



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**PETITION NUMBER 252 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 73, 75, 77, 80, 160 and 179 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION ACT, ACT NO. 9 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT, ACT NUMBER 24 OF 2011**

**AND**

**IN THE MATTER OF THE POLITICAL PARTY'S ACT, NO 11 OF 2011**

**AND**

**IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, ACT NO. 19 OF 2012**

**AND**

**IN THE MATTER OF THE SUITABILITY OF THE NOMINATED MEMBER OF  
PARLIAMENT LOIMA CONSTITUENCY IN TURKANA COUNTY**

**BETWEEN**

**JOHNSTONE EWOI LOTIIR.....1<sup>ST</sup> PETITIONER**

**BASIL ANGURAE LOKOYAN.....2<sup>ND</sup> PETITIONER**

**AND**

**HON. JEREMIAH EKAMAIS LOMORUKAI.....RESPONDENT**

**AND**

**INDEPENENT ELECTORAL & BOUNDARIES COMMISSION...1<sup>ST</sup> INTERESTED PARTY**

DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> INTERESTED PARTY

KENYA METHODIST UNIVERSITY.....3<sup>RD</sup> INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> INTERESTED PARTY

### RULING

1. The genesis of this petition seem to have been the decision by the Respondent, who it is contended is currently an MCA with the county government of Turkana representing Turkwel ward in Loima constituency, to tender his nomination papers to the 1<sup>st</sup> interested party, the **Independent Electoral and Boundaries Commission** (hereinafter refer to as “the IEBC” or “the Commission”) for clearance as the Member of Parliament for Loima Constituency in Turkana County.

2. It was however contended that the Respondent has a myriad of unsolved probity on matters integrity for which the Ethics & Anti-Corruption Commission has not initiated any legal process arising out of the complaints made against him. To the Petitioners, Respondent’s actions are a serious threat to the public interest and thus granting the orders sought will far much outweigh the private interests, obligations and commitments of a private Citizen.

3. It was the Petitioners’ case that the Respondent has violated the provisions of the Constitution, **Penal Code, Leadership and Integrity Act** and the **Public Finance and Management Act**, Laws of Kenya. The Petitioners accused the Respondent of fraudulently obtaining a degree certificate from the 3<sup>rd</sup> interested party, **Kenya Methodist University** (hereinafter referred to as “the University”) in a record one and half year period.

4. According to the Petitioners, the Respondent in 2003 was appointed Public Officer for Turkana County Council to spearhead marginalized interest, a job he double salaried with the registration of persons until 2007. In was the Petitioners’ case that by abusing the public trust entrusted upon him as a State Officer by being dishonest and fraudulent, the Respondent breached Chapter six of the Constitution on leadership and integrity, and brought ridicule and mockery to the office of the Governor by his conduct. In addition, the Respondent also failed to carry out the duties of his office in a manner that maintains public confidence in the integrity of the State office but instead used his office to unlawfully or wrongfully enrich himself.

5. It was therefore averred that unless this Court restrains the 1<sup>st</sup> interested party from accepting any nomination papers from the Respondent he will be cleared to vie for Member of Parliament Loima Constituency in Turkana County.

6. The Petition was supported by an affidavit in which apart from reiterating the foregoing, it was disclosed that the Respondent started his early primary school in Lorigum Primary School around 1980 upon which he transferred to Lodwar Primary School in class seven in 1987. He sat for his first KCPE in 1988 in Lodwar Primary School upon which he did not manage to qualify for high school admission and repeated class seven in 1989 in Namoruputh Primary School. In 1990, he sat for his second KCPE and joined Lodwar High School in 1991 – 1994 where he sat for KCSE and obtained a mean grade of C- (minus). The Respondent then joined Kenya Registration Bureau in 1995 as a Clerical Officer in the office of registration of persons where he worked until he joined politics in 2002. He contested Lorigum ward councillorship but was defeated.

7. It was averred that the Respondent between 2010 and 2012 attended computer packages course in Nakuru. Given his initial high school grades (C-), he never pursued any certificate or diploma course to warrant him direct admission to any institution of higher learning. However in December 2014, the Respondent registered for an undergraduate course at Kenya Methodist University, Nakuru branch to pursue a Bachelor’s Degree in counselling under school based program. Surprisingly, he completed his degree in June 2016 and graduated in July 2016 in a record one and half years for a course which would

ordinarily take four years full time students. According to the petitioner, it is perturbing that those students who were admitted with the Respondent are still in college pursuing their studies. It was therefore contended that the Respondent has fraudulently obtained academic papers and businesses from the county Government, thus contravening the County Public Service mandate and violating the constitution.

8. To the Petitioners, they were justified to institute the petition under Article 22(1), Article 70 and Article 258 (1),(2) of the Constitution.

9. However before the petition could be heard, the Respondent and the interested parties filed objections going to the jurisdiction of this Court and the same were heard as preliminary objections. It is the said objections that are the subject of this ruling.

### **Respondent's Case**

10. The contended that this petition same is misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this Court. It was further contended that this Court lacks jurisdiction to determine this matter since the settlement of election disputes is the sole preserve of the 1<sup>st</sup> Respondent in view of the provisions of Article 88(4)(e) of the Constitution and section 74 of the ***Elections Act***. It was further contended that this Court lacks jurisdiction to make determinations on the respondent's integrity since the role of oversight in respect of integrity issues, including enforcement of the ***Leadership and Integrity Act, 2012*** is vested upon the Ethics and Anti-Corruption Commission by dint of Article 79 of the Constitution as read with Article 245(b) of the Constitution.

11. According to **Mr Kinuthia**, learned counsel for the Respondent, the orders being sought are under the preserve of the Commission, an independent body and there is no evidence that any complaint was lodged with the Commission. It was further submitted that the issues raised herein touch on integrity of the Respondent hence involve the application of the Leadership and Integrity Act which role is vested in the EACC, a non-party to these proceedings. It was submitted that what the petitioners are doing is to invite the Court to usurp the powers and mandates of other competent authorities. In support of the submissions learned counsel relied on **William Kabogo Gitau vs. Ferdinand Ndungu Waititu [2016] KLR.**

12. It was further submitted that the grounds relied upon do not fall within Article 99 of the Constitution since a candidate for the position of Member of the National Assembly does not require degree certificate and in any case the said Article only applies where there is a conviction.

13. It was submitted that this petition was perpetrated by ulterior motives meant for public gain and not the benefit of the public and reliance was placed on **Okiya Omtatah Okoiti & 2 Others vs. Attorney General & 3 Others [2014] eKLR.**

### **1<sup>st</sup> Interested Party's Case**

14. On behalf of the 1<sup>st</sup> interested party, the Commission, it was contended that this Court lacks jurisdiction to hear the petition in view of the provisions under Article 88(4)(e) of the Constitution, section 4(e) of the ***Independent Electoral and Boundaries Commission Act*** and section 74 of the ***Elections Act***, which vests jurisdiction on the Commission's Dispute Resolution Committee (hereinafter referred to as "the Committee") to hear and determine matters arising from nomination of candidates for elections.

15. On behalf of **Miss Bisieri** for the 1<sup>st</sup> interested party, it was submitted that the Commission has special powers to determine matters arising from nomination of the Respondent and therefore the petitioner ought to have exhausted available mechanisms before coming to Court and she relied on **Kones vs. R ex parte Wanyoike [2008] 3 KLR 296.**

16. Based on section 74 of the ***Elections Act***, it was submitted that this Court lacks jurisdiction to hear a matter arising from nominations in the first instance.

## **2<sup>nd</sup> Interested Party's Case**

17. The 2<sup>nd</sup> interested party, on its part contended that the petition lacked precision with respect to allegations against it; that the same disclosed no cause of action against it as the matters relate to investigations by the EACC and that the orders sought are not tenable against it.

18. During the hearing of the objections, **Miss Khaemba**, learned counsel for the 2<sup>nd</sup> interested party informed the Court that she was leaving the matter to the Court.

## **Petitioners' Case**

19. These objections were opposed by the Petitioners. According to their learned counsel **Mr Kinyanjui**, a close look at Article 88(4)(e) of the Constitution show that the provision deals with nominations. According to learned counsel, the question before the Court is an integrity question and not question of who should be nominated. It is a question whether the candidate is fit to vie for a public office.

20. It was therefore submitted that the IEBC Tribunal has no jurisdiction to determine issues of integrity of a candidate.

21. It was submitted that Article 165(3)(a) of the Constitution gives the High Court jurisdiction to hear questions relating to interpretation of the Constitution including whether anything done is in contravention of the Constitution. The said Constitution, it was submitted gives the High Court authority to enforce the provisions of the Constitution in Article 258 and being the only Court with inherent original jurisdiction to determine any issue in this case a Constitutional one, the matter was properly before the Court. In support of this submission learned counsel relied on **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112** and submitted that if there is a conflict between the Constitution and statutory provisions then the Constitution takes precedence.

22. The Court was therefore urged not to uphold the preliminary objections and dismiss the same with costs.

## **Determination**

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

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

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

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

**who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”**

25. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”**

26. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] AC 887** that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy are deprived of any other means of enforcement. However, as was stated in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court’s jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. Where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable. I therefore agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010** to the extent that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals are to be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect of the provisions of the Act. In **Narok County Council vs. Trans Mara County Council [2000] 1 EA 161**, the Court of Appeal expressed itself as follows:

**“Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if**

the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister...Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute”.

27. In the result, I associate myself with my learned brother **Justice Majanja**, in his view expressed in **Dickson Mukweluine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy. In the result I am of the view and I hold that the Court’s jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament. That restriction or limitation, in my view does not necessarily amount to the ousting of jurisdiction in order to deprive the court of the powers conferred on the Court by the Constitution. In other words it suspends the Court’s jurisdiction until such a time as the existing avenues have been exhausted.

28. The challenge to the jurisdiction of this Court was premised on Article 88 of the Constitution of Kenya as read with section 74 of the ***Elections Act***. Article 88(4)(e) of the Constitution provides:

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

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

29. Section 74(1) of the ***Elections Act*** provides:

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

30. However, Petitioners contended that where a dispute relates to an omission by the Commission to carry out its Constitutional mandate, such a decision cannot be termed a nomination dispute so as to fall within the jurisdiction of the Commission as envisaged by Article 88(4)(e) of the Constitution as read with section 74(1) of the Act. Section 24 of the Act provides:

***24. (1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person—***

*(a) is registered as a voter;*

*(b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act; and*

*(c) is nominated by a political party, or is an independent candidate who is supported—*

*(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or*

*(ii) in the case of election to the Senate, by at least two thousand registered voters in the county.*

*(2) A person is disqualified from being elected a member of Parliament if the person—*

*(a) is a State officer or other public officer, other than a member of Parliament;*

*(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Commission;*

*(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;*

*(d) is a member of a county assembly;*

*(e) is of unsound mind;*

*(f) is an undischarged bankrupt; g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or*

*(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six of the Constitution.*

*(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.*

31. Article 88(4)(e) of the Constitution however employs the words “*the settlement of electoral disputes, including disputes relating to or arising from nominations*”. Therefore even if it was correct that integrity questions of a nominee are not nomination questions in the strictest sense the Court would still have to determine whether such issues are electoral disputes since the powers of the Commission are not restricted to nomination disputes but includes them. This issue was dealt with by a 5-judge bench of this Court in **International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others Petition 552 of 2012 as consolidated with Petitions 554, 573 and 579 of 2012 [2013] eKLR** where the Court held as hereunder:

**“The Petitioners urge that this is not a dispute on the nomination of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, but rather, their non-compliance with Chapter Six of the Constitution. We have also taken into consideration the arguments set out by the Respondents with regard to jurisdiction of other statutory bodies in a matter such as this. All the parties in this petition acknowledge the High Court’s unlimited jurisdiction under Article 165(3)(a) of the Constitution. This unlimited original jurisdiction however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners. See *Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425*, which held that:-**

**“In our view there is considerable merit.....that where there is clear procedure for the**

redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

Even if it was to be argued that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents do not meet the integrity and leadership qualification as spelt out under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88(4)(e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC. Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to IEBC and it failed or refused to act. Indeed in the case of *Narok County Council v Trans Mara County Council [2000] 1 EA 161* at page 164 it was stated

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse.”

32. I therefore disagree with the position taken by the Petitioners that the subject matter of this petition was beyond the jurisdiction of the Commission.

33. As to whether issues relating to the integrity of the nominees is the preserve of the Ethics and Anti-corruption Commission, I associate myself with the view taken by the Court in **International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others** (supra) that the duty of determining the integrity of candidates falls squarely on the shoulders of the Commission and it cannot run away from this constitutional and statutory obligation.

34. As this Court held in Petition No. 102 and 145 of 2015 - **Godfrey Mwaki Kimathi & Others vs. Jubilee Alliance Party & Others**:

“In my view the integrity of the electoral process encompasses the integrity of the players thereat and it is the duty of the Commission to ensure that the electoral process it presides over is free, fair and transparent. Therefore integrity of the candidates is part and parcel of the integrity of the electoral process. The Commission cannot conduct a sham or mock elections simply because it does not have the machinery to undertake its legal and constitutional obligations. Therefore where an issue of integrity is properly raised before the Commission, the Commission must make a determination thereon one way or the other. It cannot shirk its responsibility by shifting the onus to other bodies. If it does not fulfil its legal and constitutional obligations, this Court will not hesitate to intervene and right the wrong.”

35. As this Court appreciated in **Republic vs. Political Parties Tribunal & 2 Others ex parte Susan Kihika and 2 Others [2015] eKLR**:

“...the intention of enacting the Act was to provide a mechanism with which disputes arising between members of political parties or between political parties or between coalitions can be expeditiously resolved taking into account the need to respect the internal party governance and to resolve the same in a specialised Tribunal without the necessity of subjecting them to the time consuming process of litigation. Political issues, it is usually prudent that they as much as possible be sorted outside the arena of the Courts due to their inherent nature. Therefore Parliament in its wisdom decided that such disputes be in the first instance resolved within the party itself and if for any reason such a resolution cannot be found at that level by the Political Parties Tribunal and only thereafter may the parties approach the Court.”

36. This spirit was correctly captured by Mumbi Ngugi, J in **Stephen Asura Ochieng & 2 Others vs.**

ODM & 2 Others [2011] eKLR when the learned Judge expressed herself as follows:

**“The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties Tribunal because the political party has failed or refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant. [12] To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases. [13] To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners’ grievance and the parties involved.”**

37. This Court ought to adopt an interpretation that favours the spirit of the Act rather than one which renders the Act stillborn or ineffective. As was held in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others**:

**“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”**

38. I am also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court stated that:

**“The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words:**

**“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court’s process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power.**

**Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights”.**

39. More recently, in **H.C.Petition No. 203 of 2012 - Kapa Oil Refineries Limited vs. The Kenya Revenue Authority, The Commissioner of Customs Services and The Attorney General, Lenaola, J** (as he then was) had this to say at page 15:

**“I am also aware that even if this Court has jurisdiction to determine a violation of fundamental rights and freedoms, it must also first give an opportunity to other relevant bodies established by law to deal with the dispute as provided in the relevant statute. This rule was well articulated by the Court of Appeal in Narok County Council –v- Transmara County Council (2000) 1 EA 164 where it stated that;**

**“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister....refuses to give direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision at page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”**

40. It is similarly my view that bodies which have been established by Parliament especially those tasked with resolution of political disputes ought to be allowed to grow and the Courts should only step in to ensure that they carry out their mandate in accordance with the Constitution and the legislation.

41. Adopting, as I hereby do, the purposive approach to statutory interpretation rather than the literal interpretation one, my view is and I hold that the dispute of the nature herein falls squarely within the jurisdiction of the Independent Electoral and Boundaries Commission as the first port of call.

### **Order**

42. Accordingly, the order which commends itself to me and which I hereby grant is that this petition is incompetent and is hereby struck out but as there was non-compliance with the directions of the Court to the parties to furnish soft copies there will be no order as to costs.

43. It is so ordered.

**Dated at Nairobi this 19<sup>th</sup> day of June, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Wilson for Mr Kinyanjui for the Petitioner***

***Mr Kinuthia for Mr Nyachoti for the Respondents***

***Miss Bisieri for the interested party***

**CA Mwangi**