



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 194 OF 2015**

**FRANCIS MWANGI .....**  
**PETITIONER**

**VERSUS**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION [EACC].....1<sup>ST</sup>**  
**RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION [DPP].....2<sup>ND</sup>**  
**RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE [IG NPS].....3<sup>RD</sup>**  
**RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA .....4<sup>TH</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner has filed this matter to challenge his intended prosecution by the DPP on the basis that he made false statements that were misleading to the 1<sup>st</sup> respondent, the Ethics and Anti-Corruption Commission (hereafter the “EACC”).
2. The petitioner first approached the Court by way of an application dated 11<sup>th</sup> May 2015. He was granted interim orders restraining his arrest and prosecution pending hearing of the petition.

**The Petitioner’s Case**

3. The petition dated 11<sup>th</sup> May 2015 is supported by an affidavit sworn by the petitioner on the same date, and a supplementary affidavit also sworn by the petitioner on 27<sup>th</sup> May 2015. He has also filed submissions dated 28<sup>th</sup> May 2015.

4. The petitioner is the Governor of Murang'a County elected in the 2013 general election after meeting the requirements for election under Article 193 of the Constitution. On 3<sup>rd</sup> August 2012, prior to seeking nomination as governor, he had been convicted in Criminal Case No. 2322 of 2010 at the Chief Magistrate's Court at Makadara Nairobi and given a non - custodial sentence, being a fine of Kshs.400,000/- which he duly paid. He had also appealed against his conviction and sentence in High Court Criminal Appeal No. 251 of 2012. Judgment in the appeal was pending before the High Court at the time of filing this petition, and was delivered on 14<sup>th</sup> May 2015, resulting in a setting aside of the conviction and sentence.
5. The petitioner had, prior to vying for the seat of governor, completed and submitted to the IEBC a self-declaration form pursuant to section 13 of the Leadership and Integrity Act, 2012. One of the questions in the form was whether he had ever been convicted and sentenced to serve imprisonment for a period of at least 6 months. As he had been sentenced to a non-custodial sentence, he had responded in the negative to this question. He also justifies this response on the basis that the conviction and sentence was not final under Article 193 (3) of the Constitution as there was a possibility that the conviction could be overturned on appeal.
6. The petitioner further avers that on 14<sup>th</sup> February 2013, **Petition No. 106 of 2013-Patrick Muguro Mwangi & Francis Mbau Muiruri vs Zakary Eliud Gichuhi, Independent Electoral & Boundaries Commission (IEBC) & Francis Mwangi** was filed against him and others, seeking to have his nomination certificate to vie for governor quashed, and that he be barred from contesting on account of the said conviction and sentence. The IEBC, the body to which the self - declaration form is submitted under section 13(2) of the Leadership and Integrity Act, was a party and participated in the hearing, but it did not raise the issue of the alleged falsification of the self - declaration form.
7. In his decision dismissing the petition on 13<sup>th</sup> February 2013, Lenaola J held, among other things, that a conviction can only be final when all possibility of appeal or review under Article 193(3) of the Constitution has been exhausted, and it is the petitioner's deposition that his appeal was still pending. Following the decision in the petition, he was cleared to vie and was elected governor.
8. The petition before me was necessitated by certain acts of the respondents that occurred some three years after the petitioner's conviction and two years after his election as governor. On 1<sup>st</sup> April 2015, officers of the EACC conducted a raid in the petitioner's offices. He was arrested and taken to the EACC offices to record a statement in connection with the self - declaration form. He states that he recorded a statement and supplied EACC with all the documents relevant to the matter, including the decision of Lenaola J.
9. The EACC, however released a press statement stating that it was investigating an allegation of deceiving and knowingly misleading it with respect to the self - declaration form. He also learnt, on 11<sup>th</sup> May 2015, that the DPP had given consent for his immediate arrest and prosecution in respect of the allegedly false self-declaration form dated 11<sup>th</sup> December 2012.
10. It is his case that in view of the decision of Lenaola J in the petition against him and the non - custodial sentence in the criminal case, his intended prosecution is a contravention of his right to a fair hearing under Article 50(1), (o), (p), and (q). It is also his contention that the actions of the EACC and the DPP singularly and collectively are unlawful, unreasonable and a contravention of his rights under Article 47 of the Constitution.
11. The petitioner further contends that since the self - declaration form was issued to the IEBC under section 13(2) of the Leadership and Integrity Act, there is demonstrable malice in the complaint by EACC as it could not have been misled on information that was not supplied to it. He therefore terms the decision to recommend his prosecution not bona fide, an abuse of process and intended to achieve a collateral purpose.

12. It is also his contention that the adverse publicity that the matter has been given in the media, as well as its timing and the delay of three years since the submission of the form makes the bona fides of the intended prosecution highly questionable, malicious and oppressive.
13. In his supplementary affidavit in response to the affidavit sworn on behalf of the DPP, the petitioner notes the concession by the DPP that the self-declaration form in issue is submitted to the IEBC and not EACC. It is his deposition that the concession is significant as the intended prosecution against him relates to deceiving and knowingly misleading the EACC contrary to section 46(1)(c) of the Leadership and Integrity Act and giving false information in a declaration to the Commission contrary to section 46(1)(d) of the said Act. His deposition is that the EACC could not have been misled by the contents of a statutory declaration which the law clearly provides is submitted to IEBC, and not the EACC.
14. The petitioner submits that the basis of the intended prosecution against him is his alleged failure to disclose that he had been convicted of an offence and sentenced to serve imprisonment for a period of at least 6 months. It is his case that he has never been convicted of any offence as the conviction and sentence that he allegedly failed to disclose was quashed and/or set aside by the High Court on 14<sup>th</sup> May 2015. To the extent, therefore, that the intended prosecution is premised on failure to disclose a conviction and/or sentence that has already been quashed by the High Court, it is in contravention of Articles 50(1)(o), (p) and (q) of the Constitution and is unlawful. It is also his case that such intended prosecution would not be a valid exercise of the DPP's powers under Article 157(11) of the Constitution as it amounts to abuse of process.
15. The petitioner further contends, in the alternative, that under section 13(1) and (2) of the Leadership and Integrity Act, the self-declaration form is issued pursuant to Article 193 of the Constitution which provides under Article 193(3) that a person is not disqualified under the section unless all possibility of appeal or review has been exhausted. It is his case therefore that as the question at issue is premised on the provisions of the Constitution, a conviction or sentence cannot therefore lie where there is an appeal pending and where all possibility of review have not been exhausted.
16. In his submissions on behalf of the petitioner, Mr. Ng'ang'a argued, while reiterating the petitioner's averments set out above, that the basis of the intended prosecution by the DPP is alleged failure to disclose the conviction which has now been quashed by the High Court, and the sentence set aside. It was his submission that the DPP had failed to concede that the intended prosecution has been overtaken by events, which raised the question of the bona fides of the DPP. In his view, the good faith requirement in Article 157(11) requires that the DPP does not abuse legal process and acts in the interests of justice, and his continued desire to charge the petitioner notwithstanding that the conviction and sentence have been set aside puts into question his good faith.
17. Mr. Ng'ang'a submitted further that to the extent that the question in the self-declaration form referred to a conviction and sentence, it did not apply to the circumstances of the petitioner then as the sentence, which was a fine, was paid. Consequently, on the basis of the question as framed and the answer given, there was no good faith on the part of the DPP in seeking to prosecute the petitioner.
18. The petitioner relies on the South African case of **Jaga vs Donges, NO and Another 1950 (4) SA 653 (a)** for the holding that the use of the word "imprisonment" was to exclude a fine. Mr. Ng'ang'a submitted that the intention of the lower court in August 2012 was to impose on the petitioner a non-custodial sentence and a fine, and the alternative sentence of imprisonment was moot.
19. It was his submission further, in reliance on the case of **Justus Mwenda Kathenge vs DPP Petition No 372 of 2013**, that it was not a proper exercise of the powers of the DPP to prosecute the petitioner. While the DPP has prosecution powers, the Court has power under Article 165(3)

(d) to ensure that such prosecution is done in accordance with the Constitution.

20. With respect to the jurisdiction of the EACC to investigate and recommend prosecution for actions done before the petitioner became a state officer in December 2012, it was the petitioner's submission that as he was not a state officer in 2012, and the powers of the EACC under the Leadership and Integrity Act flow from Article 79 and relate only to public officers, the Commission had no jurisdiction to investigate his actions prior to his becoming a public officer, his contention being that whatever he did before he became a state officer is outside the jurisdiction of EACC. If there was anything he was alleged to have done, it could only be within the jurisdiction of another body, and the recommendation of the EACC to the DPP to prosecute was therefore null and void.

21. The petitioner therefore asked the Court to allow the petition and grant him the following orders:

***(a) An order of certiorari do issue to bring to this Honourable Court for the purposes of being quashed the decision of the 2<sup>nd</sup> Respondent dated 11<sup>th</sup> May 2015 giving authority for the immediate commencement of prosecution against the Petitioner for alleged false self – declaration form submitted to EACC dated 11<sup>th</sup> December 2012.***

***(b) An order of prohibition do issue to prohibit the Respondents whether by themselves, their servants, agents or whomsoever from arresting, charging and/or prosecuting the Petitioner in relation to the matters supplied in the self-declaration form dated 11<sup>th</sup> December 2012 or in other way whatsoever contravening the Petitioner's constitutional rights.***

***(c) A declaration that the alleged misleading information in the said self – declaration dated 11<sup>th</sup> December 2012 does not amount to a corruption offence or a matter within the mandate to the EACC.***

***(d) A declaration that question (m) of the Form in the First Schedule to the Leadership & Integrity Act, 2012 is inconsistent with the provisions of Article 193 (2) and (3) of the constitution and is therefore null and void.***

***(e) Any other relief that the court may deem just and fit to grant.***

***(f) Costs of this suit.***

### **The Case for the 1<sup>st</sup> Respondent**

22. The 1<sup>st</sup> respondent, the EACC, filed grounds of opposition dated 12<sup>th</sup> May 2015, a replying affidavit sworn by Mr. Josephat Chirchir on 20<sup>th</sup> May 2015, and submissions dated 15<sup>th</sup> June 2015.

23. In the grounds of opposition, the EACC argues, among other things, that the application as drawn is grossly and incurably defective as it does not disclose any grounds upon which the prayers are premised. It also opposes the petition on the basis that it is a fact, which the petitioner has conceded, that he was convicted and sentenced to pay a fine of Kshs four hundred thousand, and in default to serve six months' imprisonment. It contends therefore that the petition as framed is premature, speculative, and still born. It also accuses the petitioner of being a judge in his own cause by his argument that he will not get a fair trial, and contends that the acts of arresting and charging anyone by officers of the respondents are acts that are guided by due process and the law. In its view, the petition is merely intended to defeat and pervert the course of justice as nothing has been placed before the Court to demonstrate that the law has been violated.

24. In his affidavit in opposition to the petition, Mr. Chirchir states that he is an investigator with the EACC and a member of the team which investigated the matters forming the subject of the petition. It is his deposition that under section 11 (1)(d) of the EACC Act and section 42 and 43 of the Leadership and Integrity Act, the EACC has the mandate to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution. It also has the constitutional mandate, under Article 252 of the Constitution to conduct investigations on its own initiative or on a complaint made by a member of the public.
25. Mr. Chirchir avers that sometime in October 2014, the EACC received an anonymous complaint alleging that the petitioner had made a false declaration that he had not been convicted of any offence and sentenced to serve imprisonment for a period of at least six months yet he had actually been convicted of a criminal offence at the Makadara Law Courts sometime in the year 2012. Mr. Chirchir and his team investigated the matter and established that the petitioner submitted his declaration form to the EACC on 11<sup>th</sup> December 2012, and the form was duly received and stamped. It is his contention that the investigations by the EACC did not in any way relate to **High Court Petition No. 106 of 2013- Patrick Muguro Mwangi vs Zachary Eliud Gichuhi and Others (supra)** which sought to stop the petitioner from contesting the governor's seat, and which the EACC was not a party to. His averment is that the investigations were related to the accuracy of the information that the petitioner had provided in the self-declaration form submitted to the EACC.
26. Mr. Chirchir avers that the issue whether information provided to the EACC was accurate or not cannot be deliberated on in this petition but is an issue for the trial court. His averment on behalf of the EACC, however, is that the investigations it conducted established that the petitioner had provided the commission with false information when he submitted a self-declaration form under Chapter Six of the Constitution, the Leadership and Integrity Act and the Elections Act in the period preceding the 2013 general elections, and that the DPP had agreed with its recommendations to prefer charges against the petitioner.
27. In his submissions, Mr. Ayoo reiterated the averments made by Mr. Chirchir, particularly with regard to the powers of the EACC under section 11(1)(d) of the EACC Act and section 42 and 43 of the Leadership and Integrity Act to investigate and recommend prosecution for violation of the Leadership and Integrity Act and Chapter Six of the Constitution.
28. According to Mr. Ayoo, section 13 of the Leadership and Integrity Act requires the completion of the self-declaration form, which at clause 9 refers to moral and ethical questions. At clause 9(m), the petitioner was required to answer the question whether he had been convicted and sentenced to serve a term of 6 months or more, to which he answered in the negative, while the correct position was that he had been convicted and sentenced to pay a fine of 400,000 or six months' imprisonment in Criminal Case No 23 of 2010. Mr. Ayoo submitted that under section 46(1) of the Leadership and Integrity Act, it is an offence for any person to give false information to the EACC, and it is also an offence under section 11 of the Oaths and Statutory Declarations Act for any person to make a false statement.
29. According to Mr. Ayoo, the question that the Court should address is whether the petitioner has ever been convicted and sentenced to serve imprisonment for a period of 6 months; that it is not whether he served such sentence, nor that it was a default sentence. It is the EACC's position that the petitioner was dishonest and lied to it.
30. With respect to the time that has elapsed since the completion of the self-declaration form, Mr. Ayoo submitted that there is no limitation period with respect to the power of the EACC to investigate complaints touching on Chapter Six, and the fact that the petitioner had filed an appeal against his conviction does not take away the right of the EACC to investigate complaints.
31. To the petitioner's argument that the EACC has no power to investigate complaints relating to

acts before the petitioner became a state officer, Mr. Ayoo's response was that all persons are subject to the ordinary legal rules and processes of the land, whatever their status, and the petitioner is no exception.

32. He urged the Court not to stop its case against the petitioner, noting that the claims of infringement of rights has not been proved, and that the petitioner will have the opportunity to challenge the evidence against him in the trial court. Counsel relied on the decision in **Neptune Credit Management Ltd and Another vs Chief Magistrate's Court Nairobi High Court Misc. Appl. No. 1413 of 2005** for the proposition that the rights of the petitioner that he alleges are being violated can be vindicated through an acquittal by the lower court, and he urged the Court to dismiss the petition with costs.

### **The Case for the DPP**

33. In presenting the DPP's case in opposition to the petition, Mr. Ashimosi relied on the affidavit in reply sworn by Mr. Peter Kiprop on 19<sup>th</sup> May 2015 and submissions dated 5<sup>th</sup> June 2015.

34. In his affidavit, Mr. Kiprop states that he is a Principal Prosecution Counsel in the office of the DPP. He states further that investigations were commenced by the EACC into allegations that the petitioner swore a false declaration in the self-declaration form set out in the first schedule to the Leadership and Integrity Act 2012, which he submitted to the EACC on 11<sup>th</sup> December 2012. According to Mr. Kiprop, the petitioner is the Governor of Murang'a County elected in the general elections held in March 2013, and the office of Governor is a state office in terms of Article 259 of the Constitution.

35. Under section 13(2) of the Leadership and Integrity Act, a person wishing to be elected to a state office is required to submit to the IEBC a self-declaration in the form set out in the first schedule to the Act. The petitioner submitted two forms, namely form B6 dated 11<sup>th</sup> December 2012 and submitted to the EACC and the other, B7(iii), dated 30 January 2013, submitted to the IEBC.

36. Under clause 9 of the form titled "**Moral and Ethical Questions**", the form stated as follows:

***"Answers to the following questions are mandatory. If YES to any question you must provide additional information on a supplementary sheet."***

37. Question 9(m) was in the following terms:

***"Have you ever been convicted of any offence and sentenced to serve imprisonment for a period of at least six months?"***

38. In both forms, the petitioner answered in the negative. Mr. Kiprop goes on to make further averments with respect to the criminalization of giving false information to the EACC by section 46(1)(d) & (2) of the Leadership and Integrity Act, as well as the criminalization, under section 11 of the **Oaths and Statutory Declaration Act**, of knowingly and willfully making false statements in a statutory declaration.

39. He points out the conviction and sentence of the petitioner on 8<sup>th</sup> August 2012 by the Makadara Chief Magistrate's Court in Criminal Case No 2322 of 2010 to pay a fine of Kshs.400,000 and in default to serve six months in prison. He further states that the petitioner paid the fine and therefore did not serve the term of imprisonment; and further, that he has appealed his conviction and sentence in High Court Criminal Appeal No. 251 of 2012, which was allowed and conviction set aside on 13<sup>th</sup> May 2015.

40. Mr. Kiprop avers that the critical question is whether the suspect has ever been convicted of any offence and sentenced to serve imprisonment for a period of at least six months, rather than whether he ever served such imprisonment; and neither is it whether the petitioner was sentenced

to serve such imprisonment “*other than default of a fine.*” (Sic).

41. It is Mr. Kiprop’s averment that investigations revealed that the suspect was convicted and sentenced “***to serve imprisonment for a period of at least six months notwithstanding that such sentence was in default of fine and that the fine was paid.***” He avers that it was incumbent upon the suspect to disclose that he was so sentenced and to give particulars thereof, including the fact that the sentence was in default of a fine; and that he paid the fine and appealed against the conviction and sentence.
42. However, in the DPP’s view notwithstanding the setting aside of the conviction and sentence on appeal on 13<sup>th</sup> May 2015, at the time the petitioner made his declaration on 11<sup>th</sup> December 2012, the conviction and sentence was still lawful and in existence, and the petitioner deliberately and knowingly failed to disclose it in the declaration, thereby committing the offence. It was Mr. Kiprop’s deposition therefore that the DPP was satisfied that there was sufficient evidence to sustain the proposed charges against the petitioner, and that he made the decision in exercise of his mandate under Article 157 of the Constitution and the relevant legislation.
43. It was submitted on behalf of the DPP that the facts are not in dispute save to clarify which commission the form was submitted to, and according to the DPP, it was the EACC, and not the IEBC.
44. In submissions somewhat contradictory of the above position, however, Mr. Ashimosi submitted that it had been clarified in the affidavit sworn by Mr. Kiprop that the petitioner had completed two declaration forms, one dated 11<sup>th</sup> December 2012 and submitted to the EACC which is annexed to the petition, and another dated 30<sup>th</sup> January 2013 to IEBC which was not before the Court, and was not subject to investigation. Mr. Ashimosi echoed the submissions made on behalf of the EACC with regard to the criminalization of making false statements to the EACC by section 46(1)(d) and 46(2) of the Leadership and Integrity Act. He also observed that at the time the declaration was made, the petitioner had been convicted in Makadara CMCC No 2322 of 2010 and ordered to pay a fine of Kshs400,000, and in default to serve a sentence of 6 months.
45. According to Mr. Ashimosi, again echoing the argument put forward by Mr. Ayoo for EACC, the question is whether the petitioner was convicted of an offence and sentenced to serve imprisonment for a period of six months, and not whether the petitioner was sentenced to serve imprisonment in default of a fine. As there had been a conviction which had not been set aside at the time of the declaration by the petitioner, the DPP submitted that he properly exercised his discretion in prosecuting the petitioner.
46. Mr. Ashimosi further submitted that the decision in **Jaga vs Donges (supra)** distinguishes between the use of the word conviction and the use of other words like fines and whipping, and that where the word used is a conviction, it includes even non-custodial sentences and should have been disclosed, as the form gives room for an explanation.
47. It is also the DPP’s position that the law, under the Leadership and Integrity Act, has provided elaborate mechanism for dealing with complaints under the Act which are available to the petitioner, and he prays that the petition be dismissed as the DPP has exercised his discretion in accordance with the law.

### **Petitioner’s Submissions in Response**

48. Mr. Ng’ang’a termed as strange the DPP’s submission that the petitioner had submitted two declarations but only one was the subject of investigation, yet they were submitted with the same content and information.
49. With respect to what the question at issue was, whether it was that the petitioner had been convicted and sentenced to a term in prison and not whether he served a sentence, the petitioner’s response was that the question was answered by the judgment of the trial court which had

sentenced the petitioner to a fine of Kshs 400,000, and in default a term of imprisonment. According to Mr. Ng'ang'a, a default sentence is not the main sentence, for if the fine is paid, the default sentence becomes moot. It was also his submission that under Article 50(2)(p), the petitioner is entitled to the least severe of the sentences.

50. It was also submitted on behalf of the petitioner that both Counsel for the DPP and EACC appeared to agree that there is an ambiguity in the question at clause (m) of the self-declaration form, an ambiguity that should be resolved in favour of the petitioner.

51. With respect to the question of an alternative forum and the reliance by the DPP on the decision in the case of **Michael Wachira Nderitu and Others vs Mary Wambui Munene (2013) eKLR**, it was the petitioner's response that the decision related to a nomination process where there is a tribunal, while in this petition, the petitioner was raising constitutional issues over which the Court has jurisdiction.

## **Determination**

52. I have carefully read the pleadings and submissions of the parties, and I also heard their oral highlighting of their respective cases. Having done so, I must confess that the proceedings before me appear somewhat peculiar. Not because the petitioner has chosen to protect what he deems his constitutional rights against violation by the state in his intended prosecution, but because of the facts on the basis of which the respondents seek to prosecute him.

53. The parties are agreed on the facts. Should the petitioner's petition not succeed, the petitioner, who is the Governor of Murang'a County, faces arrest and prosecution. The reason for this is that he allegedly made a false declaration in a form which he submitted to the 1<sup>st</sup> respondent, the EACC, on 11<sup>th</sup> December 2012, prior to vying for the seat of governor.

54. The petitioner has sought three main prayers from the Court. He seeks an order of certiorari to quash the decision of the DPP made on 11<sup>th</sup> May 2015 giving authority for the immediate commencement of prosecution against him for the alleged false self – declaration form submitted to EACC dated 11<sup>th</sup> December 2012. He also seeks an order of prohibition to prohibit the respondents, whether by themselves, their servants, agents or whomsoever from arresting, charging or prosecuting him in relation to the matters in the said self -declaration form or in any other way contravening his constitutional rights. He also prays for a declaration that the alleged misleading information in the form does not amount to a corruption offence or a matter within the mandate to the EACC, and a declaration that question (m) of the Form in the First Schedule to the Leadership and Integrity Act, 2012, which is at the core of this petition, is inconsistent with the provisions of Article 193 (2) and (3) of the Constitution, and is therefore null and void.

55. The intended prosecution relates to the question, which he answered in the negative in the self-declaration form. I have already set out above question 9(m), which appears in clause 9 of the form titled "Moral and Ethical Questions," but it is, however, worth setting out the question again:

***"Answers to the following questions are mandatory. If YES to any question you must provide additional information on a supplementary sheet."***

***(m) "Have you ever been convicted of any offence and sentenced to serve imprisonment for a period of at least six months?"***

56. The parties differ on the interpretation of this question. As I understand it, the petitioner's position is that since he had been sentenced to pay a fine, the term of imprisonment for six months being in default of paying the fine, then he was correct in answering the question in the negative. He had not made a false statement to the EACC, and was therefore not guilty of an offence under the

Leadership and Integrity Act. His prosecution was therefore unlawful and in violation of his rights under Article 50(2)(o).

57. The respondents argue, and perhaps its best to capture verbatim the words used in the affidavit in reply sworn by Mr. Kiprop, that

***[15.] “...the critical question then is whether the suspect “was ever been convicted of any offence and sentenced to serve imprisonment for a period of at least six months? The question is not whether the suspect ever served such imprisonment. Nor it is whether the suspect was sentenced to serve such imprisonment “other than default of a fine.”***

58. In dealing with this petition and the somewhat convoluted arguments by the parties, I must ask myself what the purpose of, first, the completion of the self-declaration forms is, and secondly, what the purpose of criminal prosecutions is.

59. As I understand it, the idea behind the self-declaration form is to gauge the suitability of a person to run for public office, in accordance with the provisions of Article 193 of the Constitution. Article 193 provides as follows:

***193. (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—***

***(a) is registered as a voter;***

***(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and***

***(c) is either—***

***(i) nominated by a political party; or***

***(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.***

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

***(a) is a State officer or other public officer, other than a member of the county assembly;***

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

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

***(d) is of unsound mind;***

***(e) is an undischarged bankrupt;***

***(f) is serving a sentence of imprisonment of at least six months; or***

***(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.***

***(3) A person is not disqualified under clause (2) unless all possibility of appeal or***

*review of the relevant sentence or decision has been exhausted.* (Emphasis added).

60. In the case of the petitioner, he had been tried and convicted of an offence, and sentenced to a fine of Kshs 400,000, and in default of the fine, a prison term of six months. His interpretation of the requirements of clause 9(m) of the form was that as the sentence he had been given was a non-custodial sentence, the custodial sentence being applicable only if he did not raise the fine, he properly responded to the question in the negative. He has relied in this regard on the decision in **Jaga vs Donges (supra)**, in which the Court, in discussing the intention of the legislature in the legislation in question in that matter, observed that:

*“By using the word “imprisonment” it intended, as was correctly held in Rex v Phakim (supra), to exclude a sentence of a fine even although that sentence was coupled with an alternative of imprisonment in default of payment of the fine. For the main punishment intended by the convicting court was the payment of a fine.”*

61. I agree with the petitioner on this point, and find the reasoning of the Court in the **Jaga vs Donges case** unassailable. The main sentence to which the trial court sentenced the petitioner was payment of a fine. He would only be subject to imprisonment if he failed to pay the fine.

62. The petitioner has also placed before the Court the decision in his favour in **Petition No. 106 of 2013** in which the issue of the self-declaration form was raised. The argument of the petitioners in that matter appears to have been similar to that taken by the respondents in this case: that the fact that the non-custodial sentence was a default sentence, in the event that he did not pay the fine, did not matter. He should have declared it, and by failing to do so, he had willfully made a false statement to the IEBC, and in this case the EACC, and should not have been permitted to vie for election, and should, in the present instance, be prosecuted.

63. It appears to me that the intended prosecution of the petitioner is premised on the fact that he interpreted the requirements of clause 9(m) in a manner that did not accord with the interpretation given to it by the respondents, particularly with respect to the question whether or not a custodial sentence in default of payment of a fine amounts to the six month sentence contemplated under Article 193 and captured at clause 9(m) of the form. Thus, at his trial should it proceed, the trial court will not be required to try matters of fact with respect to the question whether the petitioner made a false statement to the EACC. Rather, the trial court will be required to interpret the meaning of and intent behind Article 193, and whether a default sentence amounts to the sentence that should be declared in accordance with Article 193, in order to determine whether the petitioner made a false statement and therefore committed an offence under the Leadership and Integrity Act.

64. Which then raises the question: what is the purpose of a criminal prosecution, especially in a case such as this where the question in issue has been addressed by a court of competent jurisdiction, albeit in a different context? A second question can also be asked, as a corollary of the first: is the prosecution of the petitioner in the circumstances of this case a proper exercise of the powers of the EACC, and the constitutional powers of the DPP?

65. I agree with the words of the Court in the case of **George Joshua Okungu (supra)** relied on by the respondents when it observed as follows:

*[50.] The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a*

*Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings.*

66. However, in the same case, the Court cited with approval the words of the court in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** in which the High Court had observed that:

*“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives...”*

67. Similarly, in the case of **R vs. Attorney General exp Kipng'eno Arap Ng'eny High Court Civil Application No. 406 of 2001**, it was held that:

*“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.*

68. The Court in the **Kipng'eno Arap Ng'eny** case went on to express the following view:

*“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all.....Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries.....Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters.....The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious.....In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights*

**under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed.....A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it.**

The Court in the above case went on to conclude that:

***Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay..... A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence.....A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights.....In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."*** (Emphasis added).

69. I am constrained to view the intended prosecution of the petitioner in this case as falling within the category of cases enumerated in the **Kipng'eno Arap Ng'eny** case cited above. As I observed elsewhere in this judgment, the respondents intend to prosecute the petitioner because he did not interpret the form at issue in the manner in which they did. The petitioner had been subjected to another legal process in the form of a constitutional petition in which the Court upheld his position and allowed his candidature for the seat of governor. What would a prosecution today, two years later, achieve, other than to put the petitioner to unnecessary expense, embarrass him politically, and generally vex him with matters that have already been considered by the IEBC to which he submitted the form and which allowed him to contest the seat he now holds, as well as the High Court in the constitutional petition? Is the intended prosecution of the petitioner a necessary step in the fight against corruption and meeting the ends of justice? Are the EACC and DPP serving the public interest in their pursuit of this particular case which hinges solely on the interpretation of a self-declaration form?

70. In my view, while recognizing the powers of the DPP to carry out prosecutions, and the independence of the DPP's office under the Constitution, I cannot see that the present prosecution would serve either the ends of justice or the public interest. It is, on the face of it, instituted for an ulterior motive, and should not be allowed to proceed.

71. The petitioner has sought various orders from the Court, including a declaration that the alleged misleading information in the said self – declaration form dated 11<sup>th</sup> December 2012 does not amount to a corruption offence or a matter within the mandate of the EACC. This, however, is not a declaration that the Court can issue on the basis of the material before me, and given my findings above, I need not enter into it. For similar reasons, I will also not enter into a determination of

whether question (m) in the Form in the First Schedule to the Leadership and Integrity Act, 2012 is inconsistent with the provisions of Article 193 (2) and (3) of the Constitution.

72. In the circumstances, the orders which commend themselves to me, and which I hereby grant, are the following:

*(a) An order of certiorari do issue to bring to this Honourable Court for the purposes of being quashed the decision of the 2<sup>nd</sup> respondent dated 11<sup>th</sup> May 2015 giving authority for the immediate commencement of prosecution against the petitioner for alleged false self – declaration form submitted to EACC dated 11<sup>th</sup> December 2012.*

*(b) An order of prohibition do issue to prohibit the respondents whether by themselves, their servants, agents or whomsoever from arresting, charging and/or prosecuting the petitioner in relation to the matters supplied in the self -declaration form dated 11<sup>th</sup> December 2012.*

73. With regard to costs, which are in the Court's discretion, I direct each party to bear its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 27<sup>th</sup> day of January 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Nganga instructed by the firm of Mbugua Nganga & Co. Advocates for the petitioner.**

**Mr. Ayoo instructed by the firm of Charles Ayoo & Co. Advocates for the 1<sup>st</sup> respondent.**

**Mr. Ashimosi instructed by the Director of Public Prosecution for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.**

**Mr. Mohamed instructed by the State Law Office for the 4<sup>th</sup> respondent.**