REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 8'B' OF 2019

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 35, 38, 81, 86, 91, 99(2)(d), 101, 103(1)(g), 105(1)(b), 165(3)(b)(d)(ii) & (iii), 232, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 35, 38, 81, 86, 91, 99(2)(d), 101, 103(1)(g), 105(1)(b), 165(3)(b)(d)(ii) & (iii), 232, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF: SECTIONS 16 & 76 OF THE KENYA ELECTIONS ACT NO. 24 OF 2011.

IN THE MATTER OF: THE DEFENCE, PROMOTION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010.

BETWEEN

HON. CLEMENT KUNG'U WAIBARA.....PETITIONER

AND

HON. ANNE WANJIKU KIBEH.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

JUDGMENT

1. A Petition dated 14th February, 2019 was filed on 18th February, 2019 at Kiambu High Court. The matter came before Justice Meoli who recused herself. It was referred to the Hon. Chief Justice, and on his order, it was gazetted on 2nd July, 2019 for hearing before me at Milimani High Court Nairobi. In the Petition, the Petitioner seeks for judgment against the Respondent for:

i) A declaration that Hon. Anne Wanjiku Kibeh was not qualified for election as member of the National Assembly, Gatundu North Constituency in the 8th August, 2017 general elections pursuant to Article 99(2)(d) of the Constitution of Kenya 2010.

ii) A declaration that Hon. Anne Wanjiku Kibeh's election as member of the National Assembly, Gatundu North Constituency in the 8th August, 2017 general elections was invalid *ab initio*.

iii) An order declaring as vacant the seat of the Member of the National Assembly pursuant to Article 103(1)(g) of the Constitution of Kenya, 2010.

iv) An order directing the Speaker of the National Assembly to issue to the Independent Electoral and Boundaries Commission, a notice in writing of the vacancy of the seat of Member of the National Assembly, Gatundu North Constituency, in accordance with Article 101(4)(a) of the Constitution of Kenya, 2010 and the applicable law.

v) An order directing the Independent Electoral and Boundaries Commission to hold a by-election for the position of Member of the National Assembly, Gatundu North Constituency in accordance with Article 101(4)(b) of the Constitution of Kenya, 2010 and the applicable law.

vi) Any other orders and or reliefs as the court may deem fit.

vii) Costs of the Petition.

2. The legal basis upon which the Petition has been brought is that under **Article 103(1)(g)** and **Article 105(1)(b)** of the **Constitution** as read with **section 76(1)(c)** of the **Elections Act**, a person elected to the National Assembly and who was not qualified to be elected as such is liable to removal proceedings from the said position. Further that the High Court enjoys an unfettered parallel and coordinate jurisdiction under **Article 105(1)(b)** of the **Constitution** to hear and determine a Petition seeking to declare vacant a seat of a sitting Member of Parliament on this ground.

Introduction

3. The 1st Respondent Hon. Annie Wanjiku Kibeh is the Member of the National Assembly for Gatundu North Constituency having been declared winner following the 8th August, 2017 General Election.

4. The 2nd Respondent hereinafter referred to as IEBC is an independent commission established under **Article 88** of the **Constitution of Kenya** with the legal responsibility to conduct or supervise referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by the **Elections Act No. 24 of 2011**.

5. Prior to her election as Member of the National Assembly, the 1st Respondent served as a Member of County Assembly of Kiambu County. Vide **Gazette Notice No. 9794 of 17th July, 2013**, the 2nd Respondent (hereinafter referred to as IEBC) gazetted the 1st Respondent as one of the Members of the County Assembly of Kiambu validly nominated by the National Alliance Party (TNA), as it then was, pursuant to **Article 177(1)(b)** as read with **Article 90** of the **Constitution**. The 1st Respondent served as Member of the County Assembly – Kiambu County for a period of five years from 17th July, 2013. A copy of the Gazette Notice No. 9794 dated 17th July, 2013 is on record.

6. On 3rd March, 2017 the 1st Respondent tendered her application to the Jubilee Party for nomination to contest the 2017 General elections as the Party's candidate for election as Member of the National Assembly, Gatundu North Constituency. Later on 27th June, 2017 the 1st Respondent was vide Gazette Notice No. 6253 of 2017 gazetted by the IEBC as the duly nominated candidate to contest in the 2017 General elections as the Jubilee Party's candidate for election as the Member of National Assembly Gatundu North Constituency.

Factual and Legal Grounds of the Petition

7. Article 97(1)(a) as read with **Article 101** of the Constitution provides that the National Assembly consists of 290 members, each elected by the registered voters of single member constituencies at a general election to be held on the second Tuesday in August in every Fifth year. That according to the Court of Appeal's interpretation of the said provision in the case of **Attorney General & another vs. Andrew Kiplimo Sang Muge & 2 others [2017] eKLR**, the prescribed date for the 2017 general elections was constitutionally set for 8th August, 2017.

8. An election is not lodged in a single event but is a process set in a plurality of stages. That general elections in Kenya comprise all the prescribed processes and stages leading up to the elections including but not limited to the nomination processes of candidates by political parties and the gazettement by the IEBC of validly nominated candidates for election to various elective positions.

9. The Petitioner avers that whereas any person desirous of vying for election as a member of parliament has the constitutional right to do so, the right is subject to clear, elaborate and mandatory qualification criteria set out in the Constitution and in particular **Article 99** thereof. That whereas any person who meets the qualification criteria set out under **Article 99(1)** of the **Constitution** can present themselves for election as a Member of the National Assembly, **Article 99(2)(d)** overrides the said right and renders such person disqualified "*if he/she is a member of a county assembly.*"

10. Within the Petition is an application filed by way of a Notice of motion dated 14th March, 2019 under certificate of urgency in which the Petitioner sought that the Petition be heard *ex-parte* in Nairobi as an undefended cause and be referred to His Lordship the Chief Justice for appointment of an uneven number of Judges not being less than three to hear and determine it. The matter came up for directions on 29th July, 2019 during which time the court directed that the application dated 14th March, 2019 having been overtaken by events, only prayer C which deals with the question of whether the Petition should be heard *ex-parte* as an undefended cause, would be addressed within the Petition.

Petitioner's Case

11. The gist of the Petitioner's case is that as at the date of the 1st Respondent's application to Jubilee Party for nomination as its candidate and the date of her gazettement as the Jubilee Party's validly nominated candidate for election as member of National Assembly, Gatundu North Constituency through to the General Election on 8th August, 2017, the 1st Respondent was not qualified for election to the position since her term as Member of County Assembly of Kiambu County was yet to expire. That at all the material times, the 1st Respondent was holding office as a Member of County Assembly Kiambu County and enjoying all the benefits and responsibilities attendant thereto.

12. The Petitioner drew reference to **Articles 99(2)(d)**, **103(1)(g)**, and **177(1)(a)** and **177(4)** of the **Constitution** which require sitting Members of County Assemblies wishing to vie for election as Members of Parliament to resign from office on or before the date of their application for nomination by political parties, or upon their nomination by their respective political parties as candidates for election to Parliament or prior to participating in any prescribed process, occasion, or activity comprising the general election.

13. Accordingly, though the actual election was set for 8th August, 2017 all the events that are constitutionally and legally mandated to

actualize the said date comprise an 'election' and are material for all intents and purposes in determining qualifications of candidates for various elective posts including Member of National Assembly. That bearing in mind that as at 3rd March, 2017 and 27th June, 2017 the 1st Respondent was still in office as a Member of County Assembly she was, by dint of **Article 99(2)(d)** of the **Constitution**, disqualified from election as a Member of the National Assembly.

14. The Petitioner accused the 1st Respondent and IEBC of connivance fashioned to violate express and mandatory provisions of the Constitution that prohibit election to the National Assembly of any person who holds the office of Member of County Assembly. That IEBC was negligent in discharging its mandate to ensure that the 1st Respondent was duly qualified under the Constitution and the applicable law for election as Member of the National Assembly and thereby perpetuated an illegality that persists to date in breach of the Constitution and at the expense of the constituents of Gatundu North Constituency.

15. The Petitioner asserted that as the institution with the legal responsibility to conduct or supervise referenda and elections to any elective body or office established by the Constitution, IEBC knowingly and negligently failed to discharge its Constitutional mandate in verifying the qualifications of the 1st Respondent thereby causing a grave violation of the Constitution. That accordingly, the election of the 1st Respondent was incurably invalid *ab initio* and it is imperative, fair and in the interests of justice and the rule of law that the seat of the Member of the National Assembly, Gatundu North Constituency be declared vacant.

16. In his affidavit sworn on 15th February, 2019 in support of the Petition, the Petitioner deposed that in continuing to serve as Member of the National Assembly Gatundu North Constituency, the 1st Respondent is perpetuating an illegality. He pointed out that he attempted to raise the issue during the hearing of the Election Petition he had filed against the 1st Respondent in the High Court at Kiambu in **Election Petition No. 1 of 2017 Clement Kung'u Waibara vs. Anne Kibeh & 2 others [2018] eKLR**. He contended that the issue was however not determined on its merits as the trial court declined, *per incuriam*, to determine the issue for want of jurisdiction. That the issue therefore remains a live and justiciable one for hearing and determination by this court. A copy of the ruling delivered on 30th October, 2017 and the judgment delivered on 1st March, 2018 by Justice Joel Ngugi in the High Court of Kenya at Kiambu are on the record.

1st Respondent's Case

17. On 2nd August, 2019 M/s Nchogu, Omwanza & Nyasimi Advocates filed five (5) grounds of opposition to the Petition on behalf of the 1st Respondent. The gist of the grounds are that the issues raised by the Petitioner are not justiciable since all issues pertaining to the 1st Respondent's election are *res judicata*. Further that the construction suggested by the Petitioner is *contra* **Article 259** of the **Constitution** and all known tenets of construing Constitutions.

18. The 1st Respondent asked the court to allow her to defend the suit in the interest of justice and fairness, and to dismiss the Petition with costs stating that the Petition is frivolous, scandalous and an abuse of court process.

2nd Respondent's Case

19. On 10th April, 2019, IEBC the 2nd Respondent herein, through M/s Muchemi & Co. Advocates filed four (4) grounds in opposition to the Petition dated 18th February, 2019.

20. The gist of the case of IEBC is that the entire Petition is *res judicata* as this honorable court has already pronounced itself authoritatively in **Election Petition No. 1 of 2017 (*supra*)** on the question sought by the present Petition. That the Petition is in bad faith, frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.

21. According to IEBC, all issues regarding the election of Member of Parliament of Gatundu North Constituency in the 2017 General Elections have been conclusively determined by the High Court in **Election Petition No. 1 of 2017 (*supra*)**, by the Court of Appeal in **Election Petition Appeal No. 20 of 2018 Annie Wanjiku Kibeh vs. Clement Kungu Waibara & another [2018] eKLR** and by the Supreme Court in **Petition No. 24 of 2018 Clement Kungu Waibara vs. Annie Wanjiku Kibeh & another [2019] eKLR**. Further that the High Court in **Constitutional Petition No. 321 & 331 of 2017 (Consolidated), Stephen Wachira Karani & another vs. Attorney General & 4 others [2017] eKLR** has successfully interpreted **Article 99** of the **Constitution** with regard to the rights of a Member of County Assembly to vie for elections as Members of Parliament.

22. Counsels filed written submissions which they highlighted at the hearing of this Petition on 8th August, 2019. All three Counsels reiterated the grounds put forward by their clients.

Petitioner's Submissions

23. Learned counsel Mr. Awele filed written submissions dated 2nd August, 2019 in which he reiterated the contents of the Petition and submitted that this court is clothed with jurisdiction to hear and determine the present petition. Counsel contended that this is a Petition that seeks to declare the seat of a Member of Parliament vacant under **Article 105(1)(b)** of the **Constitution** and is distinct from an Election Petition seeking to challenge the validity of an election under **Article 105(1)(a)** of the **Constitution**. That the circumstances were distinguished by the framers of the Constitution. Counsel asserted that the jurisdiction of this court in the instant case derives from **section 76(1)(c)** of the **Elections Act** which provides that such a petition may be presented at any time.

24. It was Mr. Awele's submission that in a legion of authorities, the Supreme Court, the Court of Appeal and the High Court have settled that pre-election issues falling within the purview of the IEBC can be raised at any time including after elections provided that it has not been determined. To buttress his point, Counsel referred to the cases of **Kituo cha Sheria vs. John Ndirangu Kariuki Election Petition No. 8 of**

2013 [2013] eLR; Mohammed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others Election Petition Appeal No. 2 of 2018 [2018] eKLR and **Silverse Lisamula Anami vs. Independent Electoral & Boundaries Commission & 2 others Petition No. 30 of 2018 [2019] eKLR**.

25. On whether the Petition should proceed as an undefended cause, Mr. Awele submitted that **Rule 15(2) Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules, 2013** requires that responses to any Constitutional petition be filed within seven (7) days by way of a memorandum of appearance and either a replying affidavit or statement setting out grounds upon which the Petition is opposed.

26. Mr. Awele asserted that the Respondents were properly served but that the 1st Respondent filed a response over five (5) months after service while the 2nd Respondent filed their response one (1) month after service. Counsel asserted that to date, no explanation has been proffered by the Respondents for the inordinate delay neither was leave for extension of time sought or granted. Counsel contended that such conduct should not go unpunished as it amounts to contempt of the procedures of this court. That this is a proper case to expunge the responses from the record and let the application proceed as an undefended cause. To buttress his argument, Counsel referred to the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others Application No. 16 of 2014 [2014] eKLR**.

27. Mr. Awele pointed out that while it may be inconvenient for a Member of County of Assembly to resign due to political aspirations, the Constitution does not concern itself with personal inconvenience. Counsel urged the court to allow the Petition, expunge the Responses filed hereto and award the costs to the Petitioner.

28. According to Mr. Awele, the 1st Respondent was disqualified from vying for the position of Member of Parliament during the 8th August, 2017 General Elections by virtue of **Article 99(2)(d)** of the **Constitution**. Counsel asserted that the Petition seeks the remedy provided under **Article 103(1)(g)** of the **Constitution** that the office of the Member of Parliament Gatundu North Constituency held by the 1st Respondent has become vacant. Counsel also filed two (2) volumes of authorities in support of their case.

29. Mr. Awele argued that the Constitution provides in no uncertain terms that a person is disqualified from being elected as Member of Parliament if they are state officers. That a sitting Member of County Assembly is a state officer. Counsel contended that the second disqualification is if the person is a Member of County Assembly as provided under **Article 99(2)(d)** of the **Constitution**.

30. It was Mr. Awele's assertion that **section 22** of the **Election Act** demands that any person who wishes to vie for any elective position in this country must comply with the provisions of both the **Constitution** and the **Election Act**. That it is not sufficient to comply only with the **Election Act**. Counsel urged that in the instant case, the 1st Respondent did not meet the stipulated conditions.

31. Mr. Awele invited the court to consider the cases of **Kennedy Moki vs. Rachel Kaki Nyamai & 2 others [2018] eKLR; Advisory Opinion No. 2 of 2012 In the matter of the Principle of Gender Representation in the National Assembly and the Senate** and **John Harun Mwau & 2 others vs. IEBC & 2 others, Consolidated Petition No. 2 & 4 of 2017 [2017] eKLR**. Counsel asserted that this court is bound by the positions of the Court of Appeal and the Supreme Court on what constitutes an election and that election includes nomination which is an integral part of the process.

32. Mr. Awele contended that the Constitution must be interpreted harmoniously and purposively to give meaning to the intention of the framers. Counsel asserted that the court will have to look at all the provisions that have a bearing on **Article 99(2)** of the **Constitution** and harmoniously interpret them. That **section 43(5)** and **(6)** of the **Election Act** cannot purport to exclude Members of County Assembly from a constitutional provision.

33. Mr. Awele drew attention to the decision of Mativo J in **Stephen Wachira Karani and another vs. Attorney General & 4 Others, Constitutional Petition No. 321 and 331 (consolidated) [2017] eKLR** relied on by the Respondents and submitted that the decision is bad in law. Counsel asserted that the learned Judge came up with a new definition of what an election is in disregard of all authorities at his disposal that have conclusively defined what an election is and that nomination is an integral part of election. The learned Judge stated that nomination is not an election within the meaning of **Article 99** of the **Constitution**. Counsel urged that the decision creates a dangerous precedent and was made *per incuriam* as it was not founded on the law having disregarded relevant and binding provisions of the Constitution together with binding precedent. That in any event, the decision is not binding on this court.

34. Counsel further asserted that an interpretation that elevates **section 43(5)** and **(6)** of the **Elections Act** above the provisions of **Article 99(2)(d)** of the **Constitution** cannot stand. That **section 43** of the **Election Act** is unconstitutional as it purports to exempt Members of County Assembly from express provisions of the Constitution.

35. It was Mr. Awele's submission that the Constitution does not deter a Member of County Assembly from vying for any other elective post but that one should first resign as provided by law. Counsel asserted that there is no right to public office as was held by the Court of Appeal in **Attorney General & another vs. Andrew Kiplimo Sang Muge & 2 others Civil Appeal No. 147 of 2017 [2017] eKLR**.

36. Mr. Awele asked the court to award costs to the Petitioner since the Respondents had failed to explain their delay in filing a response to the Petition. Counsel asserted that the Respondents have come to the court with unclean hands and are therefore not entitled to any discretionary orders.

1st Respondent's Case

37. Learned Counsel Mr. Onderi filed written submissions dated 5th August, 2019 and a list and bundle of authorities dated 5th August, 2019 on behalf of the 1st Respondent and in opposition to the Petition.

38. On the nature of the proceedings before the court, Mr. Onderi pointed out that the Petitioner describes his petition as an "election petition or electoral dispute" and invokes **sections 16** and **76 Elections Act** and the **Election (Parliamentary and County Elections) Petitions Rules, 2017**. Counsel asserted that under **Article 87** of the **Constitution**, petitions challenging the election of elected state officers other than the President are filed within 28 days of the declaration of the results by the IEBC. That as such, the instant Petition before the court is not an election petition within the meaning of **Article 87**.

39. Mr. Onderi stated that the Petitioner filed **Election Petition No. 1 of 2017** at Kiambu which was determined by Justice Joel Ngugi by a decision dated 1st March, 2018. The learned Judge allowed the Petition and ordered for a fresh election to be conducted. The 1st Respondent lodged an appeal in **Nairobi Election Petition Appeal No. 20 of 2018 (supra)** in which the Court of Appeal (Nambuye, Gatembu & Murgor, JJ.A) allowed the appeal by a decision dated 31st July, 2018, thus returning the 1st Respondent to office. The Petitioner then filed **Supreme Court Petition No. 24 of 2018 (supra)** against the decision of the Court of Appeal. His appeal was dismissed by the Supreme Court's decision dated 18th January, 2019.

40. On the Constitutionality of **section 43(6)** of the **Elections Act**, Mr. Onderi submitted that the Petitioner was submitting on the constitutionality of the section when there was no prayer challenging that provision in the Petition. Counsel contended that since its enactment, the **Elections Act 2011** has been subjected to no less than ten (10) reviews and amendments during which time **section 43(5)** and **(6)** have remained the same save for minor amendments such as the removal of "prime minister" and the addition of **section 43(5A)** to bring the section in line with the decision of Lenaola J (as he then was) in the case of **Union of Civil Servants & 2 others vs. Independent Electoral and Boundaries Commission (IEBC) & another [2015] eKLR**. Counsel urged that the challenge of the constitutionality of the provision is an afterthought and is untenable as it comes by way of submission and not pleadings.

41. It was Mr. Onderi's submission that the definition of an election as "*a process, not an isolated event*" does not obtain from the Constitution but rather decisional jurisprudence. That the court should therefore consider the context in which the definition was made. While Mr. Onderi admitted that an election is a process, he opposed the Petitioner's argument that for purposes of **Article 99** of the **Constitution**, nomination and all other pre-polling day activities should be read into the election or polling day.

42. Counsel urged that pre-polling day nomination disputes fall within the exclusive ambits of IEBC pursuant to **Article 88** of the **Constitution** and the invocation of the jurisdiction of the High Court, in the first instance, over such a matter is thus untenable. To support his argument, Counsel cited the decision in **Sammy Ndung'u Waity vs. Independent Electoral & Boundaries Commission & 3 others [2019] eKLR** in which the Supreme Court formulated the guiding principles on electoral disputes.

43. Mr. Onderi submitted that the 1st Respondent's nomination and election was not invalidated by her failure to resign as Member of County Assembly. Counsel asserted that **section 43(6)** of the **Elections Act** was enacted to exclude the six (6) elective posts from the blanket provision of **section 43(5)** which requires public officers to vacate their offices to avoid a scenario where there would be by-elections just before the general elections for purposes of political aspirations. This he said was owing to the fact that if and when a Member of County Assembly resigns, the Clerk of the Assembly is obligated to transmit the resignation to IEBC who shall be required to conduct a by-election prior to the general election.

44. Mr. Onderi termed the interpretation suggested by the Petitioner as absurd, illogical and contrary to the provisions of **Article 259** of the **Constitution**, stating that it is neither harmonious nor holistic. That a harmonious interpretation would envisage a situation where the functions of a County Assembly are likely to be paralyzed by failure to meet the minimum quorum owing to resignations by Members of the County Assembly with political aspirations.

45. It was Mr. Onderi's submission that the facts of this case are similar to those in the case of **Stephen Wachira Karani & another vs. Attorney General & 2 others (supra)** in which Mativo J applied a purposive and harmonious interpretation in holding that the Constitution under **Article 99** intended to prevent the holding of two (2) elective offices concurrently. The learned Judge stated that the law does not prohibit a Member of County Assembly from being nominated to vie for a Parliamentary seat by a political party. Further that nomination to contest as a member of parliament is not an election within the meaning of **Article 99** of the **Constitution**.

46. Mr. Onderi drew attention to the case of **John Munyes Kiyonga vs. Josephat Koli Nanok Election Petition No. 1 of 2017 [2017] eKLR** in which Riechi J while deliberating on **section 43(5)** of the **Elections Act** drew a distinction between the two classes of state officers: a public officer in paid service of the government and an elected representative as Member of Parliament or County Assemblies whose terms of service are pegged on the Constitution and pegged on elections. In his decision, the learned Judge observed thus:

> **"The elected state officers man both the National in the case of the President and Deputy President and the Members of Parliament and County for Governor, Deputy Governor and Members of the County Assembly. These officers are concerned in running both the National and County Government even during the period of elections. Any requirement that they cease being so will lead to the collapse of the two levels of Government and total anarchy. Section 43(5) and (6) was designed to prevent that anarchy and maintain constitutional order. These provisions in my view cannot be unconstitutional. I, therefore do find that the provisions of section 43 of the Elections Act amplifies the constitutional provisions of Article 190 and is not inconsistent with it but a derivative of the same"**

47. On the Petitioner's submission that the court should declare **section 43(6)** of the **Elections Act** unconstitutional, Mr. Onderi asserted that this Petition does not involve public interest, given that it arose from election petitions of the 2017 General Elections and is therefore a continuation of the Election Petition commenced two (2) years ago. Mr. Onderi urged that the Petitioner has exhausted the appellate chain and now seeks this court's intervention on the basis that the issue of disqualification which was alive before the Election Courts was not determined on merit. Counsel urged the court to dismiss the Petition on the basis of the grounds of opposition and the arguments raised in the 1st Respondent's written submissions.

48. Mr. Onderi urged the Court to excuse the 1st Respondent's late filing of her response in the public interest and in the interest of justice

and fairness as the Petition seeks to declare her seat vacant. Counsel asserted that no prejudice will be suffered by the Petitioner if the 1st Respondent is heard and her grounds of opposition and written submissions considered.

2nd Respondent's Case (IEBC)

49. Learned Counsel Mr. Muchemi filed written submissions dated 6th August, 2019 on behalf of IEBC, the 2nd Respondent in which he relies on their grounds of opposition dated 9th April, 2019 and bundle of authorities dated 6th August, 2019.

50. Mr. Muchemi submitted that **Article 87** of the **Constitution** requires that this Petition should have been brought 28 days from the date of pronouncement of the results. Mr. Muchemi pointed out that the results of the elections for the post of Member of Parliament Gatundu North Constituency were declared on 10th August, 2017 and gazetted on 22nd August, 2017. That on this basis alone, the Petition should be dismissed. Counsel contended that the timeframe for determination of election petitions is mandatory, inelastic and cast in stone. He referred to the **Presidential Petition**, **Raila Odinga & 5 others vs. Independent Electoral and Boundaries Commission & 3 others [2013] eKLR** in which the Supreme Court held *inter alia* that if decreed timelines amount to a procedural technicality, it is a constitutionally mandated technicality.

51. Counsel urged that there is no ground for Members of County Assembly to resign when they wish to vie for elective posts as held by Mativo J in the **Stephen Wachira case (*supra*).**

52. Further that the Petition is vexatious and a gross abuse of the court process as the issues are *res judicata*. Counsel asked the court to award the costs to the 1st Respondent stating that the Petitioner is abusing the court process as this is the fourth forum in which this issue is being litigated.

Analysis and Determination

53. I note that in the present case, the Respondents filed their grounds of opposition outside the stipulated seven (7) day period, and have therefore occasioned delay, but in the interest of justice, I allow their responses and written submissions for justice to be done and a fair trial to be had. The Petitioner has not demonstrated that he is likely to suffer any prejudice if the Petition proceeds as a defended cause.

54. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others Civil Appeal No. (Application) 228 of 2013 (Nairobi),** the learned judges at appeal stated that;

> **"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."**

55. In the instant case I find that striking out of the responses filed by the Respondents hereto is not the feasible and just thing to do. The court must always weigh the prejudice that is likely to be suffered if pleadings are allowed or disregarded. Based on the nature of the arguments raised hereto, I am inclined to find that the injustice of holding that the Respondents are undeserving of the right of reply in these proceedings is graver than the justice thereof.

56. In **Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 Others Civil Appeal No. 18 of 2013 [2013] eKLR** the Court of Appeal (Visram, Koome & Odek, JJ.A.) stated that:

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

57. While this court does not condone the delay occasioned by the Respondents, it is conscious of its duty to do whatever is necessary to promote the interest of justice. This court exists to serve substantive justice for all parties to a dispute before it. The broad equity approach to this matter is that unless there is fraud or intention to over reach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline. (See - **Phillip Chemwolo & Another vs Augustine Kubede (1982-88) KAR 103 at 1040**).

58. From the pleadings filed hereto and the arguments raised by the parties in support of and in opposition to the Petition, I find that the central issue for determination is whether this court is barred from hearing and determining the instant Petition under the doctrine of *res judicata*.

Res Judicata

59. According to the **Black's Law Dictionary 10th Edition**, *res judicata* is latin for 'a thing adjudicated'. It is defined as an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or

series of transactions and that could have been – but was not – raised in the first suit. It has three essential elements: (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. The essence of *res judicata* is to bring an end to litigation and that a party should not be vexed twice over the same cause.

60. The doctrine of *res judicata* is set out under **section 7** of the **Civil Procedure Act** as follows:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"**

I shall therefore consider the arguments advanced by both the Petitioner and the Respondents to establish whether the conditions set out in **section 7** obtain in the Petition before me.

61. For the purpose of **section 7** the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. The matter referred to must have been alleged by one party and either denied or admitted, expressly or impliedly, by the other in the former suit. **Section 7** also provides that any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of the section, be deemed to have been refused. Lastly, under the said section, where persons litigate bona fide in respect of a public right, or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

62. In sum, the test in determining whether a matter is *res judicata* as provided under **section 7** is as set out here under:

i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;

ii) The former suit must have been between the same parties or privies claiming under them litigating under the same title.

iii) The court which decided the former suit must have been competent to try the subsequent suit;

iv) The matter in issue must have been heard and finally decided in the former suit.

63. Akiwumi, Tunoi and Shah JJ.A. in the case of **Uhuru Highway Development vs Central Bank [1996) LLR CAK 2126** summarized the test in *res judicata* as follows:

(i) There must be a previous suit in which the matter was in issue;

(ii) The parties must be the same or litigating under the same title;

(iii) There must be a competent court which heard the matter in issue;

(iv) The issue must have been raise once again in a fresh suit;

64. From the record, it is not in dispute that the parties in **Kiambu Election Petition No. 1 of 2017** which was argued all the way to the Supreme Court and the current petition are the same. It is also not in dispute that the the High Court at Kiambu which was the Election Court in the former suit, was competent to try the subsequent suit. What is disputed is whether the issue herein, being the qualification of the 1st Respondent was examined and determined in the earlier Petition.

65. Mr. Awele submitted that whereas the issues of the 1st Respondent's eligibility were raised in **Election Petition No. 1 of 2017**, these issues were never determined by the court. Counsel contended that in his judgment, Justice Joel Ngugi declined to consider or determine this issue for want of jurisdiction. He admitted that an appeal was lodged in the Court of Appeal, but asserted that the appeal was on the decision of Ngugi J on the Notice of Motion that sought leave to adduce additional evidence and not on the issue of the 1st Respondent's eligibility to contest for the seat of Member of Parliament.

66. Mr. Awele asserted that in the instant case, the test of *res judicata* has not been met since the issue of the 1st Respondent's eligibility was not determined. That neither the High Court nor the Court of Appeal determined the issues arising in the instant Petition on their merits. Counsel urged that **section 7** of the **Civil Procedure Act Cap 21 Laws of Kenya** which is the foundation of *res judicata* in our laws renders an issue *res judicata* only where the same has been pleaded, heard and finally determined on merits between the same parties.

67. Mr. Awele further contended that this being a Constitutional Petition, the rules of *res judicata* should only be invoked in limited and clear circumstances. Counsel referred to the case of **Okiya Omtatah Okoiti & another vs. Attorney General & 6 others Petition 593 of 2013 [2014] eKLR** in which Lenaola J (as he then was) while deliberating on the question of *res judicata* at Paragraph 64 of the judgment opined thus:

> **"Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so, because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional**

court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."

68. A wholesome reading of the **Okiya Omtatah Case** reveals that the learned Judge made the sentiments while deliberating on whether the parties in the former suit were the same parties, or parties under whom they or any of them claim, litigating under the same title. The Interested Parties therein were the Ex-parte Applicants in the former case even though the Respondents were similar. It was therefore held that the parties thereto were not similar to those in the former suit since the Petitioners were different. This is however not an issue to be determined in the instant case since it is not in doubt that the parties herein are the same as the parties in the former suit.

69. On his part, Mr. Muchemi submitted that the Petition relates to the eligibility of the 1st Respondent to contest as a Member of the National Assembly, which issue has already been dealt with by courts of competent jurisdiction, from the Election Court all the way to the Supreme Court. Counsel pointed out that the reliefs sought in the Petition dated 14th February, 2019 are similar to those that were before the High Court at Kiambu in **Election Petition No. 1 of 2017 (*supra*)** as indicated in the judgment delivered at Kiambu on 1st March, 2018 and in particular paragraphs 78 to 83 in which Ngugi J dealt with the issue of the 1st Respondent's failure to resign as Member of County Assembly.

70. Further that on appeal, the Court of Appeal considered the issue of eligibility of the 1st Respondent to contest and found that the learned Judge had acted properly in declining to grant the prayers sought. The decision of the Court of Appeal was later upheld by the Supreme Court. That on this basis, the Petition is *res judicata*. Counsel urged the court to dismiss the Petition stating that it is an attempt by the Petitioner to relitigate an issue that has been litigated all the way to the Supreme Court.

71. It was Mr. Muchemi's submission that the law is clear that the Court must be vigilant to guard litigants from evading the doctrine of *res judicata* by parties alleging to be introducing new causes of action so as to seek the same remedy before the court. Counsel asserted that the *res judicata* doctrine is based on two principles: that there must be an end to litigation and that a party should not be vexed twice over the same cause. Counsel urged the court to uphold the cardinal principle of law that litigation must come to an end and strike out this petition for being *res judicata*.

72. In determining whether this Petition is *res judicata*, it is important to interrogate whether the subject matter of the instant Petition was in issue in **Petition No. 1 of 2017**. This is bearing in mind that the parties hereto were also the parties in **Petition No. 1 of 2017**.

73. The judgment dated 1st March, 2018 demonstrates that the question of the eligibility of the 1st Respondent was deliberated upon in **Election Petition No. 1 of 2017**. At paragraph 79 -83 of the judgment, Ngugi J analyzed this issue at length and opined thus:

"*79. The twenty-ninth claim by the Petitioner was largely a legal one. It was the allegation that the 1st Respondent violated the law, the Constitution, regulations and good practice by continuing to draw salaries and privilege as nominated Member of the County Assembly of Kiambu until 8th August, 2017. The Petitioner insisted that the 1st Petitioner had failed to produce any evidence that she resigned; and that answers to questions put to her in cross-examination tended to show, through prevarication, that she, in fact, continued to draw a salary as MCA.*

80. This was an issue before me at the interlocutory stage. The Petitioner had requested the Court to order the County Secretary to provide payroll information with the aim of establishing that the 1st Respondent has not resigned her position as Nominated MCA prior to the elections date. In declining the request I said this:

The Respondents have also urged me to disallow the prayer for the 1st Respondent's employment and salary information based on the fact that the claim the information seeks to establish is time-barred and in the wrong forum anyway. The argument is that any disputes related to nominations ought to have been filed at the 2nd Respondent's Dispute Resolution Tribunal established under Article 88(4)(e) of the Constitution.

I find this argument to be persuasive: it is too late for the Petitioner to raise this argument now – long after nominations and elections were held. The Court would, as a prudential matter, refuse to take jurisdiction to deal with this question at this time. In any event, I note that any information supplied by the County Secretary on the employment and salary of the 1st Respondent would not support any specific ground for annulment of the Petition. As such, any production and admission of evidence in this regard would impermissibly expand the Petition beyond the constitutional timelines.

81. My position has not changed. Where the Constitution or a statute creates an alternative forum for resolving disputes, a party is bound to use it before coming to court. Such a party must demonstrate to the Court that he has exhausted the other forum before the Court agrees to seize jurisdiction. This is a doctrine of vintage judicial ancestry in Kenya (see Speaker of National Assembly vs. Karume [1992] KLR 21) from which I do not intend to depart. In the Karume Case, the Court held thus:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

82. Many cases decided in the post-2010 period have found this reasoning to be sound even under the 2010 Constitutional dispensation. For example, a three-judge bench of the High Court remarked in the Matter of the Mui Coal Basin Local Community [2015] eKLR that the rationale is thus:

The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J. B. Ojwang' has felicitously called an "Ascendant Judiciary". The Constitution does not create an Imperial Judiciary zealously fueled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system.

83. For the reason that the Petitioner did not fulfill his obligations under the doctrine of exhaustion to utilize the mechanisms accorded to him by the Constitution to raise this issue and because the Petitioner did not demonstrate that the case fell within the narrow class of cases where an exception to the exhaustion doctrine applies, this claim also fails."

74. From the above, it is not in doubt that the question of the 1st Respondent's eligibility properly belonged to the subject of litigation in Election Petition No. 1 of 2017. Further that the Election Court was required to adjudicate on the issue which it did at the interlocutory stage and reiterated in paragraphs 79 to 83 of the judgment of 1st March, 2018.

75. Richard Kuloba in his book, ***Judicial Hints on Civil Procedure, 2nd Edition***, states that:

"The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for res judicata to apply"

76. In the case of **Mburu Kinyua vs Gachini Tuti [1978] KLR 69-82 pg 71-73** the Court of Appeal (Madan, Wambuzi & Law, JJ.A.) rendered itself thus on the question of *res judicata:*

"… where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, *the court requires the parties to that litigation to bring forward their whole case*, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, *only because they have, from negligence, in advertence or even accident, omitted part of their case.*

The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

77. Wigram V.C in **Henderson v Henderson (1843) 67 ER 313** summarized *res judicata as follows:*

"…where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the *same parties* to open the *same subject* of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies. Except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

78. The principle of *res judicata*, or claims preclusion, prevents the re-litigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit. See **Barr v Resolution trust Corp. 837 S.W. 2d 627 (1992)**.

79. From the foregoing jurisprudence, the suit is *res judicata* if it is brought to court to remedy failure in a first suit, which was dismissed due to an inadvertent omission of part of that case. A litigant cannot file another suit to remedy failure of a first suit which was dismissed for lack of merit.

80. It is therefore inconsequential that the Petitioner has framed his grounds for determination differently. The reliefs sought in the current petition and those sought in **Election Petition No. 1 of 2017** are identical and with regard to the same issue as stated above. The matter directly and substantially in issue in the current suit was directly and substantially in issue in **Election Petition No. 1 of 2017**, in which it was dismissed by the court. This issue having been dealt with by the Election Court at Kiambu, this court is *functus officio* as it cannot sit on an appeal against its own decision.

81. It is thus evident that this is an attempt by the Petitioner to have a second bite at the cherry and reintroduce a suit which was properly heard and finally determined on merit, by a court of competent jurisdiction. The issue, having been dismissed by the High Court at Kiambu, ought to have been raised on appeal.

82. An examination of **Election Petition Appeal No. 20 of** 2018 reveals that the Petitioner, who was the 1st Respondent therein, filed a

cross-appeal in which he asked the Appellate Court to determine whether the Appellant was eligible to contest for the seat of Member of Parliament for Gatundu North Constituency. The Court of Appeal (Nambuye, Gatembu & Murgor, JJ.A.) held that the Election Court was wrong in declining jurisdiction in respect of the issue of the Appellant's (1st Respondent herein) qualification but further stated thus:

> "*Accordingly, we consider that, the learned judge took into account matters that he should have taken into consideration, and in so doing arrived at the right conclusion…Notwithstanding our finding that the trial court erred in declining jurisdiction, and by finding that there was no connection between the application and the petition, we are satisfied that the judge properly exercised his discretion in declining to grant the Motion filed on 2nd October, 2017.*"

83. There is therefore no doubt that the issue of the 1st Respondent's qualification was alive before the Court of Appeal, where it was pleaded, examined and deliberated upon. While the Appellate Court noted that the Election Court was wrong to decline jurisdiction, it held that the learned Judge took into account the relevant matters and properly exercised his discretion in declining the motion. As such, I find that the Petitioner has no justification for filing the instant Petition.

84. I observe that although this Petition is brought under **section 76(1)(c)** of the **Elections Act** and seeks *inter alia* an order declaring as vacant the seat of the Member of the National Assembly, Gatundu North Constituency, the Petition is predicated on the validity of the election. In any case, the parties on record are in agreement that this is an Election Petition. The Petition is therefore bound by **section 76(1)(a)** of the **Elections Act** which requires a petition to question the validity of an election to be filed within 28 days from the date of declaration of the results of the election and be concluded within six (6) months.

85. From the foregoing, I am inclined to hold that this Petition is *res judicata* and cannot therefore be determined before this court. An attempt to do so, would be tantamount to this court sitting on an appeal against its own decision.

Costs

86. Section 84 of the **Elections Act** stipulates that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. In so doing, the court has the power and the duty to ensure that the costs are proportionate in all circumstances.

87. In making orders as to costs, an Election Court is further guided by **rule 30** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** which states *inter alia* that, at the conclusion of the petition, the court make an order specifying-

(a) the total amount of costs payable; and

(b) the person by and to whom the costs shall be paid.

88. When considering the amount of costs payable, the Court ought to be concerned not to make any order on costs which has disproportionate consequences on any unsuccessful petitioner. An award of costs should thus not be intended to deter but rather to indemnify and encourage genuine and bona fide challenges to the exercise of elections. Nonetheless, the costs, if awarded, should not be punitive. (See - **Election Petition No. 17 of 2017 Hezbon Omondi vs. Independent Electoral and Boundaries Commission & 2 others [2018] eKLR)**.

89. The Petitioner proposed that the costs of this Petition be borne by the Respondents citing the delay occasioned by the late filing of their responses. The 1st and 2nd Respondents on their part proposed that the costs of this Petition be borne by the Petitioner stating that the Petition is an abuse of court process. None of the parties however made suggestions on the total amount payable. While there is no doubt that the Respondents occasioned delay in this Petition, in my view, this is a suit that would have been avoided altogether in light of my finding that the Petition is *res judicata*. As such, I condemn the Petitioner to pay costs to both the 1st and 2nd Respondents herein.

90. In determining the appropriate award, I am guided by the prescribed minimum instruction fees in election disputes and the security deposit on costs which is an equivalent of Kshs. 500,000/=. Taking into account the totality of this Petition: the pleadings and the ultimate submissions, and the trial period, I am inclined to use the minimum instruction fees in awarding costs.

91. In the end, I make the following orders:

1. The Petition be and is hereby dismissed for lack of merit.

2. The Petitioner shall bear the costs of the petition to be capped as follows:

a. As against the 1st Respondent, Kshs. 500,000/=

b. As against the 2nd Respondent, Kshs. 500,000/=

3. The costs shall be taxed and certified by the Deputy Registrar and the security deposit utilized to pay the 1st and 2nd Respondents on a *pro rata* basis.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF AUGUST, 2019.

……

L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Petitioner.

In the presence of.....Advocate for the 1st Respondent.

In the presence of.....Advocate for the 2nd Respondent.