



REPUBLIC OF KENYA



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Okoti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties) (Petition E090, E168, E221, E230, E234, E249 (NRB), E017, E019 (MSA) & E010 (ELD) of 2022 (Consolidated)) [2022] KEHC 3209 (KLR) (Constitutional and Human Rights) (24 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

**PETITION E090, E168, E221, E230, E234, E249 (NRB), E017,
E019 (MSA) & E010 (ELD) OF 2022 (CONSOLIDATED)**

DAS MAJANJA, EC MWITA & M THANDE, JJ

JUNE 24, 2022

BETWEEN

OKIYA OMTATAH OKOITI 1ST PETITIONER
INUKA KENYA NA SISI 2ND PETITIONER
WANJIRU GIKONYO 3RD PETITIONER
KENYA HUMAN RIGHTS COMMISSION 4TH PETITIONER
TRANSPARENCY INTERNATIONAL KENYA 5TH PETITIONER
**EDWARD C. ASTIBA T/A EDWARD C. ASITIBA & ASSOCIATES
ADVOCATES 6TH PETITIONER**
MUKIDI D. JWENGE 7TH PETITIONER
ANDERSON WARUI 8TH PETITIONER
KELVIN NJUI WANGARI 9TH PETITIONER
SILVESTER KIPKEMOI ARAP 10TH PETITIONER
NDORO KAYUGA 11TH PETITIONER
GEORGE ODHIAMBO 12TH PETITIONER
HAKI YETU 13TH PETITIONER
KITUO CHA SHERIA 14TH PETITIONER
TRANSPARENCY INTERNATIONAL 15TH PETITIONER



ONCHIEKU HEBORN MOSIORI 16TH PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD RESPONDENT

MIKE SONKO MBUVI GIDEON KIOKO 4TH RESPONDENT

PAUL KARUNGO THANG'WA 5TH RESPONDENT

WIPER DEMOCRATIC MOVEMENT 6TH RESPONDENT

SAMUEL OTARA ARAMA 7TH RESPONDENT

JUBILEE ALLIANCE PARTY 8TH RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ... INTERESTED PARTY

NATIONAL COHESION AND INTEGRATION COMMISSION ... INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

TRANSPARENCY INTERNATIONAL INTERESTED PARTY

THE AFRICA CENTRE FOR OPEN GOVERNANCE ... INTERESTED PARTY

LEGAL AID CLINIC INTERESTED PARTY

COUNTY ASSEMBLY OF NAIROBI INTERESTED PARTY

SENATE INTERESTED PARTY

MIKE SONKO GIDEON MBUVI KIOKO INTERESTED PARTY

FERDINAND NDUNGU WAITITU BABA YAO INTERESTED PARTY

UNITED DEMOCRATIC PARTY (UDA) INTERESTED PARTY



The High Court did not have the jurisdiction to determine petitions that raised abstract or hypothetical questions.

Courts existed to resolve actual disputes. They were not in the business of engaging in academic or abstract discourse that was not anchored in disputed facts. That was why the Constitution did not confer upon the High Court the jurisdiction to issue advisory opinions.

Reported by John Ribia

Jurisdiction – jurisdiction of the High Court – harmonisation jurisdiction - matters that may be resolved via constitutional petitions – whether the High Court had the jurisdiction to determine petitions that raised abstract and hypothetical questions – whether one could petition the High Court to interpret the Constitution on the ground that there were conflicting decisions that required harmonisation - articles 1(c), 4(2), 10, 22, 23, 50(1), 159, 165, 258 and 259; , section 5.

Electoral Law – nominations – disputes related to or arising from nominations – body with jurisdiction to address such issues – doctrine of exhaustion of administrative remedies - whether filing a petition before the High Court revolving around electoral disputes relating to or arising from nominations before the dispute had been determined by IEBC’s Dispute Resolution Committee was an infringement of the doctrine of exhaustion of administrative remedies – article 88(4)(e); , section 74.

Brief facts

The instant matter contained nine consolidated petitions which concerned the interpretation and application of Chapter Six of the Constitution of Kenya, 2010 (“Chapter Six”) as it related to the electoral process and in particular the General Elections. The petitions were on qualification of candidates offering themselves for election.

The 1st petitioner was concerned that persons with integrity issues were vying for public office in the General Elections. Although the petition was general and did not target a specific person, the petitioner noted, for instance, that a person was elected as a Member of Parliament despite having being arrested, charged and dismissed from his high profile public sector position for receiving a bribe. He stated that it was a matter of public notoriety that many people adversely mentioned in theft of public funds, including the so called “COVID-19 billionaires”, were lining up to vie for positions in the forthcoming General Elections. He stated that those trends hampered good governance, transparency and accountability and undermined the Constitution. He sought interpretation of the Chapter Six as it related to qualifications and eligibility of persons seeking elective office.

The petitions also sought for the 1st respondent and/or leaders who had been impeached from public office due to gross misconduct and violation of the Constitution would be a threat to the Constitution if elected or re-elected back to public office.

Issues

- i. Whether the High Court had the jurisdiction to determine petitions that raised abstract or hypothetical questions.
- ii. Whether filing a petition before the High Court revolving around electoral disputes relating to or arising from nominations before the dispute had been determined by IEBC’s Dispute Resolution Committee was an infringement of the doctrine of exhaustion of administrative remedies.
- iii. Whether one could petition the High Court to interpret the Constitution on the ground that there were conflicting decisions that required harmonisation.

Held

1. The Constitution of Kenya, 2010 (Constitution) ushered in leadership and integrity in chapter six. In essence, the people of Kenya wanted a break from a past characterized by endemic corruption, misuse and abuse of public office by their leaders, elected and appointed.



2. In interpreting the Constitution, courts would interpret the Constitution in a manner that promoted its purposes and principles, promoted the rule of law and fundamental rights and freedoms and in a manner that contributed to good governance as guided by article 259(1) of the Constitution. Chapter Six of the Constitution (on integrity) and the various provisions that governed the electoral process were to be read together in a manner that gave full effect to the purposes of the Constitution.
3. The jurisdiction of the High Court to adjudicate on matters of and concerning the Constitution was wide. The High Court had jurisdiction to entertain any question by any person regarding interpretation of the Constitution.
4. Courts existed to resolve actual disputes. They were not in the business of engaging in academic or abstract discourse that was not anchored in disputed facts. That was why the Constitution did not confer upon the High Court the jurisdiction to issue advisory opinions. Although the High Court had jurisdiction to interpret the Constitution, it could not proceed to grant relief merely on the ground that there were conflicting decisions that required harmonization. The instant court rejected the invitation to create a harmonization jurisdiction. Harmonization could only be done where an actual and live dispute existed. The instant petitions were general in nature, raised issues without reference to concrete facts, did not allege any wrong doing against a specific person and did not have specific respondents against whom such relief may be granted.
5. Pre-election disputes such as those regarding suitability and eligibility for nomination of candidates had to be resolved by the IEBC in the first instance. The High Court's jurisdiction was only triggered once the IEBC made a decision on the issue.
6. The cases concerning 4th, 5th and 7th respondents were presented to the High Court prematurely. Since the process of the Dispute Resolution Committee of the IEBC had been invoked, it had to be allowed to run its course. The jurisdiction of the High Court should not be invoked until that process was exhausted. The instant court declined the jurisdiction to address the petitions.

Petitions struck out with no orders as to costs.

Citations

Cases

Kenya

1. *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* Petition 16 of 2011; [2011] eKLR - (Followed)
2. *Ethics and Anti-Corruption Commission v Granton Graham Samboja & another; Kenyatta University & another (Interested Parties)* Petition 382 of 2017; [2021] eKLR - (Mentioned)
3. *In re the Matter of the Interim Independent Electoral Commission* [2011] 1 KLR 32 - (Mentioned)
4. *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* Petitions 552, 554, 573 & 579 of 2012; [2013] eKLR (Consolidated) - (Mentioned)
5. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 others (Interested Parties)* Advisory Opinion Reference 1 of 2017; [2020] eKLR - (Mentioned)
6. *Mohamud, Mohamed Abdi v Ahmed Abdullahi & others* Petition 7 of 2018; [2019] eKLR - (Explained)
7. *Mwau, John Harun & 3 others v Attorney General* Constitutional Petitions 65, 123 & 185 of 2011; [2012] eKLR (Consolidated) - (Mentioned)
8. *Speaker of Senate v Attorney General & 4 others* Advisory Opinion Reference 2 of 2013 - (Explained)
9. *Trusted Society of Human Rights Alliance v Attorney General & 2 others* Petition 229 of 2012; [2012] eKLR - (Explained)
10. *Wanjiru Gikonyo & others v National Assembly of Kenya & 4 others* Petition 453 of 2015; [2016] eKLR - (Explained)

Uganda



1. *Olum v Attorney General of Uganda* (2002) 2 EA 508 - (Explained)
2. *Tinyefuza v Attorney General* Constitutional Appeal No 1 of 1997 - (Mentioned)

South Africa

1. *Government of Republic of Namibia v Cultura* 2000, 1994(1) SA 407 - (Explained)

Namibia

1. *State v Acheson* 1991 NR 1 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 1(c); 4(2);10; 22; 23; 24; 38; 50(1); 73(2); 74; 75(3); 76; 77; 78; 79; 80; 88(4)(e)(f); 99(1)(b)(2)(3); 159; 165(3)(d)(6); 179(7); 180(2); 193(1)(2)(3); 249(2); 258; 259(1)(11); 260 - (Interpreted)
2. County Government Act, 2012 (Act No 17 of 2012) section 40- (Interpreted)
3. Election (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 13(1); 51- (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) sections 74(1); 75(1) - (Interpreted)
5. Ethics and Anti-Corruption Commission Act, 2011 (Act No 22 of 2011) In general - (Cited)
6. High Court (Organisation and Administration) Act, 2015 (Act No 27 of 2015) section 5 - (Interpreted)
7. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 74(1) - (Interpreted)
8. Leadership and Integrity Act, 2012 (Act No 19 of 2012) sections 4(3)(4);13; 40; 41 - (Interpreted)

Advocates

Mr Musyoka, Counsel for the Petitioners in Petition No E168 of 2022

JUDGMENT

1. These nine consolidated petitions concern the interpretation and application of chapter six of the [Constitution of Kenya, 2010](#) (“chapter six”) as it relates to the electoral process and in particular the General Elections slated for August 9, 2022 (“the General Elections”). All the parties before us agree that chapter six is central to the transformative nature of the Constitution. Before we delve into the petitions, we think it is appropriate to discuss, albeit briefly, the background and context of chapter six.
2. The centrality and importance for Constitutional provisions on leadership and integrity in Kenya’s governance cannot be underestimated given the history of our country. The court aptly captured this in the case of [Trusted Society of Human Rights Alliance v The Attorney General and 2 Others](#)[2012] eKLR when it stated:

“102. We are persuaded that this is the only approach to the interpretation of article 73 of [the Constitution](#) which maintains fealty to the Constitution and its spirit, values and objects. Kenyans were very clear in their intentions when they entrenched chapter six and article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that chapter six and article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans



intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice."

3. In its Final Report at paragraph 14.2, page 221, the Constitution of Kenya Review Commission ("CKRC") discussed the importance of leadership and integrity as follows:

"Leadership is the backbone of the success of any undertaking, be it at village level, community project, business, a local authority or even the country. More importantly, leadership at its very best, determines the continued support of the people, national unity, growth and development of a country.

Integrity on the other hand, plays an important role in ensuring that leadership remains focused on the interest of the people and desired by the people. Leaders are faced with moral and ethical dilemma every day. In this light, integrity, which basically involves leaders consistently behaving in an honest, ethical, and professional manner, promoting and advocating the highest standards of personal, professional and institutional behaviour, is of utmost importance in their tenure."

4. The promulgation of the Constitution in 2010, ushered in a new feature, namely leadership and integrity, in chapter six. In essence, the people of Kenya wanted a break from a past characterized by endemic corruption, misuse and abuse of public office by their leaders, elected and appointed. This desire was captured in their views to the CKRC reflected in the Final Report at Paragraph 14.6, page 223 thus:

"The people want their leaders to be accountable for their actions. They want mechanisms to be put in place that assures them that if leaders step out of bounds, there are consequences to be met. This will be determined by their compliance to a code of conduct that they want fully established in the new Constitution." One of the recommendations was that there should be an ethics and integrity code of conduct that should apply to all leaders."

5. It is these views that gave birth to chapter six. Articles 73 to 80 of Chapter Six introduced principles and standards of conduct applicable to State officers in execution of their duties.
6. In brief, article 73 sets out the responsibilities of leadership. It declares that the authority assigned to a state officer is a public trust which is to be exercised in a manner that is consistent with purposes and objects of the Constitution; respects the people; brings honour to the nation and dignity of the office; promotes public confidence in the integrity of the office and the responsibility to serve the people, rather than rule over them.
7. Article 73(2) contains guiding principles of leadership and integrity which State officers are required to observe when discharging their daily duties. It states that State officers should also be elected or selected on the basis of personal integrity, competence and suitability; that they should be objective and impartial in decision making, avoid nepotism, favouritism, other improper motives or corrupt practices when making decisions; that they should render selfless service, execute their duties with honesty and avoid conflict between personal interest and public duty; be accountable in their public decisions and actions and maintain discipline and commitment in service to the people.



8. Article 74 requires State officers to bind themselves to the values and principles of leadership and integrity by subscribing to an oath or affirmation of office before assuming State office. Article 75 requires State officers to act, whether in the private or public, conduct themselves in a manner that avoids any conflict between the public and official duty and personal interests, compromises any public or official interest in favour of a personal interest and demeans the office. A State officer who falls short of these requirements is liable to disciplinary action including removal from office.
9. Article 76 requires State officers to maintain financial probity at all times while article 77 restricts state officers from engaging in gainful employment or holding office in a political party.
10. The provisions of chapter six are implemented by statutes enacted by parliament in accordance with articles 79 and 80. The Ethics and Anti-Corruption Commission (“EACC”) established under the *Ethics and Anti-Corruption Act*, No. 22 of 2011 pursuant to article 79 is the body responsible for ensuring compliance with and enforcement of chapter six.
11. The procedures and mechanisms for effective administration of chapter six are to be found in the *Leadership and Integrity Act*, No. 19 of 2012, enacted in accordance with article 80. The long title to the Act states that it is, “An Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of chapter six of the Constitution and for connected purposes.”
12. Among other provisions of the *Leadership and Integrity Act*, section 13 imposes moral and ethical requirements on a person seeking elective office as follows:
 - 13(1) For the purposes of articles 99(1)(b) and 193(1)(b) of the Constitution, a Public Officer Ethics Act (No. 4 of 2003);
 - (a) demonstrate honesty in the conduct of public affairs subject to the Public Officer Ethics Act;
 - (b) not to engage in activities that amount to abuse of office;
 - (c) accurately and honestly represent information to the public;
 - (d) not engage in wrongful conduct in furtherance of personal benefit;
 - (e) not misuse public resources;
 - f. not discriminate against any person, except as expressly provided for under the law;
 - (g) not falsify any records;
 - (h) not engage in actions which would lead to the State officer’s removal from the membership of a professional body in accordance with the law; and
 - (i) not commit offences and in particular, any of the offences under Parts XV and XVI of the Penal Code (cap. 63), the Sexual Offences Act (No.3 of 2006), the Counter-Trafficking in Persons Act (No. 8 of 2010) and the Children Act (No. 8 of 2001).



- (2) A person who wishes to be elected to a State office shall, for the purposes of this section, submit to the Independent Electoral and Boundaries Commission a self-declaration in the form set out in the first schedule.
13. Under section 40, a State officer, upon assumption of office is required to subscribe to a specific Leadership and Integrity Code. Where the State Officer breaches that Code, section 41 provides as follows:
41. Breach of the Code
- (1) Subject to subsection (2), a breach of the Code amounts to misconduct for which the State officer may be subjected to disciplinary proceedings.
- (2) Where an allegation of breach of the Code has been made against a State officer in respect of whom the Constitution or any other law provides the procedure for removal or dismissal.
14. The aforesaid provision gives effect to article 75 which states that:
- 75(1) A state officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids-
- a. any conflict between personal interests and public or official duties;
- b. compromising any public or official interest in favour of a personal interest; or
- c. demeaning the office the officer holds.
- (2) A person who contravenes clause (1), or article 76, 77 or 78 (2) --
- a. shall be subject to the applicable disciplinary procedure for the relevant office; and
- b. may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.
- (3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other state office.
15. The petitions before us relate to qualification of candidates offering themselves for election. This brings into focus the provisions of article 99 on qualification for election as member of parliament and article 193 dealing with qualification as member of county assembly. They provide as follows:
99. Qualifications and disqualifications for election as member of Parliament
- (1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—
- (a) is registered as a voter;
- (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and



- (c) is nominated by a political party, or is an independent candidate who is supported--
 - (i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or
 - (ii) in the case of election to the Senate, by at least two thousand registered voters in the county.
- (2) A person is disqualified from being elected a member of Parliament if the person—
- (a) is a state officer or other public officer, other than a member of Parliament; (b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
 - (b) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
 - (c) is a member of a county assembly;
 - (d) is of unsound mind;
 - (e) (f) is an undischarged bankrupt;
 - (f) (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or
 - (g) (h) is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened chapter six.
- (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

193. Qualifications for election as member of county assembly

- (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person
 - (a) is registered as a voter;
 - (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and
 - (c) is either
 - (i) nominated by a political party; or
 - (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.



- (2) A person is disqualified from being elected a member of a county assembly if the person
- (a) is a State officer or other public officer, other than a member of the county assembly;
 - (b) has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
 - (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
 - (d) is of unsound mind;
 - (e) is an undischarged bankrupt;
 - (f) is serving a sentence of imprisonment of at least six months; or
 - (g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened chapter six.
- (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

16. Under article 180(2), to be eligible for election as a county governor, a person must meet the qualifications set out in article 193.
17. It is the concern about the integrity of the candidates running for the General Elections, that has precipitated the filing of the petitions before us. We now proceed to briefly summarize the petitions and relief sought.

NRB Petition No. E090 of 2022

18. The petitioner Okiya Omtatah Okoiti filed the petition dated March 7, 2022 in public interest. He is concerned that persons with integrity issues are vying for public office in the general elections. Although the petition is general and does not target a specific person, the petitioner notes, for instance, that a person was elected as a Member of Parliament despite having being arrested, charged and dismissed from his high profile public sector position for receiving a bribe. He states that it is a matter of public notoriety that many people adversely mentioned in theft of public funds, including the so called “COVID-19 billionaires”, are lining up to vie for positions in the forthcoming General Elections. He states that these trends hamper good governance, transparency and accountability and undermine the Constitution. He seeks interpretation of the chapter six as it related to qualification and eligibility of person seeking elective office. He prays for the following reliefs:
- a. A declaration be and is hereby issued that, despite their sequencing, articles 99 and 193 of the Constitution each set two distinct but compulsory tests one for eligibility and another for qualifications to vie for political office and, depending on the position being vied for, a person has to first pass the



qualifications test in article 99(2) as read together with (3), or 193(2) as read together with (3), then the person has to also pass the eligibility test in article 99(1) or 193(1), as the case may be, for them to be cleared to vie for political office.

- b. A declaration be and is hereby issued that the rider in articles 99(3) and 193(3) of *the Constitution* that, “A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted,” does not apply to the eligibility criteria established in articles 99(1) and 193(1) of the Constitution and section 13 of the Leadership and Integrity Act, 2012.
- c. A declaration be and is hereby issued that, by dint of articles 88(4)(e) & (f), 99(1)(b) and 193(1)(b) of the Constitution of Kenya 2010, as read together with section 13 of the *Leadership and Integrity Act*, 2012, section 74 (1) of the *Elections Act* (No. 24 of 2011), and section 4(e) of the *Independent Electoral and Boundaries Commission Act* (No. 9 of 2011), the IEBC has power to bar any person who does not satisfy any moral and ethical requirements prescribed by the Constitution or by an Act of Parliament from vying in elections to the offices of President, Deputy President, Governor, Deputy Governor, Member of Parliament (both Senate and National Assembly), and Member of County Assembly.
- d. An order be and is hereby issued compelling the IEBC to vet and ensure that all persons it clears to vie at the August 9, 2022 general elections and in subsequent elections to the offices of President, Deputy President, Governor, Deputy Governor, Member of Parliament (both Senate and National Assembly), and Member of County Assembly are persons who satisfy any moral and ethical requirements prescribed by the Constitution or by an Act of Parliament.
- e. An order be and is hereby issued compelling the respondent to bear the costs of this petition.
- f. Consequent to the grant of the prayers above the honourable court be pleased to issue any other or further remedy (directions and orders) that the honourable court shall deem necessary to give effect to the foregoing orders, and/or favour the cause of justice.

NRB Petition E221 of 2022

19. The petitioner Edward C. Asitiba t/a Edward C. Asitiba and Associates Advocates filed the petition dated May 18, 2022. He also centres his case on chapter six and contends that the IEBC, which is mandated to register candidates for elections, has failed, refused or neglected to bar individuals with questionable integrity from running for elective office unless there is an order of the court or of a quasi-judicial body to that effect. He seeks the following reliefs:
 - a. A declaration be and is hereby issued that allowing public officials, who have been removed from office through impeachment, to contest for any state office offends the letter and the spirit of the constitution, and in particular chapter six of the Constitution.



- b. A declaration be and is hereby issued that public officials who have been found guilty of abuse or misuse of office are barred from holding any state office.
- c. A declaration be and is hereby issued that candidates with unresolved/active and ongoing court cases - alleging corruption, abuse of office and other heinous crimes – must not contest for elective posts until they have been cleared of such charges and proved their innocence or otherwise.
- d. Any other or further remedy that this Honourable court shall deem fit to grant.

NRB Petition No. E168 of 2022

- 20. The petition dated April 20, 2022 was filed by Inuka Kenya ni Sisi, Wanjiru Gikonyo, Kenya Human Rights Commission and Transparency International Kenya. It is anchored on the notion that chapter six seeks to address the historical challenge of corruption and impunity regarding management of public funds by imposing a fit and proper test for appointive and elective office holders.
- 21. The petitioners note that in previous and upcoming general elections, some candidates with integrity issues have been allowed to contest for public office. This is despite the robust Constitutional and statutory provisions providing for standards and qualifications required to contest. It is against this backdrop that the Petitioners seek a clear interpretation of chapter six. They seek the following reliefs:
 - a. A declaration that chapter six of the Constitution sets up a fit and proper test for leadership including for elective and appointive offices.
 - b. A declaration that the fit and proper test for leadership required by chapter six of the Constitution is an objective test and not a subjective test in the mind of the vetting and/or appointing bodies for elective and appointive offices.
 - c. A declaration that the fit and proper test for leadership required by chapter six of the Constitution is different from the criminal test of conviction for criminal offences.
 - d. A declaration that the vetting and/or appointing bodies/persons who include the respondents have an obligation to objectively and positively determine that a person seeking elective or appointive office is fit and proper.
 - e. A declaration that the 1st respondent has the primary and finality mandate to vet and clear candidates for purposes of chapter 6 of the Constitution.
 - f. A declaration that a person seeking elective office who has been charged in court for abuse of office, corruption, breach of public trust or any serious offence is unfit to vie for or hold any elective office until such matter is completely exhausted.
 - g. A declaration that a person who has been prevented from effectively accessing or holding office or carrying out his duties under the office by a court of law be declared unfit to vie for or hold any elective position until such matter is dispensed.
 - h. A declaration that a person found by the 1st respondent to have breached values of chapter 6 be declared unfit to vie for or hold any elective office whether or not they have pending court cases.
 - i. A declaration that a person found by an election court to have committed an election offence be found unfit to vie for or hold any elective office.



- j. A declaration that a person adversely mentioned by a report of a fact finding and investigative organ and recommended for prosecution or further action be found unfit to vie for or hold any elective office.
- k. A declaration that a person adversely mentioned by the Auditor General’s report to have overseen loss of public funds or flaunting of finance laws be found unfit to vie for or hold any elective office.
- l. A declaration that the criteria for qualification for elective positions at both the County and National level should apply mutatis mutandis to appointment to public office.

MSA HC Petition No. E017 of 2022

- 22. The petition dated April 25, 2022, amended on April 27, 2022 and further amended on the June 6, 2022 was originally filed by Ngoro Kayuga and George Odhiambo. By an order dated May 24, 2022, Ngoro Kayuga was allowed to withdraw from the petition leaving George Odhiambo as the sole petitioner.
- 23. The petitioner’s position is that Mike Sonko Mbuvi Gideon Kioko (“Mike Sonko”) is disqualified from holding any other State office including the office of the Governor of Mombasa County. That any person who has been dismissed or otherwise removed from office by way of impeachment or through other disciplinary procedure pursuant to article 75 of the Constitution is disqualified from holding State office. The petitioner contends that Mike Sonko is therefore barred from being elected, appointed, designated, employed or otherwise recruited to serve in any other State office as defined in article 260.
- 24. The petitioner avers that Mike Sonko was removed from office of Governor of Nairobi City County by impeachment for violating and contravening, inter alia article 75(1)(c). Having been so removed, he is unsuitable and disqualified from holding any other State office including the office of the Governor of Mombasa County by virtue of article 75(3). The petitioner seeks the following reliefs:
 - 1) A declaration be and is hereby issued that Mike Sonko Mbuvi Gideon Kioko, the 1st respondent herein, having been removed from the office of the County Governor of Nairobi City County by way of impeachment, is disqualified from holding any other State office as defined in article 260 of the Constitution of Kenya, 2010 including the office of the county Governor of Mombasa County.
 - 2) A declaration be and is hereby issued that any county governor or any other person including the 1st respondent herein who has been removed from office by way of impeachment or through other disciplinary procedure is disqualified from holding, being elected, appointed and/or employed into any other State office including but not limited to the office of a county governor, county deputy governor, Member of Parliament, member of county assembly, member of the executive committee of a county government and/or any other State office as defined by article 260 of the Constitution.
 - 3) A declaration be and is hereby issued that the 3rd respondent herein the Independent Electoral and Boundaries Commission, is mandated and obligated to consider, use and apply the judgment and decree of this honourable court while receiving and processing the nominations of various



persons seeking to be elected into respective State offices in the general elections scheduled for August 9, 2022 or any other election

- 4) Costs of this petition be paid by the 1st and 2nd respondents jointly and severally.
- 5) Any other order that this honourable court shall deem just to grant.

MSA Petition No. E019 of 2020

25. Haki Yetu, Kituo cha Sheria and Transparency International filed a petition dated May 16, 2022. They advance the position that the Court of Appeal, like the High Court found that Mike Sonko's impeachment lawful and procedurally fair. They raise two issues for determination namely; Whether Mike Sonko is disqualified from holding any other State office including the office of Governor of Mombasa County and whether Mike Sonko and Wiper Democratic Movement ("Wiper") have violated the petitioners' constitutional rights. The petitioners seek the following reliefs:

- 1) A declaration be and is hereby issued that Mike Sonko Mbuvi Gideon Kioko, the 1st respondent herein, having been removed from the office of the County Governor of Nairobi of the County Government of Nairobi by way of impeachment, is disqualified from holding any other State office including the office of the county Governor of Mombasa County.
- 2) A declaration be and is hereby issued that county governor or any other person including the 1st Respondent herein who has been removed from the office by way of impeachment or through other disciplinary procedure is disqualified from holding, being elected, appointed and/or employed into any other state office including but not limited to the office of a county governor, county deputy governor, Member of Parliament, member of executive, member of county assembly, member of the executive committee of a county government and/or any other state office as defined by article 260 of the *Constitution*.
- 3) A declaration be and is hereby issued that the 3rd respondent herein the Independent Electoral and Boundaries Commission, is mandated and obligated to consider, use and apply the judgement and decree of this honourable court while receiving and processing the nominations of various persons seeking to be elected into respective State offices in the general elections scheduled for August 9, 2022 or any other election.
- 4) Costs of this petition be paid by the 1st and 2nd respondents jointly and severally.
- 5) Any other order that this honourable court shall deem just to grant.

ELD Petition No. E010 of 2022

26. The petition by Silvestor Kipkemoi Arap is dated May 6, 2022. He states that Mike Sonko and Ferdinand Ndung'u Waititu Babayao were impeached and their attempts to obtain a reprieve from the courts failed and as result they cannot run for public office. The petitioner seeks the following reliefs:

- 1) A declaration that a person who has been impeached by the County Assembly and the Senate is disqualified and ineligible from offering himself for any



elective office, having offended articles 99(1), 180 (2) and 193(1) of the Constitution and section 13 of the Leadership and Integrity Act, 2012.

- 2) A declaration that the 1st and 2nd interested parties are disqualified and not eligible to offer themselves for any elective office having been removed, by impeachment, from the offices of county governor of Nairobi and Kiambu, respectively, for numerous offences, including a gross violation of the constitution.
- 3) A declaration be and is hereby made that by dint of articles 75(3), 99(2), 180(2) and 193 of the Constitution of Kenya, the 1st and 2nd interested parties are disqualified from vying for any elective office in the upcoming General Elections slated for August 9, 2022 and from holding any other public or state office.
- 4) A declaration that the 2nd respondent is clothed with the primary legal and constitutional mandate to vet and clear all candidates for elective offices.
- 5) A permanent injunction restraining the 1st, 2nd and 3rd respondents from clearing any person who has been impeached to stand for any elective office.
- 6) Consequent to the grant of the prayers above the honourable court be pleased to issue any other or further remedy (directions and orders) that the honourable court shall deem necessary to give effect to the foregoing orders, and/or favour the cause of justice.
- 7) Costs of this petition be borne by the respondents.

NRB Petition No. E230 of 2022

27. Mukudi Jwenge and Anderson Warui have filed a petition dated May 23, 2022. They state that Mike Sonko was impeached. His quest to challenge the impeachment in the High Court and Court of Appeal was dismissed. They aver that Mike Sonko's appeal to the Supreme Court lodged on April 4, 2022, is still pending. In light of the impeachment and pending proceedings, the Petitioners seek the following reliefs:

- a) A declaration be and is hereby issued that the 1st respondent, having been removed from the office of the County Governor, County Government of Nairobi City, pursuant to article 181, is barred from holding any state office as prescribed under article 75(3) of the Constitution.
- b) A declaration be and is hereby issued that the 2nd respondent cannot accept the 1st respondent for nomination as a candidate for the Mombasa gubernatorial elections scheduled for August 9, 2022 or any elections thereafter, the 1st respondent being a person barred from holding any state office pursuant to article 75(3) of the Constitution.
- c) A declaration be and hereby issued that even if the 1st respondent is cleared, nominated for the Mombasa County gubernatorial elections and is elected as the county governor for Mombasa County, the 1st respondent cannot assume office as the county governor of mombasa county by dint of article 75(3) of the Constitution.



- d) A declaration be and is hereby issued that the 2nd respondent is mandated and obligated to consider, use and apply the judgment and decree issued herein while receiving, considering, evaluating and processing the nominations of various persons seeking to be elected into various state offices, to wit; Members of the County assembly, County Governor, Deputy County governor, member of parliament, deputy president and President in the general elections scheduled for August 9, 2022 and any elections thereafter.
- e) In the alternative and without prejudice to the prayers above, the petitioners pray that even if the 1st respondent seeks protection and/or immunity under the Provisions of article 193(3) of the Constitution, he cannot be exonerated in any manner by the binding authority of article 10(2)(c) which promotes good governance, integrity transparency and accountability.
- f) Costs of this petition be borne by the 1st respondent.

NRB Petition No. E234 of 2022

28. Kelvin Njui Wangari filed a petition dated May 24, 2022 against Paul Karungo Thang’wa (“Paul Thang’wa”), the Attorney General, IEBC and the Ethics and Anti-Corruption Commission. He states that Paul Thang’wa was the Kiambu County Government Executive Committee Member for Youth Affairs, Sports, ICT and Communication, until October 29, 2019, when the Kiambu County Assembly resolved to remove him from office on grounds of incompetence, abuse of office and gross misconduct.
29. The petitioner’s case is that a person who has been impeached cannot stand for elective office as it constitutes a threat to, and violation of, the Constitution. The petitioner seeks the following reliefs:
 1. A declaration that the impeachment of the 1st respondent or indeed any other person impeached from public office due to gross misconduct and violation of the Constitution would be a threat to the Constitution if elected or re-elected back to public office.
 2. A declaration that the candidature of the 1st respondent and any other impeached candidate or individual is contrary to the tenure, ideals and spirit of the Constitution of Kenya especially chapter six and are prohibited in the circumstances.
 3. A declaration that a person is not eligible to run for any state office if he or she is or has been in breach or would be in breach of any code of integrity set out pursuant to articles 73,75,76,77,78 and 80 of the [Constitution of Kenya 2010](#).
 4. An order of injunction permanently restraining the 3rd respondent from accepting now or in the future, nomination for elections from the 1st respondent for incompetence, abuse of office, gross misconduct and engaging in acts contrary to the spirit and tenor of the Constitution of Kenya.
 5. A declaration that the nomination of the 1st respondent to contest for the offices of the Senator Kiambu County or any public office as the case may be will be a violation of the Constitution since if elected, he will be unable to uphold, protect or defend the Constitution on account of incompetence, abuse of office and gross misconduct.
 6. A declaration that the nomination of the 1st respondent to contest for the position of Senator Kiambu County or to any other State office as the case may be will be a violation



of the Constitution since if elected, he will be unable to perform the duties required by the Constitution.

7. A declaration that the nomination of the 1st respondent to contest for the offices of the Senator Kiambu County will be a violation of the Constitution's principles on leadership and integrity and specifically the provisions of articles 10, 73, 75 of the Constitution.
8. All such other orders as the court shall deem just in the circumstances.
9. An order that the costs consequent upon the petition be borne by the Respondents.

Petition No. E249 of 2022

30. The petition by Onchieku Hesborn Mosiori is dated May 26, 2022 and is filed against Hon. Samuel Otara Arama ("Samuel Arama"), the current member of Parliament for the Nakuru West Constituency, Jubilee Alliance Party and IEBC.
31. The petitioner states that Samuel Arama has been nominated by the Jubilee Alliance Party and has been cleared by the IEBC to vie for the Nakuru West National Assembly Constituency Seat despite having been convicted in Nairobi Anti-Corruption Criminal Case No 20 of 2018. The petitioner seeks the following reliefs:
 - a) A declaration that the process followed by the 2nd respondent in nominating the 1st respondent, Samuel Otara Arama, submitted to the 3rd respondent for processing his nomination papers was illegal, unlawful and thus null and void.
 - b) A declaration that the 1st respondent, Samuel Otara Arama, is not a fit and proper person with due regard to his honesty, dignity, personal integrity, dignity and suitability and hence his appointment shall be inconsistent with the Constitution and invalid.
 - c) An order of prohibition do issue restraining the 3rd respondent from processing the 1st respondent's nomination papers to contest and vie for the office of Nakuru West Parliamentary seat and from clearing the 1st respondent for election into the office of National Assembly in Nakuru West Parliamentary seat.
 - d) A Permanent Injunction, restraining the 3rd respondent from processing the 1st respondent's nomination papers to contest and vie for the office of Nakuru West Parliamentary seat and from clearing the 1st respondent for election into the office of National Assembly in Nakuru West Parliamentary seat unless due process is duly followed in their nomination and appointment and the Constitutional requirement of appointment of a person who meets chapter 6 of the Constitution is complied with.
 - e) The honorable court do order that the costs of this petition be borne by the respondents.
 - f) Such other orders as this honorable court shall deem fit and just to grant in the circumstances.



Responses

32. The eight respondents in these consolidated petitions filed their responses which we briefly set out below.

The Attorney General

33. The Attorney General filed grounds of opposition dated March 17, 2022 and May 5, 2022. It states that the petitions lack specificity and seek an advisory opinion which falls within the jurisdiction of the Supreme Court. The Attorney General states that allowing the petitions will interfere with the constitutional and statutory mandates of constitutional bodies. It urges that the petitions raise issues that are not ripe for adjudication because they are not based on a concrete controversy arising from a prevailing factual matrix but on abstract hypothetical scenarios. Consequently, it is improper for the court to make general declarations regarding the exercise of constitutional and statutory power without reference to specific actions done or not done by the Attorney General.

EACC

34. The EACC filed a replying affidavit sworn by Patrick Owiny, Deputy Director, on June 9, 2022. EACC acknowledges that it is mandated to ensure compliance and enforcement of chapter six through conducting investigations and recommending prosecution. It states that it is empowered to verify the eligibility of aspirants for elective positions under articles 99(1) and 193(3) as read with section 13 (1) of *Leadership and Integrity Act*. In the discharge of this mandate, it forwards an integrity verification report to guide IEBC in the discharge of its mandate under article 88(4)(f) and ensure that nominated candidates comply with chapter Six.
35. EACC states that IEBC is obliged by article 259(11) and section 4(3) and (4) *Leadership and Integrity Act* to act in accordance with the integrity verification report and decline to clear candidates who have not met the constitutional and statutory integrity threshold.
36. In regard to the forthcoming General Elections, EACC states that on June 1, 2022 it sent a list of aspirants with unresolved integrity issues to the IEBC asking it not to clear them. According to EACC, IEBC lacks the capacity to conduct investigations into integrity issues and for this reason, it is under obligation to act on the EACC's recommendations.

IEBC

37. IEBC responded to the petitions through the affidavits sworn by its Director of Legal and Public Affairs, Chrispine Owiye, on June 8, 2022 and June 9, 2022. The IEBC's position is that it is an independent commission and by virtue of article 249(2), it is not to be subject to the direction or control of any person or authority.
38. IEBC states that under article 88(4)(e), it has the mandate to settle electoral disputes, including disputes relating to or arising from nominations. This role is buttressed by section 74 of the *Elections Act* pursuant to which the IEBC has formed a Dispute Resolution Committee ("DRC") to adjudicate nomination disputes. IEBC therefore states that Mike Sonko has since lodged a complaint with the DRC against its decision to reject his nomination for the Mombasa Gubernatorial seat presented on the June 7, 2022. That since it is now seized of the matter this court lacks jurisdiction to adjudicate on the matter.
39. On matters of integrity and leadership under chapter six, IEBC explains that in exercising its role in the nomination process it acts in accordance with the Constitution, the IEBC Act, the *Elections Act*



the Elections (General) Regulations, (“the Elections Regulations”) and all other applicable laws in an independent, free, fair, transparent, impartial, neutral, efficient, accurate and accountable manner.

40. IEBC states that under regulation 13(1) of the Elections Regulations, political parties which intend to nominate candidates for an elective post are required to observe the provisions of the Constitution, the *Elections Act* and any other written law in respect of the qualifications and disqualifications for that office. This requirement is echoed in section 38H of the Political Parties Act which obligates political parties to ensure that each candidate satisfies the provisions of the Leadership and Integrity Act.
41. IEBC states that once political parties present their lists of aspirants, it commences the exercise of confirming that the aspirants meet the necessary qualifications prescribed by the Constitution and relevant laws. It also consults the relevant bodies, among them EACC, which are mandated to make representations on the moral, ethical and educational qualifications of the candidates.
42. EACC also makes representations on the moral and ethical suitability of the political party aspirants to contest the elections under chapter six and the Leadership and Integrity Act. That in making those representations, EACC considers inter alia whether the candidates meet the qualification for holding state office by virtue of article 75. IEBC states that the representations made by EACC are not binding on it unless backed by an order of court or quasi-judicial body. It is required to weigh the representations against the provisions of article 38 as read with article 24 and make its own decision whether the aspirants are qualified for nomination and if so, it issues the requisite certificates to the validly nominated candidates in accordance with regulation 51 of the Election Regulations.
43. IEBC denies that it misapplied or misinterpreted articles 99(3) and 193(3) in nominating candidates. It asserts that in order to satisfy itself that a candidate is qualified, IEBC states that it takes a holistic construction of the articles 75, 99(3), 193(3) and the Bill of Rights as required under article 259.

Mike Sonko and Wiper

44. Mike Sonko and his sponsoring party take a common position. They state that this court lacks jurisdiction to entertain any claim contesting his right to vie for the position of Governor of Mombasa County. They state that the petitions violate article 88(4)(e) and section 74(1) of the *Elections Act* which provide procedures for resolving nomination disputes. The contend that IEBC is the only body that has the mandate to settle nomination disputes.
45. Mike Sonko and Wiper further contend that the petitioners seek to curtail their political rights guaranteed under article 38. He takes the position that he is entitled to present himself for nomination. On its part, Wiper states that it is entitled to present a candidate of its choice and in exercise of this right nominated Mike Sonko after satisfying the party’s clearance criteria. Mike Sonko denies that his nomination violates anyone’s political rights.
46. Although Mike Sonko admits that his impeachment was upheld by the High Court and the Court of Appeal, he contends that the petitions are premature because his Petition No. E008 of 2022 is pending before the Supreme Court.

Paul Thang’wa

47. Paul Thang’wa opposes the petition against him. His position is supported by United Democratic Alliance (“UDA”) which nominated him to run for the Kiambu County Senate seat. He states that on October 29, 2019, the County Assembly of Kiambu passed a resolution to commence proceedings to remove him as a County Executive Committee Member but he was neither impeached nor removed



from office. He states that no evidence has been furnished to show that he was dismissed him from office under section 40 of the County Government Act.

48. Paul Thang'wa states that on November 8, 2019, the Employment and Labour Relations Court ("the ELRC") stayed the proceedings regarding his removal and the County Governor declined to remove him from office citing the existence that order. He asserts that he remained a County Executive Committee Member for Kiambu County until he ceased to hold office on January 29, 2020 by operation of article 179(7) when the then Governor of Kiambu County ceased to hold the office.
49. Paul Thang'wa maintains that he has filed an appeal against the decision of the ELRC which is still pending before the Court of Appeal. His counsel informed the court from the bar that the refusal by IEBC to accept Paul Thang'wa's nomination papers is the subject of a complaint before the IEBCDRC.

Samuel Arama

50. Samuel Arama states that he presented his nomination credentials and was duly nominated by IEBC.
51. He admits that he was convicted in NRB ACCR No. 20 of 2018, the court had not passed sentence by time of hearing these petitions. He states that once the court renders its sentence he shall utilize all available opportunities to appeal.

Interested parties

52. Some interested parties filed responses which we summarise below.

Commission on Administration of Justice ("CAJ")

53. The CAJ supports the position taken by the petitioners. It states that the issues concerning Chapter Six ought to be interpreted in line with article 259(1). Its position is that the EACC is the body mandated by the Constitution to ensure compliance and enforcement of chapter six and that IEBC is bound by the recommendations of EACC on issues of leadership and integrity.

Kenya National Commission on Human Rights ("KNCHR")

54. KNCHR supports the petitions to the extent that they seek broad interpretation of the provisions of chapter six. KNHCR does not however support the position that the representations made by EACC are binding on IEBC. It asserts that IEBC is an independent commission and to that extent the court cannot be directed by any person and authority as the petitioners seek.

Kenya Revenue Authority ("KRA")

55. KRA neither supported nor opposed the petition on the ground that its mandate was restricted to enforcing tax laws under the Kenya Revenue Act, Act No. 2 of 1995.

Director of Public Prosecution ("DPP")

56. The DPP contends that IEBC and EACC have separate and distinct mandates under the Constitution and the law. It contends that since EACC is the body mandated to enforce compliance with chapter six hence it plays an integral role in vetting of candidates.



Legal Aid Clinic (“LAC”)

57. LAC opposes the petitions on the ground that they are speculative and raise mere concerns which IEBC can address through the DRC. It states that the court lacks jurisdiction in nomination disputes as its own mandate is to hear appeals from the DRC.

The Hearing

58. After the petitions were referred to this court constituted by the Chief Justice, we consolidated the petitions and issued direction on the filing and exchange of depositions and submissions. We heard the parties on June 9, 2022 and reserved the matter for judgment.

Issues for Determination

59. Although all the nine petitions seek, in substance, interpretation of chapter six in the context of the general elections, they can be grouped into two: the first filed by Okiya Omtatah Okoiti (NRB Pet. No. E090 of 2022), Edward C. Asitiba t/a Edward C. Asitiba and Associates Advocates (NRB Pet. No. E221 of 2022) and Inuka Kenya ni Sisi, Wanjiru Gikonyo, Kenya Human Rights Commission and Transparency International Kenya (NRB Pet. No. E168 of 2022) raise issues of a general nature and seek general relief.
60. The second group of petitions seek specific relief against specific candidates. MSA Pet. No. E017 of 2022 filed by George Odhiambo, MSA Pet. No. E019 of 2022 filed by Haki Yetu, Kituo Cha Sheria and Transparency International, ELD Pet. No. E010 of 2022 filed by Sylvester Kipkemoi Arap and NRB Pet. No. E230 of 2022 filed by Mukidi Jwenge and Anderson Warui seek relief against Mike Sonko.
61. NRB Pet.No. E249 of 2022 filed by Onchieku Hesborn Mosiori is against Samuel Arama, while NRB Pet. No. E234 of 2022 filed by Kelvin Njui Wangari seeks relief against Paul Thang’wa.
62. The parties filed extensive written submissions and referred to authorities in support of their respective positions, which we have considered. Given the above background, the reliefs sought, submissions and the factual matrix, we have distilled the following issues for determination:
- (a) Whether the court has jurisdiction to hear and determine the petitions that raise abstract and hypothetical questions.
 - (b) Whether the petitions are premature in view of the Constitutional and statutory mandate of the IEBC.
63. In answering these questions, the court is called upon to interpret the provisions of the Constitution. All the parties have cited a plethora of decisions setting the climate for interpreting and applying the Constitution. This court is guided by 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 and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. Article 259(1) commands the court to take a purposive approach in interpreting the Constitution which is a transformative charter, intended to break from the past and look to the future. In this regard, the Supreme Court in *Speaker of Senate v Attorney General and 4 Others* SCK Advisory Opinion No. 2 of 2013 [2013] eKLR stated:

“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today’s Constitution is to institute social change and



reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –

“Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”

64. The same sentiments were expressed in *Government of Republic of Namibia v Cultura 2000*, 1994(1) SA 407 by Chief Justice Mahomed who cautioned against giving to Constitutional provisions rigid and artificial interpretation thus:

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.”

(see also *Re The Matter of the Interim Independent Electoral Commission* Constitutional Application No. 2 of 2011 and *State v Acheson* 1991(20 SA 805,813B).

65. Apart from complying with the stipulation that the Constitution must be given full life, it is also our duty in considering this matter to give effect to the Constitution as a whole. Chapter six and the various provisions that govern the electoral process must therefore be read together in a manner that gives full effect to the purposes of the Constitution. 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 [2011] eKLR 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.

66. The same principle was explained In *Olum v Attorney General of Uganda* (2002) 2 EA 508) where the Supreme Court of Uganda stated that:

[T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.

(see also *Tinyefuza v The Attorney General* Constitutional Appeal No. 1 of 1997 (Unreported)).

67. With this background we now turn to consider the issues as framed for determination.

Jurisdiction

68. The issue of jurisdiction has been raised by the Attorney General, the IEBC and Mike Sonko.
69. The Attorney General complains that Petitions No. E090 of 2022 and E168 of 2022 raise general issues without pointing out any violation by it to justify the reliefs sought.
70. Although Mr Omtatah admits that his petition is of generic nature and seeks the court’s pronouncement on the interpretation and application of several articles of the Constitution and the law, he states in his petition that this court is vested with jurisdiction under articles 1(c), 4(2), 10, 22, 23, 50(1), 159, 165, 258 and 259 as read with section 5 of the High Court (Organisation and



Administration) Act, 2015. He further states that the court has jurisdiction to hear any question regarding violation of rights and to determine whether any acts are constitutional, to interpret the Constitution including questions of contradiction between any law and the Constitution and to protect the Constitution from any threats and violations. As regards issues relating to the *Elections Act*, he states that the High Court has the exclusive mandate.

71. In response, Mr Musyoka, counsel for the petitioners in petition No. E168 of 2022, submits that the High Court has the mandate to interpret the Constitution under article 165(3)(d). Counsel cited the decision of the Supreme Court in Kenya *National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 Others (Interested Parties)* SCK Advisory Opinion Reference 1 of 2017 [2020] eKLR to argue that in that case, the Supreme Court declined to hear a matter where the parties had sought an advisory opinion on interpretation and application of chapter six and referred the parties to the High Court. For this reason, counsel argues that the Petitioner could not have gone back to the Supreme Court.

72. The jurisdiction of the High Court to adjudicate on matters of and concerning the Constitution is wide. In relation to the petitions before us, article 165(3) provides, in part, as follows:

165(3) Subject to clause (5), the High Court shall have-

- (a) -----
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) -----
- (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.

73. A reading of this clause confirms the petitioner's position that this court may entertain any question by any person regarding interpretation of the Constitution. While we agree that the court may hear these petitions, the issue before us is whether the court can grant the reliefs sought.

74. Courts exist to resolve actual disputes. They are not in the business of engaging in academic or abstract discourse that is not anchored in disputed facts. That is why the Constitution does not confer upon this court the jurisdiction to issue advisory opinions. The court in *John Harun Mwau and 3 others v Attorney General* [2012] eKLR, held that it could not deal with hypothetical issues and that the jurisdiction to interpret the Constitution under article 165(3)(d) does not exist in a vacuum and is not exercised independently in the absence of a real dispute. The court explained that the jurisdiction is exercised in the context of a controversy.

75. The aforesaid position is encapsulated in the principles of mootness, ripeness and justiciability as explained by Onguto J., in *Wanjiru Gikonyo and Others v National Assembly of Kenya and 4 Others* Petition No. 453 of 2015 [2016] eKLR as follows:

- (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of



ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

- (28) Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time.

76. The application of the aforementioned principles depends on the facts of each case. In the Wanjiru Gikonyo case (*supra*), the learned Judge, again stated:

- (34) There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.

- (35) It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.

77. We have considered the Supreme Court decision in Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 Others (Interested Parties) (*supra*) and we do not think that it provides a basis for exercise of this court’s jurisdiction as submitted by Mr Musyoki. In that case, the applicants sought an advisory opinion of the Supreme Court on the interpretation and application of chapter six. Mr Omtatah, a party in that case, raised objections on the grounds that the matter was not a proper case for an advisory opinion and that it was sub judice as there were live disputes on the same issues pending before the High Court namely; Constitutional Petition No 68 of 2017; Okiya Omtatah Okoiti v Jubilee Party and others and Constitutional Petition No 142 of 2017; Okiya Omtatah Okoiti v Attorney General and 12 others. The Supreme Court upheld the objections and directed that, “The High Court shall proceed, on the basis of priority, to hear and determine High Court Constitutional Petition No 68 of 2017 and Constitutional Petition No 142 of 2017 pending before it.” The Supreme Court’s decision was limited to directing the High Court to hear and determine the two petitions expeditiously in exercise of the court’s jurisdiction under article 165(3)(d). The Supreme Court did not address itself to whether the issues before the High Court were abstract, hypothetical or academic. This was left to the High Court to determine upon hearing those petitions.

78. The parties before us have submitted at length on the fact that they require this court’s guidance on the interpretation and application of chapter six in relation to parties seeking elective positions. Mr Lempaa went further and urged us to harmonise conflicting decisions of this court on the interpretation of chapter six including International Centre for Policy and Conflict and 5 others v Attorney General & 5 others NRB Petitions Nos 552, 554, 573 and 579 of 2012 (Consolidated)[2013] eKLR and Ethics and Anti-Corruption Commission v Granton Graham Samboja & another; Kenyatta University & another (Interested Parties) [2021] eKLR.

79. Although this court has jurisdiction to interpret the Constitution, it cannot proceed to grant relief merely on the ground that there are conflicting decisions that required harmonisation. Like the Supreme Court in Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 others (Interested Parties) (*Supra*), we reject the invitation to create a “harmonization” jurisdiction based on the need to, “clarify the fit and proper test for leadership under chapter six of the Constitution in light of the conflicting and confusing case law



that has built up on this issue”. Harmonization can only be done where there exists an actual and live dispute.

80. Having considered the entirety of Petition Nos. E090 of 2022, E168 of 2022 and E221 of 2022, we hold the view that the petitions are general in nature, raise issues without reference to concrete facts, do not allege any wrong doing against a specific person and do not have specific respondents against whom such relief may be granted. The petitions only beseech the court to pronounce itself on abstract and clearly academic questions. We reject this entreaty.
81. The second ground of objection is that the petitioners have not exhausted the existing alternative remedies. The argument is based on the fact that the individuals whose conduct is impugned have put their names forward for nomination by the IEBC which has a mechanism through its DRC for resolving any disputes arising from nominations.
82. At the time of hearing these petitions, it was admitted that Mike Sonko and Paul Thang’wa had subjected themselves to the DRC. This process is underpinned by article 88(4)(e) and section 74 of the *Elections Act* which provide as follows:

88(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

83. The aforesaid provision is restated in section 74(1) of the *Elections Act* as follows:

74(1) Pursuant to article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to and arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

84. The aforesaid provisions and the primacy of the mandate of the IEBC to resolve pre-election disputes has been the subject of consideration by the Supreme Court. In Hon. *Mobamed Abdi Mobamud v Ahmed Abdullahi and Others* SCK Pet. No 7 of 2018 [2019] eKLR, the Supreme Court affirmed the jurisdiction of IEBC under article 88(4)(e) as follows:

(68) So as to ensure that article 88(4)(e) of *the Constitution* is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election court under article 105 of the Constitution, the court developed the following principles:

- (i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
- (ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election court;



- (iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;
- (iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court;
- (v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution, even after the determination of an election petition;
- (vi) in determining the validity of an election under article 105 of the Constitution, or section 75(1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.
[Emphasis ours]

85. The net effect of this decision is that pre-election disputes such as those regarding suitability and eligibility for nomination of candidates, must be resolved by the IEBC in the first instance. The High Court's jurisdiction is only triggered once the IEBC makes a decision on the issue.

86. In the above decision, the Supreme Court was dealing with the academic qualification of a Governor under article 193 of the *Constitution*. On this specific issue the Supreme Court observed:

(69) We believe that the foregoing principles may pave the way in streamlining the electoral dispute-resolution processes, both at the pre-election and post-election stages. Applying the reasoning in *Silverse Lisamula* and the majority decision in *Sammy Waity* [supra], alongside the foregoing principles, to the instant case, we note that a complaint had been lodged before the IEBC Dispute Resolution Committee by a Mr Abdirahman Mohamed Abdille, questioning the suitability of the petitioner to vie for the position of County Governor on account of his academic qualifications. However, this complaint was pursued no further, and was not prosecuted. As a consequence, the IEBC Dispute Resolution Committee dismissed it for want of prosecution.

(70) The 1st respondent herein did not file any complaint to the IEBC, questioning the petitioner's academic qualifications, nor did he pursue the original complaint, which had been lodged by Mohamed Abdille.

87. The Supreme Court therefore emphasised that the issue of the suitability of a candidate ought to be brought before the IEBC in the first instance and pursued from there.



88. Applying the above principles to the case at hand, we hold the cases concerning the named Mike Sonko, Paul Thang’wa and Samuel Arama were presented to this court prematurely. Even then, parties admitted that they had submitted themselves to the jurisdiction of the DRC under article 88(4)(e) as read with section 74 of the *Elections Act*.
89. Since the DRC process has been invoked, it must be allowed to run its course. The jurisdiction of this court should not be invoked until that process is exhausted. This is what the court stated in *International for Policy and Conflict and 5 others v The Attorney General & 5 others (supra)*:
- “Where there exist sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted..... Where the Constitution and or statute established a dispute resolution procedure, then that procedure must be used.”
90. We find and hold that petitions relating to the nomination process concerning Miko Sonko, Paul Thang’wa and Samuel Arama are premature. We therefore decline jurisdiction.
91. On the issue of costs, we take the view that the petitions have been filed in public interest and for the purpose of enforcing the Constitution. We shall not award costs.
92. We accordingly strike out all the petitions but with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2022

D. S. MAJANJA

JUDGE

E. C. MWITA

JUDGE

M. THANDE

JUDGE

