



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

PETITION NO. E003 OF 2021

ALEX ARANI KABINGA.....PETITIONER

VERSUS

1. THE GOVERNOR, NYAMIRA COUNTY.....1ST RESPONDENT

2. DR. JAMES ONDICHO GESAMI.....2ND RESPONDENT

JUDGEMENT

Pursuant to leave granted by this court on 4th March 2021 the Petitioner amended his petition dated 16th January 2021 and now seeks: -

“(a) A DECLARATION that the nomination of the 2nd Respondent by the 1st Respondent pursuant to Article 182 of the Constitution of Kenya, 2010 and Sections 12, 32 (c) and (d) of the County Governments Amendment Act, 2017 for vetting and approval as Deputy Governor of Nyamira County is illegal, unlawful and thus null and void.

(b) A DECLARATION that if the 2nd Respondent is vetted and approved as Deputy Governor, such vetting and approval are null and void as a consequence of the declaration of the nomination being illegal, unlawful and thus null and void.

(c) AN ORDER of Judicial Review of certiorari as provided for under Article 23 (2) (f) of the Constitution of Kenya, 2010 to remove into this court for quashing the decision of the 1st Respondent to nominate the 2nd Respondent for vetting and approval as the Deputy Governor of Nyamira County.

(d) AN ORDER of permanent injunction as provided for under Article 23 (3) (b) of the Constitution of Kenya, 2010 to issue supporting the 1st Respondent from re-nominating the 2nd Respondent for vetting and approval as the Deputy Governor of Nyamira County.

(e) AN ORDER that the costs of this petition be borne by the Respondent.

(f) SUCH OTHER ORDERS as this Honourable Court shall deem fit and just to grant in the circumstances.

The legal basis of the petition which is supported by the Petitioner’s affidavit sworn on 29th January 2021 is inter alia that the petition is brought in the public interest pursuant to **Article 22 (2) (c)** and **258 (2)** of the **Constitution**; that **Article 1** of the **Constitution** provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution; that, the said power is by virtue of **Article 1 (3) (b)** delegated to the executive structures in the County Governments among other entities; that the Constitution binds all persons and all state organs at both levels of government and that under **Article 2** no person may claim or exercise state authority except as authorized by the state. Further, that **Article 10 (2) (c)** of the **Constitution** of Kenya establishes good governance, integrity, transparency and accountability as one of the core national values and principles in Kenya; that **Article 73 (i) (a)** of the **Constitution** provides that authority assigned to a state officer, including the 2nd respondent is a public trust which must be exercised in a manner that is consistent with the purpose and objects of the Constitution, demonstrates respect for the people, brings honour and dignity to the office and promotes public confidence in the integrity of the office. Further, that **Article 73 (2)** of the **Constitution** establishes the guiding principles of leadership and integrity which includes selection based on personal integrity, competence and suitability and selfless service based only on public interest showed by honesty in carrying out public duties and the declaration of any personal interest that may conflict with public duties, accountability to the public for decisions and actions and discipline and commitment in service to the people. The other legal basis and grounds cited are **Sections 12** and **52** of the **Leadership and Integrity Act** which provide for financial integrity of a State Officer and the application of **Chapter Six** of the **Constitution** of Kenya which it is urged applies to the 2nd Respondent who is a prospective Deputy Governor of Nyamira County and which financial integrity demands that a State or Public Officer should not use his office to unlawfully or

wrongfully enrich himself or any other person and should not accept a loan or benefit which may compromise him in the execution of his duties.

The factual background of the petition which is cited and which forms the gist of the petition is that: -

“15. THAT while serving as the Member of Parliament for West Mugirango he withdrew some money from West Mugirango Constituency Development Fund (CDF) and deposited it into his accounts the total sum of Kshs.1,050.000/= from the Constituency Development Fund (CDF) A/C No. 256801023 held at Kenya Commercial Bank (KCB) Nyamira.

16. THAT that allegation of the 2nd Respondent's withdrawal of a sum of Kshs.1,050,000/= from the CDF and deposit of the same into his account was given credence in the High Court of Kenya at Nairobi, Miscellaneous Application No. 264 of 2010 in a ruling dated, signed and delivered at Nairobi on the 8th day of April 2011 where the 2nd Respondent who found to have so done.

17. THAT therefore the 2nd Respondent has been involved in misappropriation and pilferage of public funds.

18. The Petitioner avers that the 2nd Respondent having been found by the High Court to have misused or caused the misuse of CDF kitty in a manner that is contrary to the national values and principles of governance and leadership and integrity, it is ridiculous and it amounts to abuse of the provisions to the national values and principles of governance and integrity to nominate such a person for vetting and approval as Deputy Governor of Nyamira County.

19. The Petitioner avers that for one to be nominated as a Deputy Governor under Article 182 of the Constitution of Kenya, 2010 and section 12, 32 (c) and (d) of the County Governments Amendment Act, 2017 he must meet the eligibility test under Article 180 of the Constitution of Kenya, 2010, and one of which is non-abuse state or public office or non-contravention of Chapter Six of the Constitution on Leadership and Integrity.

20. The Petitioner states that since the 2nd Respondent was found by the High Court to have misappropriated public funds and never challenged that finding in a higher court, he is unfit to be nominated by the 1st Respondent for vetting and approval as the Deputy Governor of Nyamira County.

21. The Petitioner avers that the action by the 1st Respondent to nominate the 2nd Respondent contravenes Articles 73, 76 of the Constitution of Kenya, 2010 on financial probity, and Articles 180 and 182 of the Constitution on the eligibility of one who should be nominated as a Deputy Governor and Sections 12 and 52 of the Leadership and Integrity Act No. 19 of 2012.”

By the time this petition was filed the 1st Respondent had submitted the name of the 2nd Respondent to the County Assembly for vetting and approval as provided in **Section 32D of the County Government Amendment Act 2020**. Consequently, on 18th January 2021 before the Respondents could even be served so as to enter appearance in this petition a motion was tabled in the County Assembly of Nyamira but the motion was defeated and the name of the 2nd Respondent was rejected. It was at that juncture that the Petitioner sought and obtained leave to amend the petition so as to avert a possible re-nomination of the 2nd Respondent.

The 1st Respondent's first response to this petition was filed on 4th March 2021 and it was in the form of Grounds of Opposition where it was stated: -

“1. The orders sought are within the mandate of the County Assembly when vetting and approving candidates.

2. No grounds have been disclosed to warrant the grant of the orders sought.”

The 1st Respondent also filed a replying affidavit sworn on 19th March 2021 where he deposed inter alia that he assumed the Office of the Governor on 29th December 2020 upon the death of the former Governor and as required by law he nominated the 2nd Respondent for appointment as Deputy Governor and submitted his name to the County Assembly for vetting and approval but the name was rejected and although the law allowed re-submission of the name of a rejected nominee he was yet to consider whether to re-submit the 2nd Respondent's name or a different candidate. He further deposed that he believed the 2nd Respondent had sufficiently addressed the allegations of his unsuitability to hold office and that he himself had not violated any of the Constitutional provisions cited in the petition. He also deposed that the law had constituted the County Assembly as the body to investigate and adjudicate the question of suitability of candidates nominated for appointment to a public office and as such the matters raised in this petition are matters that ought to be raised in the vetting and approval hearings in the County Assembly.

The 2nd Respondent opposed the application by way of a replying affidavit sworn by himself on 25th February 2021. He began by deposing that the petition had been overtaken by events as the motion of his candidature had already been debated by the County Assembly on 19th January 2021 and rejected and as such no useful purpose would be served by hearing the petition. He then deposed that the allegations contained in the Amended Petition and the Amended Notice of Motion are not true but are based on surmises and are not factual. At paragraph 7 of the replying affidavit, he deposed that the ruling in **Republic v Constituency Development Board exparte Thomas Moindi & 3 others [2012] eKLR** delivered by Musinga J, as he then was, on 8th April 2020 did not find him guilty of any criminal offence as alleged or at all. In the same paragraph he cited two cases to wit **Kisumu CMC Criminal Case No. 354 and 354 of 2011 and International Centre for Policy & Conflict & 5 others v Attorney General & 5 others [2013] eKLR** and deposed that the courts had absolved him of the allegations. He deposed therefore that the issue of his being unsuitable to vie for, contest for, be nominated for and/or to

hold a public office is *resjudicata* and it cannot be revived in this petition. At paragraph 9 he deposed that to demonstrate he had no integrity issues that were outstanding he had applied for clearance from various entities and he had been issued with all the clearances. He further deposed that the mandate of vetting and approving nominees for appointment to county public offices under the **County Government Act** lies with the County Assembly by dint of **Section 8** of the said Act and hence this application is defective, misconceived and fatally defective for not enjoining the County Assembly. He deposed that the petition is bereft of any factual and legal foundation and is only an attempt by the petitioner to drag politics and political issues into this court in the hope that the court will settle political battles. Finally, he deposed that nothing stops him from vying for contesting, being a candidate or being nominated to a public office.

The petition was canvassed through written submissions.

Mr. Makura, Advocate instructed by Kabira Kioni & Co. Advocates for the petitioner, submitted that the gist of the petition is that the 2nd Respondent misappropriated a sum of Kshs. 1,050,000/= from the West Mugirango Constituency Development Fund (CDF) while he was the Member of Parliament for West Mugirango Constituency and as such he did not, under the principles of Leadership & Integrity under **Article 73** of the **Constitution** and **Section 12 & 52** of the **Leadership and Integrity Act**, qualify to hold public office. Counsel submitted that the pilferage of CDF funds was taken cognizance of by the High Court in Nairobi Miscellaneous Application No. 264 of 2010. Counsel submitted that whereas the 2nd Respondent's candidature had been rejected nevertheless the 1st Respondent could re-nominate him after lapse of six months and the 1st Respondent's leaving the position vacant indicated his intention to re-nominate him and hence the amended petition had not been rendered otiose. He contended that the 2nd Respondent's lack of integrity had been confirmed by the rejection of his candidature by the County Assembly. Counsel contended that the petitioner seeks relief under Article 23 (3) (b) of the Constitution. He cited the case of **Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020] eKLR** to support the Petitioner's prayer for a permanent injunction restraining the 1st Respondent from re-nominating the 2nd Respondent for vetting and approval as a Deputy Governor of Nyamira County after lapse of six (6) months or in the future. Counsel also prayed that the costs of the petition be awarded to the Petitioner.

For the 1st Respondent, Learned Counsel Willis Nyagarama submitted that the office of the Deputy Governor is a creation of the Constitution of Kenya 2010 and the mode of appointment of Deputy Governor when the previous holder assumes office of the County Governor under Article 182 (1) of the Constitution is provided for under **Section 32D** of the **County Government Amendment Act 2020** which requires the Governor to appoint the Deputy Governor with the approval of the County Assembly. Counsel submitted that the court cannot interfere with the mandate bestowed upon the County Assembly. Counsel further submitted that by the time of filing this petition the name of the 2nd Respondent had already been submitted to the County Assembly for vetting and approval and had been rejected and the petition had therefore been overtaken by events. Counsel also contended that the petition has no merit and that the 2nd Respondent in his replying affidavit rebutted all the allegations of his unsuitability raised in the petition. On costs, Counsel for the 1st Respondent submitted that the Petitioner filed a frivolous suit against the 1st Respondent and he should bear the costs. Counsel urged this court to dismiss the petition with costs to the Respondents.

As for the 2nd Respondent it was submitted that the two cases cited in the replying affidavit of the 1st Respondent had vindicated him of the allegations made against him and had resolved the issue of his suitability to hold office and that issue is *resjudicata* and cannot be revived in this petition. Mr. Onsongo, Learned Counsel for the 2nd Respondent also reiterated the 1st Respondent's submission that the petition had been overtaken by events as it was seeking to stop or halt an event that had already taken place and the horse had so to speak already bolted. Mr. Onsongo submitted that this court ought not to act in vain by issuing an order of injunction after the event. Counsel relied on the case of **Jaribu Holdings Ltd v Kenya Commercial Bank Ltd [2008] eKLR** to support the aforesaid submission. It was his prayer that the petition be dismissed with costs.

In further submissions dated 27th May 2021 but filed on 9th July 2021 Mr. Makura Learned Counsel for the Petitioner alerted this court that despite having knowledge of this petition the 1st Respondent had re-nominated the 2nd Respondent and resubmitted his name to the County Assembly for approval. Counsel submitted that this conduct of the 1st Respondent rendered this petition an academic exercise.

With due respect I do not agree with Mr. Makura's submission that this petition is now an academic exercise. In my view the only prayer that was overtaken by events and hence cannot be granted by this court is prayer (d) – **A permanent injunction to stop the 1st Respondent from re-nominating the 2nd Respondent for vetting and approval as the Deputy Governor of Nyamira County.** This prayer can obviously not be granted because it has been overtaken by events the candidature of the 2nd Respondent having been resubmitted to the County Assembly, debated and approved and the 2nd Respondent having subsequently been sworn in as the Deputy Governor of Nyamira County. Be that as it may the issues of whether the nomination, vetting and approval was illegal, unlawful and thus null and void and whether declarations can issue in terms of prayers (a) and (b) are issues that are yet to be determined. The prayer for judicial review in terms of prayer (c) is still pending.

I shall start with the issue of whether the nomination of the 2nd Respondent by the 1st Respondent for vetting and approval as Deputy Governor for Nyamira County is illegal, unlawful and thus null and void. The nomination of a Deputy Governor after the holder of that office has ascended to the office of the Governor is governed by **Section 32D** of the **County Government Act** and **Section 10** of the **Public Appointments (County Assemblies Approval) Act**. The gravamen of this petition is that the 1st Respondent's nomination of the 2nd Respondent to the office of the Deputy Governor which fell vacant after he (1st Respondent) assumed the office of the Governor was illegal and unlawful because the 2nd Respondent is not suitable to hold public office thereby rendering his nomination invalid. The contention that the 2nd Respondent is not fit or suitable to hold office is predicated on the allegation that while he was the Member of Parliament for West Mugirango Constituency he embezzled a sum of Kshs. 1,050,000/- from the West Mugirango Constituency Fund (CDF). According to the Petitioner, this allegation was confirmed to be true by the decision of Musinga J, as he then was, in **HC Miscellaneous Application No. 264 of 2010**. The 2nd Respondent has on his part cited two decisions one by the Magistrates Court and the other by a five Judge bench of the High Court by which he alleges to have been absolved of the allegations. It is the 1st Respondent's contention therefore that the 2nd Respondent's suitability to hold public office is *moot* and *resjudicata* and it cannot be reopened by this petition. I have considered the rival submissions of Counsel for the parties

and the decisions cited. It is trite law that the jurisdiction of this court is broad enough to cover review of the Constitutionality or legality of appointments by other organs of government – (*See the Court of Appeal case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR*). In the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR* cited with approval by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)* it was held that: -

“If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this court is dependent on the process and constitutionality of the appointment.”

Be that as it may in the Mumo Matemu case the Court of Appeal cautioned that the courts must be careful not to take over the constitutional mandate of other organs of state and stated: -

“(54) In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya. Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases. We are persuaded by the holding of the Supreme Court of India in *Centre for PIL (supra)* where the Court, in rejecting “merit review” of appointments by the courts, stated thus:

“44. As stated above, we need to keep in mind the difference between judicial review and merit review. As stated above, in this case the judicial determination is confined to the integrity of the decision making process undertaken by the HPC in terms of the proviso to Section 4(1) of the 2003 Act. If one carefully examines the judgment of this Court in *Ashok Kumar Yadav’s case (supra)* the facts indicate that the High Court had sat in appeal over the personal integrity of the Chairman and Members of the Haryana Public Service Commission in support of the collateral attack on the selections made by the State Public Service Commission.

.....

33... Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010.” (emphasis supplied).

The court made it even more succinct at paragraph 61 where it stated: -

“(61) We further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature’s decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.”

In this case the 1st Respondent upon naming or nominating a person of his choice as candidate was required to submit that name to the County Assembly for approval. The Petitioner is not only asking this court to nullify the nomination but to also stop the vetting and approval of the candidate by the County Assembly. In my considered opinion granting those orders would be what in the **Mumo Matemu case (supra)** is described by the Court of Appeal as taking over the functions of other organs of government for which the courts have no licence. The court stated: -

“[49] We therefore agree with the High Court’s dicta in the petition the subject of this appeal that:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...”

From the foregoing it is clear that it is not the place of this court to select or nominate a candidate to fill the office of the Deputy Governor and neither is it its place to vet the candidate nominated. That power belongs to the Governor and the County Assembly respectively. This court would therefore be hesitant to grant the order stopping the nomination as that would be usurping the power vested in the 1st Respondent by law. It would also be hesitant to stop submission of the Governor’s choice to the County Assembly for vetting and approval. I do not have a licence to do so. This court would only come in to review the process of the appointment for procedural infirmities as well as for legality and I believe this is what the Petitioner intended to ask this court to do in prayer (b) of the Amended Petition.

However, and as I stated earlier, the Petitioner's objection to the 2nd Respondent's candidature is limited to the allegation that he embezzled a sum of Kshs. 1,050,000/= from the CDF account. It is instructive that contrary to the assertion by the petitioner in HC Misc. Application No. 264 of 2010, Musinga J, as he then was, did not find that the 2nd Respondent embezzled the said sum but merely made an observation that that was **"a serious allegation which ought to have elicited a specific response yet there was no denial of the same."** The allegation now made by the Petitioner was however a fact in issue in the case of **International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR**. In that case the petition in respect of the 2nd Respondent then the 5th Respondent was instituted by one Henry Nyakundi Nyang'aya (the 4th Petitioner) and it was premised inter alia on grounds that the 2nd Respondent "had engaged in corrupt activities and misuse of public office where he transferred Kshs. 1,050,000/= to his personal account from the CDF account. It was also averred that the 5th Respondent (2nd Respondent in the instant case) was by an order of the High Court compelled to refund the money. The Petitioner contended therefore that the conduct of the 2nd Respondent constituted a breach of trust and that warranted disqualification of the 5th Respondent from vying for elective or being appointed to state office. The Petitioner therefore sought: -

"(a) A declaration that the conduct of the 5th respondent of fraudulently transferring public funds amounting to Kshs. 1,050,000/- to his personal account violates the national values and principles of governance as provided for by Article 10 (2) of the Constitution.

(b) A declaration that the conduct of the 5th Respondent of fraudulently transferring public funds amounting to Kshs. 1,050,000/- to his personal account amounts to violation of Chapter Six provisions on leadership and integrity.

(c) A declaration that the 5th Respondent by virtue of his conduct in relation to the Kshs. 1,050,000/- transferred to his account from the CDF account, should be disqualified from vying for any elective posts on or before the general elections.

(d) A declaration that the 2nd Respondent should not register the 5th Respondent to participate in any elections on or before the general elections.

(e) A declaration that the 5th Respondent by virtue of his conduct in relation to the Kshs. 1,050,000/- transferred to his account from the CDF account is ineligible to hold public office.

(f) An order that the costs consequent upon the petition be borne by the 5th Respondent.

(g) All such other orders as the court shall deem just in the circumstances."

I have gone into the trouble of quoting the grounds verbatim for clarity and to demonstrate that the allegations in that petition were the same as in this petition. The petition was heard by a five Judge bench of the High Court and in regard to the case against the 5th Respondent, the 2nd Respondent in the present petition, the Court held: -

"(d) The effect of the CDF case on the integrity of the 5th Respondent.

160. The main allegation against the 5th respondent is that the action of the 5th Respondent in transferring Kshs. 1,050,000/= from the CDF to his personal account violates the national values and principles of governance as provided by Article 10 (2) of the Constitution and Chapter Six on leadership and integrity. He should therefore be disqualified from vying for any elective post on or before the general elections. The petitioner also moved the court to bar the IEBC from accepting the nomination of the 5th Respondent to participate in the elections or hold public office.

161. Two legal actions relating to this petition are instructive. The first is Republic vs CDF Board and Ethics and Anti-Corruption Commission ex-parte Thomas Mongare Moindi and 3 others High Court Judicial Review No. 264 of 2010. In this matter there was an order *inter alia* for "mandamus compelling the respondent to restore funds withdrawn from the West Mugirango Constituency Development Fund account at the instance of the patron, Hon. Joseph Ondicho Gesami, for personal use contrary to the provisions of the Constituencies Development Fund Act".

162. After hearing the application Musinga J (as he then was) made a finding that the applicants and the interested party had demonstrated that the respondent as well as the Constituency Development Fund Committee which included the 5th Respondent herein, had failed to ensure proper management of the fund in question. As a result, there had been misappropriation and pilferage of the fund. Before the conclusion of the application before Musinga J (as he then was) the 5th Respondent in this petition was arrested and charged before a Magistrate's Court at Kisumu vide Criminal Case No 354 Of 2011. However, after a full trial he was acquitted of the charge.

163. Notwithstanding the acquittal, the Constituency Development Fund Board wrote to the 5th Respondent demanding a refund of Kshs. 1,050,000/= otherwise it would involve the Ethics and Anticorruption Commission and freeze the Constituency account. The 5th Respondent resisted this move but eventually "very reluctantly" effected a transfer of the said sum to the West Mugirango Constituency Development Fund". He then instituted a suit, this being Milimani SRMCC NO. 45 of 2013, demanding a recovery thereof. That suit is still pending determination.

164. It is common ground that the nomination of the 5th Respondent to contest an elective office has been completed. Therefore, the prayer to bar the IEBC from accepting his nomination has been overtaken by events. No appeal has been registered either with the IEBC or any other adjudicating body to address the issue of his nomination.

165. The qualifications and disqualifications of election as Member of Parliament are set out in Article 99 of the Constitution. None of those provisions have been cited as against the 5th Respondent. However, there is the allegation that his conduct in the entire transaction makes him ineligible to stand for any public office. Our simple answer is that there is no case standing in the path of the 5th Respondent and above all, having been acquitted of a criminal offence relating thereto, any objection would be unsustainable. As these were the only prayers against this particular party, we find that the petition must fail. (Emphasis mine)

Nothing has been brought before this court to demonstrate that anything has changed since the case cited above was determined. Neither is there anything to show that the said decision was appealed and the five Judge bench judgement was overturned. This court being a court of competent jurisdiction has no power to sit on appeal or to review the findings of that court. In the premises I find that the ground of unsuitability of the 2nd Respondent to hold office on the ground of embezzlement of Kshs. 1,050,000/- from the CDF account cannot hold. The entire petition is found to be without merit and accordingly the declarations in the Amended Petition cannot issue the same having been the subject of another petition where they were found not to have been proved. The petition is accordingly dismissed.

So, who shall bear the costs of the petition?

Costs follow the event and are in the discretion of the court and in public spirited petitions the court will not ordinarily order a Petitioner to pay costs. However, this case is unique in that the Petitioner dragged the Respondents to court on a matter in which the 2nd Respondent had been absolved of blame by a court of law of competent jurisdiction and the decision of that court was not appealed. It is not lost to this court that even upon being served with the replying affidavit of the 2nd Respondent to which the 2nd Respondent had annexed the decision, the Petitioner did not withdraw the petition but decided to proceed with it without putting much thought into the issue of the time likely to be lost and the costs that would be incurred by the Respondents. It is for that reason that I strongly feel that the Petitioner ought to bear the costs of the petition and I do so order.

Judgement signed, dated and delivered at Nyamira Electronically via Microsoft Teams on this 23rd day of September 2021.

E. N. MAINA

JUDGE