



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 7 OF 2018

(CONSOLIDATED WITH PETITION NO. 394 OF 2017 AND JR NO. 683 OF 2017)

IN THE MATTER OF ARTICLES 22, (10) (2) 23, 27, 28, 38, 43, 47, 99, 157 (11), 238 (1) AND (3), 239 (3), 244 (C) AND (D), 245 (4), 249(1) (C), 258(1) AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT 2012

AND

IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

AND

IN THE MATTER OF ETHICS AND ANTI-CORRUPTION COMMISSION ACT

BETWEEN

FRANKLIN MITHIKA LINTURI.....PETITIONER

AND

ETHICS AND ANTI-CORRUPTION

COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE UNIVERSITY OF NAIROBI.....3RD RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....4TH RESPONDENT

JUDGEMENT

Parties

1. The Petitioner herein, **Franklin Mithika Linturi**, identified himself as the Senator representing Meru County in Parliament and the Senate and was elected to the said office and position during the general elections held on 8th August 2017.

2. The 1st Respondent, **Ethics And Anti –Corruption Commission** (hereinafter referred to as “the EACC”), is described as a State organ or agency established under section 3 of the the **Ethics and Anti-Corruption Commission Act, 2011** pursuant to Article 79 of the Constitution for the purposes of inter alia ensuring compliance with, and enforcement of Chapter Six of the Constitution.

3. The 2nd Respondent, **Director of Public Prosecutions** (hereinafter referred to as “the DPP”), is described as a state officer whose office is established under the Constitution and the **Director of Public Prosecutions Act**.

4. The 3rd Respondent herein, **The University of Nairobi** (hereinafter referred to as “the University”), is a public university established under the **University of Nairobi Act**.

5. The 4th Respondent, **The Independent Electoral and Boundaries Commission** (hereinafter referred to as “the IEBC”), is a statutory and constitutional commission established under the **Independent Electoral and Boundaries Commission Act**.

The Petition

7. According to the Petitioner prior the general elections held on 8th August 2017, he served in Parliament as a member of the National Assembly representing Igembe South Constituency. He averred that having attained the academic qualifications and met the terms and conditions for admission to the degree course in the law faculty or School of Law of the University, he was admitted to the University of Nairobi to study for a Bachelor of Laws degree a programme which he completed during his fourth academic year in 2017 and was recommended for the award of the degree of Bachelor of Laws at Second Class Honours, Upper Division having performed consistently well in every academic year.

8. The Petitioner deposed that on 27th December 2017 he obtained a clearance certificate from the University which facilitated his inclusion in the list of students to be conferred with degrees at the graduation ceremony which was held on 22nd December 2017. He subsequently and peremptorily applied for postgraduate studies leading to the award of Master of Laws in the School of Law during the 2017/2018 academic year and was notified of his admission to the University to pursue the postgraduate degree programme by a letter from the Director of the Graduate School dated 21st September 2017. According to him, he duly complied with the requirements for admission and has so far completed one semester of the postgraduate studies.

9. It was the Petitioner’s case that his qualification and eligibility for admission to the **University of Nairobi** was on the basis of a degree of Bachelor of Commerce successfully obtained from the **Marathwada University**, now known as **Dr Babasaheb Ambedkar Marathwada University** in Aurangabad, Maharashtra State in the Republic of India.

10. It was his case that in the period coinciding with the preparations of the last general elections held on 8th August 2017 the EACC with the connivance and collusion of one **Milton Mugambi Imanyara**, and who is an advocate of the High Court of Kenya and an aspiring candidate for the seat of Senator for Meru County, initiated and executed a campaign to disqualify the Petitioner from contesting as a candidate for the said senatorial seat and impugning the Petitioner’s qualification to serve as a member of the National Assembly and to be nominated as a candidate and to contest any elective seat including as member of the Senate.

11. According to the Petitioner, the said **Mugambi’s** predominant objective, purpose and interest was the disqualification of the Petitioner’s as a member of the National Assembly and his candidature for the Senate seat in Parliament to represent Meru County as opposed to the pursuance of the principles and objects of the administration of justice in accordance with the objectives of the Constitution and the law or those of the criminal justice system. In pursuance of the said purpose, it was averred that the said **Milton Mugambi**, through his advocates and/or legal representatives or proxies, executed a multifaceted onslaught and attack against the Petitioner supported by the EACC seeking the removal of the Petitioner from the National Assembly and/or his disqualification from being a candidate for the Senate in the last general elections. This plan included institution of proceedings with the Independent Electoral and Boundaries Commission and other relevant tribunals and courts against the Petitioner.

12. It was averred by the Petitioner that the EACC and the IGP prevailed upon the University of Nairobi to remove the name of the Petitioner from the list of graduands who were to participate in the graduation ceremony held on 22nd December 2017 and on 30th November 2017 the University deregistered and discontinued the Petitioner from being a student of the University of Nairobi with immediate effect with the result that he could not be accorded a Bachelor of Laws of degree and continue to pursue the Master of Laws post graduate studies at the University.

13. It was disclosed that in order to achieve the predominant, ulterior and extraneous objective or purpose, which is the removal of the Petitioner from the Senate, the EACC and **Milton Mugambi** are now intensifying criminal investigations against the Petitioner purportedly on allegations that the Petitioner committed, *inter-alia*, the offences of forgery, knowingly providing misleading and false information to a public entity and the execution of false declaration forms. To the Petitioner, the pursuit of the criminal investigations are taking place when the EACC has filed a petition in the High Court in Nairobi Constitutional Petition No. 394 of 2017 presented on 8th August 2017 against the Petitioner and the Independent Electoral and Boundaries Commission seeking the following orders against the Petitioner:

i) A declaration that the Petitioner’s political rights under Article 38(3) (c) of the Constitution are not absolute and are subject to the eligibility criteria stipulated under Article 99(1) of the Constitution.

ii) A declaration that the Petitioner is not eligible for election as a Senator in the general elections slated for 8th August 2017.

iii) A declaration that any election of the Petitioner to the position of Senator Meru County or of any other County in the Republic of Kenya, in the circumstances is null and void.

iv) A Permanent injunction barring the Petitioner from holding any public office for breaching ethical requirements of Chapter Six of the Constitution of Kenya.

14. It was the Petitioner's case that the EACC is seeking drastic and overreaching orders against the Petitioner when it has not completed the investigations or fact finding and is in possession of evidence to show that:

a) the admission of the Petitioner to the University of Nairobi was not based on performance in pre- university examinations neither were results of those examinations presented to the University of Nairobi;

b) Dr Babasaheb Ambedkar Marathwada University in a letter dated 8th November 2017 and addressed to the Dean of School Law of the University of Nairobi confirmed and attested to the Petitioner's academic credentials which is a Bachelor of Commerce degree awarded by the University;

c) The office of the First Respondent confirmed by a letter dated 11th December 2017 and addressed to the Petitioner's advocates that the self declaration forms of 2013 purportedly written and presented by the Petitioner was not in fact made, written or signed by the Petitioner; and

d) The qualifications presented to the University were not from any secondary or post-primary school in Meru or any part of Kenya.

15. According to the Petitioner, a lawyer practicing in the firm belonging to **Mugambi Imanyara & Company Advocates, Babra Nkirote Murithi**, lodged complaints with various institutions including the Independent Electoral and Boundaries Commission challenging the Petitioner's moral and ethical integrity to be nominated as a candidate through the Commission's Integrity and Vetting Committee following an order made in the High Court sitting in Nairobi in Judicial Review Miscellaneous Application No 491 of 2017 which complaint was dismissed by the Commission on the 6th August 2017. The Petitioner further noted that the EACC filed a petition in the High Court, Petition No 394 of 2017, on 7th August 2017 immediately following the dismissal of **Babra Nkirote Murithi's** complaint by the Independent Electoral and Boundaries Commission on 6th August 2017 and just a day before the polling day of the general elections held on 8th August 2017 and on 19th October 2017 the EACC wrote to the University of Nairobi requiring of the University to take administrative action against the Petitioner based on a letter purportedly received from **Dr Babasaheb Ambedkar Marathwada University** from which the EACC drew the inference and erroneous conclusion that the Petitioner's degree from the Indian University lacked authenticity and invalidated the admission of the Petitioner to the Bachelor of Laws degree programme at the University of Nairobi.

16. It was the Petitioner's case that the said letter is a demonstration of the EACC's lack of sound judgment and rush to judgment as the responses made by the Indian University was based on the information given by Kenyan authorities including the EACC which contained particulars and details allegedly concerning the Petitioner that were completely false, erroneous and misleading and did not reflect the genuine and authentic certificate of the degree obtained by the Petitioner from **Dr Babasaheb Ambedkar Marathwada University**.

17. It was disclosed that the EACC has initiated the process of invoking the provisions of the **Mutual Legal Assistance Act** by making requests for legal assistance from the competent authority of the Republic of India to obtain evidence from **Dr Babasaheb Ambedkar Marathwada University**, Aurangabad in Maharashtra State in the Republic of India in support of a case of forgery, altering a false document, namely a degree certificate purportedly issued by the said University against the Petitioner. To the Petitioner, the request for assistance is a substantial, definitive and final step in concluding the exercise of evidence gathering and the EACC has not left anybody in doubt that the exercise undertaken is in support of a case for criminal prosecution and the charges and offences have been identified. It is significant, the Petitioner averred, that the Attorney General has been involved in the exercise as the principal legal adviser to the Government and in recognition of his statutory function.

18. The Petitioner however maintained that this process is a futile and superfluous exercise since the EACC and the University have the information sought from the Indian University in their custody and a trip made to India by public officer to collect the evidence would not constitute a prudent and responsible expenditure of public funds or tax payers money. It was disclosed that the letter dated 8th November 2017 addressed to the Dean School of Law of the University of Nairobi and copied to the Petitioner in the hand of **Dr V. M. Karhale**, Deputy Registrar (Academic Affiliations) is unquestionably authentic factual, categorical, accurate and efficacious and settles all issues regarding the integrity, veracity, validity and finality of the Petitioner's degree from **Dr Babasaheb Ambedkar Marathwada University** which attests and confirms his academic credentials in the following words:

"Upon request by Franklin Linturi Mithika through his letter dated 4th November 2017 and an earlier inquiry by Rose Mary Kerketta (Attache – Edu Com Kenya High Commission of India) through her letter dated 13th October 2017 reference KHC/ND/EDU/40/1 dated 01/09/2017 regarding the above subject I am to state that upon the submission of the original degree certificate and transcripts to this office, it has now been established that – Franklin Linturi Mithika joined Babasaheb Ambedkar Marathwada University (formerly named) IN May 1998 under category: OPEN & DISTANCE LEARNING and registered for Bachelor of Commerce Degree at Doogiri College, an affiliate college of Babasaheb Ambedkar Marathwada University (formerly Marathwada University). He left in May 2001.

A verification and confirmation of the academic records/documents has been carried against the originals submitted to this shown below:

Franklin Linturi Mithika – Seat No: 60516

Document Description	Document	Doc Ref No	Seat No	Verified & Confirmed	Matches Official Records

	Dated						
				Yes	No	Yes	No
1 ST Year Transcript	16/6/1999	63528	46308	Yes		Yes	
2 ND Year Transcript	29/6/2000	4046	512431	Yes		Yes	
3 RD Year Transcript	8/05/2001	84419	60516	yes		yes	
Bachelor of Commerce Degree	20/11/2001	60516	60516	yes		yes	

Am sure this information will be of much help and supersedes any other information communicated earlier.

Dr. V. M Karhale

Dy Registrar

(Academic Affiliations)

19. According to the Petitioner, the effect of this letter is that the EACC and the University acted on false and inaccurate information and despite the University having received the letter on 13th November 2017, the University of Nairobi deregistered and discontinued him from the programmes and studies at the University and failed and/or have failed to advise the EACC on the new state of affairs regarding the Petitioner's Bachelor of Commerce degree.

20. The Petitioner therefore maintained that the actions of the EACC and the University display bad faith and abuse of discretion and powers. According to the Petitioner, the said **Milton Mugambi** wants to use the machinery of criminal law and the criminal justice system through the courts to get him out of Parliament and the Senate as evidenced by the contents of his letters some of which he copied to the DPP. The Petitioner disclosed that the said **Milton Mugambi** had filed an election petition against the Petitioner in the High Court in Meru being Election Petition No 5 of 2017 seeking the Petitioner's election as the Senator for Meru County nullified. In the said Petition, the said **Milton Mugambi** is raising the same issues subject matter of the criminal investigation in the election petition regarding the Petitioner's ineligibility to run for elections on account of moral and ethical requirements citing the instances of purported forgery or falsification of self-declaration forms, the false claim that the Petitioner had obtained a Bachelor degree in Commerce, an outrageous allegation that he made a false statement contrary to the **Oaths and Statutory Declaration Act** and that his degree from India is a forgery.

21. The Petitioner averred that the EACC summoned him several times to appear before its officers during the conduct of investigations and that he obtained court orders against the issuance of the summons and appearance before the EACC grounded on the fact that EACC had already made up its mind and made decisions which were implemented by other agencies including the University without giving the Petitioner a hearing contrary to the rules of natural justice.

22. It was further disclosed that on 31st May 2017 the EACC advised the Independent Electoral and Boundaries Commission that the Petitioner had not satisfied the educational, moral and ethical requirements to qualify as a candidate in the elective positions contested in the general elections held on 8th August 2017 without any judicial finding and without granting the Petitioner an opportunity to be heard on the matter. Further, on 18th December 2017 the EACC forwarded a report signed by its Chairperson and the Secretary and Chief Executive Officer in which it made a recommendation that the Petitioner be arraigned in court to face the charges proposed in the report, yet the EACC had not taken the Petitioner's specimen handwriting nor sought the opinion of a handwriting or forensic expert to determine the authors or makers of the documents in question and had no desire to seek for or receive evidence that would work in the Petitioner's favour.

23. It was the Petitioner's case that the EACC has the legal duty and responsibility to undertake full and comprehensive investigations with an open mind and on the basis of absolute impartiality, accuracy, integrity and credibility and to frown upon and avoid the implementation of its processes to oppress, harass, intimidate, embarrass, and persecute him. It is however evident that the pursuit of the criminal investigations on issues that are germane and alive in a superior court is vexatious, oppressive and embarrassing to me in circumstances where the preponderance of the object of criminal proceedings is to achieve an extraneous and ulterior motive and purpose. He maintained that the criminal investigation against him and the intended criminal prosecution constitute an abuse of the legal process and administrative authority and discretion.

24. The Petitioner contended that the allegation in relation to charges of making false declaration form on account of 2013 elections involve documents allegedly made and uttered in 2013 and the effluxion of time may compromise and jeopardize records and documents whose value and function were relevant in 2013, nearly five years ago. The requirement of educational qualification for parliamentary and county assembly elections were rendered unnecessary by statutory provisions for the purposes of 2013 and 2017 general elections.

25. According to the Petitioner, the DPP's prosecutor in Meru wrote to his advocates, **M/S Kiogora Mugambi & Company**, that the self-declaration form held by the Independent Electoral and Boundaries Commission was not made by the Petitioner because the handwriting and signatures on the declaration form do not belong to the Petitioner. However, the DPP has not taken any steps to advise the Respondents of this vital information that may have impacted the investigation in favour of the Petitioner.

26. According to the Petitioner, he was summoned at various times and stages to appear before the EACC which the Petitioner objected to by obtaining court orders against the EACC on the basis that the EACC had already made decisions against the Petitioner without giving him a hearing contrary to the rules of natural justice and the principle of *audi alteram partem*.

27. It was averred that on or before the 31st May 2017 the EACC advised the Independent Electoral and Boundaries Commission that the Petitioner had not satisfied the educational, moral and ethical requirements to qualify as a candidate in the elective positions contested in the general elections held on 8th August 2017 without any judicial finding and without granting the Petitioner an opportunity to be heard on the matter. Further, on 18th December 2017 the EACC forwarded a report signed by its Chairperson and the Secretary and Chief Executive Officer in which it made a recommendation that the Petitioner be arraigned in court to face the charges proposed in the report which include the charge of forgery of a Kenya Certificate of Secondary Education contrary to section 349 of the **Penal Code**; uttering a false document contrary to section 353 as read with section 349 of the **Penal Code**; making a false statutory declaration contrary to section 11 of the **Oaths and Statutory Declarations Act**; and providing false information to the Independent Electoral and Boundaries Commission contrary to section 46(1) (d) as read with section 46(2) of the **Leadership and Integrity Act**.

28. The Petitioner was therefore apprehensive that the threat or likelihood that he would be arrested charged and prosecuted for the said offences was imminent and real and that the DPP would proceed with the recommendations made by the EACC at any time without reference to the Petitioner.

29. According to the Petitioner, although civil and criminal cases over the same subject matter can proceed contemporaneously and simultaneously, the machinery of criminal law has been and is being employed against the Petitioner to achieve an ulterior motive and extraneous purpose, the EACC and the said **Milton Mugambi** having failed to secure the disqualification of the Petitioner from being a candidate and running and winning the seat of Senator for Meru County in Parliament and the Senate.

30. It was contended that the EACC had not taken any specimen handwriting from the Petitioner or sought the opinion of a handwriting or forensic expert to determine the authors or makers of the documents in question as the EACC had no desire to obtain exculpatory evidence in the course of investigations.

31. To the Petitioner, it is the legal duty and responsibility of the EACC to undertake full and comprehensive investigations with an open mind and on the basis of absolute impartiality, accuracy and credibility and to frown upon and avoid the implementation of its processes to oppress, harass, intimidate, embarrass, persecute and bash around the Petitioner.

32. The Petitioner's case was therefore that the actions by each and all the Respondents are in violation of Article 47 of the Constitution as read with the **Fair Administrative Action Act**.

33. In this respect the Petitioner averred that the said actions were made in bad faith, bias and were tainted with procedural unfairness in that:

- (i) The Respondents have shown bad faith and exhibited bias by taking steps against the Petitioner before undertaking full and comprehensive investigations;
- (ii) The Respondents have sought punitive action against the Petitioner before completing investigations and particularly by seeking his deregistration and discontinuance from the University of Nairobi; and
- (iii) The EACC has deliberately ignored the advantage sought by **Milton Mugambi** to stop, prohibit or frustrate the candidature of the Petitioner in the general elections.

34. Further the said actions were informed by ulterior motive or extraneous purpose in that:

- (i) The action by the EACC was calculated to prejudice the legal rights of the Petitioner, to wit, the enjoyment of political rights under Article 38 of the Constitution;
- (ii) The complaints made and the investigations undertaken have the predominant and extraneous objective of ensuring that the Petitioner is not a Senator or an occupant of a state or public office in Meru County or in any other County or in the National Government;
- (iii) The machinery of the law is being used to frustrate and disturb the Petitioner's legitimate tenure and mandate as a Senator or in any other capacity as a state or public officer; and
- (iv) The machinery of the law is being used to cause injustice.

35. It was further contended that the said action was arrived at as a result of the failure to take relevant considerations, irrationality, unreasonableness and error of the law in that:

- (i) The steps taken by the EACC are unreasonable and irrational since the investigations are not complete;
- (ii) The EACC has ignored the fact that the admissions to the University of Nairobi were based on a degree as opposed to pre-university qualifications;
- (iii) The Respondents have taken action against the Petitioner before seeking expert evidence including that of a handwriting expert

to determine the maker or author of documents alleged to have been forged;

(iv) The Respondents have acted in error of the law by making a false presumption that a complaint without judicial findings or purely based on the exercise of administrative discretion is sufficient to determine that the Petitioner lacks the moral and ethical integrity to be elected as a Senator or to any elective public office;

(v) The Respondents acted on the basis of misleading and false information given to the EACC as a public entity;

(vi) The EACC has acted irrationally and unreasonably by taking steps which are detrimental to the Petitioner without waiting for a proper, fair and impartial inquiry and without being in possession of all the facts, material and documents that would help it as a public body make a just and fair decision;

(vii) The complaints and grievances made in this matter are not yet ripe for administrative action or any other action and the Respondents decisions and actions have been premature;

(viii) The First, Second, Third and Fourth Respondents are obligated to equip themselves with information necessary to enable them make informed decisions;

(ix) The First Second, Third and Fourth Respondents decisions and actions are anchored on exaggerated and misleading complaints and facts which have not been accurately placed before them;

(x) The First, Second, Third and Fourth Respondents do not have a sufficiently full picture for a fair decision to be made and each and all of them do not have all the material facts;

(xi) The Respondents have a duty to make sufficient inquiries and specifically the duty to carry out investigations regarding the complaints and accusations made against the Petitioner in a thorough and balanced way;

(xii) The Respondents placed themselves in the awkward and unreasonable circumstances and position where “the State’s left hand does not know what the right hand is doing”;

(xiii) The incomplete investigations have the effect of shifting the evidential burden prematurely on the Petitioner when the duty falls squarely on State organs and agencies;

(xiv) The Respondents actions have been based on materially misleading reports and complaints making them to proceed on a mistaken factual basis and as a consequence they failed to have regard to material and relevant considerations and to proceed with objectivity and impartiality; and

(xv) There are documentary inconsistencies and material contradictions which must be resolved.

36. It was the Petitioner’s case that the Respondents’ actions amounted to abuse of discretion and power, disproportionate action, oppression, vexation and illegality as:

(i) The Respondents have taken into consideration false information and accusations which have been made against the Petitioner and have failed to consider exculpatory evidence and material in favour of the Petitioner;

(ii) The Respondents have taken a multiplicity of actions and suits against the Petitioner including court proceedings, administrative action and subjected the Petitioner to acts of harassment and intimidation before the investigations are completed and before a finding of a court of competent jurisdiction is made;

(iii) The Respondents have made the Petitioner to suffer punitive measures from the University of Nairobi before the disclosure and revelation of all the material facts and taking into account relevant considerations;

(iv) The sterling performance by the Petitioner in the examinations at the University and his admission to postgraduate studies for the degree of Master of Laws should have elicited care, caution and prudence in the investigations on the part of the Respondents before action is taken; and

(v) Taking into account that the initial complaints were made in April/May 2017 the decision taken by the Second Respondent, the administrative and other action have not been made expeditiously, efficiently and lawfully.

37. As regards equality and freedom from discrimination it was the petitioner’s position that the action by each and all the Respondents are in violation and/or likely to violate Article 27(1)(2) and (3) of the Constitution and in particular for the following reasons:

(i) The Respondents each and all have denied or threatened to deny the Petitioner the right to equality before the law and the right to equal protection and equal benefit of the law in that arbitrary action has been taken against him or threatened to be taken against without the determination of the veracity and justification of the false information and accusations made against the Petitioner;

(ii) The Respondents have taken action or threatened to take action against the Petitioner without balancing the proportionate interests of all persons affected including the Petitioner and weighing the consequences of arbitrary, ill considered, irrational,

capricious, overbearing and peremptory action;

(iii) The Respondents have each and all failed to inquire into the information given to them by the Petitioner in his defence and thus failed to take into account relevant considerations;

(iv) The Respondents have failed and/or neglected to recognize and protect the Petitioner's rights to human dignity, political rights and the right to education as provided by Articles 28, 38 and 43(1)(f) of the Constitution respectively; and

(v) The Respondent each and all have discriminated directly or indirectly against the Petitioner on account of the Petitioner's conscience and belief including political views and principles.

38. It was further contended that the said actions contravened the Petitioner's right to human dignity. To the Petitioner, the Respondents have each and all violated the Petitioner's inherent dignity and the right to have that dignity respected and protected as provided under Article 28 of the Constitution as shown by the following actions and conduct of the Respondents:

(i) The Petitioner has worked hard to achieve self-fulfilment in education and to attain personal integrity, sovereignty and self-autonomy by pursuing education despite a political career. The pillars of integrity, trust and reputation are the anchors of the disciplines of scholarship and leadership;

(ii) The Petitioner has taken four academic years to pass examinations and to pursue academic courses in order to get the award of the Bachelor of Laws degree and subsequently to qualify for admission to the programme of a Master of Laws degree which was only possible after previously obtaining a Bachelor of Commerce degree;

(iii) The Respondents are destroying and are threatening to destroy these achievements by the arbitrary, irrational and unreasonable exercise of power and discretion by not acting judiciously, fairly and justly to the detriment of the Petitioner; and

(iv) Article 19 of the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and the recognition and protection of human rights and fundamental freedoms is *inter-alia* to preserve the dignity of individuals.

39. To the Petitioner the Respondents by their said actions have similarly threatened to violate his political rights under Article 38 of the Constitution and in particular the right without unreasonable restrictions to be a candidate for public office and to hold office as stipulated in Article 38(3)(c) of the Constitution as follows:

(i) The principal, paramount and overriding objective of the Second, Third and Fourth Respondents is to bring to a halt the Petitioner's tenure and mandate as an elected senator or to dim the opportunity for the Petitioner to occupy or hold any state or public office; and

(ii) The restrictions contemplated or envisioned under Article 38(3) of the Constitution do not extend to an arbitrary denial of rights enshrined and protected by the Constitution and the law and in particular when the preponderant purpose is achieved by using craft and wit to invoke the criminal justice system as a sword and tool to score a political advantage.

40. It was further contended that the Respondents each and all have denied or threatened to deny the Petitioner the right to education contrary to the provisions of Article 43(1)(f) of the Constitution in that:

(i) The Petitioner has been deregistered and discontinued from the University of Nairobi and cannot pursue his post graduate studies for a Master of Laws degree;

(ii) The Petitioner has lost the award of the degree of Bachelor of Laws and cannot participate in a graduation ceremony at the University of Nairobi and get his certificate for the degree of Bachelor of Laws;

(iii) The Petitioner has lost and is likely to lose four years of strenuous and intense academic studies and as a result thereof will stand not to enjoy the fruits or benefits of his education, academic achievements and hard labour; and

(iv) The Petitioner will or is likely to miss opportunities in advancement of his career in politics, law and other disciplines.

41. It was pleaded that the DPP is enjoined under Article 10 and 157(11) of the Constitution and sections 5(4) and (6) of the **Office of the Director of Public Prosecutions Act** to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of the legal process; to maintain the rule of law and to contribute to a fair and equitable criminal justice; not to require the consent of any person or authority for the commencement of criminal proceedings and not be under the direction or control of any person or authority in the exercise of his powers or functions under the Constitution, the **Office of the Director of Prosecutions Act** or any other written law; and to be subject to the Constitution and the law.

42. The Petitioner averred that the Office of the Director of Public Prosecutions has published a National Prosecution Policy to ensure that prosecutions are conducted in manner that meets the requirements of the Constitution, secure public accountability in the exercise of prosecutorial authority and to make the exercise of the prosecutorial authority inspire public confidence and trust. Accordingly, the role of the DPP as a prosecutor includes providing legal advice to the EACC and IGP as investigative agencies and accordingly direct and guide investigations in a process that is consultative, collaborative and complementary. However, the Director of Public Prosecutions was getting letters from the EACC and the IGP intimating that it will be required of him to institute criminal proceedings against the Petitioner.

43. It was averred that despite the Petitioner's protest through his advocates to the DPP placing before him materials that show that the investigations and intended prosecution are unconstitutional, illegal, irrational and procedurally unfair and are being pursued for an ulterior and extraneous motive and purpose, the Petitioner did not receive any response from the DPP. It was the Petitioner's case that the DPP is duty bound to advise the EACC to stop the investigations or preparation of charges, which have been identified and framed by the EACC, in circumstances where there is an abuse of the legal process.

44. It was argued that the superior courts have in many instances stopped, discontinued or prohibited prosecutions or intended prosecutions undertaken or intended to be undertaken by the DPP where an appropriate case is made as borne out in the decision and the jurisprudence contained in cases like **Githunguri vs. Republic (1986) KLR**, **Hassan Ali Joho vs. Republic Mombasa High Court Petition No 15 of 2017** and **Cyrus Jirongo vs. Republic, Nairobi High Court JR No 78 of 2016**.

45. The Petitioner averred that having been unlawfully and arbitrarily punished by the deregistration and discontinuance of his degree programme at the University of Nairobi, it is just and reasonable for him to seek the intervention of the Court at the earliest opportunity in order to stop the intended prosecution on account of the absence of factual and legal foundation.

46. The Petitioner's position was that the EACC is established under Article 79 of the Constitution and section 3 of the **Ethics and Anti-Corruption Commission Act** and is required to adhere to the values and principles under Article 10 of the Constitution and by dint of Article 79 of the Constitution it has the status and powers of a constitutional commission under Chapter Fifteen of the Constitution. It is however the implementing agency for the **Leadership and Integrity Act** and is responsible for overseeing and enforcing the Act. Under Article 79 of the Constitution and section 11 of **Ethics and Anti-Corruption Commission Act** it has additional functions besides those enumerated in Article 252 of the Constitution which include:

1) Ensuring compliance with, and enforcement of the provisions of Chapter Six of the Constitution on Leadership and Integrity.

2) Investigation and recommendation to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the Ethics and Anti- Corruption Commission Act or any other law enacted pursuant to Chapter Six of the Constitution.

3) Recommendation of appropriate action to be taken against State Officers or public officers alleged to have engaged in unethical conduct.

47. It was averred by the Petitioner that the action or recommendations of the EACC leads to criminal or disciplinary process resulting in some form of punishment penalty or disciplinary action and it is therefore unreasonable, irrational and procedurally unfair for the EACC to make decisions which are adverse and to the detriment of any person before undertaking and completing comprehensive and appropriate investigations. Further, it was arbitrary, capricious, irrational and unfair for the EAC to make recommendations to the DPP or any other public entity based on ongoing, incomplete, threadbare and scanty investigations and contained in reports which are premature and unmeritorious and that in the said recommendations or reports call for drastic action including administrative action to be taken against a person.

48. It was accordingly averred that the EACC had contravened Articles 2, 10, 27, 28, 43 and 47 of the Constitution and was in breach of the provisions of the **Fair Administrative Action Act** to the detriment of the Petitioner.

49. As regards the position of the IGP, it was contended that it is appointed under Article 245(2) of the Constitution and the **National Police Service Act** and exercises independent command over the National Police Service and can perform any other functions prescribed by national legislation. However, its powers and functions are subject to Articles 2, 10, 157(4), 238, 244, and 245(4) and (5) and 249 of the Constitution and other written law including the **National Police Service Act** and the **Office of the Director of Public Prosecutions Act** which include the following obligations:

1) The rule of law, human rights, non-discrimination, good governance, integrity, transparency and accountability.

2) Utmost respect and compliance with the constitutional standards for the rule of law, democracy, human rights and fundamental freedoms.

3) Not to act in a partisan manner and not to act with the direction of any person with respect to the investigations of any particular offence or offences or the enforcement of the law against any particular person.

4) In relation to the National Police Service to promote constitutionalism.

50. The Petitioner pleaded that it was conceivable like in many cases or instances that the IGP may join or replace the EACC in carrying out the investigations and indeed the Director of the Criminal Investigations through his officers in Meru County have undertaken an aspect or component of the investigations regarding false declaration forms purportedly written or made in the hand of the Petitioner which was found to be untrue.

51. As for the University of Nairobi, it was averred that it is established under section 3 of the **University of Nairobi Act** and its functions and objects include the provision directly, or in collaboration with other institutions of higher learning, facilities for university education, including technological and professional education, and for research; to participate in the discovery, transmission and preservation of knowledge and to stimulate the intellectual life and cultural development of Kenya; and to conduct examinations for and to grant such academic awards as may be provided in the statutes.

52. The University, it was averred, is authorized by the Act to confer the degrees of Bachelor, Master and Doctor and such other degrees as may be provided in the statutes and to grant diplomas or certificates or other awards. In the Petitioner's view, the University has regulations to determine the eligibility of persons for admission to a course of study and the standard of proficiency to be gained in each examination for a degree, diploma, certificate or other award of the University and the University Senate has the power and duty to decide which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other award of the University.

53. It was contended that in exercise of its powers and duties under the **University of Nairobi Act**, the University admitted the Petitioner to the University on the basis of a degree of Bachelor of Commerce attained by the Petitioner from **Dr Babasaheb Ambedkar Marathwada University** and proceeded to award the Petitioner the degree of Bachelor of Laws and on the strength of the Petitioner's performance in the examination admitted the Petitioner to the graduate school to pursue post-graduate studies leading to the award of degree of Master of Laws.

54. It was therefore pleaded that the University illegally and without undertaking proper and conclusive investigations unreasonably, irrationally and without procedural fairness deregistered and discontinued the Petitioner from the programmes and studies at the University whereupon the Petitioner ceased to be a student at the University of Nairobi. It was therefore the Petitioner's case that the University's conduct was not in accordance with the Constitution, the **Fair Administrative Action Act** and the Statutes and Regulations of the University.

55. As a result of the foregoing the Petitioner's contention was that he was adversely affected and had suffered from the constitutional violations as spelled out and articulated in Part C of the Petition. He disclosed that he had been deregistered and discontinued from the University of Nairobi and had suffered the loss of the award of a Bachelor of Laws degree and had been stopped from participating and taking part in the graduation ceremony held by the University of Nairobi. As a result he will not be able to obtain a certificate for the degree of the Bachelor of Laws from the University of Nairobi and to pursue his post graduate studies leading to the award of a Master of Laws degree. In addition, he will not be able to enrol as an advocate of the High Court of Kenya and practice as such as he cannot undertake professional courses at the Kenya School of Law.

56. It was the Petitioner's case that his reputation had been dented and damaged by publication of the news of his deregistration and discontinuance from the University of Nairobi and the circulation of the information and the news that he is being investigated by the EACC which investigations are likely to lead to a prosecution against him by the DPP in a process which will or may be based on false evidence and statements. Such a prosecution, according to him, may lead to declaration that the Petitioner's election is unlawful and unconstitutional and therefore null and void with the result that the Petitioner may suffer the loss of his senate seat and be declared unfit to hold any State or public office.

57. In response to the EACC's petition, the petitioner herein averred that he was the Jubilee Senatorial aspirant for Meru County and on or about 14th May 2017 he got wind of a video that was circulating online in which the then Meru County Governor, **Peter Munya**, and the then PNU Senatorial aspirant, **Milton Mugambi**, addressed a crowd at Nkubu asserting that they would do anything to ensure that the Petitioner's name was not on the ballot paper on 8th August, 2017 General Elections.

58. It was averred that soon thereafter, on 16th May, 2017 the firm of **M M Gitonga Advocates** purported to circulate a letter addressed to the IEBC on social media claiming that the Petitioner had been admitted to the University of Nairobi to study Commerce and Law without having attained the basic academic qualifications for the course therein and that the Petitioner sat for his KCSE Examination in 1989 at Igembe Boys High School and attained a paltry mean grade D- that could not enable him qualify to take the degree courses in Commerce and Law. On 17th May, 2017 a letter with similar contents addressed to the Vice Chancellor of the University of Nairobi was circulated online by the said firm. The Petitioner therefore formed an opinion that this was a well-orchestrated move to ensure that he was locked out of the said polls by his opponents. He averred that since then he has been the subject of constant harassment, public ridicule having been painted by the petitioner as an academic dwarf and political manipulation by the EACC who on 26th May, 2017 summoned him to appear before it on 31st May, 2017 for investigations.

59. However before he could so appear, on 30th May, 2017 the EACC wrote a letter to the IEBC Chairman alleging that the EACC had conclusively investigated the allegations against the Petitioner to the effect that the Petitioner's self-declaration forms for the 2013 elections filed with the IEBC were falsified and that the Petitioner was not a graduate of the University of Nairobi. Apart from that the EACC wrote yet another letter to the IEBC dated 5th June, 2017 requesting the IEBC to help it in the investigations against the Petitioner notwithstanding the fact that the EACC had informed the IEBC that it had conclusively investigated the Petitioner.

60. The Petitioner further averred that through a letter dated 15th June, 2017, the EACC summoned him to appear before it on 23rd June, 2017 to respond to allegations of the allegedly falsified self-declaration forms. Noting the timing of the said summons, the Petitioner filed a Petition and sought stay of the said summons which orders were granted though later on the application was dismissed on 30th June, 2017 but the Petitioner was yet to be heard substantially. In the meantime one **Babra Nkirote Murithi** filed judicial review application no. 491 of 2017 seeking that the Petitioner's name be expunged from the ballot papers for alleged falsification of self-declaration forms. This matter was however referred for hearing by the IEBC and upon hearing the Tribunal on 6th August, 2017 dismissed the complaint on the ground that there was no judicial finding on the alleged breach of Chapter Six of the Constitution by the Petitioner.

61. According to the Petitioner, thereafter, the EACC resumed its intimidation, threats, harassment and witch-hunting and filed petition no 394 of 2017. Notwithstanding that and during the pendency thereof, the EACC issued further summons dated 21st August, 2017 purporting to investigate the Petitioner over his academic qualifications and the alleged false self-declaration forms. To the Petitioner this action was a violation of the *sub judice* rule.

62. The Petitioner therefore contended that from the said actions, it is evident that the EACC is being used to achieve political goals and to fight political battles by his political opponents. He lamented that while the integrity report had several names, none of the people mentioned therein have been pursued by the EACC in any way whatsoever hence by singling him out, the EACC has discriminated against him and violated his right to human dignity contrary to Articles 27 and 28 of the Constitution. In his view the said report was made in violation of his right to fair administrative action under Article 47 of the Constitution as he was never given written reasons for the making of the report or

heard before the same was made.

63. It was the Petitioner's contention that the EACC was out to punish him for fighting for integrity and stepping down of the EACC's bosses in order to gain ground in the fight against corruption. This, according to him, was informed by his push for the reform of the EACC in 2015.

64. The Petitioner therefore averred that it was unconstitutional for the EACC to call upon this Court to nullify his election as the Senator based on a report that was unconstitutionally made in violation of his rights. By seeking that the Court finds that he is criminally liable for the alleged fabrication, and giving false information in violation of the Penal Code, the Petitioner was of the view that the EACC was seeking that this Court sitting as a constitutional court sits as a criminal court of first instance, yet this Court has no jurisdiction to investigate and determine his alleged criminal liability in so far as the allegations are concerned as a court of first instance. In this respect the Petitioner relied on Petition No. 331 of 2015 – **Jacob Juma vs. Evans Kidero [2016] eKLR**, Petition No. 44 of 2013 – **Silas Make Otuke vs. Attorney General & 3 Others [2014] eKLR** section 11 of the *Ethics and Anti-Corruption Commission Act*, the *Leadership and Integrity Act* and averred that by its petition, it was alleged that the EACC was attempting to circumvent the well laid down processes contrary to the holding in **The Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992**. The Petitioner therefore averred that the EACC's petition was an abuse of the procedure.

65. To the Petitioner, the IEBC was right in declining to act on the verification report without a judicial determination on his alleged criminal culpability or otherwise.

66. The Petitioner recalled that in its replying affidavit dated 6th September, 2017, the EACC categorically stated that the integrity verification report submitted to the IEBC on 30th May, 2017 was not conclusive as at that date investigations were still ongoing. The Petitioner was therefore bewildered as to why the EACC was despite disregard of the due process of the law calling on the IEBC to use un-concluded integrity verification report to bar the petitioner from contesting the August 8th 2017 polls, an act which constituted a violation of a fair trial. The Petitioner alleged that he was not the author of the alleged 2013 self-declaration forms that formed the basis of the said report by the EACC. To him, he was a victim of political sabotage as neither the handwritings nor the signature therein were not his.

67. In a rejoinder to the replying affidavits sworn and filed on behalf of the Respondents, the Petitioner reiterated the foregoing and asserted that each and all the Respondents did not respond to the findings of the investigations carried out by the Director of Criminal Investigation Officer in Imenti North and confirmed by the Senior Assistant Director of Public Prosecutions, acting on behalf of the DPP, confirming that the self-declaration forms purportedly made, executed and presented to the IEBC by the Petitioner in 2013 General Elections was not made by the Petitioner because the handwriting and signature on the declaration form do not belong to the Petitioner. It was therefore his view that the lack of response to the views of both the said investigating officer and the prosecutor is unreasonable, irrational and malicious with the effect that the Respondents are intolerant to exculpatory facts that are beneficial or advantageous to the Petitioner.

68. He took the position that the existence of unresolved issues, whether many or serious, can only meet the test and requirements of the Constitution and the law when there is a proper judicial or quasi-judicial finding on matters of integrity, morality or ethics after a thorough and comprehensive inquiry or investigations have been carried out.

69. The Petitioner denied that the Independent Electoral and Boundaries Commission refused to discharge its constitutional and statutory obligations as the matters placed before it were heard inter parties and determined. He maintained that his political opponents colluded with the Respondents herein, **Milton Mugambi** being one of them, because of the following reasons:

a) There was constant pressure exerted on the First, Second and Fifth Respondents to take immediate action even without carrying out and completing investigations;

b) There was disregard of exculpatory facts including the findings of Director of Criminal Investigations Officer, Igembe North and letters from Dr Babasaheb Ambedkar Marathwada University; and

c) The Respondent's used a multiplicity of cases hoping that one may deliver the desired effect of barring me from participating in August 2017 general elections.

70. It was his case that the irrational, unreasonable and biased conduct on the part of the EACC leads to a justifiable inference that the EACC was unhappy with the Petitioner's views on their conduct in performance of constitutional and statutory obligations and duties on their part which views he gave in the debates held in the National Assembly on 22nd April 2015. To him, he did obtain some orders suspending letters or summons calling for his appearance before the EACC when he was convinced that there was a conspiracy to stop him from running for the elective office of Senator Meru County hence he did not arbitrarily refuse to appear when summoned before the EACC.

71. He reiterated that the letters from **Dr Babasaheb Ambedkar Marathwada University** show that he could not have been lying about the fact that he was a student at the said University which was formerly known as **Marathwada University**.

72. It was his case that the EACC had not read and interpreted correctly the qualifications required for admission at the School of Law of the University of Nairobi, and the law and the statutes of the University show clearly that one can be admitted to the University solely on account of possessing a degree from a University recognized in Kenya.

73. He further averred that the EACC has misunderstood the grounds of the petition which are based on violations of rights and freedoms enshrined in the Constitution of Kenya 2010 and that the process of investigation and the intended prosecution are illegal, irrational, procedurally unfair and constitute an abuse of the process of the Court.

74. It was the Petitioner's case that the University had confirmed that he was admitted to the University solely on his qualification of having

a degree from a recognized University and the minutes of the University of Nairobi held on Thursday, 30th November 2017 and the University Senate also held on the same day show that the only issue for consideration was the authenticity of his degree from **Marathwada University**. The minutes further show that the letter confirming and attesting to his academic credentials from **Dr Babasaheb Ambedkar Marathwada University** dated 8th November 2017 and addressed to the Dean School Law and received by the University on 13th November 2017 was never placed before either meetings for consideration. He therefore insisted that his degree certificate from **Dr Babasaheb Ambedkar Marathwada University** is genuine and authentic.

75. The Petitioner noted that the University had not referred to the contents of the letter from **Dr Babasaheb Ambedkar Marathwada University** which he exhibited in his affidavit in support of the Petition as this removes any doubt on the question of his qualification to be admitted to the University of Nairobi. This, to him, was a deliberate, dishonest and improper conduct of a statutory or public body such as the University. While the material placed before the University Senate allege that the University conducted due diligence including conducting a visit to **Marathwada University**, there was no report or record of a visit to **Marathwada University** by the University and the names of the University of Nairobi officials who conducted the visit are not disclosed. To the contrary, the meeting held on 30th November 2018 by the University, including that of the Senate show that the certificates and mark sheets he presented to the University while seeking admission to the University were only those from **Marathwada University** and the University only confined itself to examining and verifying the following:

a) Marathwada University Bachelor of Commerce Degree Certificate.

b) Marathwada University first year handwritten Certificate Number 63528 and seat number 46308 showing number of marks obtained in Bachelor of Commerce examinations held in April 1999.

c) Marathwada University second year handwritten Certificate Number 4046 and seat number 512431 showing number of marks obtained in Bachelor of Commerce examinations in April 2000.

d) Marathwada University third year handwritten Certificate Number 6352884419 and seat number 60516 showing number of marks obtained in Bachelor of Commerce examinations held in April - May 2001.

e) Marathwada University handwritten Passing Certificate Number 60516 certifying that Franklin Linturi Mithika has passed the examinations held in April 1st 2001 and was placed in the Second Division.

76. However, it was not claimed by the University in the proceedings that the Petitioner had presented pre-university and/or secondary school certificates or results and neither were the same considered in the meetings. The Petitioner disputed the minutes which indicated that the first meeting held by the University which was slated for 7:00am commenced at 7:40am when it was called to order was attended by, amongst others, **Prof Henry W. Mutoro** and **Prof J. Kiarie Mwaure** since it was inconceivable that **Prof Henry W. Mutoro** and **Prof J. Kiarie Mwaure** could have been attending the Senate meeting when their first meeting had not even commenced and that both of them were able to compile a report to be submitted to the University Senate in time for the Senate meeting.

77. The Petitioner disclosed that **Milton Mugambi** had taken legal steps to withdraw Election Petition No 5 of 2017 and it had emerged that this has been done on account of getting a job as the Chairperson of the National Standards Council. He further disclosed that on 25th January 2018 the said **Milton Mugambi** wrote a letter of undertaking to **Mr. Joseph Kinyua**, the Head of the Public Service, that the election petition would be withdrawn on condition of gazette of the appointment of the Fourth Respondent in the specified office aforesaid and the issuance of a letter of appointment which was done. To the Petitioner, these matters confirm that **Milton Mugambi** has never sought his disqualification from running for the office of Senator Meru County or that a prosecution be instituted against him as a vindication of the law and in pursuance of public policy and public good, but for an extraneous or collateral purpose and for an ulterior motive. It was further revealed that the said **Milton Mugambi** had tried to put pressure on the Petitioner to execute a deed of indemnity to indemnify him absolutely and to keep him indemnified against any costs that may be ordered to be payable by **Milton Mugambi** following an intended withdrawal of the election petition he filed against the Petitioner and to undertake to withdraw the claim in the suit the Petitioner filed against him and others in the High Court at Nairobi.

78. The Petitioner therefore believed that **Milton Mugambi** is attempting to engage in an act of collusion and condonation which is tantamount to both acts of blackmail and bribery so that he can escape the legal consequences of the withdrawal of the petition and to coerce the Petitioner to withdraw the legitimate claims he has against him in various Courts and at the same time be able to get a senior state office in the public service while at the same time instituting and maintaining a criminal investigation and prosecution against me. The Petitioner therefore contended that there is a clear motive on the part of the said **Milton Mugambi**, which has born him fruit, to use the proceedings he has instituted against the Petitioner in various courts and the complaints he has made against the Petitioner with the First, Second and Fifth Respondents to get into a high office and get lucrative salary, allowances and benefits.

79. It was therefore the Petitioner's case that the material and documents I have presented to the Honourable Court show that the First Respondent and the Second Respondent have no proper factual foundation and has not carried out and completed investigations to make an informed and proper decision to institute charges and arraign me in a criminal court and therefore would amount to an abuse of the court process.

80. In his submissions the Petitioner relied on the decision of **Ogola J**, in **Hassan Ali Joho vs. Inspector General of Police and 3 Others [2017] eKLR**.

81. In this case it was submitted that on 19th October 2017 the EACC advised the University that the degree certificate used for admission by the Petitioner was not authentic based on a letter received from **Dr Babasaheb Ambedkar Marathwada University**. The EACC then, in words couched as an order, required the University "to take the necessary administrative action". Besides receiving a letter from **Dr Babasaheb Ambedkar Marathwada University** on 13th November 2017 to the contrary the University arbitrarily deregistered and

discontinued the Petitioner from being a student of the University of Nairobi based on one factor, one consideration alone.

82. To the Petitioner, it is clear that nothing is made out of the Petitioner pre-secondary school qualification which matter was relevant and pertinent on the part of the University where, in the first instance, the Petitioner undertook his undergraduate studies and his first degree. The matter of pre-secondary school performance was only relevant to **Dr Babasaheb Ambedkar Marathwada University**. Of importance to the Fifth Respondent was the question of whether or not the University is recognized in Kenya. In this case **Dr Babasaheb Ambedkar Marathwada University** has confirmed and attested to the Petitioner's academic credentials and qualifications and that indeed he was their student. The University has verified and confirmed the Petitioner's Degree of Bachelor of Commerce which he obtained in 2001. The Petitioner has exhibited Passing Certificate No 4046 dated 12th May 2001, which certifies that the Petitioner passed Bachelor of Commerce examinations held in the month of April 2001 and was placed in the Second Division. The Petitioner has exhibited several certificates showing the number of marks obtained in each and every academic year and the degree certificate dated 20th November 2001. The integrity of this performance is confirmed by the Petitioner's record at the University of Nairobi where he did extremely well in every academic year and was awarded the degree of Bachelor of Laws at Second Class Honours, Upper Division. He was almost within range of getting a First Class Honours degree. The Fifth Respondent did not therefore hesitate to admit the Petitioner to postgraduate studies which were to lead to the award of Master of Laws degree in the School of Law during 2017/2018 academic year. The Fifth Respondent had no basis for rescinding the award and issue to the Petitioner the Bachelor of Laws degree and similarly to terminate his postgraduate studies.

83. According to the Petitioner, beginning from the month of May 2017 the **Milton Mugambi** undertook an expansive and intensive enterprise, directly or indirectly through his advocates or agents, to bar the Petitioner from participating in the general elections held on 8th August 2017. Court proceedings were instituted in the High Court and with the Independent Electoral and Boundaries Commission. Complaints were made to the EACC, the University and the DPP. Letters were copied to the Cabinet Secretary Ministry of Education, Science and Technology, and the Clerk of the National Assembly. **Milton Mugambi** was also having issues with the Petitioner's tenure in the National Assembly during the existence of the Eleventh Parliament. **Babra Nkirote Murithi**, an advocate, practicing with the Fourth Respondent's law firm, instituted proceedings against the Petitioner in Nairobi High Court Miscellaneous Application No. 491 of 2017 seeking orders to bar the Petitioner from participating in the parliamentary elections in 2017 on account of failure to satisfy the moral and ethical requirements under Article 99 of the Constitution of Kenya, 2010 and section 40 of the **Elections Act 2011**. By an order of the court the matter was transferred to the Independent Electoral and Boundaries Commission (IEBC Integrity Vetting Committee) which was heard as Complaint No 3 of 2017. The Committee did not find merit in the complaint and proceeded to dismiss it on 6th August 2017 on the basis that the EACC had not forwarded to the IEBC a record of any adverse findings of either a judicial or quasi-judicial body on the complaint for breach of Chapter Six of the Constitution and the **Leadership and Integrity Act** on matters of integrity, morality and ethics hence it was premature for the Committee and IEBC to pass judgment on the Petitioner for breach of Chapter Six of the Constitution in the absence of a judicial finding on his culpability.

84. According to the Petitioner, because the ECC was acting together with **Milton Mugambi** in a questionable mission of stopping the Petitioner's candidature in the elections, on 7th August 2017 the EACC promptly filed in Nairobi High Court, Constitutional Petition No 394 of 2017 seeking declarations, *inter alia*, that the Petitioner was not eligible for election as a Senator in the general elections slated for 8th August 2017 and that any election of the Petitioner to the position of Senator, Meru County, or any of other County in the Republic of Kenya, in the circumstance would be null and void and further prayed for a permanent injunction barring the Petitioner from holding any public office for breaching the ethical requirements of Chapter Six of the Constitution of Kenya.

85. Albeit Petition No 394 of 2017, the EACC was still seeking out the Petitioner and served him with summons to appear before its officials in pursuit of self-same issue of moral and ethical integrity through a criminal and administrative investigative process. On 25th August 2017 the Honourable Court issued conservatory orders in favour of the Petitioner. Similar orders had also been granted before the date of elections in Meru High Court Petition No 13 of 2017. The Petitioner was being vexed, tossed about and harassed before, during and after the elections.

86. On 7th September 2017 **Milton Mugambi** filed Election Petition No 5 of 2017 at the High Court in Meru against the Petitioner and others seeking *inter alia* a declaration that the Petitioner is not and was not eligible to contest in the senatorial election held on 8th August 2017 for Meru County. It was **Milton Mugambi's** case as set out in the Election Petition that the Petitioner failed to satisfy the requisite moral and ethical requirements on account of matters to do with the self-declaration forms for 2013 general elections and qualification to study for the law degree at the University of Nairobi.

87. The Petitioner submitted that in all these cases, the predominant purpose and overriding motive was and has been to stop the Petitioner from being a Senator now and in the future and that the pursuit of the objectives of criminal law and public policy or even the values and principles of Kenya's criminal justice system were a secondary and collateral aim. However, it has now emerged that **Milton Mugambi** has taken steps to institute proceedings for the withdrawal of the election petition. He has published a notice of intention to withdraw the petition as required by the law. The reason he has given is that he is no longer interested in pursuing the petition having become a public officer. On 25th January 2016 he wrote to **Mr. Joseph Kinyua**, the Head of Public Service, a letter to the effect that he would withdraw the petition upon his gazettelement as Chairman of the Kenya Bureau of Standards and upon issuance to him of the letter of appointment. His appointment as Chairman of the National Standards Council for a period of three years with effect from 17th January 2018 was published in the Kenya Gazette on 26th January 2018 through Gazette Notice No 922 by Uhuru Kenyatta as President, exercising powers under section 6(1) (e) of the **State Corporations Act**. The Petitioner appreciated that under the law **Milton Mugambi** as a state officer cannot be qualified to be elected as a member of parliament. But that does not make him ineligible to prosecute the election petition to its conclusion. In the circumstances it is clear that the complaints he had made in the courts, with IEBC, to the other Respondents herein and to other agencies were for the fulfilment of a personal ambition which has been extinguished once a lucrative appointment has fallen on his laps. It is confirmation that the vindication of the objectives of the criminal law were not at the centre of the Fourth Respondent's crusade.

88. In support of his submissions the Petitioner relied on the decision of **Khamoni, J** in **Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995** in which the learned Judge relied on **Stanley Munga Githunguri vs. Republic (1986) eKLR** and while citing the Australian case of **Williams & Others vs. Spautz (1992) 174 CLR 509**, enunciated important legal principles that may serve as an opener to these submissions by laying certain compelling principles and propositions and submitted that the court has jurisdiction to stay proceedings which are an abuse of process or otherwise oppressive, illegal and procedurally unfair. The power

arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings. It goes beyond the determination of the dispute between parties.

89. It was submitted that the intended prosecution by the First and Second Respondents, like other legal steps that **Milton Mugambi** has taken against the Petitioner, can be characterized as a stalking horse to conceal **Milton Mugambi's** outrageous “**self-proclaimed campaign for justice**” which in essence has only one improper and predominant objective; to remove the Petitioner from the Senate.

90. It was argued that since the enactment and promulgation of the Constitution of Kenya 2010 our courts need not invoke the inherent power or jurisdiction of the court to prevent abuse. Under the Bill of Rights protection exists to secure the rule of law and fair hearing. Article 47 of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The whole basis of administrative law and judicial review has been statutorily established, developed and expanded under the **Fair Administrative Action Act** by dint of Article 47 of the Constitution. Since the **Kangwana** and **Githunguri** cases and before the promulgation of the Constitution of Kenya 2010, has developed solid case law which has enriched our jurisprudence that is now built on the hard rock and foundation of the Constitution. In this respect the Petitioner relied on **George Okungu and Another vs. Chief Magistrates Court Anti –Corruption Court Nairobi and Another [2014] eKLR.**

91. It was submitted that it is crystal clear that the efforts of the Respondents, save the University, in desiring to mount a prosecution against the Petitioner has nothing to do with the vindication of the law or the objectives of the law. It is not to justly punish the Petitioner if found guilty of any offence. The predominant purpose and ulterior motive is to remove the Petitioner from his office as the Senator for Meru County, and disqualify him for any subsequent election or elective post on the grounds of being unfit to hold public office. This predominant purpose is compounded by the Petitioner own individual drive and ambition to occupy the office of Senator Meru County. The timing of the complaints, investigations and prosecution had all to do with the commencement of the electoral cycle in the months when political parties were undertaking the exercise of nomination of candidates and presenting nomination papers to the Independent Electoral and Boundaries Commission.

92. Based on the Australian case of **Williams & Others vs. Spautz (1992) 174 CLR 509**, it was submitted that this is a vivid manifestation and replication of the manner in which **Milton Mugambi** acted in this matter with substantial support from the EACC. For example **Milton Mugambi's** advocates wrote to the Vice Chancellor of the University of Nairobi on 12th June 2017 threatening that legal proceedings would be instituted against the University if information requested was not received. On 16th May 2017 the same firm had written to the Independent Electoral and Boundaries Commission that the Petitioner should be prosecuted “**forthwith**”. According to the Petitioner, on 14th July 2017 the advocates warned the EACC that a petition would be filed against it under Article 251 of the Constitution unless the decision to hold in abeyance action against the Petitioner was rescinded. These letters were not only directed towards creating pressure to act, and to act only in one way to prosecute the Petitioner but to enable **Milton Mugambi** to achieve his personal objective of getting the Petitioner off the ballot and have a free ride to the Senate.

93. It was submitted that the EACC on its part while conducting criminal investigations and before conclusive evidence had been adduced rushed to advise the University to take administrative action. In its report to the Independent Electoral and Boundaries Commission for integrity verification of candidates for 2017 General Elections the EACC gave the electoral body the impression that conclusive investigations had been carried out in which the Petitioner's culpability had been established. Contrary to this assertion when the same complaints were presented the IEBC Integrity Vetting Committee, it took the view that the EACC had not provided it with a record of any adverse findings of either a judicial or quasi – judicial body on the complaint for breach of Chapter Six of the Constitution and the **Leadership and Integrity Act** on matters integrity, morality and ethics.

94. It was submitted that this runs afoul of the law and our jurisprudence. The Respondents are being unreasonable and irrational since action was taken before the investigations were completed. The First and Second Respondents are not in possession of all the facts based on a proper, fair and impartial inquiry. The Respondents' decisions and actions have been premature and the complaints and grievances made are not yet ripe for administrative action or prosecution. The First and Second Respondents are obligated to equip themselves with information necessary to enable them make proper, legitimate and informed decisions. In this respect the Petitioner relied on **R vs. Attorney General exp Kipngeno Arap Ngeny (2001) eKLR.**

95. According to the Petitioner, the absence of a proper factual foundation was contributed to, in large part, by the convergence of similar interests and which transformed the Petitioner to “**A man under siege**” and relied on **Mativo, J's** decision in **Samuel Roro Gicheru & Another vs. OCS Nanyuki Police Station & Another [eKLR]**. In this case it was submitted that **Milton Mugambi's** objective or motive has never been hidden. It was to bar the Petitioner from vying for the position of senator and/or to achieve the nullification of his election. The conduct and by extension the EACC's conduct is not consistent with those of a person motivated by a genuine desire to uphold the law and relied on **Waki, J's** decision in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] eKLR.**

96. It was the Petitioner's case that the use of the arms of the law to score a private advantage as displayed in the cases cited in these submissions is a reflection of what the Petitioner has experienced. He is a man literally under siege and his plea to the Honourable Court is that the oppression harassment, vexation, abuse and violations must be brought to a halt. The Petitioner's experience is an exemplification of harassment and oppression by the abuse of the process of law. In his view, the justification for the Court's intervention in cases such as the present case was aptly stated in the case of **Kuria & 3 Others vs Attorney General [2002] 2 KLR 69** and in the **Ganijee Case.**

97. **Waki, J** also cited with approval the decision of **Kuloba, J** in **Vincent Kibiego Saina vs. Attorney General H. C. Misc Application No 839 and 1088 of 1999**. Reliance was so placed on the decision of **Majanja, J's** decision in **Petition No 461 of 2012 – Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions.**

98. The Petitioner submitted that the EACC and **Milton Mugambi** have tried to use or manipulate the courts and quasi-judicial organs like the IEBC vetting committee to stop the Petitioner's candidature. The EACC has invoked its statutory mandate to coerce the University to take administrative action. There is also an election petition awaiting determination, albeit **Milton Mugambi** has commenced judicial steps to withdraw the election petition. The EACC is also in a hurry to commence prosecution before concluding the investigations. It is a classic

case of abuse of process.

99. It was the Petitioner's case that the actions of the Respondents are therefore tainted and contaminated with bad faith, bias and procedural unfairness. A punitive action has been taken against the Petitioner before a full, comprehensive and conclusive investigations have been undertaken. This includes deregistration and discontinuance of the Petitioner's studies at the University of Nairobi. The ulterior motive or extraneous purpose has been to ensure that the Petitioner is not a Senator which actions threaten the Petitioner's enjoyment of political rights guaranteed and enshrined under section 38 of the Constitution of Kenya 2010. It then follows that the Respondents' actions are irrational and unreasonable and made in error of the law. They have failed to consider relevant matters before proceeding ahead with the decision to recommend prosecution. The University has ignored and abandoned its own statutes for admissions. Once the Petitioner was admitted on the basis of a degree the University cannot recall its decision and impose other conditions that were not relevant for purposes of admission. No doubt if there is some other infraction that was not relevant to the question of admission some other appropriate measure can be taken proportionate to the breach. The performance of the Petitioner for the law degree and his subsequent admission to postgraduate studies confirm that he was intellectually ripe, ready and qualified to pursue education and scholarship at the University of Nairobi and beyond. To the Petitioner, the Respondents have exhibited a complete and utter abuse of discretion and power which has been compounded with oppression, vexation and illegality.

100. It was submitted that there was no fair administrative action as required under Article 47 of the Constitution of Kenya 2010 and the ***Fair Administrative Action Act***. To the Petitioner, the Respondents action fails the test of equality and freedom from discrimination as provided in Article 27 of the Constitution of Kenya 2010. The EACC Respondent has discriminated against the Petitioner and denied him equal protection and benefit of the law by taking action against the Petitioner without determination of the veracity of the accusations made against him. The false information about his degree in India has been taken as gospel truth. There is no record that indeed the Petitioner supplied his Kenya Secondary School Examination Certificate to the University. The exculpatory facts regarding the self-declaration forms including a report from the Director of Criminal Investigation and a letter from an officer of the DPP have been ignored to the detriment of the Petitioner.

101. The Petitioner relied **Prof Sir William Wade** in his book "***Administrative Law***" containing a passage cited in ***R vs. Somerset County Council, ex parte Fewings and Others [1955] 1 All ER 513 at 524*** which speaks to the nature of the duty of a public body and as noted by this Court in ***Republic vs. Attorney General and 9 Others Ex Parte Cyrus Shakhhalaga Khwa Jirongo [2017] eKLR***.

102. It was submitted that in our jurisdiction this principle is a constitutional diktat that commands the Director of Public Prosecutions, in exercise of the powers conferred on the office under Article 157(11) of the Constitution of Kenya, to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Article 244 of the Constitution requires the National Police Service to comply with constitutional standards of human rights and fundamental freedoms. The Inspector General exercises independent command over the National Police Service and no person may give him direction in respect to the investigations of any particular offence or offences and the enforcement of the law against any particular person or persons. In this case the EACC and the University are public bodies and should not act arbitrarily or capriciously. It is not clear from what the University has placed on record that the Petitioner was given a fair hearing before it took the drastic decision against the Petitioner. It appears that right from the beginning, the University was committed to drowning the Petitioner in the high seas. The letter from the **Dr Babasaheb Ambedkar Marathwada University** dated 8th November 2017 and received on 13th November 2018 did not seem to matter.

103. In his submissions the Petitioner contended that Article 47 of the Constitution of Kenya 2010 is a bulwark of the principle of fair hearing and reinforces Article 50 of the Constitution of Kenya and the principles of natural justice and relied on the case of ***Onyango Oloo vs. Attorney General (1986) EA 456*** and submitted that the University was never invited to the University Senate hearing. It made an irrational decision. It is clearly apparent from its letter dated 30th November 2017 addressed to the Petitioner that the confirmation and attestation of the Petitioner's academic credentials as contained in the letter by **Dr Babasaheb Ambedkar Marathwada University** had no impact on its decision. The University was informed that the **Marathwada University** degree certificate was authentic and genuine. At the same time the EACC was still conducting investigations including a request for an international mutual assistance in the investigations. This request is signed on 24th November 2017 and forwarded to the Office of the Attorney General for consideration and dispatch. The Attorney General acknowledges receipt on 1st December 2017 and the same is forwarded by the Ministry of Foreign Affairs on 4th December 2017. Quite clearly there was no basis for the University to take action against the Petitioner. The action was taken when the University had in its possession documentary evidence of the authenticity of the Petitioner's degree. The decision can only be described as capricious, arbitrary, unfair, unreasonable and illegal. The Petitioner therefore submitted that it was entitled to the orders prayed for in the Petition.

104. The Petitioner argued that whereas it may be argued that the existence of other cases cannot disturb or obviate criminal proceedings based on the same facts which are in issue in civil proceedings. Indeed the law allows it, this begs the question and runs afoul of good jurisprudence and relied on the statement by the court in ***Stanley Munga Githunguri vs. Republic (1986) eKLR***.

105. It was submitted that the words of the Court were not any different from those expressed by **Lord Scarman** in ***Reg vs. Humprys (16) [1977] AC 46***, a case considered by their Lordships in the ***Githunguri*** case.

106. Accordingly, the Petitioner sought the following reliefs:

a) A declaration that the investigations and intended prosecutions against the Petitioner by any and/or each and all the Respondents is unconstitutional, illegal, unreasonable, irrational, oppressive and procedurally unfair.

b) A declaration that the investigations and intended prosecution against the Petitioner has resulted in the violation and infringement and threatens to violate and infringe the Petitioner fundamental rights and freedoms under Articles 27(1) (2) and (3), 28, 38(3) (c), 43(1) (f), and 47(1) of the Constitution.

c) A declaration that the actions and conduct of each and all the Respondents contravene Articles 2(1) and (2), 10(2), 157(11), 238(1) and 2(b), 239(3) (a) (b), 244(c) and (d) and 245(a) and (b) of the Constitution.

d) A declaration that the conduct and actions of the Second Respondent constitute an abuse of power and discretion and are otherwise, in excess of jurisdiction and decisions have been made in bad faith.

e) An order restraining and/or prohibiting each and all the Respondents whether by themselves, agents and servants and officers and whomsoever acting under their authority or instructions from charging prosecuting, arresting, harassing and/or intimidating the Petitioner on account of the Petitioner's academic qualifications, false declaration forms relating to 2013 general elections or on subsequent elections held before the institution of these proceedings or on account of any investigations relating to his academic qualifications or purported forgery of the self-declaration forms purportedly filled and completed for the purposes of 2013 general elections or the degree certificate obtained from Dr Babasaheb Ambedkar Marathwada University.

f) A declaration that the actions of the Fifth Respondent of deregistering and discontinuing the Petitioner from the programmes and studies at the University of Nairobi and stopping the Petitioner from participating in the graduation ceremony held on 22nd December 2017 are unconstitutional, illegal, unreasonable, irrational and procedurally unfair.

g) An order compelling the Fifth Respondent to readmit the Petitioner to the University of Nairobi to pursue post graduate studies leading to the award of the degree of Master of Laws to the Petitioner in the School of Law during the 2017/2018 academic year and to further compel the Fifth Respondent to award immediately and forthwith to the Petitioner the degree of Bachelor of Laws Honours, Upper Division.

h) An order of judicial review of certiorari to remove ito this Court and quash the decision dated 30th November, 2017 by the University of Nairobi to de-register and discontinue the Petitioner as its student.

i) Judicial review order of mandamus compelling the University of Nairobi to reinstate/re-admit the Petitioner as a student of the University of Nairobi, School of Law.

j) An order of mandamus compelling the University of Nairobi to reinstate the Petitioner's name in the graduation list for 22nd December, 2017.

k) Any other or further order the Honourable deems fit and just to grant.

l) Costs be provided for.

1st Respondent's Case

107. The 1st Respondent herein, the EACC, apart from its own petition opposed the consolidated petition.

108. According to it, its mandate is to investigate, either upon receipt of a complaint or on its own motion, violations of the provisions of the said Chapter and the *EACC Act* as well as the *Leadership an Integrity Act*.

109. Sometimes in May, 2017, the EACC averred, it received a request from the IEBC to provide it with relevant information touching on the integrity of 16,182 identified persons, including the Petitioner (an aspirant for senatorial position of Meru County), who were aspiring for various elective positions in August, 2017 General Election, with relevant information touching on their integrity, to enable the IEBC discharge its mandate under Article 88(4)(f) of the Constitution.

110. It was averred that at that time the Petitioner was a Member of the National Assembly representing Igembe South Constituency and was therefore a State Officer within the meaning of Article 60 of the Constitution. It was averred that subsequent thereto, the EACC received an anonymous report on 24th May, 2017 alleging that the Petitioner had submitted a falsified self-declaration report to the IEBC in the year 2013 claiming to be a holder of a Bachelor of Commerce Degree, Insurance Option from the University of Nairobi obtained in the year 2001. At the time of the submission of the said declaration the Petitioner was an aspirant for elective position of Member of the National Assembly for Igembe South Constituency hence subject to the provisions of Chapter Six of the Constitution and the *Leadership and Integrity Act, 2012*.

111. Pursuant to the said letter, the EACC wrote a letter to the University of Nairobi seeking to establish whether the Petitioner had been a student of the said institution at the relevant time and sought information on the courses that he had applied for and undertaken. It also sought copies of his academic transcripts and information on any academic awards that he may have obtained from the institution. The said University responded that the Petitioner had not been registered as a student in its School of Business for the degree of Bachelor of Commerce (Insurance management Option) and that the Petitioner's name did not appear in the University's graduation booklet for the year 2001.

112. According to the EACC, through its letter dated 30th May, 2017 forwarded its integrity verification report to the IEBC pursuant to the aforesaid request. It was the EACC's position that there were many serious unresolved issues concerning the Petitioner's integrity at the time of the submission of the said report to the IEBC and that the Petitioner consequently lacked integrity.

113. It was the EACC's position that the failure or refusal of the IEBC to hear the aforesaid complaint of **Babra Nkirote Murithi** until it was compelled to do so by the High Court was completely unjustifiable as the power to hear and determine electoral disputes, including disputes relating to or arising from nominations save for petitions and post declaration of results disputes is donated to the IEBC. The EACC therefore faulted the IEBC's decision since in its view the High Court could not have referred the matter to the IEBC if the IEBC lacked the legal capacity to adjudicate over it in the absence of a judicial determination. It was the EACC's case that the decision of the IEBC watered

down its constitutional and statutory powers and reduced it to a mere rubber stamp of decisions and findings made by judicial and quasi-judicial bodies.

114. The EACC's position was that it has a constitutional and statutory duty to investigate any complaints of corruption, economic crime and violations of Chapter Six that it may receive and to act on its findings. In this case it was averred that no evidence had been adduced to prove that there was conspiracy against the Petitioner and that the EACC was out to settle personal scores as none of its commissioners were in the office at the time when the Petitioner claims to have criticised the institution. It was the EACC's case that in any case as a constitutional commission funded by the taxpayers' funds, it fully expects to have its operations scrutinised by the National Assembly in the discharge of its oversight functions.

115. It was therefore the EACC's case that it only filed the petition in order to enforce its mandate after the IEBC failed to refuse to discharge its mandate. According to it, in such event the High Court can step in at the request of an aggrieved party in the exercise of its supervisory jurisdiction and that the EACC has the locus to institute the said proceedings. The EACC denied that it filed the said proceedings before undertaking comprehensive investigations as alleged. According to it, the said allegations arise out of the failure on the part of the Petitioner to distinguish between the 2nd Respondent's separate and distinct legal mandates of conducting criminal investigations and investigations touching on alleged ethical violations which violations it reasonably believed the Petitioner had committed.

116. It was the EACC's position that the Mutual Legal Assistance Request which was subsequent thereto made to the Republic of India and other investigations conducted after the filing of the said petition were merely for the purpose of firming up any evidence of criminal conduct which had been gathered in the course of the aforesaid investigations of ethical violations so as to raise it to the standard required for a criminal prosecution pursuant to the **Leadership and Integrity Act**, which is beyond reasonable doubt.

117. It was the EACC's view that the submission of falsified self-declaration form is a criminal offence under the provisions of the **Leadership and Integrity Act** as well as under the **Penal Code**. According to it, the Petitioner cannot claim that the EACC ignored exculpatory evidence in the course of its investigations when he completely refused to comply with summons issued by the EACC to present himself at its offices to record a statement despite his attempt to restrain the EACC from summoning him failing.

118. It was disclosed that in the course of its investigations, the EACC also established that the Petitioner had been admitted to the Bachelor of Laws Degree programme offered by the University of Nairobi in the year 2014 on the basis of being a holder of Bachelor of Commerce (Advanced Accounting and Auditing) degree obtained from **Marathwada University** in India in 2001. However despite the Petitioner's application form for admission to the University of Nairobi indicating that he attended *inter alia* **Marathwada University** between 1999 and 2001, the EACC obtained a written confirmation that at the relevant time the said **Marathwada University** did not exist and that at that time it was known as the **Dr. Babaseb Ambedkar Marthwada University**. It was however revealed that the purported letter written to the Dean of the School of law of the University is the subject of investigations to determine its authenticity in view of the contents of the aforesaid letter received by the Commission from the said University.

119. Further investigations, the EACC contended, established that the Petitioner had also misrepresented the results that he had obtained in the Kenya Certificate for Secondary Education examination in his aforesaid application to join the Bachelor of Laws program at the University since the Kenya National Examinations Council confirmed that the Petitioner had obtained a Mean Grade C- and not B- in KCSE as he had contended. It was the EACC's case that providing false information and uttering false documents to a public entity as the Petitioner, appears to have done while seeking admission to the University of Nairobi is a criminal offence. The forging of a document, in this case the aforesaid KCSE Certificate where the Petitioner purportedly obtained a mean grade B-, is also a criminal offence under the provisions of section 345 as read with section 349 of the **Penal Code**.

120. It was therefore the EACC's case that the Petitioner cannot claim that he was admitted to the University of Nairobi's School of Law only on the basis that he held a Degree and not on the basis of any pre-university qualifications as a person seeking admission to the said Faculty of School of Law is required *inter alia* to meet the minimum university requirements for admission. It was contended that the admission to the Kenya School of Law which the Petitioner claims to have obtained pursuant to purported legal studies carried out at the University of Nairobi is regulated by the **Kenya School of Law Act, 2012** which requires *inter alia* that an Applicant should have attained a mean grade of C+ (plus) with a minimum grade B in English or Kiswahili at KCSE.

121. It was averred that upon the conclusion of its investigations, the interested party submitted its report to the Respondent as required under the provisions of section 43(3) of the **Leadership and Integrity Act, 2012** and section 11(1)(d) of the **Ethics and Anti-Corruption Commission Act, 2011**.

122. The EACC asserted that it and the DPP cannot be restrained from discharging their respective constitutional and statutory mandates without any evidence of any impropriety on their part.

123. The EACC's case was that it is open to any member of the public to institute court proceedings regarding the Petitioner's qualifications for the senatorial position he was aspiring for.

124. Apart from seeking that the Petitioner's case be dismissed the EACC on its part sought the following orders:

1. A declaration that the IEBC in exercising its mandate of managing elections is bound by the Constitution and national legislation.

2. A declaration that Articles 88(4)(f) and 99(1)(b) of the Constitution of Kenya and section 4(f) of the Independent Electoral and Boundaries Commission Act, 2011 bestow upon the IEBC a duty to inquire into the eligibility of candidates for election and to register only those candidates who meet the moral and ethical requirements for the positions that they aspire to hold.

3. A declaration that by dint of Article 99(1)(b) a report in the nature of an integrity verification report submitted by the EACC notifying the IBC that the Petitioner does not satisfy the moral and ethical requirements prescribed by section 13 of the *Leadership and Integrity Act* bestowed upon the IEBC an obligation to inquire into the veracity of the report or in any other lawful manner satisfy itself of the eligibility of the Petitioner as a candidate for the position of Senator, County Government of Meru in the 2017 General Elections.

4. A declaration that the IEBC failed to discharge its responsibility to undertake an inquiry into the Petitioner's moral and ethical fitness for the state office that he aspires to hold.

5. 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 Petitioner for the position of Senator of the County Government of Meru in the 2017 General Elections in the face of the Integrity Report submitted to it by the EACC indicating that the Petitioner had given false information about his academic qualifications in the 2013 Self-Declaration form.

6. A declaration that the Petitioner's political rights under Article 38(3)(c) of the Constitution are not absolute and are subject to the eligibility criteria under Article 99(1)(b) of the Constitution.

7. A declaration that the 1st Respondent is not eligible for the election as a Senator in the general elections slated for 8th August, 2017.

8. A declaration that any election of the 1st Respondent to the position of Senator, Meru County or of any other County in the Republic of Kenya, in the circumstances, is null and void.

9. A permanent injunction barring the Petitioner from holding any public office for breaching the ethical requirements of Chapter Six of the Constitution of Kenya.

10. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

11. Costs of the petition.

2nd Respondent's Case

125. According to the 2nd Respondent, the DPP, pursuant to section 35 of the *Anti-corruption and Economic Crimes Act, 2003* as read with section 11(1)(d) of the *Ethics and Anti-Corruption Commission Act, 2011*, the EACC forwarded to the DPP on 18th December, 2017, a duplicate inquiry file no. CR: EACC/EL/INQ/712017, which was an inquiry into an allegation that the Petitioner herein filed a false self-declaration form in relation to his academic qualifications for the purposes of the 2013 general elections.

126. It was disclosed that the EACC forwarded the said inquiry file with a report and recommendations with which the Petitioner should be charged and prosecuted. It was averred by the DPP that the said inquiry file was under independent review of the evidence by the EACC after which the DPP would give directions on whether or not to charge. The DPP further revealed that during the pendency of the said review, the Petitioner on 22nd December, 2017, forwarded to his office a bundle of documents touching on the investigation by the EACC which documents the DPP would, in reviewing the inquiry file, give consideration to.

127. It was the DPP's position that it has a clear mandate under Article 157 of the Constitution, and even though such quasi-judicial decisions made by it are subject to supervision by this Court, such supervision can only be exercised after it has made a decision but the Court cannot interfere with such mandate before a decision is made. It was therefore its case that this petition is premature.

128. Accordingly, the DPP averred that it was unaware of any malice by any of the Respondents.

129. In support of its case the 2nd Respondent relied on, *inter alia*, **Njuguna S. Ndung'u vs. Ethics & Anti-Corruption Commission & 3 Others [2014] KLR**, **Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 Others [2014] eKLR** and on **Alfred N. Mutua vs. Ethics & Anti-Corruption Commission & 4 Others [2016] KLR**.

130. It was therefore the EACC's case that the petition was devoid of merit and ought to be dismissed with costs.

The University's Case

131. In response to the application, the 3rd Respondent herein, **the University of Nairobi**, averred that pursuant to the Petitioner's application to be admitted for undergraduate studies in Law *vide* his application dated 13th July, 2013, the University admitted him *vide* its letter dated 3rd January, 2014.

132. According to the University, the Petitioner's academic qualifications were questioned by and/or in:-

a) MM. Gitonga Advocates.

b) IEBC Integrity Complaint No. 3 of 2017.

c) Nairobi HC Petition No. 394 of 2017.

d) EACC.

e) Meru HC Election Petition No. 5 of 2017.

133. It was contended that prompted by the aforesaid inquiries and doubts raised on his academic qualifications, the University wrote to the Petitioner *vide* a letter dated 1st November, 2017, to which the Petitioner responded *vide* his letter dated 4th November, 2017. Thereafter the University went into inquiry and authentication of the Petitioner's qualifications of more so, as it was now seized of the documents and information exhibited in the Replying Affidavit of EACC.

134. It was averred that the University deliberated in meetings, held on **29th November, 17** and **30th November, 2017** and unanimously decided to nullify the initial admission of the Petitioner and thereafter informed the Petitioner of its decision *vide* its letter dated 30th November, 2017.

135. The University's position was that having gained admission to the University of Nairobi based on fraudulent or forged academic certificates and degrees, the entire substratum of his admission falls away. To the University criminal and/or illegal and/or fraudulent actions of the Petitioner cannot be the basis to filing a Constitution Petition and alleged benefits that arise from criminal and/or illegal and/or fraudulent actions cannot be said to confer rights capable of being violated.

136. The University contended that the Petition is not maintainable as the alleged violations have not been established or particularized and no legal foundation has been established for the alleged rights. The University took the position that the remedies cannot be available to the Petitioner who is already pursuing similar remedies in Nairobi HC Misc. Appl. No. 683 of 2017.

137. Based on a number of cases the University submitted that the Petitions and the related Judicial Review is for dismissal for the following reasons:-

i. The University of Nairobi is a regulated Public academic Institution by ***The Universities Act, No. 42 of 2012***, with its inbuilt mechanisms in pursuant of academic freedom and excellence.

ii. Petitioner has failed to establish that the University or the other Respondents acted in excess or lack of Jurisdiction.

iii. The powers of the University to admit or not to admit students is discretionary.

iv. Powers of the Universities on admission and graduation are permissive and internal.

v. Initial admission of the Petitioner to the University was fraudulent and we cannot be allowed to benefit from it.

vi. There is no *substratum* to the prayers sought, the same being premised on illegality.

vii. The Petitioner has wholly failed to establish a legal or factual basis that his Constitutional Rights were violated.

viii. The Petition doesn't meet the legal threshold.

138. The Court was therefore urged to dismiss the petition with costs.

4th Respondent's case

139. According to the 4th Respondent, the IEBC, the EACC's complaint against it were prematurely brought before this Court since the EACC had not exhausted the available dispute resolution mechanisms before instituting the proceedings before this Court.

140. It was further contended that the EACC's complaint against the Petitioner herein were premises upon a preliminary finding as opposed to conclusive investigations.

Analysis and Determination

141. I have considered the issues raised in this consolidated Petition.

142. These suits having been consolidated in the Petition, it is my view that this Court ought to consider the matters before it as if the case revolved around the interpretation and the application of the Constitution. In any case, since the enactment of the Constitution of Kenya, 2010, under which one of the remedies that the Court is entitled to grant is the remedy of judicial review, it is my view that there is no longer a clear distinction between judicial review and constitutional determinations. As was appreciated by the South African Constitutional Court **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99**:

“Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution...Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was “the main crucible” for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the “spirit, purport and objects of the Bill of Rights.” This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is “lawful administrative action,” “procedurally fair administrative action” and administrative action “justifiable in relation to the reasons given for it,” cannot mean one thing under the Constitution, and another thing under the common law...Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court “makes the final decision whether a matter is a constitutional matter”. This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.”

143. Therefore before delving into the substance of this petition, it is important with circumstances which properly call for this Court to invoke its powers to grant orders which merit being granted in a constitutional petition as opposed to a civil action.

144. In Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385, Nyamu, J (as he then was) held that a constitutional issue is that which directly arises from the court’s interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193, Court the expressed itself as hereunder:

“We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court’s intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point... Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry... It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

145. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in Karuri & Others

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

146. Therefore it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

147. It is in that light that I understand the Court’s position in John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

148. Similarly, in Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

149. Accordingly, it was held in Jeminah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012 that:

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”

150. The rationale for this was given in Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011 where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

151. I associate myself with the decision in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

152. So, in General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR, Wendoh, J expressed herself as hereunder:

“The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that

being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See *Ben Kipeno & Others vs. AG Pet15/07* and *Bahadur vs. AG (1986) LRC Const 297* where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In *Speaker of National Assembly vs. Njenga Karume (1990-1994) EA 546* the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also *Harrikisson vs. AG (1979) 3 WLR 63*.”

153. Further afield, in *NM & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)* the Constitutional Court of South Africa stated that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

154. Similarly in *Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755*, Georges, CJ held as follows:

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (*Wahid Munwar Khan vs. The State AIR (1956) Hyd.22*).”

155. The judge added that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

156. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) and in *Peter Oduor Ngogo vs. Hon. Francis Ole Kaparo Petition No. 2 of 2012* declined to hear an appeal and stated:

“In the petitioner’s whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court...the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court.”

157. Subsequently, in *Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board Petition No. 5 of 2012* the Court held that:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

158. Although several issues were raised by the Petitioner before me, this Court is aware that apart from these proceedings, it is my view that most of the said issues are issues that do not properly fall for determination in a constitutional petition and ought to be dealt with by either ordinary civil courts in purely civil suits or in the other alternative dispute resolution forums.

159. In my view such issues as the intention of the said **Milton Mugambi Imanyara** in lodging complaints against the Petitioner, whether the Petitioner qualified for admission to the University of Nairobi, whether the IEBC was justified in deciding not to entertain the complaint against the Petitioner the qualifications of the Petitioner, whether the EACC had not read and interpreted correctly the qualifications required for admission at the School of Law of the University of Nairobi and whether the University erred in its handling of the information received from **Dr Babasaheb Ambedkar Marathwada University** are with due respect not matters which properly fall within the realm of the jurisdiction of this Court sitting as a Constitutional Court.

160. In my view, the only issue that falls for determination is whether the 1st, 2nd and 3rd Respondent’s decision contravened and violated the Petitioner’s constitutional rights. It is now clear that whether a party has been treated fairly by the authority before whom he is subjected is a matter that is properly a constitutional issue since the right to fair administrative action is now one of the rights enshrined in Article 47 of the Constitution.

161. In this case it is contended that the University took its action based on the decision of the EACC, a decision which itself was contrary to the provisions of Article 47 of the Constitution, without affording the Petitioner an opportunity of being heard.

162. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**, it was held that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, ‘Even where no actual hearing is to be held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision’... Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information’... Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439)... In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See *Charkaoui v Canada* [2007] SCC 9, *Alberta Workers’ Compensation Board v Alberta Appeals Commission* (2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police* (1988) 51 DLR (4th) 750).”

163. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies ex parte Githungo [2001] KLR 299**, where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

164. Section 4(3) of the ***Fair Administrative Action Act, 2015***, (hereinafter referred to as “the Act”), a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

165. Section 4(4) on the other hand provides as follows:

The administrator shall accord the person against whom administrative action is taken an opportunity to

(a) attend proceedings, in person or in the company of an expert of his choice;

be heard;

(b) cross-examine persons who give adverse evidence against him; and

(c) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

166. Similarly, section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** provides that a court or tribunal may review an administrative action or decision, if the person who made the decision denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case.

167. In this case the Petitioner contends that the University of Nairobi made its decision without affording him an opportunity of being heard.

On its part the University contended that following inquiries and doubts raised on the Petitioner's academic qualifications, the University wrote to the Petitioner *vide* a letter dated 1st November, 2017, to which the Petitioner responded *vide* his letter dated 4th November, 2017. Thereafter the University went into inquiry and authentication of the Petitioner's qualifications of more so, as it was now seized of the documents and information exhibited in the Replying Affidavit of EACC.

168. It is therefore clear that the University of Nairobi relied purely on the decision of the EACC in arriving at its decision to nullify the Petitioner's award of the degree and to terminate his further studies with the University. In other words the decision of the University of Nairobi must necessarily depend on whether the decision of the EACC was properly arrived at. According to the Petitioner, on 30th May, 2017 the EACC wrote a letter to the IEBC Chairman alleging that the EACC had conclusively investigated the allegations against the Petitioner to the effect that the Petitioner's self-declaration forms for the 2013 elections filed with the IEBC were falsified and that the Petitioner was not a graduate of the University of Nairobi. Apart from that the EACC wrote yet another letter to the IEBC dated 5th June, 2017 requesting the IEBC to help it in the investigations against the Petitioner notwithstanding the fact that the EACC had informed the IEBC that it had conclusively investigated the Petitioner.

169. In this case it is the Petitioner's case that the EACC arrived at its decision before concluding investigations into the allegations made against the Petitioner. According to the Petitioner, thereafter, the EACC resumed its intimidation, threats, harassment and witch-hunting and filed petition no 394 of 2017. Notwithstanding that and during the pendency thereof, the EACC issued further summons dated 21st August, 2017 purporting to investigate the Petitioner over his academic qualifications and the alleged false self-declaration forms. To the Petitioner this action was a violation of the *sub judice* rule.

170. It was the Petitioner's case that in its replying affidavit dated 6th September, 2017, the EACC categorically stated that the integrity verification report submitted to the IEBC on 30th May, 2017 was not conclusive as at that date investigations were still ongoing. The Petitioner was therefore bewildered as to why the EACC was despite disregard of the due process of the law calling on the IEBC to use un-concluded integrity verification report to bar the petitioner from contesting the August 8th 2017 polls, an act which constituted a violation of a fair trial. The Petitioner alleged that he was not the author of the alleged 2013 self-declaration forms that formed the basis of the said report by the EACC. To him, he was a victim of political sabotage as neither the handwritings nor the signature therein were not his.

171. While not contesting the fact that the EACC sought to carry out further investigations even after the submission of its report, the EACC contended the Mutual Legal Assistance Request to the Republic of India which was subsequent to the verification report and other investigations conducted after the filing of the said petition were merely for the purpose of firming up any evidence of criminal conduct which had been gathered in the course of the aforesaid investigations of ethical violations so as to raise it to the standard required for a criminal prosecution pursuant to the **Leadership and Integrity Act**, which is beyond reasonable doubt. However in its own words, the submission of falsified self-declaration form is a criminal offence under the provisions of the **Leadership and Integrity Act** as well as under the **Penal Code**. According to it, the Petitioner cannot claim that the EACC ignored exculpatory evidence in the course of its investigations when he completely refused to comply with summons issued by the EACC to present himself at its offices to record a statement despite his attempt to restrain the EACC from summoning him failing.

172. It is therefore clear that the EACC's contention that the Petitioner violated the provisions of the **Leadership and Integrity Act** cannot be divorced from the allegations that the Petitioner was culpable under the provisions of the **Penal Code**.

173. Since the EACC admits that its investigations relating to the alleged offences were incomplete it amounts to double-speak for it to contend that it was justified in taking action against the Petitioner. In my view to take administrative action against a person before conclusion of investigations as was done by the EACC herein clearly amounts to a violation of fair administrative action enshrined in Article 47 of the Constitution.

174. It is my holding that before advising the Independent Electoral and Boundaries Commission that the Petitioner had not satisfied the educational, moral and ethical requirements to qualify as a candidate in the elective positions contested in the general elections held on 8th August 2017, on 31st May 2017, the EACC ought to have completed its investigations with respect to the allegations made against the Petitioner including taking statements from the Petitioner before preparing its report whose contents were clearly adverse to the interests of the Petitioner. Similarly, it is my view that the decision of the EACC to forward the report signed by its Chairperson and the Secretary and Chief Executive Officer in which it made a recommendation that the Petitioner be arraigned in court to face the charges proposed in the report was premature and violated the Petitioner's right to fair administrative action. In other words the decision violated all the rules and principles of fairness protected by the Constitution.

175. This Court has had to express itself on the matter in *this Court in **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeru [2015] eKLR** inter alia as hereunder:*

“In my view a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be met be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria.”

176. As regards the EACC's petition, it is clear that the substance thereof is to invite this Court to make findings with respect to the criminal liability of the Petitioner. I agree that by seeking that the Court finds that the Petitioner is criminally liable for the alleged fabrication, and giving false information in violation of the **Penal Code**, the EACC is seeking that this Court sitting as a constitutional court sits as a criminal court of first instance, yet this Court has no jurisdiction to investigate and determine the Petitioner's alleged criminal liability in so far as the allegations are concerned as a court of first instance. In this I associate myself with the decision in Petition No. 331 of 2015 – **Jacob Juma vs. Evans Kidero [2016] eKLR** where it was held that:

“For the foregoing reasons, it is not within the mandate of this court to sit as a criminal court of first instance, without any input of the relevant criminal justice players to make a finding whether the Respondent is guilty or not guilty of criminal offences pertaining to fraud and theft of funds belonging to the Mumias Sugar Co. Ltd.”

177. Similarly, it is my view that the position in Petition No. 44 of 2013 – **Silas Make Otuke vs. Attorney General & 3 Others [2014] eKLR** expresses the correct legal position when the Court opined that:

“If we were to allow before us the hearing and determination of the issue of obtaining and of uttering a false degree we would be denying the Director of Public Prosecutions the constitutional right of directing investigations and prosecuting the alleged crime of fraud.”

178. I agree that based on section 11 of the *Ethics and Anti-Corruption Commission Act* and the *Leadership and Integrity Act*, the jurisdiction of instituting criminal proceedings lies with the offices of the DPP and the IGP and not the EACC hence the EACC lacks the *locus standi* to prosecute its said petition in so far as the orders sought in the said petition were intended to declare the Petitioner herein culpable of commission of criminal offence since it is an investigator and not a prosecutor.

179. This was the position in **Jacob Juma vs. Evans Kidero** (supra) where it was held that:

“It is therefore clear that the mandate of instituting Court proceedings where alleged criminal offences have been committed lies with the Office of the Director of Public Prosecutions and furthermore, where a person has evidence that a criminal offence has been committed, that person is entitled to move the relevant authorities to take the necessary action as permitted by law.”

180. I however find nothing wrong with the EACC seeking declaratory orders with respect to the constitutional mandate of the IEBC. I have however noted that the first two prayers of his petition are not proper prayers since they simply seek to declare the law generally. As was held in **El-Busaidy vs. Commissioner of Lands & 2 Others [2002] 1 KLR 508**:

“...for the court to have jurisdiction to declare any legal right, the right must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event; to that end such court’s jurisdiction was not there to declare the law generally to give advisory opinions but it was confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone who is not before it.”

181. The position was restated by the Court of Appeal in **Sololo Outlets & 3 Others vs. National Social Security Fund & Others Civil Application No. Nai. 181 of 1994** where it was held that though the Court can make a declaration, it ought not to declare law generally or give opinion but such declaration should be confined to contested legal rights subsisting or future of the parties before it.

182. It is however my view that to the extent that such declaratory orders have the effect of declaring the Petition herein as having not been properly elected as a Member of Parliament, the said prayers are misconceived. As was held by the Court of Appeal in **Kipkalya Kiprono Kones vs. Republic & Others Ex Parte Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226; [2008] 3 KLR (EP) 291**:

“A seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through the processes set out therein...The jurisprudence underlying the above decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly and those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular since the Law Reform Act and Order 53 of the Civil Procedure Rules are both inferior to and can only apply subject to the provisions of the Constitution...No doubt mistakes, even grievous mistakes will be made in the process of elections or nominations but such mistakes cannot be used to stop the electoral or nomination process since if this is allowed the country may well end up having no members in the National Assembly as there undoubtedly will be interventions by the Courts in the process of either electing or nominating members to the National Assembly...The procedure of judicial review, like that of plaint or any such like procedure, is and was not available to the parties aggrieved by the acts or omissions of the Commission and the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly and Presidential Elections Act by petition.”

183. In that decision the Court relied on **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**, where it held that:

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”

184. I agree that by preparing its report and submitting the same to the relevant authorities before conclusively completing its investigations the EACC placed the “cart before the horse” and therefore “caught the wrong end of the stick”. Its action clearly amounted to harassment and intimidation and it thereby exercised its powers for an improper purpose. It is clear that power ought to be properly exercised and ought not

to be misused or abused. According to **Prof Sir William Wade** in his book *Administrative Law* as cited in **R vs. Somerset County Council, ex parte Fewings and Others [1995] 1 All ER 513 at 524:**

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

185. It is in this light that I understand **Ogola J’s** decision in **Hassan Ali Joho vs. Inspector General of Police and 3 Others [2017] eKLR** where he held that:

“The DPP has the right to carry out any investigations. But they should not harass the applicant in the process. In particular the investigations about the applicant’s educational background has now reached a public comic level. The Applicant has been investigated up to his primary school. I should think that the next level of any investigations in this matter will probably go to the hospital where the applicant was born. Or perhaps the investigations will look for the schools attended by the applicant’s ancestors. My view here is not to bring comic relief to these proceedings. It is actually a judicial indictment of investigative and prosecution process based on no value or principles of criminal justice system, but purely suited to the appetite of investigative agencies”.

186. I agree with the decision of **Khamoni, J** in **Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995** in which the learned Judge relied on **Stanley Munga Githunguri vs. Republic (1986) eKLR** and while citing the Australian case of **Reg vs. Williams and Others vs Spautz (1992) 174 CLR 509**, expressed himself as follows:

“The proceedings complained of were instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus in such a suit is on the purpose for which the proceedings exist, and on the dominant purpose of the person charged with abuse of the process in instituting them...Where a stay is sought to stop prosecution that has been instituted and maintained for an improper purpose it does not follow that the Court must first be satisfied that an unfair trial will ensue unless the prosecution is stopped. The possibility that a result may be achieved by the application of the law of contempt is not a reason for denying the existence of the court’s inherent jurisdiction to protect its own process from abuse. The Court’s inherent power extends to preventing an abuse of process resulting in oppression even if the moving party has a prima facie case. The relationship between the inherent jurisdiction and the fact of collateral abuse of process, and the crucial test found in the purpose of the party instituting the proceedings. It is not essential to the exercise of jurisdiction that there be an improper act as well as an improper purpose; and the improper purpose need not be the sole purpose of the moving party – the predominant purpose is the criterion...To bring proceedings to achieve objects ulterior to the purpose of a cause of action as pleaded was an abuse of the process of which a permanent stay would be granted...In the present case, it followed that the threat and maintenance of criminal actions for defamation, with the predominantly improper purpose of seeking reinstatement in employment were such an abuse of process”.

187. In **Reg vs Sang-Williams and Others vs. Spautz (1992) 174 CLR 509**, Lord Scarman stated that:

“The public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizens alike...its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice”.

188. To annex the powers of the EACC for the purposes of intimidation and harassment is in my view an improper exercise of its power and cannot be warranted. Where such unwarranted power leads to a violation or threat of violation of a person’s constitutional rights the same must be prohibited. In that event the Court does not have to wait until the violation occurs. I therefore adopt the position in **Hassan Ali Joho vs. Inspector General of Police & 3 Others** (supra) at paragraph 116 that:

“Whatever the motivation, however, it is the considered opinion of this court that all the alleged investigation, intimidation and harassment and intended prosecution of the petitioner by the Respondents have a politically timed ending. It is the finding of this court that the said intended charges and prosecution are ill timed and motivated, are malicious and disclose abuse of Petitioner’s Constitutional rights”.

189. It is therefore my view that the Petitioner’s contention that the actions taken by the EACC in particular was meant to perpetuate the aims and intendments of the said **Milton Mugambi Imanyara**, may well have substance. In that event the decision in **Reg vs. Sang-Williams and Others vs. Spautz** (supra) rings true. In that case it was held that:

“there was ample material before the trial judge from which he could draw that conclusion. In particular, there was a mass of documentation comprising newsletters, pamphlets and memoranda which the Respondent had written and distributed to members of the University, media outlets, politicians and legal advisers to his opponents in the litigation. This material contained warnings about proposed legal proceedings, demands for reinstatement, discussions of Dr Spautz' purpose and motive and, what is more important, threats. In the opinion of the trial judge, the material plainly showed that, from the outset, Dr Spautz intended to exert pressure on the persons with power to decide the issues affecting him not to proceed in a manner unfavourable to him if they wished to avoid being sued. In this way he sought to bring pressure to bear so that the University would settle his wrongful dismissal action on terms, including reinstatement, favourable to himself”.

190. It may well be that had the EACC properly and conclusively conducted its investigations taking into account the Petitioner's version, it may have arrived at the decision that the complaints lodged against the Petitioner by the said **Milton Mugambi Imanyara** were ill-motivated and were meant for self-aggrandisement as was stated by **Waki, J** (as he then was) in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] eKLR** where the Learned Judge noted that:

“It seems to me, whichever way I look at it, that the Interested Party in this matter is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive. And that is when the High Court steps in”.

191. As the DPP has disclosed that it is yet to make a decision whether or not to prosecute the Petitioner, nothing turns on his perceived intended action.

Summary of Findings

192. In the premises I find that the manner in which the EACC proceeded to compile and submit its report to the 1st and 3rd Respondent's a decision which inspired little confidence or none at all in the fairness of the EACC's action. It is clearly inimical to the fair administrative action for an authority to arrive at a conclusion and purport to implement the same and thereafter embark of the process of gathering evidence in support of the said decision. Such an action, in my view amounted to a violation of the Petitioner's right to fair administrative action enshrined in Article 47 of the Constitution and cannot be sustained. That decision being faulty, the decision of the 3rd Respondent, the University of Nairobi, which from the evidence presented before me cannot be justified other than on the basis of the decision of the EACC, must equally give way.

Disposition and Remedies

193. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

- 1) A declaration that the decisions made against the Petitioner by any the 2nd and 3rd Respondents are unconstitutional, illegal, unreasonable, irrational, oppressive and procedurally unfair.**
- 2) A declaration that decisions made against the Petitioner by any the 2nd and 3rd Respondents have resulted in the violation and infringement and threatens to violate and infringe the Petitioner fundamental rights under Article 47 of the Constitution.**
- 3) A declaration that the petition by the 2nd Respondent in so far as it purports to seek orders meant to find the Petitioner culpable of criminal offences constitute an abuse of power and discretion and is otherwise, in excess of jurisdiction.**
- 4) An order restraining and/or prohibiting each and all the Respondents whether by themselves, agents and servants and officers and whomsoever from acting on the basis of the 2nd Respondent's integrity verification report the subject of these petition.**
- 5) A declaration that the actions of the 4th Respondent, the University of Nairobi, of deregistering and discontinuing the Petitioner from the programmes and studies at the University of Nairobi and stopping the Petitioner from participating in the graduation ceremony held on 22nd December 2017 are unconstitutional, illegal, unreasonable, irrational and procedurally unfair.**
- 6) An order of certiorari removing into this Court for the purposes of quashing the decision of the University of Nairobi dated 30th November, 2017 deregistering and discontinuing the Petitioner herein which decision is hereby quashed.**
- 7) An order compelling the 3rd Respondent, the University of Nairobi, to reinstate/readmit the Petitioner herein as a student of the University of Nairobi, School of Law, to pursue post graduate studies leading to the award of the degree of Master of Laws for the 2017/2018 academic year unless and until the Petitioner's studies are lawfully terminated.**
- 8) An order of mandamus compelling the University of Nairobi to reinstate the Petitioner's name in the graduation list for 22nd December, 2017.**
- 9) An order of mandamus compelling the 3rd Respondent, the University of Nairobi, to award to the Petitioner the degree of Bachelor of Laws Honours, Upper Division, and an order prohibiting the said University from nullifying the said degree**

unless and until due process leading to the nullification of the said degree is lawfully adhered to.

10. The costs of these proceedings are awarded to the Petitioner to be borne by the 2nd Respondent, the Ethics and Anti-Corruption Commission.

194. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 18th day of May, 2018

J M MATIVO

JUDGE

In the presence of: