as it has only 1533 inhabitants. The applicants also contend that the area is densely forested.

6. The applicants also aver that the residents of Naar-olong are from the Uasin Gishu Clan who occupy

Keyian ward while the occupants of Lolgorian Ward are from the Siria and Moitabik clans. The applicants aver that land tensions between the clans have been simmering over the years and it would be appropriate to leave Naar-olong sub-location in Keyian ward to avoid the conflict.

7. The IEBC opposes the application and states that it followed the Constitution and held public consultations in delimiting the constituency. It denies that Naar-olong sub-location is inaccessible as there is an earth road through Masurura to Lolgorian. Further that the issues raised by the applicants are matters of administration rather than delimitation and that access to services would not be impeded in any way.

8. We note that Naar-olong location was part of Lolgorian ward in the Preliminary Report. The National Assembly Report noted that there was need to align the wards to accommodate community interests but did not identify the specific nature of these interest.

9. We have reviewed the evidence before us and we are cognisant that clan issues are sensitive and emotive in nature. We have indeed been referred to litigation concerning land adjudication in the area. But this is a matter concerning delimitation of electoral boundaries. The applicant bears a burden of showing that IEBC acted in an unconstitutional manner.

10. Part of the grievance is about accessibility and communication network. We note that though this may be a factor in delimitation, it cannot be a basis for interfering with IEBC's decision in this case.

11. We have read the Memorandum of Protest by residents. It is made by residents of Masurura and Ndonyo locations in Transmara District who belong to the Moitanik and Uasin Gishu clans. The application before us is only in respect of Naar-olong sublocation. We have not been informed what would happen to members of those clans in Masurura Sub-location which is in Lolgorian Ward. In our view, it is difficult to align clan interests in the absence of clear evidence to demonstrate the nature and extent of occupation of the two clans in Lolgorian Ward.

12. In the circumstances the application is dismissed with no order as to costs.

368. *Constitutional Petition No. 134 of 2012- Nairobi*

1. This petition concerns the delimitation of Narok West and South constituencies of Narok County.

2. The genesis of the petitioners' claim is that at an IEBC meeting held on 17th February 2010, the residents of Narok South proposed that Narok South should be divided into two to create a new Narok West constituency.

3. When the IIBRC published its report, Narok had three new constituencies; Narok West, Narok East and Emurua Dikir. The IEBC preliminary report of the First Review thereafter delimited the two constituencies as follows; Narok West comprising Ilmotiok, Mara, Siana and Naikarra wards and Narok South comprising Maji Moto-Narooswa, Olulunga, Malelo, Loita, Sagoo and Sagamian ward. The petitioners' aver that the first review did not reflect their proposals.

4. The petitioners complain that the delimitation carried out by the IEBC was not in accordance with the Ligale Report. The reason the Ligale Report adopted this process was that Narok West consists of many Kipsigis who engage in small scale farming and animal husbandry. The two constituencies were also different in that the proposed Narok West was more densely populated unlike the sparsely populated Narok South which comprises mostly Maasai pastoral communities and includes a large part of Maasai Mara Game reserve.

5. It is the petitioners' view that the two communities, the Kipsigis and the Maasai share negligible community ties and thus the proposal in the Ligale Report should be adopted to benefit each community.

6. The IEBC opposed the petition and contended that it acted reasonably and substantively addressed the main demand by the people of Narok South which was that the constituency be split into two, which was

done. The IEBC contended that before the delimitation exercise created Narok West constituency, the Kipsigis and the Maasai had lived peacefully under one constituency known as Narok South constituency. It also contends that the population of the two constituencies has a population above the highest limit of 173,079 people.

7. The IEBC also rejects the applicants' suggestion that the two constituencies be delimited along ethnic lines so that the Maasai have Narok South and the Kipsigis, Narok West as this would be unconstitutional and discriminatory of some residents in each of these areas also ethnic lines contrary to the provisions of Article 27.

8. We have reviewed the evidence before us and we think the substantial issue for consideration is whether the IEBC was bound to follow the proposal in the IIBRC report as contended by applicants. As we have stated the IEBC was entitled to look at all factors. In conducting the first review the IEBC was to look at Narok as a whole and make the necessary adjustments to the boundaries. This is a balancing act that requires it to balance various interests across the county particularly in Narok where there are various clan and community interests. We do not think a case has been made for us to upset this fine balance of the communities.

9. Consequently, the application is dismissed with no order as to costs.

County No. 34- Kajiado County

369. Judicial Review Application No. 131 of 2012- Nairobi

1. The proceedings in this matter relate to the delimitation of Hospital and Market Sub-location in Ildamat Ward Kajiado Central constituency of Kajiado County.

2. The applicants seek orders of certiorari and mandamus to reverse the decision of the IEBC delimiting Hospital Sub-location and Market Sub-location in Ildamat Ward with the result that the two wards will be in Dalalekutuk Ward of Kajiado Central Constituency.

3. The applicants claim is that the IEBC placed Market sub-location and Hospital sub-location under Ildamat Ward contrary to the position stated in IEBC Preliminary Report on the First Review. The applicants assert that the IEBC failed to consider that the two sub-locations and their residents hail from the Dalalekutuk section, and that moving them to the Ildamat section would lead to loss of identity and marginalisation. The Applicants also submit the two sub-locations and those in Ildamat Ward are separated by a river which demarcates the Ildamat and Dalalekutuk.

4. IEBC states that it carried out wide public consultations and that in several memorandums received from the residents of Kajiado Central Constituency, the residents petitioned for the creation of Ildamat Ward and specifically wanted the sub-locations of Market and Hospital to form part of the said ward.

5. The IEBC further explained that the removal of the two sub-locations from Ildamat to Dalalekutuk would drop the population of the former ward below the population quota and would take the population of the latter above the threshold. It maintained that it was not possible to create a ward based on clan settlement or to have homogenous clan wards particularly under the new constitutional dispensation.

6. We have considered the material presented by the parties and we note that the population in Ildamat Ward is 9,990 which is already below the permitted lower deviation for county assembly wards. The population of Dalalekutuk Ward is 27,830 which places it slightly above the population quota for county assembly wards. The applicants' proposal to remove the two sub-locations from Ildamat ward to Dalalekutuk Ward would create an imbalance of the population to the extent that Ildamat Ward would have population of 4,332 which, in the circumstances of the Kajiado Central County, is untenable.

7. We are cognisant that the Dalalekutuk section of the the Maasai are are the majority in Ildamat and Dalalekutuk County Assembly wards and the risk of losing their identity and representation does not

arise.

8. The application is therefore dismissed with no order as to costs.

County No. 35- Kericho County

370. *Judicial Review Application No. 7 of 2012- Kericho*

1. The proceedings in this matter relate to the delimitation of Kalyet sub-location in the current Kipkelion constituency of Kericho County which was split into Kipkelion West and East constituencies. As a result of the delimitation, the two sublocations forming Lemotit location were split with Kalyet sub-location being placed in Kipkelion West and Saramek sub-location being placed in Kipkelion East.

2. The applicants request is to have the IEBC decision reversed and the two sub-locations placed in Kipkelion East constituency. The application is based on grounds that, *inter alia*;

a) Kaylet and Saramek sub-locations constitute Lemotit location and by removing Kaylet sub-location to Kipkelion West constituency would render the residents of Kaylet without a chief and/or a location.

b) The divisional and district headquarters at Londiani are 9 kms away as opposed to those at Kipkelion which is 26kms away;

c) The removal of Kaylet from Kipkelion West was therefore contrary to the principle of bringing services closer to the people.

d) The shared economic activities between the residents of Kalyet and Saramek sub-locations, especially the Sorget Community Forest Association, would be affected by the proposed move;

e) That James Finlay (K) Limited, which, towards fulfilling its corporate social responsibility, had established a trust fund for the benefit of the locals that though it was located in Saramek sub-location, benefited the people of Kalyet as well by virtue of being within the same location. The benefits included scholarships, improved access to healthcare, provision of water resources, improved road networks and access to employment opportunities;

f) That the people of Kalyet and Saramek sub-locations share cultural activities at the Kiptangit Water Point, specifically male initiation ceremonies, and these would be disrupted by the proposed move.

g) The topography of the area favours Kaylet sub-location in Kipkelion East constituency “as previous boundary has always been the river and a very big valley, with a different climate all together.”

3. The Applicants further allege that they presented their views before the IIBRC and were satisfied with the propositions contained in the Report of the Interim Independent Boundaries Review Commission on the Delimitation of Constituencies and Recommendations on Local Authority Electoral Units and Administrative Boundaries for Districts and Other Units (the IIBRC Report) with Kaylet sub-location within the proposed Kipkelion East constituency.

4. The IEBC opposes the application on the ground that the it followed the it legal and constitutional mandate and in delimiting the former Kipkelion constituency into two constituencies, Kipkelion East and Kipkelion West it took into account, *inter alia*, population size, the principle of universal suffrage based on the aspiration for fair representation and equality of votes; geographical features, urban centres and means of communication; and community of interest, historical, economic and cultural ties.

5. We have considered the evidence on record and we are of the view that there was a broad consensus

among the inhabitants of the area that Kipkelion Constituency should be split into two and the unit for delimitation was the sub-location. We have considered the shared interests of the residents of the two sub-locations find that they will not be affected by the delimitation of the electoral units in the manner proposed by the IEBC.

6. Consequently the application is dismissed with no order as to costs.

371. *Judicial Review Application No. 23 of 2012- Nakuru*

1. This matter concerns Tugunon, Chepcholyet and Cheboswa Sub Locations of Kipkelion East Constituency.

2. The applicants are aggrieved by the inclusion of Tugunon, Chepcholyet and Cheboswa sub locations in Kipkelion West Constituency. They contend that they were not consulted by the IEBC and that the delimitation was not carried out in accordance with the Constitution and the IEBC Act.

3. The applicants' argument is that the topography of the land favours the inclusion of Tugunon and Chepcholyet sub locations in Kipkelion West Constituencies. It is argued that there is adequate and reliable communications, namely two bridges connecting the two regions. These are the Kamachungwa-Lesirwo foot bridge, Kichawir-Lesirwo bridge (under construction), Chebwareng-Siret bridge and other foot bridges that have been constructed by the residents on a self-help basis. The applicants further contend that the affected areas also share both primary and secondary schools and some three coffee factories which serve both Tugunon and Chepcholyet as well as Chilchilla and Lesirwo sub location which are in Kipkelion West constituency.

4. The IEBC opposes the application on the ground that it took into account the views of the people and considered geographical features such as valleys, mountains, hills, cliffs, the historical ties based on the origins of the specific electoral wards and the population quota as provided for under Article 89 (12) of the Constitution.

5. We have considered the application together with all the supporting documents and submissions by the advocates. The applicants have not proved their allegations against the IEBC. The applicants made general statements of non-compliance by the IEBC in delimiting Kipkelion East constituency.

6. The argument by the applicants that if the three sub locations remain in Kipkelion East constituency, the economic activities which are shared between the peoples of the three sub locations and those of Chilchilla and Lesirwo sub locations will be affected is self defeating because those facilities are and will remain in the same places where they have always been.

7. Accordingly, we find no basis to interfere with the decision of the IEBC. The application is dismissed but with no order as to costs.

372. *Constitutional Petition No. 137 of 2012- Nairobi*

1. This petition concerns Kericho county and in particular Kipkelion East, Kipkelion West, Ainamoi, Belgut, Sigowet and Bureti constituencies.

2. The petitioner complains that the delimitation of the constituencies in Bomet and Kericho counties violated Articles 89 and 188. They also complain that the IEBC ignored the representation of the residents of Ainamoi and Belgut regarding the names and boundaries of the said constituencies. The petitioner seeks to reverse the IEBC decision placing Kipchebor Ward in Ainamoi Constituency rather than in Belgut Constituency. They also seek orders reviewing the names of the proposed Sigowet and Belgut constituencies as Belgut North and Belgut South respectively.

3. The petitioner's case is that Legal Notice No. 14 of 2012 proposed six constituencies for Kericho county namely Kipkelion East, Kipkelion West, Ainamoi, Belgut, Sigowet and Bureti constituencies. The

petitioner avers that in delimiting the boundaries of Ainamoi and Belgut Constituency to create Sigowet constituency, and in order to realise the principle of equality of the vote, it was the obligation IEBC to ensure that the population of the two resultant constituencies was as far as possible equal and in any event, as close as possible to the population quota.

4. The petitioner complains that in its proposals as published, IEBC has allocated Ainamoi Constituency with a population of 187,101 twelve wards and Belgut Constituency with a population of 171,943 ten wards.

5. The petitioner further complains that the views of the residents of Chelimo and Biashara civic wards which are now part of Kipchbor County Assembly Ward in Ainamoi Constituency were not taken in to account as they wished to be part of Belgut. Further they wanted the constituency divided into two units; Belgut North and South. The petitioner also avers that there are cultural ties amongst the people which would have been enhanced by the use of the name Belgut.

6. Though the petition was not opposed, we are bound to consider, on the basis of the material before us, whether the petitioner has made out a case to warrant interference with the decision of the IEBC.

7. We have considered all the material placed before us and find that the IEBC has no mandate to deal with matters of county boundaries as these are matters specifically reserved by the Constitution to be dealt with in accordance with Article 188. Therefore we cannot allow the complaint relating to Kericho and Bomet county boundary.

8. Secondly, we have looked at the National Assembly Review of the IIBRC Report of December of December 2010 which did not raise any issues regarding Belgut and Ainamoi. The IEBC Preliminary Report noted the matters proposed by the petitioner's but noted that there were no emerging issues regarding the two constituencies.

9. Thirdly, the delimitation of Belgut and Ainamoi must be considered in the context of the entire Kericho County which gained three constituencies as a result of the delimitation and the IEBC was required to balance all the interests and considerations required by Article 89.

10. The onus was on the petitioner to demonstrate with due particularity the breach of the Constitution by the IEBC. The petitioner must set out specific facts or point to specific legal provisions that have been breached. The petition as drawn contains general grievances that do not rise to the level required to enable us intervene to review the decision of the IEBC contained in Legal Notice No. 14 of 2012.

11. We find that the petition lacks merit and is dismissed with no order as to costs.

373. *Judicial Review Application No. 8 of 2012- Nairobi*

1. The applicants are aggrieved by the IEBC decision in delimiting Ainamoi Constituency County Assembly Wards.

2. The applicants allege that the IEBC ignored their views in the manner in which the delimitation was carried out. They contend that the manner the wards were delimited would result in hardship and inconvenience.

3. The IEBC in answer to the issues raised contends that it took into consideration the views of the residents of Ainamoi. It is also the position of the IEBC that in arriving at the final decision, it took into account criteria prescribed in Constitution and that it is not possible to please every citizen in the delimitation process.

4. We have considered arguments by both sides and it our view that the applicants case proceeds from misconception. The applicants have in a very brief way without pointing to any specifics urged this Court to reverse a number of decisions of the IEBC in regard to County Assembly Wards in Ainamoi

Constituency. The first allegation the applicants make is that Kipchimchim and Kipchebor Wards have split the neighbouring wards into two. Granted that the IEBC is mandated to consider geographical factors where relevant in addition to the population quota criteria. The applicants' claim in this regard is totally unsupported. We have taken the liberty to carefully scrutinise the map of Ainamoi and we do not find any evidence of the applicants' claim.

5. The applicants further urge this Court to reverse a number of decisions made by the IEBC. Specifically, they allege that the IEBC committed anomalies *to wit*:

- a) By placing Chepkurbet Sub Location in Kapsoit Ward instead of Kipchebor Ward;
- b) By placing Maso Sub Location in Kapsaos Ward instead of Kapkugerwet;
- c) Chebobo, Chepkolon, Chepkurbet and part of Biashara Sub Locations ought to be in Kipchebor Ward and not in Kipchimchim Ward;
- d) That Kapsuser (B) and Kapkiptui (B) should not be in Ainamoi Constituency;
- e) Kipchebor derives its name and identity from Chebocho and Chepkolon Sub Locations and by detaching and annexing these two Sub Locations into Kipchimchim Ward leaves Kipchebor Ward as an incomplete ward; and
- f) Kapkormon and Kejiryet Sub Locations ought to have been in Ainamoi Ward.

6. The delimitation of Ainamoi Constituency and County Assembly wards necessitated realignment of the sub-locations to meet the constitutional criteria set. The applicant has not provided or shown any evidence to enable us interfere with the delimitation carried out by the IEBC.

7. We however note that the sub-locations indicated in the map of Ainamoi Constituency contained Vol.III of the Final Report of IEBC do not accord with those provided in Legal Notice No. 14 of 2012. We direct the IEBC to rectify this anomaly and subject to this order the application is dismissed with no order as to costs.

374. *Judicial Review Application No. 137 of 2012- Nairobi*

1. This application concerns delimitation of wards in Chepalungu and Bomet Central constituencies in Bomet County.

2. The applicant states that Itembe sub-location of Nyangores Ward in Chepalungu constituency should be transferred to Silibwet Township Ward of Bomet Central constituency. The applicants contend Itembe has always been part of the former Emkwen location which now forms the bigger part of Bomet Central Constituency and that by being made part of Chepalungu constituency the residents of Itembe have to travel for forty kilometres to reach Sigor which is the Divisional headquarters.

3. We have considered the issues raised and note that the population quota is just one of the factors taken into account in the delimitation exercise. Bomet County benefited from new constituencies which would necessitate the 'redistribution' sub-locations and creation of wards. Delimitation is not intended to affect the provision of government services.

4. We therefore dismiss the petition with no order as to costs.

375. *Judicial Review Application No. 11 of 2012- Nairobi*

1. The applicant was granted leave to move this court by way of judicial review to quash the IEBC decision in respect of the County Assembly wards in Belgut Constituency within Kericho County.

2. The applicant states that the constituents of Belgut are aggrieved by the positioning of Chepkembe sub-location of Chaik location which they say has been administered politically within Kericho County from time immemorial.

3. Nothing further was filed in this matter and an indication was given to this court that this matter was similar to the one filed in Petition No. 137 of 2012 which was argued before us.

4. The counsel for applicant formally applied to withdraw this matter on 14th June 2012, and the application was allowed. This matter is therefore marked as withdrawn with no order as to costs.

376. *Judicial Review Application No. 12 of 2012- Kericho*

The application for leave to file Judicial Review proceedings in this matter with respect to Litein Ward in Bureti Constituency was filed on 25 April 2012. The same was thus filed outside the stipulated time. In light of this Court's ruling dated 30 May 2012, this suit is dismissed *in limine*.

County No. 36- Bomet County

377. *Judicial Review Application No. 138 of 2012- Nairobi*

1. This matter concerns the delimitation of Burgei sub location from Rongeno –Manaret ward to Kipsonoi Ward of Sotik Constituency in Bomet County.

2. The applicants are dissatisfied with the decision of the IEBC to move Burgei sub-location from Rongena-Manaret ward to Kipsonoi ward in Sotik Constituency. The IEBC complain that IEBC did not consult them. The only proposal that was made was to move Chekeigei sub-location from Rongena-Manaret Ward to Ndanai-Abosi ward.

3. The applicants' complaint is that Burgei sub-location is one of the two sub-locations that form Tembwa location. The other sub-location is Tembwa sub-location. Tembwa location and Rongena location were created out of the former Kaitit Ranch a former white settlement area. When Kaitit Ranch was split, each location was allocated five acres of land for putting up a shopping centre and other social amenities.

4. The applicants aver that the five acres allocated to Tembwa location are situated three kilometres from Burgei sub-location. Therefore relocating Burgei sub-location means that the residents of Burgei sub-location will not benefit from the use and enjoyment of the said amenities. They also complain that the headquarters of Rongena-Manaret ward is in Rongena trading centre which is about five kilometres from Burgei sub-location.

5. That the headquarters of Kipsonoi ward is in Chebole market which is forty kilometres away from Burgei sub-location. To get there one has to pass through Rongena centre, Sotik town, Kaplong centre and Soimet centre which are in Chemagei ward before getting to Chebole market.

6. The applicants' case is that the relocation of Burgei sub-location to Kipsonoi ward is contrary to the government policy and the spirit of the Constitution of taking services closer to the people. They also complain that the residents of Burgei sub-location have unique boundary security concerns that may not match those of the other residents of Kipsonoi ward as it is the only Ward of Kipsonoi Ward that borders Borabu/Nyamira while all the sub-locations of Rongena-Manaret Ward border Borabu/Nyamira.

7. The applicants complain that the relocation Burgei sub-location to Kisonoi ward has reduced the population of Rongena-Manaret ward to 22,344 while the population of Kipsonoi ward goes up to 35,194 and as such it was unnecessary to move Burgei sub-location on the basis of compliance with the population quota.

8. IEBC states that it complied with the provisions of the Constitution and that the population quota nonetheless is one to be achieved progressively. IEBC also states that the petitioners have wrongly

perceived that the the inhabitants of Burgei sub-location will not benefit from the proposed shopping centre and other amenities in Tembwo sub-location. It is also submitted that that unique security concerns Burgei sub-location are not matters for delimitation but for the Government.

9. We have considered the applicants case and the main complaint concerns the issue of population of each ward. The population of Burgei sublocation is 2,486. When Burgei is added to Rongena/manaret ward the population is 24,830. The population of Kipsonoi after removal of Burgei is 34,708.

10. The transfer of the sub-location could not be justified on the basis of population as the population of each ward was almost equal and we think the applicant have demonstrated justifiable economic and social interests that connect them to Rongena/Manaret Ward. We think that the applicant case is justified and in order to bring ensure that the number of the inhabitants is as nearly as possible to the population quota of the wards we order as follows;

- a) We order that Burgei sub-location be transferred from Kipsonoi Ward to Rongena/Manaret County Assembly Ward.
- b) Rongena/Manaret County Assembly Ward shall comprise the following sub-locations; Monire, Chebilat, Mabwaita, King'oss, Rongena, Tembwo and Burgei with a population of 24,830.
- c) Kipsonoi County Assembly Ward shall comprise the following sub-locations; Kipsonoi, Chebole, Kapkures, Kinywelet, Kapkelei, Motiret, Sigorian and Oldebesi with a population of 34,708.
- d) Legal Notice No. 14 of 2012 is amended to reflect these changes
- e) The maps in Vol. III of Final Report of the IEBC shall be and is hereby amended accordingly.
- f) There shall be no order as to costs.

County No. 37- Kakamega County

378. Judicial Review Application No. 128 of 2012- Nairobi

1. The proceedings in this matter relate to the delimitation of South Kabras and Chemuche wards of Malava Constituency in Kakamega County.

2. The applicant seeks orders of certiorari to quash Legal Notice No. 14 of 2012 proposing to hive off and move Mukhonje and Muting'ong'o sub-locations which were formerly under Mahira Civic Ward to Chemuche Ward in Malava Constituency.

3. The applicant's claim is that the IEBC disregarded the views of the people of Mahira Ward who desired that they would be merged with South Kabras Ward. This was informed by the need to preserve the traditional boundary between civic wards based on the main Kakamega-Webuye road.

4. In his affidavit the applicant states, *"That I am one of the people to be adversely affected by this decision by the respondent as now I have to seek government services at the Headquarters of Chemuche ward/Division located at Kimang'eti on the foot of the Nandi Escarpment more than 40Km from my current place of residence yet South Kabras Headquarters is just a door step away."*

5. The applicant fears that the residents of the two sub-locations will be marginalised in Chemuche Ward since residents of Muting'ong'o and Mukhonje number 5,850 while the rest of the sub-locations forming Chemuche Ward has 23,895.

6. The IEBC opposed the application on the ground that it had followed the Constitution and the law in delimiting the county assembly wards in Malava Constituency.

7. We have considered the material before the court and our finding is that the applicant misunderstood the nature of county assembly wards. The IEBC, pursuant to its mandate, reduced the eleven civic wards in Malava Constituency to produce the seven County Assembly Wards. Mahira Civic Ward was a casualty of this exercise and the two sub-locations were therefore delimited to Chemuche County Assembly ward.

8. The memorandum which was presented to the IIBRC was focused on the division of Malava Constituency into Malava North and South and as such the wards were to be subdivided accordingly. The IEBC in re-distributing the wards had to exercise its discretion in delimiting the county assembly wards taking into account the constitutional provisions.

9. We do not think that this is a valid complaint as the exercise of delimitation deals with boundaries of electoral units for the purposes of representation in the National Assembly and the County Assembly. Delimitation of these boundaries does not affect the delivery and or access to Government services.

10. We have also considered the material before us as whole and we do not find the delimitation contrary to the Constitution and the law. We therefore dismiss the application with no order as to costs.

379. *Judicial Review Applications No. 24 of 2012 and 26 of 2012- Kakamega*

1. These two applications concern the delimitation of the Ingotse Matiha County Assembly Ward and Shinoyi/Shikomari/Esumeiya Assembly Ward of Navakholo Constituency.

2. The applicants seek orders of certiorari, mandamus and prohibition to issue against the IEBC decision delimiting Shinoyi/Shikomari/Esumeiya ward in Navakholo Constituency. They contend that the wards should be in Lurambi Constituency in accordance with the wishes of the residents of the said wards.

3. The applicants contend that while they have no objection to the creation of Navakholo Constituency, they are aggrieved that the boundary between Lurambi and Navakholo constituencies is against their wishes because they belong to the Batsotso sub tribe who reside in Lurambi. They also contend that they have been mixed together with the Banyala who are the majority in Navakholo.

4. They also claim that the IEBC failed to consider the administrative boundaries between Kakamega Central District and Navakholo District in delimiting the boundaries.

5. The IEBC opposes the application on the basis that in carrying out the delimitation exercise, it observed the provisions of the Constitution and the IEBC Act. It also states that in carrying out the delimitation, it paid attention to the population quota of the two constituencies.

6. The IEBC's contention was that if the two wards of Ingotse/Matiha and Shinoyi/Shikomari/Esumeiya are taken back to Lurambi as demanded by the applicants, then the proposed Navakholo Constituency which currently has a population of 137,165 will have a population of 89,772 which falls below the minimum threshold. Such a scenario will increase the population of Lurambi to 207,672.

7. We have reviewed all the evidence on record. It is not disputed that before the delimitation, the Batsotso and Banyala people lived harmoniously in Lurambi Constituency. It is also not disputed that there was a general consensus that the larger Lurambi constituency would be split into the two proposed constituencies. Such a split would not please everybody and it was incumbent on the IEBC to consider the totality of circumstances to effect the split.

8. We find that the IEBC redistributed wards and administrative units as was appropriate, considering that there was now a new constituency requiring sufficient county assembly wards and appropriate population quota. The interests of the Batsotso have been taken into account by creating the two wards; Ingotse-Matiha and Shinoyi/Shikomari/Esumeiya in Navakholo. If we were to accept the applicants' proposals it will result in overburdening Lurambi constituency and their representatives.

9. For the above reasons, the application is dismissed with no order as to costs.

380. *Judicial Review Applications No. 21 and 25 of 2012- Kakamega*

1. The two applications concern Mumias East and Mumias West Constituencies and since they raise the same issues they shall be considered together. The applicants are aggrieved by the decision of the IEBC to delimit Ekero sub-location in Mumias East Constituency.

2. The applicants contend that the decision was contrary to the view of the majority of the people in Ekero sub-location. They contend that they have long common social, economic and political ties with the people of Mumias West Constituency since the time of King Mumia of the Wanga Kingdom.

3. Consequently, they are seeking orders of certiorari and mandamus to alter the proposed boundary between Mumias East and West constituencies by moving Ekero sub-location from Mumias East back to Mumias West Constituency.

4. The IEBC opposed the application on the ground that it complied with the Constitution and the IEBC Act in delimitating the boundaries of the original Mumias Constituency which had a population of 212,818. The split resulted in Mumias East and Mumias West constituencies having populations of 100,956 and 111,862 respectively.

5. After giving due consideration to the arguments put forward by the parties and we find that the applicants have not demonstrated how their common social, economic and political ties differ with those of the inhabitants of Mumias West Constituency.

6. In addition if Ekero sub-location is removed as proposed, the population of Mumias East Constituency will be 89,724 which is below the minimum threshold. The population of Ekero sub-location is 11,232 and if added to Mumias West Constituency, there would also be inequality in the population of the two constituencies, as Mumias West Constituency will have a population of 123,094. Further, the Applicants have not stated in which ward the said sub-location should be placed in Mumias West Constituency.

7. In view of the foregoing, the applications are dismissed with no order as to costs.

County No. 38- Vihiga County

381. *Judicial Review Application No. 94 of 2012- Nairobi and Petition No. 3 of 2012 - Kakamega*

1. The applicants and the petitioners in these two matters are aggrieved with the delimitation of the proposed North East Bunyore Ward in Emuhaya Constituency and the proposed Sabatia West and Chavakali Wards in Sabatia Constituency.

2. They are particularly aggrieved with the inclusion of Wanondi and Viyalo sub-locations in North-East Bunyore County Assembly Ward of Emuhaya Constituency. They are seeking orders that the said sub-locations be returned to Chavakali ward. In ***Nairobi JR Application 94 of 2012***, the applicants also want Sabatia West County Assembly Ward in Sabatia Constituency renamed West Maragoli ward.

3. The applicants and petitioners contend that the IEBC failed to take into account their views and those of the National Assembly.

4. The Applicants are aggrieved by the transfer of Viyalo and Wanondi sub-locations from Sabatia Constituency to Emuhaya Constituency. It is the case of the applicants that the transfer was illegal and unreasonable since the people of Sabatia did not request to have the two sub-locations delimited to the proposed Emuhaya and that Sabatia was not subject to delimitation. They also complain that the residents of Viyalo and Wanondi sub-locations are from the Maragoli community and do not share any community of interest and cultural ties with the Banyore community of Emuhaya constituency.

5. Various interveners from Emuhaya and Luanda constituencies also supported the applicants and petitioners position.
6. The IEBC opposed both applications on the basis that it applied the correct parameters in delimiting the two sub-locations as set out in Article 89(5) and (7). Further, the IEBC contended that in delimiting the wards in the two constituencies, it adhered to the population quota and the variations as provided under Article 89 (6) and (7).
7. Having considered the application, pleadings, evidence and submissions made we note that there was a general consensus among the people of Sabatia and Emuhaya constituencies in the event Vihiga County gained a new constituency, Emuhaya would be the one to be delimited. The general consensus was that Emuhaya would be delimited into two relatively equal constituencies to take into account the cultural and social diversity of the Maragoli and Banyore people.
8. IEBC was entitled to delimit the constituencies in a manner consistent with Article 89 which included consulting and taking into account the views of the people. We find the reason proffered by the IEBC insufficient to explain why it departed from the general consensus, particularly in view of the provisions of section 2 of the Fifth Schedule to the IEBC Act which did not require that demographic equality to be obtained instantly while conducting the first review. Article 89(7) also requires that the population quota be obtained progressively.
9. A key factor that was disregarded by IEBC was the lack of community of interest between the the Maragoli and Banyore communities, that would effectively make the residents of Viyalo and Wanondi sub-locations a minority both in North East Bunyore Ward and Emuhaya Constituency.
10. We have also considered the applicants prayer for change of name of Sabatia West ward in Sabatia Constituency to “West Maragoli Ward.” We are unable to agree with the reasons advanced by the applicants and we see no need to interfere with the IEBC decision in this respect. We see no mischief or prejudice if the name is retained.
11. We therefore order as follows:
 - a) Wanondi and Viyalo sub-locations be and are hereby removed from North East Bunyore County Assembly Ward in Emuhaya Constituency and placed in Chavakali County Assembly Ward of Sabatia Constituency.
 - b) Chavakali County Assembly Ward shall comprise the following sub-locations; Walodeya, Evojo, Igunga, Wanondi and Viyalo with a population of 18,452.
 - c) North East Bunyore County Assembly Ward shall comprise the following sub-locations; Ebusamia, Ebusiloli, Ebungangwe, Emusutswi, Ebukhunza and Ebusiratsi with a population of 29,991.
 - d) Sabatia Constituency will have a population of 129,678
 - e) Emuhaya Constituency will have a population of 89,147
 - f) The maps of Sabatia and Emuhaya Constituencies in Volume III of the IEBC Final Report be and are hereby altered and amended to reflect the above changes and position.
 - g) Accordingly Legal Notice Number 14 of 2012 be and is hereby amended to this extent.
 - h) There shall be no order as to costs.

382. *Constitutional Petition No. 3 of 2012- Nairobi*

1. This is a petition filed by the Western Kenya Human Rights Watch which is a Non-Governmental Organization. It concerns the delimitation of constituencies in Bungoma, Trans-Nzoia and Uasin Gishu districts.
2. The petitioner claims that when the IEBC released the Preliminary Report, it received complaints from sections of members of public adversely affected by the outcome of the report. The members of the public are said to have “*expressed shock, disbelief and dissatisfaction.*” They contend that the IEBC report is flawed, unconstitutional and full of errors.
3. Apart from seeking general declarations of unconstitutionality based on non-compliance by the IEBC of the provisions of Article 89(5), the specific order sought is that the counties of Bungoma, Trans Nzoia and Uasin Gishu are entitled to ten, six and seven constituencies respectively, and that they are also entitled to fifty three, thirty one and thirty four county assembly wards respectively.
4. The Affidavit of Job Wandalia Bwonya sets out in general terms the calculations used to arrive at these figures.
5. Though the Petition was not opposed, we have considered the same and have come to the conclusion that it does not raise any specific issue nor does it demonstrate how the actions of the IEBC with regard to three counties contravened the Constitution and the law. In this regard, the petitioner has failed to discharge its burden and consequently the application is dismissed with no order as to costs.

383. *Judicial Review Application No. 15 of 2012- Bungoma*

1. This application raises issues touching on Bungoma, Mandera and Wajir Counties as well as Mount Elgon Constituency.
2. The applicants seek orders to quash the delimitation of Bungoma, Mandera and Wajir Counties and an order of mandamus to compel the IEBC to award the Mt. Elgon Constituents one additional National Assembly Constituency and nine additional County Assembly Wards.
3. The residents of Mt Elgon contend that the IEBC committed an error of law when it failed to observe strictly the provisions of Article 89 (5) (b) regarding the delimitation of boundaries on the basis of geographical terrain and the historical factors of the Mt. Elgon population.
4. The applicants also complain that the IEBC did not consider the views and recommendations of either the Walagu Commission or Mwangovya Commission and all the historical grievances of the people of Mt Elgon region which are well documented in representations to various government agencies over the years. It was also argued that moving Kamuneru and Sacho sub locations from Kapsokwony to Cheptais Ward is a recipe for marginalization of the Sabaot people.
5. The application is opposed by the IEBC on the basis that it carried out its mandate in accordance with the Constitution. It is their position that the prayers sought are ill-advised and bad in law, generalized and contradictory. IEBC states that it consulted all the interested parties and complied with the formula of distributing county assembly wards applied countrywide. The IEBC avers that the applicants have not placed any material before the court in relation to the Mandera and Wajir Counties.
6. The question that now arises for determination is whether the applicants have made out a case to warrant the quashing of Legal Notice No.14 of 2012 and particularly concerning Bungoma, Mandera and Wajir Counties and whether this court should create an additional constituency in Mt. Elgon and nine additional county assembly wards.
7. The issues raised by the applicants must be looked at in light of the broad and general principles we have already set out in this judgment. In our considered view, the applicants have not made out a case for

the reliefs sought. We also find, and as rightly contended on behalf of the IEBC that the applicants have not placed any material before this court to warrant the quashing of Legal Notice No. 14 of 2012 in respect of Bungoma, Mandera and Wajir Counties.

8. It is to be noted that both Kapsokwony and Cheptais Wards are inhabited by the Sabaot people, so that the internal movement of the two sub locations from one administrative unit to another cannot be said to give rise to marginalization.

9. We find the application to be without merit and it is accordingly dismissed but with no order as to costs.

384. *Constitutional Petition No. 2 of 2012- Bungoma*

1. The petitioners seek declarations that Sirisia Constituency is entitled to four county assembly wards as opposed to the three gazetted in Legal Notice No. 14 of 2012. They also seek a declaration that the ward boundaries for Kabuchai constituency should be altered and changed in accordance with views of the residents and in accordance with community of interest, historical ties and geographical features.

2. With regard to Kabuchai constituency, the petitioners' complaint is that the boundaries of the four county assembly wards as delimited did not take into account the specific geographical details of the maps in drawing the said boundaries. They contend that the locations that do not border each other have been delimited in the same ward thereby making communication between the wards difficult and expensive.

3. The IEBC opposed the petition on the ground that it complied with the provisions of the Constitution and the IEBC Act in delimiting Sirisia and Kabuchai constituencies. It also avers that it took into account the views of the public and weighed them against the requirements and the criteria set out in the Constitution.

4. We have considered the petition as filed, the affidavits in support and against together with the submissions by the petitioners as well as the IEBC. There are two issues for our determination; whether to grant Sirisia Constituency an additional county assembly ward and second, whether to re-arrange and adjust the boundaries of Kabuchai wards

5. As regards the first issue, we have to look and address our mind to the formula and criteria as applied to the distribution of wards in Bungoma County as a whole. A key factor which was considered by the IEBC and which we must appreciate is that Bungoma County has a large population making the distribution of wards amongst its constituencies a delicate balance. In that regard, it was incumbent upon the IEBC to observe that delicate balance in line with the criteria set out under Article 89 and justify departure from these criteria.

6. Taking into account the fact that Bungoma County has nine proposed constituencies, it was entitled to a total of forty five county assembly wards. The allocation and distribution of the county assembly wards was not to be done arbitrarily. All factors and peculiar circumstances of each constituency in the county had to be considered. We have to test the above principles against the allocation of county assembly wards in Sirisia.

7. According to the population of Sirisia, which stands at 102,422, it was legally entitled to three county assembly wards. Taking into consideration the population of the other constituencies within Bungoma County, we do not find any basis for interfering with the decision of the IEBC to allocate Sirisia Constituency three county assembly wards.

8. The second issue for determination is that of the realignment and redistribution of the wards in Kabuchai Constituency. We have addressed our mind to the issue, and note that in delimiting the county assembly wards the IEBC took into consideration the respective populations of the wards and geographical features, and we find no basis to interfere with the decision of the IEBC.

9. Accordingly the application is dismissed with no order as to costs.

385. *Judicial Review Application No. 17 of 2012- Bungoma*

1. This application concerns the delimitation of Webuye West Constituency. The applicants seek orders altering Bungoma County Assembly Wards in Webuye West Constituency namely; Sitikho, Matulo and Bokoli County Assembly Wards. They also seek to compel the IEBC to restore the original boundaries of Bokoli, Misikhu and Matulo Wards. They also seek the creation of an additional County assembly ward.

2. The applicants' case is that the IEBC did not take into account the residents views and that it did not bear in mind the geographical features, population and size of the wards. They submit that the IEBC should have followed the existing administrative boundaries in delimiting the county assembly wards.

3. The applicants argue that the IEBC disregarded the population quota and misapplied the formula for allocation of county assembly wards thereby denying the constituency one ward. It is the applicant's case that if IEBC had properly applied all the parameters of Article 89(5) in delimiting the wards in Webuye West constituency, it would not have made the mistake of interfering with the original boundaries. The applicants pray for creation of an additional ward to be known as Misikhu.

4. The application is opposed by the IEBC on the basis that it considered the views of the residents and applied the principles set out in the Constitution in delimiting and allocating the County Assembly wards.

5. We have considered the applicants' case and we find that it has some merit. According to its population and applying the IEBC formula for allocating county assembly wards, Webuye West Constituency was entitled to four county assembly wards. The IEBC did not demonstrate why it departed from this general principle in reducing the number of county assembly wards in Webuye West Constituency.

6. We have reviewed the number and allocation of county assembly wards within Bungoma County and applying the formula used by IEBC we find that Kanduyi with a population of 229,701 has nine county assembly wards, yet it was entitled to eight. We have also also noted that certain wards in Kanduyi Constituency have a lower population than that of the wards in Webuye West.

7. In order to balance and effect the right to fair representation for the people of Webuye West we now make the following order;

a) Tuti and Marakuru County Assembly Wards of Kanduyi Constituency comprising Tuti and Marakuru sub-locations are merged to form one county assembly ward to be known as Marakuru/Tuti Ward with a population of 35,781.

b) Kanduyi Constituency shall comprise the following County Assembly Wards; Marakuru/Tuti Ward, Musikoma, Khalaba, Township, Bukembe West, Bukembe East, West Sang'alo and East Sang'alo.

c) Webuye West shall have an additional ward to be known as Misikhu Ward comprising Misikhu and Kituni sub-locations with a population of 31,382.

d) Webuye West constituency shall comprise the following four County Assembly Wards; Misikhu Ward comprising Misikhu and Kituni sub-locations with a population of 31,382, Bokoli Ward comprising Bokoli, Mahanga, Miendo and Matisi sub-locations with a population of 32,891; Matulo Ward comprising Malaha, Matulo and Webuye Township (part) sub-locations with a population of 34,905; Sitikho Ward comprising Sitikho, Milo and Khalumuli sub-locations with a population of 30,055.

e) Legal Notice No. 14 of 2012 be and is hereby amended to reflect these changes

f) The maps in Vol. III of Final Report of the IEBC shall be amended accordingly.

g) There shall be no order as to costs.

County No. 40- Busia County

386. *Judicial Review Application No. 11 of 2012- Bungoma*

1. This application concerns the delimitation of Teso North Constituency of Busia County. The applicant challenges the inclusion of the areas known as Akobwait, Aterait and Changara in Teso North Constituency. They contend that these areas should be in Sirisia Constituency.

2. The applicant also accuses the IEBC of failing to take into account the provisions of Article 89 (5) particularly the need to consider geographical features, community of interest, historical, economic and cultural ties and means of communication.

3. The applicant contends that the transfer made by the IEBC of the affected areas was against the wishes of the local people and that the IEBC changed the name Kisiombe to Aterait to cover up for historical relationship between the Aterait area and Bungoma County and that in any event, the IEBC tampered with the administrative boundaries of Bungoma County as defined by the Districts and Provinces Act.

4. The applicant also contends that the people of Changara sub- location do not have any cultural ties with the Teso people, apart from the fact that it is easier for the people of Changara to access Sirisia administrative centre than they can Amagoro. North Teso District is said to belong to the Teso people while Changara is inhabited mainly by the Bukusu whose brothers are in Sirisia constituency of Bungoma County. The applicant avers that if his prayers are not granted, the bad blood between the Bukusu and Teso that arose because of the transfer is likely to escalate and to bring about unnecessary animosity.

5. We have considered the evidence before us and we note that there are conflicting maps on the location of Changara. According to the Census Report Changara sub-location was in Teso North District but according to some undated maps of Busia and Bungoma Districts exhibited by the applicant and said to be compiled by the Survey of Kenya the location of Changara is in Bungoma District. We note that the said maps were not certified as true copies of the original by the Survey of Kenya. We have also perused the maps provided by IEBC as Annexure PT 10, which do not show Changara sub-location as being in Bungoma County.

6. After considering all the material that has been placed before us, we find that the IEBC acted within its mandate in delimiting the constituencies in Busia County. The complaints raised concern the boundary between Bungoma and Busia County which are outside the mandate of the IEBC to resolve. The delimitation was done on the basis on the sub-locations existing in Busia County. Further, the evidence before us is insufficient for us to make any finding as to the location of Changara.

7. Accordingly, the application is dismissed with no order as to costs.

387. *Constitutional Petition No. 14 of 2012- Busia*

1. The petitioners fault the delimitation of Butula Constituency and particularly the proposed placement of Tingolo sub-location in Marachi North Ward.

2. The petitioner's case is that the delimitation is contrary to the recommendations made by the Ligale Report and the Preliminary Report, that Tingolo sub- location be located in Marachi East Ward.

3. The petitioners claim that by fusing Tingolo sub-location together with Elukhari sub-location and placing them in Marachi North Ward, the IEBC is forcing them to cohabit with strangers, thereby breaking their long standing traditional and communal association with the inhabitants of Elukongo and Bumala "B" who have been left in Marachi East Ward.

4. The IEBC opposes the petition on the ground it collected views from the residents of Butula

Constituency and received written and oral memorandum. The IEBC also states that it received conflicting and competing views from the residents.

5. We have considered the the pleadings and submissions made in this petition. It is clear that the people of Tingolo sub-location were previously in Marachi East location, but constitutional criteria had to be met in the creation of the new County Assembly Wards.

6. Tingolo sub-location has a population of 10,804 according to the 2009 population Census. If the sub-location is removed from Marachi North Ward and taken to Marachi East Ward, Marachi North Ward would have a population of 12,250 which is below the minimum population quota allowed for county assembly wards.

7. The same action would also leave Marachi East Ward with a population of 31,669, which while within the allowed variation of the population quota for wards, will be comparatively unequal and inequitable in relation to the other wards in Butula Constituency, which all have populations ranging between 18,000 to 24,000 persons.

8. The petitioners have also not shown that the shared services in Marachi East Ward are not available in Marachi North Ward and in our view delimitation will not interfere with social and cultural links between the people in the two wards.

9. The petition is therefore dismissed with no order as to costs.

County No. 41- Siaya County

388. Constitutional Petition No. 7 of 2012- Kakamega

1. This matter concerns Uhuyi sub location in Siaya County. The petitioners seek orders that Uhuyi sub-location be transferred to the proposed Mumias West Constituency and more specifically to Musanda County Assembly Ward.

2. The petitioners state that Uhuyi sub-location is occupied by Luhya people and is separated from the rest of Siaya County by a river. They claim that they have been subjected to violations of their rights as they have been and continue to be denied the opportunity to participate in determining county boundaries.

3. It is the IEBC's case that to transfer Uhuyi sub-location to the proposed Mumias West Constituency would be beyond its mandate.

4. The court has carefully considered this petition in light of the provisions in the Constitution defining the mandate of the IEBC. The IEBC cannot transfer Uhuyi sub-location of Siaya County to Mumias West Constituency of Kakamega County.

5. The petition is hereby dismissed with no order as to costs.

389. Judicial Review Application No. 126 of 2012- Nairobi

1. This matter relates to delimitation of Alego Usonga Constituency which has six county assembly wards and in particular South East Alego County Assembly Ward which the applicants seek to be split into two.

2. The applicants complain that the IEBC ignored the proposals made in the Preliminary Report and the Revised Preliminary report which had proposed creation of seven wards. The IEBC is accused of merging wards in the southern part of the constituency to create a vast area with fourteen sub-locations and a population of 56,000. In so doing the IEBC is accused of departing from its own formula for creating wards. The uneven distribution of sub-locations and large population affects allocation of resources and provision of services. The applicants propose that South East Alego Ward be split into two to form South

and East Alego.

3. In response the IEBC submits that its decision was within the constitutional parameters and its mandate under the law.

4. We have considered all the material placed before us, and find that apart from the population factor, IEBC was required to take into account other factors provided under Article 89(5). We note that the optimal number of wards per constituency was five and Alego Usonga was allocated six wards.

5. We also note that the population quota for South East Alego county ward is way above the deviation margin relative to the other wards in the area. In order to balance the population of the respective wards in Alego Usonga Constituency and to achieve effective representation we must redistribute the sublocations within South East Alego Ward and North Alego because South East Alego has a high population of 56,453. North Alego Ward which is contiguous to South East Alego has a population of 21,710.

6. We therefore order as follows;

a) North Alego County Assembly Ward shall comprise the following sub-locations; Komolo, Hono, Nyamila, Nyalgunga, Ulafu, Umala and Olwa with a total population of 31,777.

b) South East Alego County Assembly Ward shall comprise the following sub-locations; Bar-Olengo, Mur-Malanga, Nyajuok, Bar-Osimbo, Randago, Bar-ding, Bar-Agulu, Pap-Oriang, Nyang'oma, Masumbi and Mur-ng'iya with a total population of 46,386.

c) Legal Notice No. 14 of 2012 shall be amended to reflect these changes.

d) The map of Alego Usonga Constituency in Vol III of the IEBC Final Report be amended accordingly.

e) There shall be no order as to costs.

County No. 42- Kisumu County

390. Judicial Review Application No. 147 of 2012- Nairobi

1. The application is brought by the Applicants on behalf of the Abaluhya people who live in Kisumu and Siaya Counties. The applicants are seeking an order of certiorari to quash Legal Notice No. 14 of 2012 concerning the following wards: North West Kisumu Ward, West Kisumu, Kisumu North, Seme North, East Seme, East Gem, Yala Township, Emabungo, Luanda South which are in Kisumu West, Seme, Gem, and Luanda Constituencies. The applicants also want the IEBC compelled to redistribute the wards and administrative units of Kisumu West, Seme, Gem, Emuhaya and Luanda constituencies to be delimited and described according to the wishes of the Abaluhya people of Kisumu, Siaya and Vihiga Counties.

2. The Applicants sought the creation of Maseno Township constituency to cater for the interests of the Abaluhya living in Kisumu, Siaya and Luanda at the IEBC public hearing. They complained that the IEBC failed to take these views into account. The Applicants are aggrieved by the fact that the boundaries between Vihiga and Kisumu counties and between Vihiga and Siaya Counties have not been altered and or delimited to create the new Maseno Constituency inspite of the popular demand by the Abaluhya people of Kisumu, Siaya and Vihiga counties for such a constituency.

3. The applicants contended that the mathematical formula used by the IEBC was wrong in so far as it did not take into account the protected constituencies in determining the additional constituencies to be distributed countrywide.

4. The IEBC opposed the application on the grounds that in so far as public participation it carried out its mandate in accordance with the constitution and the law. Further, that the reasons advanced by the

Applicants for either justifying the creation of a new constituency or the transfer of the wards named in the application are not only unconstitutional, but also do not fall within the purview of Article 89(5).

5. The IEBC also averred that Article 89(1) of the Constitution set the number of constituencies as 290 and it had no discretion in that regard and that the Applicants' considerations are ethnic and/or clan based and against the national values of cohesion and integration as espoused under Articles 10.

6. With respect to the applicants' grievances that the boundaries of Kisumu, Siaya and Vihiga counties should have been adjusted so as to bring the Abaluhya Community residing in Kisumu and Siaya counties to Vihiga County, the IEBC stated its mandate did not include the interference with County boundaries.

7. The IEBC denied that there was an error in the mathematical formulae it used to determine the number of constituencies per province and stated that the applicants proposed formulae is incorrect and inconsistent with the Constitution.

8. We have considered the application together with its supporting pleadings evidence, as well as the responses and submissions made by the parties. Mr Nabutete, learned counsel for the applicant made a comprehensive submission to buttress the applicants' case. We commend him for his industry in presenting a very detailed historical account of the applicants' case.

9. We found the material presented illuminating but we cannot create a new constituency as our hands are tied by the constitutional limit of 290 constituencies and the Applicants have not established how the new constituency is to be created. We are unable to agree with applicants' contention that the delimitation was carried out in a manner to warrant our intervention.

10. A substantial part of the applicants' grievance relates to delimitation of county boundaries which is not within the mandate of the IEBC. We are thus unable to intervene in this respect.

11. We have already dealt with the mathematical formula in the part one of this judgment and our finding is that the formula applied by the IEBC did not warrant interference.

12. For the foregoing reasons the Application is dismissed with no order as to costs.

391. *Judicial Review Application No. 135 of 2012- Nairobi*

1. This application concerns the delimitation of Kajulu Ward within Kisumu East Constituency of Kisumu County.

2. The applicants seek orders in relation to *Kajulu County Assembly Ward*. They contend that Kajulu East and Kajulu West which were civic wards should remain separate.

3. The IEBC states that in the delimitation of Kisumu County it complied with the law and the Constitution. IEBC contends that the population of Kisumu East Constituency is 130,558. Further that Kajulu East Civic Ward and Kajulu West Civic Ward has a population of 14,778 and 26,098 respectively. Kajulu County assembly ward has a combined population of 40,876. IEBC contends that it could not retain the Kajulu East Civic Ward as its population could not sustain the creation of a county assembly ward.

4. We have reviewed the evidence before us against the grievances raised by the applicants and in our view the merger of the Kajulu East and West wards was done in order to meet the population quota requirements within Kisumu County. Furthermore, the applicants have not demonstrated any basis for us to interfere with the decision of IEBC.

5. The Application is therefore dismissed with no order as to costs.

392. *Judicial Review Application No. 54 of 2012- Kisumu*

1. The Applicants are aggrieved by the delimitation of Kakmie sub-location in the proposed Ahero County ward instead of the proposed Awasi/Onjiko ward in Nyando Constituency. They also state that the population Kakmie sub-location is not reflected in the population of the two wards.
2. The Applicants aver that Kakmie sub-location has a population of 6263 and that the population of Awasi/Onjiko ward will be adversely affected by the removal of the said sub-location from the ward. Further, that the population of Awasi/Onjiko will be reduced to less than 24,000. However, if Kakmie sub-location is added to Ahero Ward, its population will be enhanced to more than 36,000.
3. It is the case of the applicant that Kakmie sub-location be delimited to Awasi/Onjiko and their population reflected.
4. The IEBC opposes the application and states that the placing of Kakmie sub-location in Ahero County Assembly ward was in accordance with its mandate. The IEBC states that the Applicants have not shown how they would adversely be affected if Kakmie sub-location is removed from Awasi/Onjiko ward and placed in Ahero ward.
5. We have considered the material before us and particularly the 2009 Population Census Report, and it is our finding that the population of Kakmie is missing from the particulars of the population of both Ahero and Awasi/Onjiko wards in Legal Notice No. 14 of 2012.
6. According to our calculations the population of the sub-locations in Awasi/Onjiko Ward in Legal Notice No. 14 of 2012 is actually 24,674 and not 30,937 as stated. Kakmie sub-location is not named as a sub-location in Awasi/Onjiko Ward but its population of 6,263 is reflected in the total ward population.
7. Our calculation of the population of the sub-locations placed in Ahero Ward is 37,703 and not 31,440 as stated. Kakmie sub-location is named in Ahero Ward but its population of 6,263 is not reflected in Legal Notice No. 14 of 2012.
8. It is obvious that there is an error by IEBC in either the calculations of population of the two wards, or in the placement of Kakmie sub-location. Retaining Kakmie sub-location in Ahero Ward would lead to a population of 37,703 that is significantly higher than that of other Awasi/Onjiko Ward which would be 24,674. It is our finding that the intention of IEBC was to place Kakmie sub-location in Awasi/Onjiko where its population is reflected.
9. The totality of what we have analysed is that Kakmie ought to be in Awasi/Onjiko Ward and we consequently direct and order as follows;
 - a) Legal Notice No. 14 of 2012 be and is hereby amended to remove “Kakmie” from the description of Ahero County Assembly Ward to Awasi Onjiko County Assembly Ward both of Nyando Constituency, Kisumu County.
 - b) The Map of Nyando Constituency, Kisumu County in Volume III of the IEBC Final Report be and is hereby altered and amended to reflect the above changes and position.
 - c) There shall be no order as to costs.

393. *Judicial Review Application No. 16 of 2012- Kisumu*

1. The Applicants want this Court to quash the decision of the IEBC to include Koguta Clan in Sigowet Constituency instead of Muhoroni Constituency.
2. The applicants complain that they will be alienated by putting them in Kericho County and Rift Valley Province instead of Nyanza Province. They state that they migrated from Nyakach in Nyanza and settled in South West Muhoroni Town, which part of Muhoroni was placed in Kericho District in 1970.

3. The IEBC opposed the application on the basis that applicants' own evidence shows that the Koguta clan falls within Kericho County, and that the IEBC has no mandate to interfere with county boundaries.

4. We have considered the material before us and that granting the prayers sought will result in a change of the boundary between Kericho and Kisumu Counties. The IEBC has no mandate to delimit any county boundaries and we cannot grant the prayers sought.

5. The application is therefore dismissed with no order as to costs.

394. *Judicial Review Application No. 17 of 2012- Kisumu*

1. The complaint by the applicants concerns the inclusion of East Kabar, West Kabar and Central Kabar sub-locations in Masogo Nyangoma County Assembly Ward, instead of Miwani Assembly Ward in Muhoroni Constituency.

2. The applicants seek orders of certiorari, prohibition and mandamus with regard to this decision of the Respondent Commission. The grounds for their application is that they are being alienated from Miwani Ward, and are their constitutional rights have been breached as they are condemned to not having the necessary facilities such as hospitals, licences, CDF Funds and other social amenities, and have been denied the right to vote for a place where they stay and reside.

3. At the hearing of this application Mr Mwamu for the applicants, and Mr Mburugu for the IEBC entered into and filed a written consent dated 14th June 2012 and filed on 15th June 2012 on the following terms:

a) That the parties are in consensus that the population of East Kabar, West Kabar and Central Kabar sub-locations is properly delimited within Miwani County Assembly Ward of Muhoroni Constituency

b) That the names of the sub-locations (East Kabar, West Kabar and Central Kabar) erroneously published in Masogo/Nyangoma Ward be correctly published within Miwani County Ward where the constituent population is delimited in a pertinent corrigendum.

c) Costs be in the cause.

4. This consent is accordingly adopted by the Court and orders given accordingly.

395. *Judicial Review Application No. 18 of 2012- Kisumu*

1. The application relates to Muhoroni Constituency of Kisumu County.

2. In this matter, the court granted leave to the applicants, Remjius Achieng Tanyi and seven others on the 12th June 2012 to commence their judicial review proceedings.

3. The applicants were required to file and serve their main motions by Wednesday 13th June 2012 but did not do so. They were given further extension to Monday 18th June 2012, but again they did not comply.

4. Effectively therefore there is no application before us for determination. The matter is accordingly struck out with no orders as to costs.

County No. 43- Homa Bay County

396. *Judicial Review Application No. 27 of 2012- Kisii*

1. This application concerns Kogweno Oriang' East and Kogweno Oriang' West sub-locations in

Kanyaluo County Assembly Ward of Karachuonyo Constituency of Homa Bay County.

2. The applicants seek orders to quash the delimitation of Kogweno Oriang' East and Kogweno Oriang' West sub-locations, which have been excised from Central Ward to Kanyaluo Ward in Karachuonyo Constituency. The applicants' complaint is that the IEBC erroneously excised Kogweno Oriang' East and Kogweno Oriang' West sub-locations from Central Ward of Karachuonyo constituency to Kanyaluo Ward contrary to the views the resident.

3. The applicants aver that the the people of Central County Assembly Ward did not advocate for excision and removal of two sub-locations to neighbouring Kanyaluo Ward; that Central Ward had a population of only 21,000 registered voters; the boundaries between Central and Kanyaluo Wards were demarcated, established and respected by the Awuor, Nyosano and Kanyaluo clans respectively; that after the error was brought to the attention of the IEBC, it admitted and rectified the same by returning the two sub locations to Central Ward, and that the delimitation of the two sub-locations in Central Ward was correctly shown in report of the Parliamentary Committee on Justice and Legal Affairs which confirmed and recommended the retention of the two sub-locations in Central Ward.

4. The applicants complain that the decision by the IEBC was unreasonable and procedurally unfair and that as a result thereof, the members of Awuor Nyosano clan have been divided in total disregard of the socio-economic ties between the members of the said clan.

5. It is also contended that the Kanyaluo Ward comprises the Kanyaluo clan which is a majority therein, so that the members of the Awuor Nyosano clan who have been delimited to Kanyaluo Ward are now a minority in Kanyaluo Ward.

6. The IEBC opposes the application and states that in delimiting Kogweno East and Kogweno West sub locations in Central ward of Karachuonyo Constituency of Homa Bay County, it complied with all the constitutional and statutory provisions governing its mandate to delimit constituencies and county Assembly Wards.

7. We have now considered all the submissions and the material placed before us, and we conclude that the IEBC ought to have taken into account the community of interest between the residents of Kogweno Oriang East and Kogweno Oriang West and Central Ward. This was adequately addressed in National Assembly and indeed IEBC admitted the error.

8. We therefore direct and order the following;

a) Kogweno Oriang East and Kogweno Oriang West sub-locations be and are hereby delimited to Central County Assembly Ward of Karachuonyo Constituency.

b) Central County Assembly Ward will comprise the following sub-locations; Kamser 'a", Kamser 'b" Kodondi, Kogembo, Kogweno Kawour, Kogweno Oriang East and Kogweno Oriang West sub-locations with a population of 20,425.

c) Kanyaluo County Assembly Ward shall comprise the following sub-locations; East Kowuor, West Kowuor, North Komenya, Komenya Central, Kobila and Komuoyo with a population of 18,684.

d) Legal Notice No. 14 of 2012 is amended to reflect these changes

e) The Karachuonyo Constituency map in Vol. III of Final Report of the IEBC shall be amended accordingly.

f) There shall be no order as to costs.

1. These matters relate to the delimitation of County Assembly Wards in Homa Bay Town Constituency in Homa Bay County.
2. The applicants and the petitioners seek orders to re-alignment the County Assembly Wards in accordance with the wishes and submissions of the residents of Homa Bay presented to the IEBC. The proposal by the applicants and the petitioners is as follows; Homa Bay East Ward to comprise Komolo, Kothidha, Kobuola Kogwang, Kanyach/Kachar sub-locations; Homa Bay Central ward to comprise Kalanya Kanyango and Asego sub location; Homa Bay West Ward to comprise Kanyabala location, Arujo sub location (part). The parties however differ on the composition of Homa Bay Arujo Ward. The applicants in JR 16/2012 propose that Homa Bay Arujo Ward should comprise West Kanyada location, Arujo sublocation (part) and Homa Bay Township sublocation.
3. The applicants and petitioners proposal for delimitation is to enable each county assembly ward to have to access to the waters of Lake Victoria which has both geographical and economic significance. The applicant and petitioners further contend that if the IEBC decision is implemented it will result in disruption clan cohesion and fuel resource based conflict.
4. The IEBC opposed the application on the ground that it complied with the Constitution and the law. The IEBC contended that it received various submissions and memoranda which contained different proposals for delimitation of the proposed county assembly wards. It considered all the proposals presented to it, took into account the fact that Homa Bay Town Constituency was split from the original Rangwe constituency hence the need to maintain population parity between Rangwe and Homa Bay Town constituencies.
5. We have now reviewed the submissions and the memoranda submitted to the IEBC by the people of Homa Bay Constituency and our view is that the IEBC did not consider all the parameters and the special circumstances of Homa Bay Constituency when delimiting the county Assembly Wards. The waters of Lake Victoria are essential to the lives of all the people of Homa Bay County.
6. It is noted that Parliament debated and approved the recommendations by the Departmental Committee, so as to allow access to the lake by each ward. In our considered view, there is sufficient material before us to warrant interference with the IEBC decision.
7. We therefore order and direct as follows:-
 - a) Homa Bay East County Assembly Ward shall comprise the following sub-locations; Komolo, Kotidha, Kobuola Kogwang, Kanyach/Kachar with a population of 27,597.
 - b) Homa Bay Central County Assembly Ward shall comprise the following sub-locations; Homa Bay Township, Kalanya Kanyango and Asego with a population of 30,575.
 - c) Homa Bay Arujo County Assembly Ward shall comprise the following sub-locations; Arujo and Katuma with a population of 24,310
 - d) Homa Bay West County Assembly Ward shall comprise the following sub-locations; North Kanyabala, South Kanyabala and Kotieno with a population 12,184
 - e) Legal Notice No. 14 of 2012 is amended to reflect these changes
 - f) The Homa Town Constituency map in Vol. III of Final Report of the IEBC shall be amended accordingly.
8. Each party shall bear its own costs.

1. The dispute in this application revolves around Suba North and Suba South Constituencies of Homa Bay County. The main issue being whether the names Suba North and Suba South Constituencies instead of Mbita and Gwassi should be reviewed and set aside.
2. The applicants seek orders of certiorari and mandamus to quash the names of Suba North and Suba South and rename them Mbita and Gwassi respectively.
3. The applicants' case is that the decision was unlawful and that the IEBC exceeded its legal mandate in considering change of names with respect to the two constituencies. Further that it considered extraneous or irrelevant factors in making the decision.
4. The applicants argue that the IEBC could not change the name of the constituencies as its mandate during the First Review is limited to resolving outstanding issues emerging from the Ligale Report and that there were no emerging issues in respect of Mbita and Gwassi Constituencies. They also contend that the issue of names was neither contained in the primary or secondary reference material.
5. The applicants also argue that the the change of names of the two constituencies was unreasonable and submitted that the names Mbita and Gwassi are neutral and have worked well in the past.
6. The IEBC and thirteen Interested Parties opposed the application. The IEBC stated that it has the mandate to change the names of the two constituencies under the Constiution and the IEBC Act. Further, it heard and considered the views of the residents of the two constituencies and it took account of the geographical features and urban centres, the community of interest, historical, economic and cultural ties as well as the means of communication.
7. The Interested Parties confirm that there were public hearings concerning the two constituencies and that the majority of the residents proposed and supported change of names. They contended that there is no historical connection between the Luos and the name Mbita and that Mbita, like Gwassi is a Suba word and in coming up with the names Suba North for Mbita and Suba South for Gwassi, the IEBC has corrected a historical injustice in accordance with the letter and spirit of the Constitution.
8. After considering all the pleadings, evidence and submissions by the parties we appreciate the fact that Mbita and Gwassi constituencies are inhabited by Subas and Luos. We also appreciate the fact that each group has historical, economic, social and cultural attachment to the two names. We further note that most of the inhabitants of Mbita constituency are Luos and this explains the passion with which the applicants' case was put to the court.
9. The interested parties put up spirited and passionate arguments in support of the IEBC position.
10. Notwithstanding the passion, the case on both sides was argued on legal principles and factual matters. The Luo and Suba people have always lived in harmony for generation and we do not think it is right to disturb this harmonious relationship. We think that it is appropriate and prudent to allow the residents of Mbita to define their identity by retaining the name of their constituency. We also recognise the need for the people of Gwassi to define their identity by changing the name of their Constituency to reflect their identity.
11. Accordingly, and in order to balance the interests of the residents of Gwassi and Mbita constituencies we order as follows:-
 - a) The proposed Suba North Constituency is renamed Mbita Constituency.
 - b) The proposed Suba South is renamed Suba Constituency.
 - c) Legal Notice No. 14 of 2012 be and is hereby amended to reflect these changes.
 - d) The maps for the proposed Suba North and Suba South constituencies in Vol III of the Final

Report shall be amended to reflect these changes.

e) There shall be no order as to costs.

399. Constitutional Petition No. 26 of 2012- Kisii

1. The Petitioners represent the residents of Lambwe Valley Settlement Scheme and are aggrieved by the decision of the IEBC to delimit the the boundaries of the proposed Suba North and Suba South Constituencies.

2. The Petitioners seek a declaration that the IEBC disregarded community, cultural and economic interests of the people of Lambwe Valley Settlement Scheme by excising two portions out of the scheme, and annexing one part to Suba North Constituency and the other Suba South Constituency. They also seek an order that the original boundaries of Lambwe Valley Settlement Scheme as surveyed and mapped in 1954 and revised in 1963 do remain intact and Ruma Location be reinstated as part of Lambwe Valley Settlement Scheme.

3. The petition is made on the ground that the IEBC disregarded the resolutions of the National Assembly as well as the interests of the stake-holders in the delimitation of boundaries.

4. The petitioners further state that Lambwe Valley with a population of about 34,000 qualifies to be a County Assembly Ward in the Constituency, and that Lambwe Ward and Ruma-Kaksingri East Ward respectively as created do not take into account the interests of the residents of the Lambwe Valley Settlement Scheme. They aver that the ward boundaries as gazetted pose the danger of fanning inter-clan conflicts in Lambwe, Gwassi and Kaksingiri.

5. The Petitioners have given a detailed history of the Lambwe Settlement Scheme, and state that the residents of Lambwe Valley Settlement Scheme proposed that the original Lambwe Valley Settlement Scheme as established by Legal Notice No. 625 of 1963 which adopted Government Notice No. 1321 of 1954 including Ruma location, should form a ward as it has a population of 30,315 people.

6. The Petitioners contend that the IEBC ignored their submissions and instead renamed Mbita and Gwassi constituencies as Suba North and Suba South respectively. Further, that the IEBC delimited a portion of Lambwe Valley Settlement Scheme and annexed it to Suba North Constituency as Lambwe Ward with a population of 22,315 and another portion annexed to Suba South Constituency and named Ruma-Kaksingiri East Ward with a population of 11,872. The petitioners contend that in making the decision the IEBC disregarded the community of interest, historical, economic and cultural ties and the means of communication. They further contend that the delimitation will result in Lambwe Valley Settlement Scheme ceasing to exist as an entity.

7. The IEBC opposed the petition on the grounds that that in delimiting the boundaries was guided by the law and the Constitution and that it applied all relevant factors including taking into account public views.

8. The IEBC denied that it interfered with any geographical or physical location of any administrative units within the proposed constituencies. It further contended that its mandate did not extend to the delimitation of any of the administrative Boundaries of Districts, Settlement Schemes or Counties.

9. We have considered material before us and note that Ruma Location comprising Nyatoto and Nyadenda sub-locations has always been in the proposed Suba South Constituency. It is also our finding that Lambwe Settlement Scheme is a cosmopolitan area located in the proposed Suba North and Suba South constituencies, and there is no justifiable reason or basis to move Ruma Location to the proposed Suba North Constituency. The boundaries of the both constituencies were also not affected by the First Review.

10. As regards the names of the the proposed constituencies we adopt the decision in ***Kisii JR No. 13 of 2012***.

11. The petition is dismissed with no order as to costs.

County No. 44- Migori County

400. *Constitutional Petition No. 19 of 2012- Kisii*

1. The Petition is seeking declarations that the proposal to remove Koluoch sub-location from East Kamagambo Ward to be part of North Kamagambo Ward within the proposed Rongo Constituency.

2. The Petitioners seeks orders to compel the IEBC to remove Koluoch sub-location from North Kamagambo Ward to East Kamagambo Ward on the ground that IEBC did not consider all material factors necessary to arrive at a fair and just decision. In proposing to have Koluoch sub-location removed from East Kamagambo Ward and taken to North Kamagambo Ward, the residents of Koluoch sub-locations would be made minority. The Petitioner also avers that the threshold in terms of population quota set by the law would not be affected in any way should this petition be allowed. Further that all the proposed wards in Rongo Constituency have the necessary population even if Koluoch sub-location were to remain in East Kamagambo Ward.

3. The Petitioner's case is that historically Koluoch sub-location inhabitants have never been part of the conglomeration of clans that form part of North Kamagambo, but have a close association with the clans of Kongoma, Kongudi, Kanyadieto, Kambija and Kagoro, with whom they have voted and shared all their political decisions together in East Kamagambo Ward. The IEBC therefore failed to consider the historical and cultural background of Koluoch sub-location.

4. The IEBC opposed the petition and states that its duty in delimitation of electoral units does not include considerations of clanism. Further, that in delimiting electoral units within Rongo Constituency it was guided by the criteria set out in Article 89(5).

5. After consideration of the pleadings and submissions by the parties to this Petition, we note that according to the 2009 Population Census Koluoch sub-location has a population of 2,181, and if removed from North Kamagambo will result in the population of the ward reducing to 16,574 which is below the allowed minimum population for wards, as well as being considerably lower than the other wards in Rongo Constituency.

6. We also note that a sub-location could only have been delimited from the former East Kamagambo Location to meet the population quota for Kamagambo North Ward, as it is the only location that is contiguous to North Kamagambo Location.

7. In addition, the residents of Koluoch will not be a minority in the County as the petitioner has stated that they have shared political interests with other clans in East Kamagambo ward.

8. The Petition is therefore dismissed with no order as to costs.

401. *Judicial Review Application No. 23 of 2012- Kisii*

1. The application concerns the delimitation of boundaries of County Assembly Wards within Awendo Constituency of Homa Bay County.

2. The Applicant seeks to compel the IEBC to change the name of North East Sakwa Ward to North Sakwa Ward, move Waware sub-location to South Sakwa Ward, and realign or regroup Kakmasia sub-location to North Sakwa Ward and delimit the boundaries in the four wards according to the aspirations, views and wishes of the stakeholders of Awendo Constituency as submitted to the IEBC.

3. The Applicant states that the decision of IEBC in re-grouping the clans forming the sub-locations and placing them in different wards shall affect the cohesion and harmony and cultural ties of the clans and presents administrative problems. The decisions of the Respondents in placing Waware in two wards

namely North East Sakwa and South Sakwa Wards was also said to be illegal, arbitrary, illogical and unconstitutional.

4. The IEBC states that the original Rongo Constituency was split in the first review of electoral units to create Rongo Constituency and Awendo Constituency each bearing population of 100,547 and 108,913 persons respectively. Further that in delimiting the County Assembly Wards between the two new Constituencies, it took into account the need for a balanced equitable and fair distribution of County Assembly Wards and considered the requirements of the Constitution.

5. The IEBC averred that it conducted a public hearing in Migori County and it took into account the proposals which largely recommended that Awendo Constituency should not have less than five County Assembly Wards. However, that the recommended number of wards was unavailable, and four County Assembly Wards were delimited for each Constituency in accordance with the criteria set in the Constitution and the IEBC Act.

6. The IEBC admitted in its response that Waware sub-location was inadvertently published as forming part of North East Sakwa County Assembly Ward, and that this was a publication error that can be corrected *vide corrigenda* and does not affect the delimitation of County Assembly Wards in Awendo Constituency.

7. After consideration of the arguments by the parties herein and in light of the admission by IEBC that Waware be removed from North East Sakwa Ward and be delimited to South Sakwa Ward, we think the applicants were justified in seeking the orders subject to determination to this extent.

8. As regards the Petitioners' request for the change of the name of North East Sakwa Ward to North Sakwa we note that the IEBC did not contest the request. The proposed name would be consistent with the names of the other county assembly wards in the constituency.

9. Finally on the Petitioners' prayer that Kakmasia sub-location be delimited in North East Sakwa Ward instead of West Sakwa Ward, we accept that there is a community of interest between the residents of Kakmasia sub-location and those of North East Sakwa Ward. We also find that the population of North East Sakwa ward was lower than that of the other county assembly wards within the Constituency. It is therefore our view that delimiting Kakmasia sub-location to North Sakwa will balance the respective populations of the wards in Awendo constituency.

10. We therefore direct and order as follows;

(a) North East Sakwa County Assembly Ward of Awendo be renamed North Sakwa County Assembly Ward.

(b) Legal Notice No. 14 of 2012 be amended to reflect that Waware sub-location is delimited to South Sakwa Ward and that South Sakwa shall comprise the following sub-locations; Waware, Kogelo East, Kogelo West, Kogelo South, East Alego, Central Alego, West Alego and Waudha with a population of 36,200.

(c) Kakmasia is removed from West Sakwa County Assembly Ward is delimited to North Sakwa County Assembly Ward and North Sakwa County Assembly Ward shall now comprise the following sub-locations; Kadera Kuoyo, Kadera Lwala, Kanyasrega and Kakmasia with a population of 22,874.

(d) West Sakwa County Assembly Ward shall now comprise the following sub-locations; Rabondo, Kanyamgony and Kamresi with a population of 22,278.

(e) Legal Notice No. 14 of 2012 be and is hereby amended to reflect these orders.

(f) The map of Awendo Constituency contained in Vol III of the IEBC Final Report be and is

hereby amended accordingly.

(g) There shall be no order as to costs.

402. *Judicial Review Application No. 18 of 2012- Nairobi*

1. This application challenges the delimitation of Kombe, Sagegi and Nyamagagana sub-locations from Masaba ward of the proposed Kuria West constituency to Nyabasi West ward of the proposed Kuria East Constituency.

2. The applicants are also aggrieved by the reversal of the delimitation of Gokeharaka/Getabwega County Assembly Ward from Kuria East to Kuria West Constituencies. The applicants aver that the IEBC did not take into account the community of interest, historical, economic, cultural and geographical factors in the process of delimitation. Further, that the IEBC failed to take into account the recommendation of the Ligale Report and the Parliamentary Committee report that favoured the their position.

3. It is the applicants case that in delimiting the three sub-locations to Nyabasi West Ward of Kuria East constituency, the IEBC disregarded to the criteria and conditions laid out in the Constitution and the views of the people. The applicants further contend that the three sub-locations do not share any common boundary with Nyabasi West County Assembly Ward and for one to access the three sub-locations from Nyabasi West County Assembly Ward one has to access it through Bukira East Ward, Bukira Central ward and Ikerege County Assembly Wards all of Kuria West Constituency. It means that the three sub-locations are a Kuria East constituency island within Kuria West constituency.

4. The IEBC contends that in carrying out the delimitation it took into account the fact that both Kuria East and Kuria West constituencies were part of the former Kuria Constituency. Further, that the delimitation was carried out in compliance with the law and Constitution taking into account the views that had been received from the public.

5. We have considered the application and all the material before us. It is clear from the documents filed that the residents and inhabitants of the three sub-locations made proposals and suggestions to the IEBC which were considered in the Preliminary Report by placing the three sub-locations in Masaba ward of Kuria West constituency.

6. After publication of that report there is no evidence that any person or party made recommendations or proposals that the three sub-locations be moved from Masaba ward to Nyabasi West ward of Kuria East constituency. When the report was taken to Parliament, it was recommended that Gokeharaka/Getabwega ward be moved to Kuria West from Kuria East and the splitting of Bukira Central/Ikerege Ward.

7. It is clear to us that there is no material or evidence that entitled the IEBC to transfer of the three sub-locations to Nyabasi West ward of Kuria East constituency. For one to access the three sub-locations, one has to practically go through three different wards which are in Kuria West Constituency. The IEBC purported to create a corridor which is neither delimited nor defined through Kuria West constituency in order to transfer the three sub-locations to Kuria East constituency.

8. We therefore find that the decision was actuated by factors outside the constitutional and statutory mandate of the IEBC. The three sub-locations share no common boundary with Kuria East constituency and for the inhabitants will have to traverse vast and wide area in order to reach where they can get convenient and efficient services.

9. We have also noted that the transfer of the three sub-locations to Kuria East constituency came about as a result of transferring or moving Gokeharaka/Getabwega which was initially in Kuria East constituency. Consequently, we order and move the three sub-locations to Masaba ward in Kuria West constituency and the transfer of Gokeharaka/Getabwega from Kuria West constituency to Kuria East constituency. We therefore direct and order as follows;

- a) Kuria East Constituency shall comprise the following County Assembly Wards; Ntimaru West, Ntimaru East, Nyabasi East, Nyabasi West and Gokeharaka/Getabwega with a population of 113,541.
- b) Kuria West Constituency shall comprise the following County Assembly Wards; Bukira East, Bukira Central/Ikerege, Isibania, Mokerero, Masaba, Tagare, Nyamosense/Komosoku with a population of 142,545.
- c) Masaba Ward of Kuria West Constituency shall comprise the following sub-locations; Nyamagagana, Masaba, Nyanchabo, Getong'anya, Kombe, Sagegi and Kurutiyange with a population of 20,934.
- d) Nyabasi West County Assembly Ward shall comprise the following sublocations; Sanchawa, Nyaitara, Nyabikongori, Nyaroha, Tebesi and Kebaroti with a population of 27,371.
- e) Legal Notice No. 14 of 2012 is amended to reflect these changes
- f) The Kuria East and Kuria West Constituencies maps in Vol. III of Final Report of the IEBC shall be amended accordingly.
- g) There shall be no order as to costs.

County No. 45- Kisii County

403. Judicial Review Application No. 12 of 2012- Kisii

1. The Applicants approached this Court seeking orders of certiorari and prohibition against the IEBC decision to delimit Borabu/Chitago County Assembly Wards and Getenga County Assembly Wards in South Mugirango Constituency in Kisii County.
2. The Applicants aver that the IEBC acted in excess of its jurisdiction in delimiting Borabu/Chitago County Assembly Ward with a population of 39,413 which is above the maximum allowed of 34,460 persons, and in delimiting Getenga County Assembly Ward with a population of 14,905, far below the minimum allowed of at least 18,639 . The applicants aver that the IEBC ought to have created two county assembly wards out of the proposed Borabu/Chitago ward.
3. It is the Applicants' case that the Respondent failed to take into account the views of the Applicants and those of the residents of the wider Chitago Ward. It is also their contention that the IEBC failed to take into account the community of interest, historical, economic and cultural ties of the residents of Chitago and Borabu, and hence should not have "lumped" them in the same Ward. The Applicants allege that the Boige clan in the ward has distinct characteristics and has no relationship with the other clans.
4. On its part, the IEBC opposes the application and states that it properly applied the law, and specifically that consultations were carried out in which the applicants and other residents were granted an opportunity to express their views.
5. We have considered the applicants grievances and come to the conclusion that it is not within the province of this Court to interfere with the work of the IEBC unless the aggrieved party specifically articulates the grievance supported by provisions of the law.
6. The IEBC produced uncontroverted evidence to show how it carried out consultations through public hearings and in so far the applicant's constituency is concerned we are satisfied that public consultations were carried out. The applicants' case is that the IEBC did not take into consideration the community of interest, historical, economic and cultural ties of the residents of Chitago and Borabu. In order for such a claim to succeed, the same has to be set out clearly outlining the interests and ties that were not taken into consideration. Abstract claims cannot do. The Applicants have not shown any unique community of

interests or historical, economic and cultural ties that they possess, which ought to have been taken into account by the IEBC and how they have been aggrieved by the alleged failure.

7. Other than describing what they allege are political dynamics and voting patterns along clan lines in South Mugirango Constituency, the applicants do not give further details on the alleged failure to take into account the community of interest, historical, economic and cultural ties of the residents of Chitago and Borabu. The applicants have also not given any proposals as to how their interests should be taken into account in the realignment of the county assembly wards, and have not provided the necessary particulars in relation to the other sub-locations and wards in the County that are likely to be affected to enable us order such a realignment.

8. It is also not the case that the IEBC cannot depart from the set population quotas in creating a ward or constituency at least for purposes of the first review. Departure from the criteria may be necessary in order to recognize factors like geography, community history, community interests and minority representation so that wards and constituencies effectively represent the diversity of our social economic and political interests. We also note that this being the first review, it was not necessary to have instant demographic equality.

9. In the circumstances we do not find merit in the application and it dismissed with no order as to costs.

404. *Judicial Review Application No. 22 of 2012- Kisii*

1. This matter concerns Bonchari Constituency in Kisii County. The applicants seek orders concerning Bonchari Constituency where they seek to compel the IEBC to realign and rename the Assembly wards and draw their boundaries as contained in the Report by stakeholders submitted to the IEBC as follows:

- a) Bogiakumu ward comprising the following sub locations: Bogiakumu, Bomwanda and Bonyando.
- b) Bomorenda ward comprising Bomakombi, Bomwancha, Bonyanchaire, Bonyaoro and Bokeire sub locations.
- c) Riana ward comprising Bogitaa, Nyamwari and Bomokora sub locations.
- d) Bomariba ward comprising Bomariba, Boroko and Keboye sub locations.

2. The applicants contend that the delimitation of the four county assembly ward does not comply with or take into account the legal parameters stipulated by the Constitution, and in particular the community of interest, historical, economic and cultural ties. It is argued that as a result of the regrouping of clans, and failure to take into account administrative structures and the values and objects of the Constitution, the IEBC has put in place a recipe for clan disharmony administrative problems.

3. The applicants also contend that the IEBC did not take into account the unanimous decision of the residents of Bonchari constituency as contained in their proposals dated 15th February 2012 to the IEBC. The court was shown a copy of the proposed views of 27 people representing Bogiakumu (6), Riana (9), Bomorenda (4), Bonyando (4) and Iyabe (4) locations made on behalf of other residents.

4. The IEBC opposed the application on grounds that it was guided by the provisions of the Constitution and the law. The IEBC contended that it was not constitutionally or legally bound to consider clans or clanism as criteria for delimitation of the electoral units including the wards in question.

5. We have considered the material and the submission of the parties. During the IIBRC delimitation process the people of Bonchari Constituency had requested for five wards, and made a proposal on delimitation based on administrative boundaries which took into account communities of interest in the area. Subsequently the IEBC allocated four wards to the constituency whereupon the residents made further representations as to how the four wards should be delimited. This consensus is not reflected in

the IEBC Final Report and no reason has been proffered why it departed from the proposal. Furthermore, we note that other proposals presented to the IEBC are similar to those of the applicants.

6. We have considered the proposals presented and note that if effected, the population quota of each ward will be consistent with that of other county assembly wards in the Kisii County. In order to give effect to the public views and consensus we order that the county assembly wards in Bonchari Constituency be re-aligned and renamed as follows;

- a) Bogiakumu County Assembly Ward shall comprise the following sub-locations; Bogiakumu, Bomwanda and Bonyando with a population of 27,694;
- b) Bomorenda County Assembly Ward shall comprise the following sub-locations; Bomakombi, Bomwancha, Bonyanchaire, Bonyaoro and Bokeire with a population of 31,952.
- c) Riana County Assembly Ward shall comprise the following sub-locations; Bogitaa, Nyamwari and Bomokora with a population of 34,351.
- d) Bomariba County Assembly Ward shall comprise the following sub-locations; Bomariba, Boroko and Keboye with a population of 20,618.
- e) Legal Notice No. 14 of 2012 be amended to reflect these orders.
- f) The map of Bonchari Constituency contained in Vol III of the Final Report be and is hereby amended accordingly.
- g) There shall be no order as to costs.

405. *Constitutional Petition No. 93 of 2012- Kisii*

1. The petition concerns Bobasi Constituency and Bomachoge Constituency.

2. The Petitioners are seeking a review of the decision of the IEBC and orders that the current Bobasi Constituency and Bomachoge Constituency be split to create four new constituencies namely Bobasi Borabu, Bobasi Chache, Bomachoge Borabu and Bomachoge Chache Constituencies. In the alternative, that the IEBC be compelled to create three new constituencies, namely Bobasi Constituency, Bomachoge Constituency and Gucha Constituency. They also seek Bosoti Ward be moved to Bomachoge Borabu Constituency.

3. The Petitioners complaint is that the IEBC in its Final Report disregarded all the previous reports and recommendations of Parliament's Departmental Committee on Justice and Legal Affairs, and delimited Bomachoge Constituency into Bomachoge Chache and Bomachoge Borabu constituencies. The petitioners further complain that Bobasi Constituency was left intact, at double the population of the new proposed constituencies, and that the IEBC failed to take into account the ideal of demographic equality as a constitutional benchmark for delimitation.

4. The petitioners are also aggrieved by the fact that the IEBC ignored memoranda and representations made by the inhabitants of Bosoti Ward who wished to be moved to Bomachoge Borabu where it actually lies, instead of placing the said ward in Bomachoge Chache, whose headquarters is Ogembo, some 25 kilometres away.

5. According to the petitioners, the Ligale Commission recommended that Bobasi and Bomachoge Constituency be split and delimited to create three new constituencies namely Bobasi Constituency, Bomachoge Constituency and Gucha Constituency, in a manner that would have seen the three constituencies have near similar population for equitable representation. Further, that by placing Bosota Ward in the proposed Bomachoge Chache, the petitioners complain that the inhabitants who live around Kenyeny town and district headquarters to first go to Kenyeny Town, then Mogonga town before

reaching Ogembo headquarters because of the Ibencho Hill that lies between Bosota Ward and Ogembo Town.

6. The IEBC stated that in delimiting the boundaries of Bobasi, Bomachoge Borabu and Bomachoge Chache Constituencies it applied the criteria set out under Article 89(5). Further, that in delimiting the County Assembly Wards within Bobasi, Bomachoge Chache and Bomachoge Borabu Constituencies it took into account the population quota.

7. The IEBC further stated that prior to the split, the constituents of Bomachoge Constituencies were extremely opposed to the delimiting of sections Bomachoge and Bobasi Constituencies to create Gucha Constituency as prayed for by the petitioners, thus the same was not affected resulting in the revision of the proposed electoral boundaries by IIBRC and the split of Bomachoge Constituency into Bomachoge Chache and Bomachoge Borabu Constituencies.

8. Further, that the removal of Bosoti sub-location as proposed by the petitioners shall leave Bomachoge Borabu Constituency with a population of 125,573 while Bomachoge Chache Constituency will have 75,156 a population below the stipulated minimum threshold. IEBC averred that in delimiting Bosoti/Sengera Ward it also considered the views of the inhabitants of Bomachoge Constituency.

9. We have considered the application herein and arguments made for and against the orders sought. We find that the IEBC has given a reasonable justification for the decision not to create a new Gucha constituency from Bobasi and Bomachoge Constituencies as it was against the wishes of the people of the two constituencies. The alternative prayer seeking that Bobasi constituency also be split into two is rejected as the number of constituencies prescribed by the Constitution is 290 and none can be created to benefit the applicants.

10. We note that Bosoti Ward has a population of 36,851 and moving it to Bomachoge Borabu constituency will result in a reduction of the population of Bomachoge Chache Constituency below the stipulated minimum threshold.

11. The application is therefore dismissed with no order as to costs.

406. *Judicial Review Application No. 10 of 2012- Kisii*

1. This matter concerns the Bomachoge Borabu Constituency in general and the Kiango and Igorera sub-locations in particular.

2. The applicants' complaint is that the IEBC excluded Machoge Borabu ward and that it should be reinstated and renamed Bombaba Borabu ward. They also propose that the four wards of Bomachoge Borabu Constituency be realigned, redistributed and renamed as follows; Boochi Borabu ward to be made up of Emesa and Ritembu sub-locations, Kenyenywa ward to be made up of Bokimonge, Kenyenywa and Nyabitinwa sub-locations; Magenche ward to be made up of Mokubo, Nyamecheo and Magenche sub-locations and Bombaba Borabu ward to be made up of Igorera and Kiango sub-locations.

3. The applicants case is the proposed re-alignment will take care of the Ababamba clan who occupy Igorera and Kiango sub-location. They contend that the IEBC proposal has split the clan into Boochi Borabu and Borabu Masaba County Assembly wards where they will have no electoral voice.

4. The applicants pray that the ward currently known as Machoge Borabu, consisting of the Abambaba be restored so that the 4 wards of Bomachoge Borabu constituency will be as follows:-

a) Boochi Borabu made up of Emesa and Ritembu sub locations with a population of 16,273.

b) Bombaba Borabu made up of Kiango and Igorera sub locations with a population of 23,726.

c) Kenyenywa made up of Nyabitinwa, Bokimonge and Kenyenywa sub locations with a total population of

33,499.

d) Magenche made up of Magenche, Nyamecheo and Mokubo sub locations with a population of 33,703

5. The application is also supported by an interested party who also supported the proposals presented.

6. The IEBC oppose the application on grounds that it complied with its mandate of set out the Constitution and the IEBC Act, 2011. The IEBC urged the court to resist the temptation to interfere with its decision as the applicant has not established any grounds or demonstrated any reasons to warrant intervention.

7. After reviewing all the evidence and submissions, we note that the views given to the IIBRC and IEBC were based on a consensus that Bomachoge Borabu Constituency county assembly wards be delimited to take into account the administrative boundaries of Kenya Division, which coincide with the proposal given by the applicants. The proposal was also supported by the views by the people of Bomachoge, and the population quotas of the wards would be more rationalised if the proposals are adopted.

8. We have also considered the prayer by the applicant to change the name of Borabu Masaba Ward to Bombaba Borabu. We find that this is merited in order to reflect the consensus reached by the people. It is out view that there was no basis for the IEBC to depart from the consensus.

9. We therefore order as follows:

a) Bomachoge Borabu Constituency shall comprise the following County Assembly Wards; Boochi Borabu, Bombaba Borabu, Bokimonge and Magenche.

b) Boochi Borabu County Assembly Ward shall comprise the following sub-locations; Emesa and Ritembu with a population of 16,273.

c) Bombaba Borabu County Assembly Wards shall comprise the following sub-locations; Kiango and Igorera with a population of 23,724.

d) Bokimonge County Assembly Ward shall comprise the following sub-locations; Nyabitunwa, Bokimonge and Kenya with a population of 33,499.

e) Magenche County Assembly Ward comprising the following sub-locations; Magenche, Nyamecheo and Mokubo sub locations with a population of 33,703.

f) Legal Notice No. 14 of 2012 be amended to reflect these orders.

g) The map of Bomachoge Borabu Constituency contained in Vol III of the Final Report be and is hereby amended accordingly.

(h) There shall be no order as to costs.

407. *Constitutional Application No. 98 of 2012- Kisii*

1. The application concerns the delimitation of wards in Bomachoge Chache Constituency and particularly the delimitation of Bosoti/Sengera Ward, which the applicants have stated is above the population quota and hence violates the constitutional criteria set out in the Constitution, and does not represent the views of the inhabitants of the constituency.

2. Further, that during the public hearing held in Kisii County Hall nobody from Bomachoge proposed a ward known as Majoge Basi as is now proposed by the IEBC. The applicants further contend that going by the formula adopted by the IEBC, Bomachoge Chache deserves an extra ward.

3. The applicants argue that the name Majoge Basi is a foreign and strange name and proposed the ward be renamed Mesesi/Kanyimbo Ward. It was also argued that Boochi/Tendere ward as currently constituted is occupied by both the Abambaba and Abaochi clans, and only the latter are recognized in the naming of the ward, and it was proposed that it be renamed Central Ward.
4. On the issue of the population quota of Bosoti/Sengera being above the population quota used by IEBC, it was argued that subjecting the formula for allocation of county assembly criteria to Bomachoge Chache Constituency with a population of 93,530 would result in 4 wards. Subjecting the same test to Bobasi Constituency with a population of 190,077 would result in seven wards.
5. The IEBC averred that in delimiting the boundaries of Bobasi, Bomachoge Borabu and Bomachoge Chache Constituencies, it applied the criteria set out under Article 89(5).
6. After consideration of the application, pleadings and submissions made, we firstly find that the population of Bosoti/Sengera Ward is 36,851, and slightly above the allowed maximum threshold of 34,616 for wards. We however note that the population can go beyond this figure if there is justification and the Constitution allows for progressive realization of the population quota.
7. We also have observed that the geographical area of Bobasi Constituency from which a ward is suggested to be removed is 240.60 square kilometers, more than twice that of Bomachoge Chache constituency which is 106.30 square kilometers. In addition the people of Bomachoge Chache benefited from an additional constituency while those of Bobasi Constituency with a population of 190,074 did not. These and other factors have to be balanced in the delimitation of electoral boundaries, in addition to the population quota.
8. On the prayer for change of name of Majoge Basi Ward to Mesesi/Kanyimbo Ward and that of Boochi/Tendere ward renamed Central Ward we see no basis established to interfere with the IEBC decision.
9. The application is dismissed with no order as to costs.

408. *Judicial Review Application No. 139 of 2012- Nairobi*

1. The application concerns Nyaribari Masaba Constituency of Kisii County.
2. The applicants sought an order to review and vary the boundaries of the county assembly wards in Nyaribari Masaba Constituency so as to reflect the views of the residents. The major complaint is that the IEBC has created county assembly wards in contravention of the Constitution, and disregarded its own formula used in creation of wards by deviating from the population quota.
3. The nature of complaint is that Kiamokoma County Assembly Ward was proposed to comprise the following sub-locations; Mogweko, Getare, Masaba, Chironge, Mobamba, Ibacho and Emeroka with a population of 26,000 people. Gesusu County Assembly Ward was proposed to be made up of Getacho, Chibwobi, Omobera, Ikenya, Kiomiti, Getare, Nyamesocho, Mesabisabi, Geteri, and Ranonga sub-locations with an estimated population of 27,000.
4. Further, that in its final report, IEBC placed Chironge, Getare, Kegogi and Masabo in Gesusu ward, which is opposed. The reason for the opposition is that these four sub-locations have administratively always been under Kiamokoma ward and Legal Notice No. 14 of 2012 misplaces the sub-locations. Secondly, that there is the practical impossibility of operating in a different administrative division and going to vote in a different electorate ward with no community of interest.
5. IEBC's response is that its primary consideration was the number of inhabitants in the ward being nearly as possible or equal to the population quota.
6. We have reviewed the material placed before us by the parties. The memorandum and views presented

by the area MP contained proposals that the four sub-locations should be in Kiamokoma ward. The IEBC Preliminary Report placed the four sub-locations in Mobamba/Kiamokoma ward.

7. In the Revised Preliminary Report, the four sub-locations were placed in Gesusu ward. The Parliamentary Committee on Justice and Legal Affairs made no reference to Nyaribari Masaba constituency. The final report published in Legal Notice No. 14 retained the four sub-locations in Gesusu.

8. It is submitted on behalf of the applicants that the delineation has affected their rights to effective representation, and the population quota should not be the only factor to be taken into account in ensuring effective representation. It is also argued that the circumstances of the four locations justify deviation from the permitted population quota margin on grounds that the four wards have co-existed since time immemorial and they share distinctively similar culture ties. The inhabitants are farmers benefiting from each other through exchange of goods and also share important social facilities such as sporting and other recreational facilities. We are urged to use the population variance of +40% on grounds that they are underdeveloped.

9. Gesusu ward has a population of 25,861 people and Kiamakoma's population is given as 20,963. The two wards each have a population just slightly below the population quota margin but within the range of deviation. If the four sub-locations were to be removed from Gesusu it would bring the population of Gesusu below the permitted quota deviation drastically.

10. Secondly, although the four sub-locations were in the past under the administration of Kiamakoma, this concern is now deflated by the fact that delimitation of wards was based on sub-locations and not divisions and the residents will continue to enjoy government service unaffected by the delimitation. It has also not been demonstrated by the applicants how the community of interests differ in the two wards.

11. Consequently, there is no merit in the prayers sought and the application is dismissed.

409. *Judicial Review Application No. 11 of 2012- Kisii and Judicial Review No. 122 of 2012 - Kisii*

1. The two applications relate to Mwamonari County Assembly Ward in Kitutu Chache North Constituency.

2. The Applicants in ***Kisii JR Application No. 11 of 2012*** seek to quash the decision of the IEBC which divides Mwamonari Ward by misplacing Nyakeiri sub-location of Mwamonari location and by taking it to Marani County Assembly Ward against the wishes of the people of Mwamonari.

3. They also seek to compel the IEBC to include Nyakeiri sub-location in Mwamonari ward comprising of only Nyakeiri and Rioma sub-location in accordance with the unanimous decisions of the residents of Kitutu Chache North Constituency. The applicants contend that it was the wish of the Mwamonari clan to have Nyakeiri and Rioma sub-locations in one ward so as to maintain their identity.

4. In ***Kisii JR Application No. 122 of 2012***, the applicants, in addition to being aggrieved with the delimitation of Nyakieri sub-location in Marani Ward, complain that by reconstituting Mwamonari Ward the IEBC has sidelined the Mwaking'oina clan which is distinct from the Mwamonari clan. Further that by placing the two together and renaming the county assembly ward 'Mwamonari,' the IEBC offended the two clans' cultural identity.

5. The applicants in both cases state that during the public hearing held on 24th January 2012, in a joint memorandum presented by the people of Kitutu Chache, it was unanimously agreed that the constituency was to comprise of five County Assembly Wards, namely Kegogi, Ngenyi Marani, Sensi and Mwamonari Wards.

6. The IEBC opposed the applications and stated that in determining the number of County Assembly Wards for Kitutu Chache North Constituency which has a population of 103,849, it applied its formula allocated four County Assembly Wards. Further, it considered historical factors and ties since the

constituency initially was called Kitutu Chache, and all these inhabitants were living harmoniously.

7. The IEBC states that it distributed the county assembly wards based on the populations of the inhabitants, community of interest, geographical features, cultural ties but not on clan basis, because it had no data on clans and tribes but on sub-locations, constituencies and Kenya as one Nation.

8. After consideration of the matters herein, and the pleadings and submissions made, we recognise that in some Kenyan communities the clan is still a strong social and political unit of organization. It was therefore incumbent on the IEBC to take into account the unanimous agreement which was presented to it to delimit the constituency in a manner that would effect these interests.

9. The IEBC in this case has not demonstrated the basis for the the departure from the mutual agreement reached by the residents of Kitutu Chache North, and it is our finding that we are entitled to interfere where it is manifest that the views of the people were not respected. The applicants' remedy therefore lies in realigning the wards so as to place Rioma and Nyakieri sub-locations in the same ward and leave Ngokoro and Metembe sub-locations in another ward according to the consensus presented to the IEBC.

10. Taking into consideration the contiguous geographical location, and the population of Sensi Ward of 10,522, it would be just and fair that Rioma and Nyakeiri sub-locations be delimited to the proposed Sensi county assembly ward. The combined population of Sensi Ward including Rioma and Nyakeiri sub-locations will now be 27,539.

11. Since Rioma sub-location which is inhabited by the Mwamonari clan has been delimited by the Court to Sensi Ward, we are of the view that the name Mwamonari Ward is no longer tenable and needs to be changed. In this regard and taking into account the community consensus, the two remaining sub-locations of Ngokoro and Metembe shall be in a ward now renamed Kegogi County Assembly Ward with a population of 20,538.

12. We therefore order and direct as follows;

a) Kitutu Chache North Constituency of Kisii County shall comprise the the following County Assembly Wards; Monyerero, Sensi, Marani and Kegogi.

b) Marani County Assembly Ward shall comprise the following sub-locations Igemo, Onywere, Nyamage and Kiomoncha sub-locations with a population of 28,161.

c) Sensi County Assembly Ward shall comprise the following sub-locations; Sensi, Kiong'anyo, Nyakeiri and Rioma with a population of 27,539.

d) Kegogi County Assembly Ward shall comprise the following sub-locations; Ngokoro and Metembe with a population of 20,538.

e) Monyerero County Assembly Wards shall comprise the following sub-locations; Ikuruma, Matongo and Gesangero with a population of 27,611.

f) Legal Notice No. 14 of 2012 be amended to reflect these orders.

g) The map of Kitutu Chache North Constituency contained in Vol III of the Final Report be and is hereby amended accordingly.

h) There shall be no order as to costs.

County No. 46- Nyamira County

410. Judicial Review Application No. 21 of 2012- Kisii

1. This application concerns the delimitation of Kiabonyoru County Assembly Ward in the proposed Borabu Constituency of Nyamira County.
2. The applicants have come before this court seeking an order to quash the excision of Kiabonyoru Ward from North Mugirango constituency. They seek an order compelling the IEBC to delimit it to North Mugirango instead of Borabu Constituency.
3. The applicants explained that they have always expressed the wish that they should remain in North Mugirango Constituency in the event that event North Mugirango/Borabu Constituency was split.
4. The Applicants further asserted that the IEBC failed to take into account the economic, historical, community and cultural disparities and differences between the residents of Borabu constituency and those of Kiabonyoru ward; that Kiabonyoru ward fell within ancestral land unlike Borabu which fell within a settlement scheme.; that Kiabonyoru ward is not directly connected to or linked to Borabu in any way and that Kiabonyoru ward did not share any direct means of communication with the larger Borabu constituency.
5. The IEBC stated that it was mandated to resolve all issues arising from the first review, and in so doing it considered that Borabu Constituency was the product of the split of the original North Mugirango constituency which had a population of 239,443. The delimitation of Kiabonyoru County Assembly Ward was informed by the IEBCs scrutiny of the applicable population quota of the new constituency, and it was included in Borabu constituency to bring that electoral unit within the population quota and permitted deviation.
6. We have considered all the submissions made and the law and we conclude that if Kiabonyoru ward is returned to North Mugirango Constituency, the population of Borabu Constituency would fall to 73,426, which is below the threshold required for the creation of a new constituency.
7. We have taken into account the fact that the applicants' interests have also been taken into account by delimiting the Kiabonyoru as a separate ward.
8. The application is dismissed with no order as to costs.

411. *Judicial Review Application No. 29 of 2012- Kisii*

1. This matter concerns Kitaru and Nyankono/Kerumbe sub-locations of Ekerenyo ward in North Mugirango constituency. The two sub- locations have allegedly been made part of Mekenene ward in Borabu constituency.
2. After filing the application for leave to apply for orders of judicial review, the applicants did not prosecute the application. No leave was obtained and when the matter was called out at the hearing there was no appearance either by the applicants or their advocates.
3. As the matter was not prosecuted we dismiss it with no order as to costs.

County No.47- Nairobi County

412. *Judicial Review Application No. 123 of 2012- Nairobi*

1. This Application relates to delimitation of County Assembly Wards in Dagoretti North constituency.
2. The Applicants allege that the IEBC totally ignored the fact that community interests differ substantially between the economic and social interests of the Kileleshwa and Kilimani Wards from those of Kangemi, parts of Kawangware and Gatina locations, and that lumping of Kangemi, parts of Kawangware and Gatina with Kileleshwa and Kilimani as one ward, and to the exclusion of Mountain view and Gichangi will greatly disadvantage residents of these areas. It was further alleged that the

sharing of resources including CDF will be in disharmony hence creating skewed development owing to great disparities in the general development, income levels, demographic trends and social-economic needs in the stated wards.

3. The applicants also allege that the IEBC did not consult the local residents of the affected wards before their action as required by the Constitution, and that the IEBC disregarded its memoranda presented to the Commission during the public hearings. They claim, their legitimate expectation that due process would be followed by respondent was scuttled.

4. The IEBC opposes the application on the basis that the applicant's suggestion that Kilimani and Kileleshwa wards be excluded from Dagoretti North constituency on the grounds that these are high class areas is discriminatory contrary to Article 27. Further that it is unreasonable, that in any case, not everyone in the two wards is wealthy; and likewise not all residents of the suggested areas proposed for inclusion namely Kangemi, Mountainview and Gichangi sub-locations is poor. Furthermore, the wards suggested by the applicants to be removed were initially in Westlands constituency before it was split.

5. The IEBC contends that it considered the principle of serviceability and compactness of the Constituency in the delimitation. It also took into account the Dagoretti North constituency is a cosmopolitan one and that residents have diverse historical cultural and economic ties but that as far as geographical features and urban centres were concerned, there were no issues for serious concern and the means of communication was fairly well developed.

6. The IEBC further contends that the applicants did not give any evidence to contradict the population figure used by the IEBC as a basis for delimitation of boundaries for Dagoretti North constituency and that the Commission was mandated to consider the population of Dagoretti North constituency relative to other constituencies in the country.

7. We have considered the Applicants' assertion that the Kilimani and Kileleshwa parts are wealthy and needed to be separated from the rest of the Dagoretti North Constituency cannot stand. We are of the view that it would be retrogressive to delimit the citizenry based on their social status. In addition, delimitation of electoral boundaries will not affect service delivery by both the national and county governments.

8. We therefore dismiss the application with no order as to costs.

General Applications

413. Judicial Review Application No. 25 of 2012- Kisii

1. The petitioner seeks various declarations regarding the the legality and constitutionality of the first review by the IIBRC, and a declaration that section 2 of the Fifth Schedule to the IEBC Act is void for being inconsistent with Articles 88 and 89 of the Constitution as read with section 27 of the Sixth Schedule to the constitution.

2. The petition was not prosecuted, however from a perusal of the prayers outlined, it is our finding that we have dealt with the issues raised in the Part One of this judgment. In the circumstances the petition is dismissed with no order as to costs.

414. Constitutional Petition No. 147 of 2012- Nairobi

1. The petitioner is a company limited by guarantee and it brings this petition to challenge the decision of the IEBC contained in Legal Notice No. 14 of 2012. It seeks several declarations regarding the constitutionality of the First Review carried out by the IEBC pursuant to the provisions of the IEBC Act and the delimitation process generally.

2. These issues have been considered in Part One of this judgment and we see no need to repeat them. In the circumstances the petition is dismissed with no order as to costs.

PART THREE

Conclusion

415. During the hearing several issues came to light which we think we must highlight. The delimitation process is based on sub-locations. We heard several complaints about the manner in which these units were delimited. Sub-locations constrained the manner in which the IEBC could meet the constitutional criteria particularly that of population parity. For example, Kaptembwo sub-location in Nakuru Town West with a population of 70,352 was delimited into a ward of its own. The other wards in the constituency have populations ranging from 6,781 to 24,596 meaning that in such a place population parity cannot be achieved as long as the unit of delimitation is the sub-location.

416. There is therefore a need to develop a legal framework for the creation and determination of sub-locations. Failure to deal with this issue would open a door for indirect gerrymandering by those who have influence to create sub-locations to suit their own tastes. The process adopted to determine sub-locations must take into account the obligation of the IEBC to progressively achieve population parity.

417. Parliament must also address the issue of County boundaries. In some instances we had conflicting or inaccurate information as to the counties where certain sub-locations were located. The Constitution lists the names of 47 counties but does not define the boundaries of each county. The definition of these boundaries in the Constitution is an imperative, and will of necessity address the various disputes as to county boundaries including those we encountered in the cases we considered.

418. As we conclude this judgment we urge Kenyans to live in peace and harmony and enjoy the fruit of the Constitution. We nevertheless urge them to be vigilant in its protection.

DATED and DELIVERED at NAIROBI this 9th of July 2012.

M. WARSAME

R.N. SITATI

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JUDGE

JUDGE

H.A OMONDI

P. NYAMWEYA

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JUDGE

JUDGE

D. MAJANJA

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JUDGE