In re National Gender and Equality Commission (Reference 1 of 2013) [2014] KESC 42 (KLR) (27 March 2014) (Ruling)

In the Matter of the National Gender and Equality Commission [2014] eKLR

Neutral citation: [2014] KESC 42 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

REFERENCE 1 OF 2013

PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

MARCH 27, 2014

IN THE MATTER OF AN APPLICATION BY A STATE ORGAN FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF THE PRINCIPLES OF GENDER EQUALITY, NON-DISCRIMINATION AND DEMOCRACY IN THE ALLOCATION OF SPECIAL SEATS CREATED BY THE CONSTITUTION IN THE NATIONAL ASSEMBLY, THE SENATE AND COUNTY ASSEMBLIES PURSUANT TO THE PROVISIONS OF ARTICLES 97(1) (C), 98(1) (B) (C) & (D) AND 177(1) (B) & (C)

-AND-

IN THE MATTER OF THE NATIONAL GENDER AND EQUALITY COMMISSION AS APPLICANT REQUEST FOR AN ADVISORY OPINION

(PURSUANT TO ARTICLE 163(6) OF THE CONSTITUTION

RULING

I. Introduction

1. The matter before this Court is a reference filed by the applicant seeking to invoke its advisory-opinion jurisdiction under Article 163(6) of *the Constitution*. The applicant is a Constitutional Commission established under Article 59(4) of *the Constitution*, and the *National Gender and Equality Commission Act*, 2011. Its key mandate as provided by Section 8 of the Act is to promote gender equality and freedom from discrimination, in the terms of Article 27 of *the Constitution*.

2. The applicant filed its Reference on the 8th day of May, 2013 framing twelve issues on which it seeks the Court's opinion; these are summarized as follows:

   (i) Whether the "Special Interests" represented in Parliament pursuant to Article 97 (1) (c) of *the Constitution* are confined solely to the categories mentioned therein, to wit: the youth, persons

with disabilities, and workers; or whether it extends beyond such categories; and if it extends beyond such categories, then which other categories are included?

(ii) Whether the meanings and/or categories of special interests represented in Parliament under Article 97 (1) (c) of *the Constitution* are fixed in law, or whether they vary and/or are determinable afresh from time to time; and if so, then which organ is constitutionally mandated to make such determinations from time to time? Is it the Independent Electoral and Boundaries Commission, or the political parties? Or is it any other organ?

(iii) Whether the distribution of special seats in Parliament pursuant to Article 97(1)(c) should also be based on regional and/or ethnic balance? And if so, then what is meant by "regional balance"? Does it mean that each region should be equally represented in the lists submitted by political parties? And what is meant by "regions", in this context? Does it mean former "provinces", or does it mean the current "counties?" Must each region and/or tribe be equally represented on the list? Can it be said that there is ethnic balance, for example, where the party list submitted by a political party for nomination to Parliament has four persons from one tribe and one person each from eight different tribes? Which one, as between regional balance and tribal balance, should take priority over the other?

(iv) Whether a person representing a special interest under Articles 97(1)(c), 98(1)(b), (c) and (d) and 177(1)(b) and (c) of *the Constitution* must belong to that category of special interests. Can a person who is not a youth represent the interests of the youth, or can a person who is not a worker represent the interests of workers? Can a person who is physically disabled represent the interests of persons with visual disability or must each category of the disabled be represented?

(v) Whether the meanings and scope of the interest-groups referred to in Articles 97 (1) (c), 98 (1) (c) and (d) and 177 (c) of *the Constitution* (such as the youth, persons with disabilities, workers, and members of marginalized groups) are fixed in law, or are subject to fresh determination from time to time, and if so, then which organ is constitutionally mandated to determine this question at any given time? Is it the Independent Electoral and Boundaries Commission, or the political parties? Or is it any other organ? Can the categories of persons with disabilities, for example, be extended? Is the age-limit for the youth fixed in law, or is it left to the discretion of IEBC, or political parties? Is the meaning of "worker" or "minority", or "person belonging to a marginalized group" fixed in law, or determinable after every election?

(vi) Whose duty is it to ensure that party lists prepared pursuant to the provisions of Article 90 of *the Constitution* are developed in a democratic, transparent and participatory manner in accordance with the national values and principles of governance enshrined in Article 10? Is it that of the political parties, or of the Independent Electoral and Boundaries Commission? Or that of any other body or agency? Does the applicant have a role to play thereon, having regard to its mandate under Section 8(a)(b)(c) (d) and (e) of the *National Gender and Equality Commission Act*? And if so, then what role?

(vii) Whether the systems and mechanisms for ensuring that the drawing of party lists under Article 90 of *the Constitution* are democratic, transparent and participatory, are enshrined in *the Constitution* or any other statute, or left entirely to the discretion of the Independent Electoral and Boundaries Commission, or the political parties. Does IEBC have a duty to seek views and recommendations from the public, before issuing guidelines to political parties under Article 90 of *the Constitution*? What is the effect of failure to seek public participation and views, prior to the issuance of such guidelines?

(viii) Whether Article 177 (1) (c) of *the Constitution* as read together with Section 7 (1) (b) of the County Government Act, 2012 imposes a requirement that each County Assembly is to have two people (a man and a woman) representing marginalized groups, two people (a man and a woman) representing the youth, and two people (a man and a woman) representing persons with disabilities? Or whether the statutory and constitutional requirements are sufficiently fulfilled as long as any number of any such group is represented in the County Assembly, even when any of these categories of special interests is under-represented, or totally unrepresented?

(ix) Whether there is a conflict between the provisions of Section 36 (1) (f) of the *Elections Act* 2011 (which requires eight candidates to be nominated by political parties pursuant to the provisions of Article 177 (1) (c) of *the Constitution*) and Section 7 (1) (a) of the *County Governments Act*, 2012 (which requires that six members be nominated pursuant to Article 177 (1) (c) of *the Constitution*)? If so, how is such conflict to be resolved? Of the two statutes, which one is "the Prescribed Act of Parliament" within the meaning of Article 177 (1) (c) of *the Constitution*?

(x) Whether the principle of regional and/or ethnic balance must inform the allocation of special seats created under Article 177(1)(b) and (c) of *the Constitution*. Can electoral constituencies be considered as "regions", for purposes of allocation of special seats under Article 177(1) (b)and (c)? Should tribal balance be considered in the allocation of special seats under Article 177(1)(b) and (c) of *the Constitution*, especially in situations where a county is inhabited by members of more than one tribe? What is meant by "Community and Cultural diversity of the County," within the terms of Section 7 of the County Government Act 2012?

(xi) Whether County Assemblies, the National Assembly or the Senate are lawfully constituted when the special interests sought to be represented therein (by virtue of the provisions of Article 97 (1) (c), 98 (1) (b) (c) & (d) and 177 (1) (b) (c) of *the Constitution*) are not represented, or are under-represented contrary to the relevant constitutional and/or statutory provisions?

(xii) Whether nominated members of County Assemblies, the National Assembly and/or the Senate are validly elected to the special seats created pursuant to the provisions of Article 90 as read together with Articles 97 (1) (c), 98 (1) (b) (c) and (d), and 177 (1) (b) (c) of *the Constitution*, where it is shown that the process leading up to their nomination and/or being allocated special seats, did not comply with *the Constitution*, or any Statute? If the answer is in the affirmative, then what degree of non-compliance, either with the constitutional or other statutory provisions, can, or ought to be allowed, and what are, or should be, the guiding principles?

3. Inter alia, the crux of this reference turns on the interpretation of Articles 97(1) (c), 98(1) (c) and (d), and 177(1) (b) and (c) of *the Constitution*.

4. The applicant's reference was supported by an affidavit sworn by one Mrs. Winfred Osimbo Lichuma, the Chairperson of the applicant. In her affidavit, she reiterated the applicant's mandate as provided in Section 8 of the *National Gender and Equality Commission Act*, 2011 (*Act No.15 of 2011)* - as the basis upon which the applicant has sought the Court's opinion on the issues framed.

5. Mrs. Lichuma deponed that unless this Court rendered an advisory opinion in this instance, it would be difficult for the applicant to give accurate advice on the status of the Government's compliance with some of the provisions of the international treaties, conventions and protocols listed in the affidavit, and embodying principles of gender equality.

II. Preliminary Objections

6. Upon the filing of the reference, two notices of preliminary objection were filed. The first one was by the Independent Electoral and Boundaries Commission (IEBC), on 27th May, 2013 opposing the reference on the following grounds:

7. This matter took a different dimension thereafter. In response to the preliminary objection filed by the IEBC, the applicant-Commission filed "a Notice of a Preliminary Objection to the Preliminary Objection" raised by the IEBC. The applicant wished to challenge the preliminary objection on the grounds that:

8. The matter was mentioned on 6th June, 2013 whereupon directions were given that the two sets of objections be heard together. Meanwhile, on 17th October, 2013 the applicant filed a notice of withdrawal of some parts of the reference. It withdrew issues framed as No. 1, 2, 6 and 12 on grounds that they had been determined in Commission for Implementation of *the Constitution* v the Attorney-General and Others, Civil Application No.14 of 2013; Ben Njoroge & others, High Court Election Petition No. 14 of 2013; National Gender and Equality commission v Independent electoral and boundaries Commission and Others, High Court Petition No. 147 of 2013.

9. Meanwhile, the Attorney-General filed his submissions on 14th June, 2013 stating his position in relation to the matter as filed in Court.

III. Submissions

10. Learned Counsel, Mr. Nyamodi for the IEBC reiterated that the Court had no jurisdiction to render an advisory opinion as sought by the applicant. First, it was counsel's submission that on the face of the reference, there was non-compliance with the provisions of Rule 41(1) of the Court's rules, as the opinion of the Attorney-General had not been sought. Counsel relied on this Court's earlier decision, In The Matter of the IEBC, Application No. 2 of 2011 and submitted that it was a mandatory to seek the opinion of the Attorney-General, before a party invokes this Court's jurisdiction under Article 163(6) of *the Constitution*.

11. Secondly, it was Mr. Nyamodi's submissions that the matters placed before this Court had already been determined by the High Court and the Court of Appeal, with sufficient clarity. Counsel referred the Court to its supplementary list of authorities filed on 24th October, 2013 which includes three decisions: the decision of the High Court in Judicial Review Application No. 110 of 2013, Republic v Transitional Authority & 4 Others Ex parte Crispus Fwamba & Benjamin Hinga Njeri; the decision of the Court of Appeal in Civil Appeal No. 351 of 2013, Commissioner for the Implementation of *the Constitution* v Attorney-General & Another; and the decision of the High Court in Constitutional Petition No. 147 of 2013, National Gender and Equality Commission v Independent Electoral and Boundaries Commission & Another. It was counsel's submission that these decisions have determined all the matters for which the applicant now seeks this Court's advisory opinion.

12. Counsel went further to demonstrate how some issues as framed in the reference had been answered in the three cases: Petition No. 147 of 2013 answered the question whether the scope and meaning of the named categories in Article 97(1) and 177(c) are fixed, or can be expanded within the terms of *the Constitution* (as framed in issue No. 5 of the reference). At paragraph 63 of this decision, the Court had resolved this question thus:

> " The course adopted by the IEBC, we think, was guided by the approach adopted by the Court in the case of Micah Kigen and 2 Others v Attorney-General and 2 Others, Nairobi

> Petition No. 268 and 398 of 2012 [2012] eKLR. In that case the Court considered the definition of special interests under the provisions of Article 97(1) (c) and it held that, 'the nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to time...; any special interests may emerge in future and which the political party may consider require representation' . . . "

13. Counsel submitted that only two issues (8 and 9), as framed by the applicant, remained outstanding. However, on these two issues, it was counsel's submission that the applicant was seeking a constitutional interpretation: in which case, this Court had held in Advisory Opinion No. 2 of 2011, it was the High Court that had the primary jurisdiction. Hence the High Court should be given an opportunity to carry out its constitutional duty; and issues pertaining to the interpretation of *the Constitution* should come to this Court only through the hierarchy of the Courts.

14. Counsel further urged that, in Advisory Opinion No. 2 of 2011 this Court held that where there is litigation pending in the High Court or the Court of Appeal in respect of matters that form the substance of an advisory-opinion request, it will allow the High Court and/ or Court of Appeal to carry out its constitutional mandate. It was this Court's position that where issues have been litigated in Courts below, the proper course for parties who have participated in such litigation is an appeal.

15. Thirdly, Mr. Nyamodi contended that this request for an advisory opinion amounts to an appeal from the decisions of the Court of Appeal and High Court, and in particularly from Judicial Review matter No. 110 of 2013, and Constitutional Petition No. 147 of 2013. Counsel urged that appeals from the High Court, under Article 164(3), do not lie to this Court. In respect of Civil Appeal No. 351 of 2013, whereas appeals lay to this Court from the Court of Appeal, an advisory opinion is not an appeal, and thus if this Court pronounces itself, in particular in respect to issue No. 4, it will be sitting on appeal over a decision of the Court of Appeal that it has not been formerly moved to consider. Hence it was counsel's submission that this Court lacks jurisdiction to render an advisory opinion as requested.

16. The Attorney-General, through learned counsel, Mr. Bita sought to rely on submissions filed in Court on 14th June, 2013. Counsel argued that the Court has jurisdiction in this matter, save that this was not an appropriate occasion for the exercise of that jurisdiction. Mr. Bita urged that there were no circumstances before the Court to warrant a departure from its previous decision, that even when it had the jurisdiction to render an advisory opinion, it would only do so in proper circumstances.

17. Mr. Bita also reaffirmed the importance of first seeking the Attorney- General's opinion, which was not sought in this case. Counsel agreed with Mr. Nyamodi that several cases had been decided by the Courts on the same issues, and the Attorney-General had occasion to participate in some, as a respondent. He recalled this Court's position in Advisory Opinion No. 2 of 2011.

18. Learned counsel submitted that some of the questions raised by the applicant would require the application of law to precise facts that cannot be known, right up to the material time; and this would require these matters to proceed from the High Court, being processed all the way to this Court. He urged the Court to decline to give and advisory opinion.

19. The Attorney-General submitted that, generally speaking, the issue for determination before the Court in the two sets of objection was the procedural competence of the reference. He urged that the burden of proof specifically lies with the applicant, to show the procedural competence of its application.

20. As to whether the applicant was a party competent to seek an advisory opinion, it was the Attorney-General's position that the applicant is a State organ, and is competent to seek an advisory opinion. Secondly, as to whether the matter in issue concerned county government, it was submitted that the reference concerns representation of the special interests under Articles 97(1)(c), 98(1) (b) (c) and (d)

and 177(1) (b) and (c). And since by virtue of Article 176(1) the County Assembly is an organ of county government, the matter concerns county government.

21. However, it was the Attorney-General's position that this matter was the subject of a High Court Petition No. 147 of 2013, National Gender and Equality Commission v IEBC & Others, in which the meaning of 'special interests' was considered in clear terms. It was urged that if the applicant was dissatisfied, it should have filed an appeal. The upshot of the Attorney-General's submissions is that, despite the applicant being a State organ competent to seek an advisory opinion, and the subject-matter being one concerning county government, the Court should not render an advisory opinion, as both the High Court and the Court of Appeal have substantially dealt with the subject-matter and, if aggrieved, the applicant should have filed an appeal, and not a request for the Court's advisory opinion.

22. The Commission was represented by learned counsel, Mr. Ligunya who appeared together with Mr. Juma. Mr. Ligunya confirmed to the Court that the applicant indeed filed a case in the High Court, but was not satisfied with that Court's decision, and appealed in the Court of Appeal. He submitted, however, that the issues before this Court are not the same as those already determined.

23. It was the applicant's case that the original preliminary objection does not raise a clear point of law, and that the issues raised required the Court to go through the process of ascertaining facts, and of establishing the similarity of the opinion-request to the various facts and findings in the High Court and the Court of Appeal.

24. On the argument that the applicants should have sought the Attorney- General's opinion, counsel argued that it is only after the Court has heard the parties that it is able to determine whether or not such opinion was sought. Besides, it was urged that it was not mandatory to seek the Attorney-General's opinion. Counsel submitted that the authorities submitted by the respondents provided no proof that the issues in the requested advisory-opinion had been laid to rest, in the course of past litigation.

IV. Analysis

25. The main issue for determination at this stage is whether this Court has jurisdiction, and whether it should exercise it and render an advisory opinion. All the arguments flow from the position taken by the IEBC, that the Court has no jurisdiction to render an advisory opinion.

26. In determining this matter, the following issues arise for consideration:

27. Though not forming part of the issues for determination, a matter arose in the course of filing the pleadings that caught our attention. Upon the institution of the reference, the Interested Party (IEBC) filed a notice of preliminary objection. Upon being served with the notice, the applicant proceeded to file what it termed as "a notice of preliminary objection to the notice of preliminary objection". Ordinarily, a party files grounds of opposition in response to a preliminary objection. However, counsel for the applicant argued that he was justified in filing a parallel notice of preliminary objection: because the preliminary objection as filed by the IEBC was "bad in law", as it did not seek to raise a pure point of law.

28. It is our position that parties should not endeavour, in their pursuit of creativity, to introduce 'new pleadings' unknown to the law. The rules of procedure are a handmaid to the course of justice, and should be followed with fidelity.

29. The Court decided, however, to exercise its discretion on the basis of Article 159 of *the Constitution*, and to consider the essence of both sets of preliminary objection, in a holistic framework.

Does the Court have Jurisdiction?

30. It is now trite law from the decisions of this Court that jurisdiction is a paramount consideration to be taken up at the earliest stage, if raised. In the Matter of the Senate, Advisory Opinion No. 2 of 2013, this Court held:

> "Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning. It is the foundation from which the flow of the judicial process originates".

31. The crux of the IEBC's preliminary objection is that this Court has no jurisdiction. This Court's jurisdiction to issue advisory opinions is anchored in *the Constitution*, Article 163(6), which stipulates:

> "The Supreme Court may issue an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government".

32. The same provision is reflected in the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)* which provides in Section 13 thus:

> "An advisory opinion by the Supreme Court under Article 163(6) of *the Constitution* shall contain the reasons for the opinion and any judges who differ with the opinion of the majority shall give their opinions and their respective reasons".

33. Further, the Rules of the Supreme Court also provide for the exercise of this jurisdiction. Rule 41 states:

> "The National Government, a state organ or County Government may apply to the Court by way of reference for an advisory opinion under Article 163(3) of *the Constitution*".

34. Suffice it to say that since the applicant has invoked Article 163(6) of *the Constitution*, the Court, indeed, has jurisdiction. We agree with the Attorney- General's submission when he observes that this Court has the jurisdiction to render an advisory opinion. The Attorney-General's point of departure was that in this instance, this is not the right matter in which to render such opinion.

35. Article 163(6) of *the Constitution* specifies who can seek an advisory opinion, and in what kind of matters such opinion may be sought. It is worth noting that this jurisdiction even where it exists is a discretionary jurisdiction. Not all cases qualify for rendering of an advisory opinion. The Court is alive to the danger of such a jurisdiction being perceived as a normal litigation mandate. The Court thus cautioned itself in the Advisory Opinion No. 2/2012, where it observed:

> "(17) In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*, of developing 'rich jurisprudence that Kenya's history and traditions and facilitates its social, economic and political growth.'

"[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of *the Constitution*, in particular, a principle such as the separation of powers, by assuming the role of general advisor to Government".

36. Consequently, the Court has developed a mechanism through which it sieves matters referred to it to ascertain if they pass the admissibility test. This was developed in the first advisory opinion reference filed in the Court, In Re Matter of the Interim Independent Electoral Commission, Constitutional Application 2 of 2011 in which the Court held:

"(83) With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction:

(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.

(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings withleave of the Court, either as an intervener (interested party) or as amicus curiae.

(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.

(iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of greatpublic importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolutionthrough adversarial Court process.

"[84] The foregoing guidelines coincide with our conviction that the plain terms of *the Constitution* should be read in the broader context of its spirit and philosophy; and on that basis, applications seeking Advisory Opinion shall be resolved as necessitated by the merits of each case. In view of the practical and

legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint".

37. Does one have to fulfil all the foregoing conditions, or just some? This issue flows from the submission of counsel in response to the Attorney-General's point, that this is not an appropriate case for the Court's advisory opinion.

38. As already stated, this jurisdiction is discretionary, and its application is determined on a case-by-case basis. The sieving mechanism is not a scientific formula that warrants a specification of the precise elements to be fulfilled. Neither are some of those elements more fundamental than others. Even where a party meets all, the Court could still exercise its discretion not to give an opinion, upon consideration of other prevailing factors.

39. However, there are certain key considerations in applying these essentials. The starting point will always be that the party must have locus standi. The Court will always consider whether the party seeking to move it, falls within the categories of parties decreed by *the Constitution*. The Court will then proceed to consider the subject-matter: whether it is one involving County Government. Once it rules in the affirmative, the other considerations come into play.

40. Consequently, the locus standi of the party, and the nature of the subject matter, are the two paramount considerations. However, other factors though essential, will be weighted on a case-by-case basis. In the Re Senate matter, the issue as to whether the opinion of the Attorney-General had been sought was not considered, as it emerged that the Attorney-General was not impartial in that instance. The applicant had not in that case, indicated whether or not it sought the opinion of the Attorney-General; and the respondents urged that failure to do so was fatal to the request. Though there is no mandatory requirement to first seek the Attorney-General's opinion, this Court has held that, as a matter of good practice, such opinion should be sought. Clause 41(4) of the Supreme Court Rules provides:

> " The Court may on giving the parties an opportunity to be heard, reject a reference in whole or in part if —
>
> ...
>
> (c) the matter in respect of which the reference is made can in the opinion of the Court be resolved by the advice of the Attorney-General, and such advice has not been sought . . ."

41. This Court considered the opinion of the Attorney-General in Re the matter of IIEC, and pronounced itself as follows (para.61):

> " In the instant matter, it is our opinion 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 after obtaining advice from the office of the Attorney-General is not necessarily bound by the same, for the purpose of this Court, the fact that such advice was sought in the first place, will demonstrate the applicant's commitment, as well as fidelity to due process".

42. Consequently, as a matter of due process, we would restate that the applicant, same as other government institutions and agents, should adopt the practice of resorting to the office of the Attorney-General first. Article 156 of *the Constitution* provides that "The Attorney-General— is the principal legal adviser to the Government".

43 Another ground on which this reference was contested is that the subject- matter formed part of the proceedings in the lower superior Courts. This Court has held that it will be hesitant to exercise its discretion to render an advisory opinion if the matter in respect of which the reference is made is the subject of proceedings before another Court.

44. We have perused the three decisions of the other Courts: High Court Petition No. 147 of 2013; Civil Appeal No. 351 of 2013; and Judicial Review decision No. 110 of 2013 — and evaluated the submissions of counsel in regard to these. Counsel for the IEBC, Mr. Nyamodi went to great lengths to compare the issues framed in the reference with the decisions of the various Courts, and submitted that there were only two issues left that had not been canvassed before those Courts.

45. As we have noted, the applicant did indeed withdraw some of the issues originally laid before this Court, when an advisory opinion was sought. The act of withdrawing the said issues leads us to the conclusion that the applicant filed the reference while being aware that there were matters pending in Court, in respect of which appropriate determinations would be made. If such issues were answered in the normal litigation process, they would clearly be subject to the High Court's jurisdiction in constitutional interpretation; and they would reach the Supreme Court through the normal appellate process. Of relevance in this regard is this Court's position in Advisory Opinion No. 2/2012:

> "(17) In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*, of developing 'rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.'
>
> "[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of *the Constitution*, in particular, a principle such as the separation of powers, by assuming the role of general advisor to Government".

46. This reference, as framed, mainly raises issues of constitutional interpretation, but this Court will not usurp the High Court's jurisdiction to interpret *the Constitution*. *The Constitution* provides in Article 165 (3) that:

> " Subject to clause (5), the High Court shall have –
>
> .....
>
> (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;

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

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191...."

47. Clearly, the High Court has been entrusted with the mandate to interpret *the Constitution*. Where it has discharged this task, one can only challenge its judgement by way of appeal to the Court of Appeal and, if still not satisfied, then to the Supreme Court. The Court in this regard, in Re Matter of IIEC, stated as follows (Para. 43):

> " ... The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of *the Constitution*. Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of *the Constitution* by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages".

48. The applicant states that there are a number of issues which are not settled by the High Court's judgement, and proceeds to indicate that it seeks a clarification of these by way of a Supreme Court advisory opinion. Such is not, in our opinion, the right course to take. The applicant having moved to the High Court and gotten orders, cannot disregard those orders merely because "they are not what it anticipated". A reading of the High Court decision shows that the Court filtered out the issues for determination, and exhaustively addressed itself to each and every one of them. The Court's determination might not have been what the applicant anticipated, but it remains a Court order. If the applicant is not satisfied with the decision, the due process of the law is that it applies to the same High Court for review, whereupon the Court will clarify any unclear aspect of the judgement.

49. Secondly, there is the appellate process whereby the applicant can proceed to the Court of Appeal, to challenge the decision of the High Court. No appeal has been filed with regard to the judgement of the High Court.

50. Suffice it to say that, though there is no case now pending in either the High Court or the Court of Appeal, the matters raised in this reference have been the subject of litigation in the superior Courts. Hence this Court should not allow parties to jump the litigation chain, and come to the Supreme Court in its exclusive advisory-opinion jurisdiction.

V. Conclusion

51. This is the fourth reference being made to this Court for an advisory opinion, since its creation. As much as the jurisdiction to render advisory opinion is vested in the Supreme Court by *the Constitution*, this is a jurisdiction exercised as a matter of discretion, and it is not bestowed upon litigants as a matter of right.

52. The Court has developed a criterion for filtering matters before admission. We signal that the applicant may refer the matter back to the High Court for review, if it is dissatisfied with their decision, or lodge an appeal in the Court of Appeal, in a proper case. The upshot is that, even though the applicant

is a party with locusstandi to seek an advisory opinion, and the matter forming the substance of the reference is one concerning county government, we hold that this is not an appropriate matter in which the Court should exercise this special jurisdiction.

53. The preliminary objection by the IEBC is upheld in its entirety. The reference is struck out. Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH 2014.

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P.K. TUNOI

JUSTICE OF THE SUPREME COURT

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MOHAMMED K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG

JUSTICE OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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Registrar

Supreme Court of Kenya