



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF: ARTICLES 22(1) & (2) (C), 23, 24, 38,

252, 253(B), 258, 260 OF CONSTITUTION OF KENYA 2010

IN THE MATTER OF: CHAPTER SIX OF THE CONSTITUTION

OF KENYA 2010 (LEADERSHIP AND INTEGRITY)

IN THE MATTER OF: THE CONTRAVENTION AND VIOLATION OF ARTICLES 10(1)(C),

38(2), 88(4) & (5), 180(2) AND 193(1) (B), 2 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTION 22 OF THE ELECTION ACT

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ACT, 2011

IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY ACT, 2012

IN THE MATTER OF: THE OATHS AND STATUTORY

DECLARATION ACT CAP 15 LAWS OF KENYA

ARMSTRONG MWANDOO KIWOI.....1ST PETITIONER

THOMAS MNYAMBU JUMWA.....2ND PETITIONER

VERSUS

GRANTON GRAHAM SAMBOJA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

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

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

COUNTY GOVERNMENT OF TAITA TAVETA.....4TH RESPONDENT

AND

KENYATTA UNIVERSITY.....1ST INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION....2ND INTERESTED PARTY

JOHN ROBERT MWAISEGHE.....3RD INTERESTED PARTY

SELINA MKAMBELE MWAKIO.....4TH INTERESTED PARTY

RULING

The Applications

1. This Ruling relates to the following two (2) applications which are interrelated:

- (i) A Preliminary Objection dated 31st August 2017 filed by the 1st Respondent.
- (ii) A Preliminary Objection filed on 18th September 2017 filed by the 2nd Respondent

The Preliminary Objection dated 31st August 2017

2. The 1st Respondent contends that the Petition is a premature invocation of Article 165 (3)(d)(iii) and 258 of the Constitution which give this court jurisdiction to act, and as such the Petition is incompetent and abuse of the process of court. The 1st Respondent also contends that by dint of Article 82 (1) (b) and 88 (4)(d), (e) and (k) of the Constitution the body with the authority to investigate and authenticate academic qualifications of the 1st Respondent in the Gubernatorial race is the 2nd Respondent and not the election court.

3. The 1st Respondent claims that the Petition is abuse of the court process and offends the Elections Act more specifically Section 25 (1), (2) and (3) which are clear on the qualifications and disqualifications from nomination and/or election as a member of a County Assembly. The 1st Respondent further claims that the question of nomination ought to have been dealt with in accordance with section 74 of the Elections Act No. 24 of 2011 and the Elections (Parliamentary and County Elections) Petition Rules, 2017 (Hereinafter referred to as “Elections Rules”) made thereunder and not otherwise.

4. The 1st Respondent alleges that pursuant to Articles 79 and 80 of the Constitution as read with section 4 (2) of the Leadership and Integrity Act, Act No. 19 of 2012 this court is divested of jurisdiction to investigate issues of integrity against the 1st Respondent in the first instance, the sole mandate is vested in the 2nd Interested Party as defined under Section 11 (1) (d) and (e) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

5. The 1st Respondent further alleges that the election court cannot make inquiry as sought by the Petitioners as the mandate to order for investigations and prosecution is vested in the office of the Director of Public Prosecutions pursuant to Article 157 of the Constitution.

6. The 1st Respondent contends that the prayers sought by the Petitioners have been overtaken by events and only seek to upset the will of the electorate as exercised pursuant to Article 38 of the Constitution.

7. It was thus the 1st Respondent’s case that the 1st Petitioner’s Application and Petition both dated 17th August 2017 ought to be dismissed with costs to the 1st Respondent.

The Preliminary Objection filed on 18th September 2017

8. The 2nd Respondent's preliminary objection was raised in opposition to the 1st Petitioner's Notice of Motion application dated 17th August 2017 and the issues raised in the Petition. The 2nd Respondent contends that the application by the 1st Petitioner is spent and was overcome by time and circumstances as the 1st Respondent has already been sworn in as the Governor of Taita Taveta County.

9. The 2nd Respondent alleges that the issues raised for determination in both the Application and the Petition are *res subjudice* in light of the proceedings in **Milimani Law Courts Constitutional Petition No. 382 of 2017 Ethics & Anti-corruption Commission Vs. Granton Graham Samboja & Kenyatta University**.

10. The 2nd Respondent proposed that this court stay the current proceedings pending the determination of the proceedings in the Constitutional Petition No. 382 of 2017.

11. The 2nd Respondent alleged that the present petition cannot proceed on the same grounds as another suit in which the same issues are canvassed, as to do so would frustrate and embarrass the judicial system and that in any event that would not be a prudent use of judicial time.

Hearing

12. These applications came up for hearing on 15th December 2017. Mr. Gichigi appeared for the 1st Petitioner, Mr. Sifuna appeared for the 2nd Petitioner, Mr. Ayiro appeared for the 1st Respondent, Mr. Ondieki Ayuka appeared for the 2nd Respondent, Mr. Kibet appeared for the 1st Interested Party, Mr. Lempaa Soyinka appeared for the 3rd Interested Party, while Mr. Omolo appeared for the 4th Interested Party.

13. Mr. Ayiro for the 1st Respondent relied on his submissions filed on 30th November 2017 and further submitted that his Preliminary Objection is four pronged. Counsel submitted that jurisdiction is everything. Without it a court has no power to make one more step. The court must immediately down its tools the moment it finds that it has no jurisdiction. Counsel submitted that section 74 of the Elections Act as read with Article 88 (4) (iii) of the Constitution demand that any electoral dispute must be dealt with before nomination or before elections whichever is applicable.

14. Mr. Ayiro contended that any party who had issue with the nomination of any candidate ought to have raised the same with the 2nd Respondent. He averred that academic qualifications are presented during the nomination stage and the 1st Respondent was already duly nominated and gazetted. He pointed out that the Petitioners had a window of opportunity to apply to the High Court to have the Gazette Notice quashed. Otherwise the window, once a party such as the 1st Respondent is gazetted and issued with a nomination certificate, closes. He stated that the jurisdiction of this election court cannot be opened at this stage as the jurisdiction is limited to dealing with matters arising after the declaration of results.

15. Secondly, Mr. Ayiro contended that on issues of integrity it is EACC that is mandated to deal and this court has no role at all, thus once EACC has investigated a matter and made its recommendation its duty is complete. He pointed out that there is a similar case in Nairobi in which the EACC is involved as an investigator of academic qualifications of the 1st Respondent.

16. Counsel further contended that this is an election court and cannot investigate and make a finding on issues that lie with other bodies. He stated that there are state organs charged with responsibilities to deal with the issues raised in this petition. Counsel submitted that the academic qualifications of the 1st Respondent are not within the mandate of this court. He pointed out that in this petition there is nothing on any election irregularities but only on the 1st Respondent's academic qualifications. He relied on the case of **Diana Kethi Kilonzo & Another vs. IEBC & 10 Others [2013] eKLR**. He stated that the issue

before the court is whether there are any other public institutions that can deal with this matter. If so, he stated that this court must refer this matter to that institution. He submitted that no court of competent jurisdiction or any public institution had tried and convicted the 1st Respondent. He submitted that proceedings in the Anti-corruption Court in Petition No. 382 of 2017 are ongoing and a determination is yet to be made.

17. Thirdly, counsel questioned whether what is before this court is an election petition. He pointed out that originally when this matter came to court it had very many parties including Kenyatta University and EACC. He stated that Rules 8, 9 and 10 of Election Rules provide who ought to be parties to election petition and thus the present petition does not satisfy the procedures required for election petition.

18. Fourthly, Mr. Ayiro submitted that the petition does not satisfy Rule 8(1) and 8(3) of Election Rules. He pointed out that even the prayers sought in the petition are not the kind of prayers normally sought in an election petition. He submitted that under Rules 12(b) (c) and (d) of the Election Rules this petition is fatally defective since the petition cannot now be amended. He contended that the petition is an afterthought containing nomination issues which are beyond the jurisdiction of this court at this stage.

19. Mr. Ondieki Ayuka counsel for the 2nd Respondent supported and adopted the submissions of Mr. Ayiro. He added that an election petition is an invitation to the court to enquire into the process, conduct and management of results of an election. He pointed out that the present petition does not make any such invitation.

20. Secondly, he submitted that having filed his Preliminary Objection on 18/9/2017, none of the parties had responded to that Preliminary Objection. He stated that the petition filed herein is a replica of Petition No. 382 of 2017 filed by EACC on 1st August 2017 in Milimani Nairobi. Counsel pointed out that in the petition in Milimani, all the parties thereto are parties hereto. He further noted that the Petitioners herein are aware of the Nairobi petition because he photocopied all proceedings in that petition and attached them to this petition.

21. Counsel pointed out that the said two petitions contain the same prayers except that in this one there is a further prayer relating to the results. He prayed that this petition be struck out to allow the one filed in Nairobi to proceed to its logical conclusion.

22. Mr. Ondieki Ayuka submitted that the issues raised in this petition have nothing to do with election results, and that this petition raises issues which a special tribunal can deal with and under which there is adequate appellate provisions. He submitted that the 1st Respondent was duly gazetted as a candidate for governorship and people are deemed to have been aware. Counsel urged the court to strike out the petition so that the one filed in Nairobi may proceed to its logical conclusion. Counsel submitted that the Petitioners can join the petition in Nairobi and leave this court to deal with election matters.

23. Mr. Gichigi for the 1st Petitioner opposed both Preliminary Objections. He relied on his grounds of opposition dated and filed 15th December 2017. He submitted that Section 75(1) is the one that gives the court jurisdiction to deal with issues of validation of elections and no other court or Tribunal has jurisdiction to deal with that issue. He stated that once a winner is declared all other institutions are denied jurisdiction except an election court thus the moment the 1st Respondent was elected the matter ceased to be a nomination issue but election issue.

24. Mr. Gichigi contended that while the Petition No. 382 of 2017 filed in Nairobi by EACC raised the issue of integrity, it is an issue that is also raised in this petition. However the intended results of the Petitions are different. He submitted that though the 2nd Respondent was aware of the 1st Respondent's academic inaptness he choose to do nothing about it. He further submitted that this court has power to look at whether the 1st Respondent had the necessary academic qualifications to serve as Governor of Taita Taveta County.

25. On the issue of parties to the petition it was his submission that the law does not shut out parties and

any party can be part of a petition. He submitted that the prayers sought in the present Petition are relevant and stated that the election court has the jurisdiction to issue an injunction order to stop swearing in of a candidate. He contended that the court should not be guided by technicalities but should go for substantive justice.

26. On his part, Mr. Sifuna for the 2nd Petitioner adopted Written Submissions by Mr. Lempaa for 3rd Interested Party. Counsel submitted that the jurisdiction of this court arises from Section 75 of Elections Act where this court has jurisdiction to determine validity of an election. He referred the court to the case of **Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 Others Nakuru Election Petition No. 12 of 2013; [2013] eKLR** where the court held that the court has jurisdiction over matters where relevant institutions such as EACC or the 2nd Respondent have failed to discharge their duty.

27. Counsel pointed out that the Petition No. 382 of 2017 filed by EACC in Nairobi was filed on 1st August 2017 yet gazette of candidates by the 2nd Respondent herein was done on 7th June 2017. He stated that the Petitioners could not have known about the inadequate academic credentials of the 1st Respondent.

28. Mr. Sifuna submitted that the court should give a just resolution under Rule 4 of Election Rules on whether the Governor was validly elected or not?

29. On his part Mr. Lempaa for 3rd Interested Party relied on his written submissions dated 8/12/2017 in opposition to the two Preliminary Objections. He agreed that when the court has no jurisdiction it should down its tools. It was his submission that in the present matter the court has jurisdiction. Counsel submitted that the 2nd Respondent negligently cleared the 1st Respondent to vie. He contended that an election is a process and starts at voter registration. He stated that he relied on his submissions and authorities which are detailed.

30. Mr. Kibet for the 1st Interested Party refrained from making any submissions on grounds that the matter of Preliminary Objections falls within the purview of the Petitioners and Respondents, and that his client did not wish to participate.

31. Mr. Ayiro for the 1st Respondent in response submitted that the EACC in the Petition No. 382 of 2017 filed in Nairobi has submitted that its investigation of 1st Respondent has not yet been concluded, and that the certificates from Kenyatta University need to be authenticated through a legal process. Counsel argued further that what Kenyatta University refers to as integrity of its certificate would still have to be verified through a legal process. Mr. Ayiro referred the court to Section 74, 109(x) and Regulation 99 of the Elections Act on the issue of validity of any elections. He submitted that the moment the Returning Officer issued a nomination certificate the issue became *fait accompli* and thus the only other avenue was for an appeal. He therefore prayed that the Preliminary Objections be upheld.

32. Mr. Ondieki for the 2nd Respondent in response submitted that it was common ground that the basis of the present petition is academic qualification of the 1st Respondent. He pointed out that it was also the central issue in the Petition no. 382 of 2017 filed in Nairobi. He contended that both this court and the court in Nairobi were likely to find themselves in a decisional conflict as courts of equal jurisdiction which is against the policy on justice.

33. Mr. Ayuka submitted that it was also common ground that the conduct of the elections and management of results of Taita Taveta County is not an issue in this petition. Counsel questioned what the court was being invited to inquire into and submitted that there is nothing to enquire into by this court. He contended that Rule 29 of the Elections Rules regarding validity of elections does not relate to validity of candidates but validity of votes cast. Counsel prayed that the Preliminary Objections be allowed.

Analysis and Determination

34. Having considered the submissions by the parties, the following issues arise for determination by this court:

- a) Whether the court has the requisite jurisdiction to hear the Petition and whether the Petition is a premature invocation of this Court's jurisdiction under Articles 165(3)(d)(ii) of the Constitution.
- b) Whether pursuant to Articles 82(1)(b) and 88(4) (d), (e) and (k) of the Constitution the body with the authority to investigate and authenticate academic qualifications of the 1st Respondent, is the 2nd Respondent.
- c) Whether the Election Court has the jurisdiction to investigate, authenticate the academic qualifications and recommend prosecution of the 1st Respondent.
- d) Whether the issues raised for determination in both the Application and the Petition are res subjudice in light of the proceedings in **Milimani Law Courts Constitutional Petition No. 382 of 2017 Ethics & Anti-corruption Commission vs. Granton Graham Samboja & Kenyatta University**.

Does the court have the requisite jurisdiction and Is the present Petition premature?

35. The issue of jurisdiction is central to these proceedings and any legal proceedings, as was stated by Nyarangi JA in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1:**

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

36. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court."

37. This court must therefore examine whether it has the requisite jurisdiction. Mr. Ayiro for the 1st Respondent submitted that section 74 of the Elections Act as read with Article 88 (4) (iii) of the Constitution demand that any electoral dispute must be dealt with before nomination or before elections whichever is applicable. Mr. Ayiro contended that any party who had issue with the nomination of any candidate ought to have raised the same with the 2nd Respondent. He averred that academic qualifications are presented during the nomination stage and the 1st Respondent was already duly nominated and gazetted thus the window of opportunity to apply to the High Court to have the Gazette Notice quashed had already passed. Counsel contends that the Petition is a premature invocation of Article 165 (3) (d) (ii) and 258 of the Constitution. Article 165 (3) (d) (ii) provides as follows:

"Subject to clause (5), the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent

with, or in contravention of, this Constitution.”

38. Mr. Gichigi for the 1st Petitioner and Mr. Sifuna for the 2nd Petitioner both argued that this Court has jurisdiction to determine the Petition by virtue of Section 75 of the Elections Act. Mr. Gichigi submitted that once the 1st Petitioner was declared the winner, jurisdiction to determine disputes shifted from the 2nd Respondent to this Court. That the issue was no longer a nomination issue but was now an election issue. Mr. Sifuna relied on the Karanja Kabage case (supra) where the court found that it has jurisdiction over matters where relevant institutions such as EACC or the 2nd Respondent have failed to discharge their duty. Article 258 of the Constitution deals with enforcement of the Constitution.

39. It is trite law that Article 165 of the Constitution confers upon the High Court unlimited jurisdiction in both criminal and civil matters. However the High Court also has a special jurisdiction in electoral matters, conferred by the Constitution under Article 165(3)(a), and given effect under the Elections Act, particularly Section 2 thereof. Section 75 of the Elections Act provides that:

“A question as to the validity of an election of a county governor shall be determined by High Court within the County or nearest to the County.”

This was emphasized by the Supreme Court in the case of **Lemanken Aramat vs. Harun Meitamei Lempaka & 2 Others Supreme Court Election Petition No. 5 of 2014; [2014] eKLR.**

40. The Supreme Court in the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013 [2014] eKLR** held that once Form 38 declares the winner of an election, this terminates the mandate of the returning officer, which in turn shifts the jurisdiction as regards the election outcome to the Election Court. The court held as follows:

“The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer’s mandate, thus shifting any issue as to validity, to the election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer.”

41. From the foregoing it is the finding of this court that it has the jurisdiction to entertain this petition, to hear and determine the same.

Is the 2nd Respondent the body with the authority to investigate and authenticate academic qualifications of the 1st Respondent, and not the election court?

42. It is the 1st Respondent’s submission that the Election Court was established to handle disputes subsequent to the declaration of election results including disputes arising from the conduct of elections rather than pre-election contestations. The 1st Respondent’s case is that this Court should limit its inquiry to the events that transpired on the polling day and after the declaration of results.

43. Mr. Ayiro for the 1st Respondent contended that the issues raised as regards the 1st Respondent’s qualifications are not within the jurisdiction of the election Court but rather with the 2nd Respondent. He further contended that the Petitioners failed to follow the laid down procedure in challenging the nomination of the 1st Respondent as a gubernatorial candidate for Taita Taveta County. He relied on the Article 82 (1) (b) of the Constitution which provides as follows:

“Parliament shall enact legislation to provide for the nomination of candidates.”

He further relied on Article 88(4)(d), (e) and (k) of the Constitution which stipulates as follows:

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

(a) ...

(b) ...

(c)

(d) the regulation of the process by which parties nominate candidates for elections;

(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;

....

(k) the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.”

44. Mr. Ayiro submitted that the 2nd Respondent is guided by Section 74 of the Election Act, 2011 and Regulation 99 of the Regulations. In addition, he stated that Section 109 (x) of the Elections Act empowers it to make regulations to provide for complaints resolution mechanisms and for the manner of settlement of election disputes. Section 74(1) of the Elections Act stipulates as follows:

“Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for 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.”

Whereas Section 74 (3) of the Elections Act provides as follows:

“Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

45. Section 109 of the Elections Act provides for regulations to be utilized during the election process and provides in part in Section 109 (1)(c):

“The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to —

(c) provide for the regulation of the process by which parties nominate candidates for elections.”

46. The Court notes that Regulation 99 of the Elections (General) Regulations, 2012 was deleted by Legal Notice No. 72 of 2017.

47. In concluding Mr. Ayiro in his submissions stated that the academic qualifications of the 1st Respondent for his election as Governor of Taita Taveta is a dispute relating and directly arising from his nomination as a Wiper Democratic Party candidate for the Gubernatorial seat and pursuant to the said Articles of the Constitution and Sections of the Elections Act, once the Returning officer of the IEBC

issued a nomination certificate to the Petitioner in respect of Taita Taveta County Gubernatorial elections, that decision could only be challenged by lodging a complaint with the Dispute Resolution Committee and where dissatisfied in the High Court (then) to determine the issue. Mr. Ayiro submitted that the Petitioner was not diligent.

48. Mr. Ayiro relied on the case of **Kituo Cha Sheria vs. John Ndirangu & Another [2013] eKLR** where the court held that only in instances of outright negligence by the IEBC in the nomination process that infringe on the Constitution can an election Court re-open the issues relating to nomination. He further relied on the case of **The Speaker of the National Assembly vs. Karume [2008] 1 KLR (EP) 425**. The case affirmed that where the Constitution and the law prescribe clear procedures for redress of any grievance, such procedure ought to be strictly followed.

49. The court notes that in the case of **Kituo Cha Sheria vs. John Ndirangu & Another [2013] eKLR** Mabeya J. held as follows:

“That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would have to intervene.”

50. Mr. Sifuna for the 2nd Petitioner argued that the 2nd Respondent gazetted the 1st Respondent’s nomination on 7th June 2017 yet the EACC, the body mandated to investigate integrity issues, was only able to file its Petition No. 382 of 2017 in the High Court in Nairobi on 1st August 2017 challenging the 1st Respondent’s nomination, despite having the machinery and mandate to conduct investigations. Counsel submitted that Petitioners only learnt of the 1st Respondent’s academic inadequacies from the Petition filed by EACC. It would thus not be fair to punish the Petitioner for the 2nd Respondent’s failure to disqualify the 1st Respondent.

51. Mr. Lempaa for the 3rd Interested Party reiterated Mr. Sifuna’s submissions by relying on the case of **Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 Others Nakuru Election Petition No. 12 of 2013; [2013] eKLR** where M.J. Anyara Emukule J. was tasked with determining whether the issue of the petitioner not being validly nominated was a justiciable issue before the court, especially after the dispute arose after the declaration of results. The Election Court held as follows:

“The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration of the winner. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament. Consequently the court is not barred from determining all matters relating to nomination and qualification of candidates for election even though their determination is vested in other bodies where they failed to discharge their mandate as per the law.

Therefore in a case where there was clear breach of the law by contravention of the code of conduct or by failure to disqualify a candidate under Section 72 of the Elections Act as a result of which the election was compromised then the court has to consider these processes in determining the validity of the election of the candidate and in so doing it should be cautious not to usurp the powers of the Second and Third Respondents.”

52. The case of **Karanja Kabage (supra)** went on appeal in Civil Appeal No. 301 of 2013 **Karanja Kabage vs. Joseph Kiuna Kariambegu Ng’ang’a & 2 Others [2014] eKLR**. The Court of Appeal did not overturn this position.

53. Mr. Lempaa further relied on the case of **Godfrey Mwaki Kimathi & 2 Others vs. Jubilee Alliance Party & 3 Others [2015] eKLR** where G.V. Odunga held as follows:

“In my view the integrity of the electoral process encompasses the integrity of the players

thereat and it is the duty of the Commission to ensure that the electoral process it presides over is free, fair and transparent. Therefore integrity of the candidates is part and parcel of the integrity of the electoral process. The Commission cannot conduct a sham or mock elections simply because it does not have the machinery to undertake its legal and constitutional obligations.

Therefore where an issue of integrity is properly raised before the Commission, the Commission must make a determination thereon one way or the other. It cannot shirk its responsibility by shifting the onus to other bodies. If it does not fulfil its legal and constitutional obligations, this Court will not hesitate to intervene and right the wrong.”

54. These cases cited above i.e. **Kituo Cha Sheria vs. John Ndirangu & Another [2013] eKLR, Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 Others, Nakuru Election Petition No. 12 of 2013; [2013] eKLR, Godfrey Mwaki Kimathi & 2 Others vs. Jubilee Alliance Party & 3 Others [2015] eKLR** are decisions by courts of concurrent jurisdiction and are therefore not binding on this court. However, their persuasive force and legal logic is clear. This court is inclined to agree with the Anyara Emukule J. findings in **Karanja Kabage case (supra)**. This is further buttressed by the Supreme Court decision in the **Hassan Joho decision (supra)** where once a candidate is declared a winner in an election, this terminates the mandate of the returning officer and the 2nd Respondent, which in turn shifts the jurisdiction as regards the election outcome to the Election Court. This court finds that it is clothed with the requisite jurisdiction to investigate all aspects of the election in order to determine whether the 1st Respondent was validly elected and thus has the jurisdiction to hear and determine the Petition herein. This finding determines the third issue on whether the court has the jurisdiction to investigate the 1st Respondent’s academic qualifications to hold his current position as Governor of Taita Taveta.

In light of the proceedings in Milimani Law Courts Constitutional Petition No. 382 of 2017 Ethics & Anti-Corruption Commission vs. Granton Graham Samboja & Kenyatta University is the Petition subjudice?

55. Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

56. In the case of **Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 others [2016] eKLR**, G.V. Odunga J. held as follows:

“The doctrine of *sub judice* is grounded on the basis that in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits. See **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993 [1994] IV KALR 39.”**

57. EACC filed a Constitutional Petition No. 382 of 2017 in the Constitutional Division in Milimani Nairobi against the 1st Respondent, 2nd Respondent and the 1st Interested Party herein. EACC was in essence seeking to bar the 1st Respondent from vying for the position of Governor in the elections held on 8th August 2017 on account of ineligibility due to alleged lack of requisite academic qualification. Key among the prayers in the Petition are:

“a) ...

b)

c)

d) ...

e) A declaration that the IEBC failed to discharge its constitutional obligations under Article 88 (4)(f) of the Constitution in the manner envisaged under Article 88 (5) of the Constitution by registering the candidature of the 1st Respondent for the position of Governor of the County of Taita Taveta in the 2017 General Elections in the face of the Integrity report submitted to it by the Petitioner indicating that the 1st Respondent did not have a degree from Kenyatta University or any University recognized in Kenya and consequently did not meet the requirements prescribed by Section 22 (2) of the Elections Act, 2011 law for the said position.

f)

g) A declaration that the 1st Respondent is not eligible for election as Governor in the general elections slated for 8th August 2017.

h) A declaration that any election of the 1st Respondent to the position of Governor of the County of Taita Taveta or of any other County in the Republic of Kenya without meeting the educational and ethical qualifications prescribed by law for the candidates for such an office is null and void.

i) A permanent injunction barring the 1st Respondent from contesting in any general election for the position of Governor of the County of Taita Taveta or any other County in the Republic of Kenya without meeting the educational and ethical qualifications prescribed by law for candidates for such an office.

j) A permanent injunction barring the 1st Respondent from holding any public office for breaching the ethical requirements of Chapter Six of the Constitution of Kenya.”

58. In the case of **Edward R. Ouko vs. Speaker of the National Assembly & 4 others [2017] eKLR G.V. Odunga J.** laid down the conditions for a matter to be declared *subjudice* as follows:

“This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

(1) There must exist two or more suits filed consecutively.

(2) The matter in issue in the suits or proceedings must be directly and substantially the same.

(3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.

(4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

59. There is no doubt that conditions (1) and (2) hereinabove are common in the two suits under consideration. At the heart of the two Petitions, the Petitioners are seeking to nullify the election where the 1st Respondent was elected as Governor of Taita Taveta County. The Petition by EACC was filed

before the elections held on 8th August 2017 whereas the present Petition was filed after the aforesaid elections.

60. As for condition (3), would the parties in the two Petitions be considered the same or parties under whom they or any of them claim, litigating under the same title. EACC is a body corporate established under Section 3 of the Ethics and Anti-Corruption Commission Act No. 22 of 2011 pursuant to Article 79 of the Constitution for purposes of ensuring compliance with and enforcement of Chapter Six of the Constitution. The two Petitioners herein are Kenyan Citizens and registered voters in Taita Taveta County. It would be grossly incorrect to assume that EACC and the Petitioners can be considered the same or parties under whom one can make claim on behalf of the other.

61. As for condition (4), are the two Petitions pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The Petition by EACC No. 382 of 2017 was filed in the Constitutional Division in the High Court in Nairobi, whereas this petition is before the Election Court, which is the High Court in Voi. The two courts have competent jurisdiction to grant the reliefs sought. Further the two courts have concurrent jurisdiction save for the fact that whereas the Election Court is specialized, High Court is also clothed with special jurisdiction in electoral matters, conferred by the Constitution under Article 165(3)(a), and given effect under the Elections Act, particularly Section 2 thereof.

62. In the case of **Edward R. Ouko vs. Speaker of the National Assembly & 4 Others [2017] eKLR** Odunga J. stated as follows:

“This Court cannot be expected to call for a matter pending before a Court of concurrent jurisdiction as opposed to an inferior tribunal, peruse the same and in the secrecy of the chambers make a determination prejudicial to a party without affording the said party an opportunity of being heard on the same. To do so would amount to a violation of the principles of natural justice and that would amount to abetting an injustice. As has been held before, a court of justice has no jurisdiction to do injustice.”

63. This begs the question as to what would the justice of the matter be in this case? Is it prudent to strike out the current petition? Is it possible to stay proceedings herein pending the outcome of the proceedings in Petition 382 of 2017 filed in Nairobi?

64. It is trite law that a party must be given a fair and reasonable opportunity to present his case. This is to afford such party a fair and reasonable opportunity to ventilate its case. It is now a well settled principle of law that striking out of pleadings is a draconian measure. The dicta of Madan JA in **D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another [1980] eKLR** where Madan J stated that courts will only resort to striking out pleadings as a matter of last resort and only when the impugned pleadings are so hopeless to be incapable of being resuscitated by amendment. The court's objective ought to be to sustain rather than terminate a suit on technicalities.

65. However, this court must also take into account the issue at hand. In this petition and in Petition No. 382 of 2017 filed in Nairobi, the only issue for determination by both courts is whether or not the 1st Respondent possessed adequate academic qualifications to have been nominated to vie for the gubernatorial seat in Taita Taveta County. It is a single issue. There are no allegations of electoral malpractice such as bribery, ballot stuffing, voter intimidation, police brutality, theft of votes or such like issues mundane in electoral petitions. The issue of lack of academic qualification then becomes the sole denominator in this petition and the one filed in Nairobi. These two petitions are currently proceeding, with absurdity which can embarrass the court should the courts arrive at conflicting decisions.

66. In both petitions the 1st Respondent has denied allegations that he did not possess the requisite academic qualification to vie for the aforesaid seat. This denial means that both courts must now investigate and try the issue to reach a decision. The issue then is this: between this petition and Petition No. 382 of 2017, which one is best placed to determine the issue, granted that both, as we have seen

above, have the jurisdiction in the matter? To address this issue it must be emphasized that in Petition No. 382 of 2017 in Nairobi all the criminal investigative agencies are involved. These include the EACC, the DPP, the Directorate of Criminal Investigations, the Attorney-General as well as Kenyatta University which allegedly issued the disputed university degree. To the contrary in this petition those investigative agencies are not party, and even Kenyatta University remains only in the periphery as an interested party. It is therefore clear to me that Petition No. 382 of 2017 filed in Nairobi is better placed to investigate the adequacy or lack thereof of the 1st Respondent's academic qualifications. Further, it must be had in mind that electoral petitions have a limited time lines to be heard and determined. This means that this petition must be heard and determined by 18th of February, 2018. This period of time will not be enough to investigate, hear and determine the issue of the 1st Respondent's academic qualifications. It therefore means that continuing with these proceedings is an exercise in futility. However, the greatest absurdity would ensue were this court to find that indeed the 1st Respondent does not possess requisite academic qualifications, only for the court in Nairobi to find that the 1st Respondent is indeed duly qualified. If that were to happen irreparable damage would have been occasioned to the 1st Respondent. This would be unmitigated injustice against the 1st Respondent. For justice to be seen to be done one of these petitions must give way, and for the foregoing reasons, this petition must indeed give way so that the issue of academic qualifications of the 1st Respondent is investigated and tried in the Petition No. 382 of 2017 in Nairobi.

67. The Petitioners in full knowledge that Petition No. 382 of 2017 was filed in Nairobi, proceeded to file this petition yet knowing full well that the single issue for determination was the common denominator in both petitions. This was a gross abuse of court process and a misuse of precious judicial time.

68. It is the finding of this court that whether in full hearing or at interlocutory stage, the proper determination on whether the 1st Respondent had adequate academic qualifications must be determined in Petition No. 382 of 2017 filed in Nairobi. That petition has adequate personnel, mechanism and time and investigative resources to undertake the trial. It is also the finding of this court that the petition herein is a duplication of Petition No. 382 of 2017 filed in Nairobi. For that reason this petition is herewith struck out so that Petition No. 382 of 2017 filed in Nairobi may proceed unhindered. Should Petition No. 382 of 2017 (Nairobi) succeed and the court finds that the 1st Respondent did not have requisite academic qualifications, the law will take its proper course. At this stage it would cause great prejudice to the 1st Respondent to proceed with this Petition.

Disposition

69. For the foregoing reasons, the Preliminary Objections dated 31st August 2017 and 18th September 2017 be and are hereby allowed. The result is that the petition herein is dismissed.

70. As for costs, the court hereby directs that the same be and is hereby limited to the deposit of Kshs. 500,000/= paid in equal share by the Petitioners. The said deposit shall be shared equally between the 1st and 2nd Respondents. Other parties shall bear their own costs.

71. Orders accordingly.

Dated, Signed and Delivered at Voi this 15th day of January, 2018.

E .K. O. OGOLA

JUDGE

In the presence of:

Mr. Mwinzi holding brief for Mr. Gichigi for 1st Petitioner

Mr. Sifuna for 2nd Petitioner

Mr. Ayiro holding brief for Mr. Ayuka for 1st and 2nd Respondents

Mr. Kibet for 1st Interested Party

Mr. Mwinzi holding brief Mr. Omolo for 2nd Interested Party

Mr. Kibet holding brief for Mr. Lempaa for 3rd Interested Party

Mr. Mwinzi holding brief for Mr. Omolo for 4th Interested Party

Mr. Josephat Mavu Court Assistant