

DISPOSITION

1] Having determined all the issues that we considered germane in these consolidated appeals, the final orders of the Court are as follows:

A. We uphold the judgment of the High Court to the extent that we affirm the following:

- i. The basic structure doctrine is applicable in Kenya (Sichale, J. A. dissenting).*
- ii. The basic structure doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution (Okwengu & Sichale, JJ. A. dissenting).*
- iii. The basic structure of the Constitution can only be altered through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum (Okwengu, Gatembu & Sichale, JJ. A. dissenting).*
- iv. Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution (Tuiyott, J. A. dissenting).*
- v. The President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution.*
- vi. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (The BBI Steering Committee) has no legal*

capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution.

- vii. The Constitution of Kenya Amendment Bill, 2020 is unconstitutional and a usurpation of the People's exercise of sovereign power.**
- viii. The Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum in the absence of evidence of continuous voter registration by the Independent Electoral and Boundaries Commission (Sichale, J.A. dissenting).**
- ix. The Independent Electoral and Boundaries Commission does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification whether the initiative as submitted by the Building Bridges Secretariat is supported by the requisite number of registered voters in accordance with Article 257(4) of the Constitution (Sichale, J.A. dissenting).**
- x. At the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was neither legislation governing the collection, presentation, and verification of signatures, nor an adequate legal/regulatory framework to govern the conduct of referenda (Sichale, J.A. dissenting).**
- xi. County Assemblies and Parliament cannot, as part of their constitutional mandate, change the contents of the Constitution of Kenya Amendment Bill, 2020 initiated through a popular initiative under Article 257 of the Constitution.**
- xii. The second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to: predetermine the allocation of the proposed additional seventy constituencies, and to direct the Independent Electoral and Boundaries Commission**

on its function of constituency delimitation, is unconstitutional (Sichale, J.A. dissenting).

xiii. The Administrative Procedures for the verification of signatures in support of the Constitution Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum and in violation of Sections 5, 6 and 11 of the Statutory Instruments Act, 2013. (Sichale, J.A. dissenting).

xiv. A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill, 2020.

B. We hereby set aside the following declarations and orders of the High Court:

i. That President, Uhuru Muigai Kenyatta has contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

ii. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People. (Nambuye, Okwengu & Kiage, J.J.A. dissenting).

iii. The BBI Steering Committee established by the President vide Kenya Gazette Notice No. 264 of 3rd January 2020 and published in a special issue of the Kenya Gazette of 10th January 2020 is an unconstitutional and unlawful entity.

C. The Cross appeals fail and are hereby dismissed.

- 2] This being a public interest matter, the parties shall bear their own costs in these appeals and in the High Court.

Dated and delivered at Nairobi this 20th day of August, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

Signed

DEPUTY REGISTRAR