



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 408 OF 2013**

**BETWEEN**

**COMMISSION ON ADMINISTRATIVE JUSTICE.....PETITIONER**

**AND**

**JOHN NDIRANGU KARIUKI.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is the curious case of John Ndirangu Kariuki. He is an elected member of parliament. He was elected in 2013. He ought to be a venerable gentleman. The Petitioner is however convinced, very convinced, that John Ndirangu Kariuki ought not have been on the ballot as he had been convicted of a disqualifying offence in 2004.

2. The Petition raises a critical question of the role of the Independent Electoral and Boundaries Commission's role in the registration of candidates for election to elective or public bodies.

**The Parties**

3. The Petitioner is a constitutional commission established by the Commission on Administrative Justice Act (Cap 102A) of the Laws of Kenya pursuant to Article 59(4) of the Constitution.

4. The 1st Respondent is the Member of Parliament for Embakasi Central Constituency. He was elected to the National Assembly during the general elections conducted in the year 2013.

5. The 2<sup>nd</sup> Respondent on the other hand is also a commission. It is created under Article 88 of the Constitution. It is charged with the mandate of overseeing elections to elective bodies and offices

established by the Constitution.

6. The Petitioner ,in its petition , seeks the following final orders:

***(i) Declaration that the 1<sup>st</sup> Respondent was not qualified to vie for the position of Member of Parliament for Embakasi Central constituency under the constitution and Elections Act, 2011.***

***(ii) [For] a declaration that the 2<sup>nd</sup> Respondent in failing to find that the 1<sup>st</sup> Respondent was qualified acted in dereliction of its constitutional and statutory duty***

***(iii) For a declaration that the office of member of parliament for Embakasi Central Constituency has become vacant by virtue of Article 103(1) (g) of the Constitution***

***(iv) That Costs of this petition be met by the Respondents***

***(v)Any other relief that this court deems fit to grant.***

7. The Petition is supported by the affidavit of Leonard Ngaluma together with the written submissions filed on 5 November 2015.

### ***The Petitioner's case***

8. The Petitioner states that it is empowered under Article 249(1) and 59 of the Constitution and Section 8 of the of the Commission on Administrative Justice Act to investigate any conduct in state affairs, complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unresponsive official conduct and misbehaviour in public administration. Further the Petitioner states that it promotes constitutionalism in addition to addressing improper conduct.

9. It is the Petitioner's case that the 1<sup>st</sup> Respondent was unlawfully cleared by the 2<sup>nd</sup> Respondent to contest for the seat of Member of Parliament for Embakasi Central Constituency. The Petitioner avers that the 2<sup>nd</sup> Respondent unlawfully cleared the 1<sup>st</sup> Respondent to vie for the position, and subsequently gazetted him as the duly elected member of the National Assembly for Embakasi Central Constituency notwithstanding the express provisions of Article 99(2)(h) of the Constitution and section 24(2) of the Elections Act ,2011.

10. Additionally, it is the Petitioner's case that Article 99(2)(h), whose provisions have been replicated in section 24(2)(9)(h) of the Elections Act, sets out the qualifications and disqualifications for elections as Member of Parliament. Further, Article 99(1)(b) of the Constitution outlines the qualifications for election as a member of parliament and states that a person is eligible for election as a Member of Parliament if the person, inter alia, satisfies any educational and ethical requirements prescribed by the Constitution or by an Act of Parliament.

11. The Petitioner avers that under Article 99(2) of the Constitution, a person is disqualified from being elected as a member of parliament if the person 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.

12. The Petitioner contends that the 1<sup>st</sup> Respondent did not meet the requirements as set out in law and was therefore not qualified for election as a member of parliament, as he had been convicted of two counts of abuse of office on the 14<sup>th</sup> January 2004 by the Anti-Corruption Court in Nairobi in ***Anti Corruption Court Criminal Case No 25 of 2002; In re Republic versus John Ndirangu Kariuki & another*** and subsequently sentenced to a fine of Kshs 100,000 on each count. In default, the 1<sup>st</sup> Respondent was to serve a jail term of one year on each count.

13. The Petitioner avers that it informed the 2nd Respondent on 14<sup>th</sup> December 2012 about the status of the 1<sup>st</sup> Respondent in relation to his [dis]qualification under Article 99 of the Constitution and Section 24

of the Elections Act. The 1<sup>st</sup> Respondent had honoured the sentence without preferring any appeal. In addition, the Petitioner states that it furnished the 2<sup>nd</sup> Respondent with all the relevant documents confirming the conviction.

14. It is the Petitioner's case that having been charged and convicted of abuse of office for which no appeal had been preferred, the 1<sup>st</sup> Respondent's character and personality neither bring honour to the nation and the dignity to the office he holds nor promotes public confidence in the integrity of a public office required by the Constitution.

15. The Petitioner averred that the Election Petition filed by a third party against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent seeking to challenge the nomination and subsequent election of the 1<sup>st</sup> Respondent as a Member of parliament in view of his conviction was dismissed on 24<sup>th</sup> May 2013 on the basis that the petitioner therein was not a competent legal person known to law and therefore incapable of bringing the petition in its own name.

16. It is the Petitioner's case that the 2<sup>nd</sup> Respondent acted in blatant abuse of the Constitution, the Elections Act, the Commission on Administrative Justice Act, breach of trust and abused power by clearing the 1<sup>st</sup> Respondent to contest for elections as Member of Parliament and subsequently gazetting him as having been duly elected.

17. According to the Petitioner the 1<sup>st</sup> Respondent is not fit to assume and or hold any public office within the Republic of Kenya and his holding of office as a Member of Parliament is in contravention of the Constitution and he ought to vacate office in accordance with Article 103(1)(g) of the Constitution. Article 103(1)(g) provides that the office of a Member of Parliament becomes vacant if the member becomes disqualified for election to parliament under Article 99(2)(d) to (h) of the Constitution.

18. In these respects, the Petitioner contends case that the 2<sup>nd</sup> Respondent abdicated its obligation and fraudulently and unlawfully cleared the 1<sup>st</sup> Respondent to contest for election. According to the Petitioner the 2<sup>nd</sup> Respondent was fully aware that the 1<sup>st</sup> Respondent was a disqualified person.

19. The Petitioner avers that the 1<sup>st</sup> Respondent could not therefore lawfully assume and or hold the office of Member of Parliament since his election as the Member of Parliament for Embakasi Constituency was null and void. The assumption of office and the continued holding of office by the 1<sup>st</sup> Respondent as Member of Parliament for Embakasi Central Constituency, accordingly contravenes Article 73(1) of the Constitution. The Petitioner contends that even though the 1<sup>st</sup> Respondent filed judicial review proceedings against the 2<sup>nd</sup> Respondent being Judicial Review Application No 452 of 2012, the same was dismissed on the 28<sup>th</sup> January 2013.

### ***The 1<sup>st</sup> Respondent's case***

20. The 1<sup>st</sup> Respondent opposed the petition by way of a Replying Affidavit sworn on the 9<sup>th</sup> November 2015.

21. He contends that the Petition challenges his eligibility and consequential membership to the National Assembly by reference to Articles 99(1)(b) and 99(2)(h) of the Constitution and Sections 24(1) (b) and 24(2) (h) of the Elections Act which provisions of the law are on eligibility for one to contest for a seat in parliament. According to the 1<sup>st</sup> Respondent, the appropriate forum for such challenge is through an election petition filed before an election court.

22. The 1<sup>st</sup> Respondent also contends that the petition is an abuse of the court process, only intended to harass and distract him from discharging his functions as the Member of Parliament for Embakasi Central Constituency.

23. It is also the 1<sup>st</sup> Respondent's case that the provisions of Article 99(2)h of the Constitution cannot be applied retrospectively and that the petition seeks to do exactly the opposite.

24. The 1<sup>st</sup> Respondent also contends that he had been cleared to contest for the elective public position by yet another independent commission in the Ethics and Anti-Corruption Commission prior to being cleared by the 2<sup>nd</sup> Respondent. The clearance by both Commissions, states the 1<sup>st</sup> Respondent, was after a full disclosure of all relevant facts. The 1<sup>st</sup> Respondent denies any fraud.

25. In these respects, the 1<sup>st</sup> Respondent asserts that having been cleared by the Ethics and Anti-Corruption Commission, which decision was never challenged in court, it is not open for the Petitioner to question his eligibility, to contest and hold the seat of Member of Parliament for Embakasi Central Constituency, on ethical grounds and the petition should be dismissed.

26. Finally, it is the 1<sup>st</sup> Respondent's case that Article 99(3) of the Constitution provides that a person is not disqualified under clause 2 unless all possibility of appeal or review of the relevant sentence or decision has been exhausted. The 1<sup>st</sup> Respondent contends that he has a pending application for leave to institute appeal out of time and therefore the issue of him not being eligible to contest or hold office does not arise, as such the 1<sup>st</sup> Respondent states that he is yet to exhaust his appeal avenues.

### ***The 2<sup>nd</sup> Respondents case***

27. The 2<sup>nd</sup> Respondent also opposed the Petition through the replying affidavits of Moses Kipkogei.

28. The 2<sup>nd</sup> Respondent contends that it is an independent commission under Article 88 of the Constitution with the exclusive mandate of registering candidates for elections and not subject to the direction and control of any person or body.

29. It is the 2<sup>nd</sup> Respondent's case that the petition impugns the validity of the election of the 1<sup>st</sup> Respondent as the Member of Parliament for Embakasi Central Constituency and the orders being sought are governed by Article 105 of the Constitution as operationalised by section 80 of the Elections Act 2011. The orders can only be determined by way of an election petition.

30. The 2<sup>nd</sup> Respondent asserts that Article 105 gives the High court exclusive jurisdiction to hear and determine election matters. As such the timelines set for the determination of election related matters is strict mandating that the same be heard and determined within a period of six months. The petition is therefore brought in breach of the rules and the set timelines, so contends the 2<sup>nd</sup> Respondent.

31. The 2<sup>nd</sup> Respondent refutes having unlawfully cleared the 1<sup>st</sup> Respondent to vie for the seat of Member of Parliament for Embakasi Central constituency. The 2<sup>nd</sup> Respondent contends that the 1<sup>st</sup> Respondent fully disclosed in his nomination papers that he had been convicted offences under the Penal Code, but had sought to appeal against the conviction in High Court Misc. Criminal Application No.614 of 2012(Nrb).

32. The 2<sup>nd</sup> Respondent asserted that while Article 99(2)(h) of the constitution provides that a person is disqualified from being elected as a member of parliament if the person is found in accordance with any law to have misused or abused a state office or public office or in any way contravened Chapter six of the Constitution, the provision is qualified by Article 99(3) which provides that a person is not disqualified to vie for the position of member of the National Assembly unless all possibility of appeal or decision has been exhausted.

33. The 2<sup>nd</sup> Respondent asserts that having been shown the letter by the 1<sup>st</sup> Respondent showing that an appeal was being preferred, the 2<sup>nd</sup> Respondent was constitutionally duty bound to allow the 1<sup>st</sup> Respondent to contest the elective position.

34. It is further the 2<sup>nd</sup> Respondent's case that the decision to clear the 1<sup>st</sup> Respondent to contest the elective post was not appealed against before the 2<sup>nd</sup> Respondent's dispute resolution committee. Provision for appeal is given under Article 88(4)(e) as read with section 74 of the Elections Act and section 4 of the Independent and Electoral and Boundaries Commission Act together with all the rules of procedure.

35. Urging that the 2<sup>nd</sup> Respondent had no duty to investigate the matter further, the 2<sup>nd</sup> Respondent contends that the only investigative function vested in the commission is as provided under section 4(1) of the Independent Electoral and boundaries Commission Act to investigate and prosecute electoral offences by candidates, political parties or their agents pursuant to article 157(12) of the Constitution.

36. The 2<sup>nd</sup> Respondent further states that for the purposes of clearing any candidate the commission relies on the self-declaration, statutory declaration as well any report of the Ethics and Anti-Corruption Commission which is mandated with enforcement of Chapter six of the Constitution on leadership and integrity. In this case, the 2<sup>nd</sup> Respondent asserts, no report impugning the eligibility of the 1<sup>st</sup> Respondent to vie for membership of parliament was received from the Ethics and Anti-Corruption Commission and as such the 1<sup>st</sup> Respondent had to be cleared him.

37. According to the 2<sup>nd</sup> Respondent, Article 99(2) of the Constitution and Section 24(2) of the Elections Act 2011 are qualified and have to be read together with Article 99(3) of the constitution and section 24(3) of the of the Elections Act 2011 which allow for rights of appeal or review to be first exhausted.

38. The 2<sup>nd</sup> Respondent denies in any way having fraudulently, unlawfully or negligently abdicated its obligation.

39. In closing, the 2<sup>nd</sup> Respondent urges that the court should take into consideration the effect that the orders sought would have on the constituents of the affected electoral area and the special nature of elections in the country and interpret the law strictly.

## **ARGUMENTS IN COURT**

40. The petition was urged by way of written submission filed in court and highlighted by Mr Yuvinalis Angima for the Petitioner and Mr Elisha Ongoya for the 1<sup>st</sup> Respondent. Ms. Sarah Okimaru advocated for the 2<sup>nd</sup> Respondent.

### *Petitioner's submissions*

41. During its submissions in court, the Petitioner restated its case that the 2<sup>nd</sup> Respondent knew that the 1<sup>st</sup> Respondent was not qualified to run for election but none the less cleared him to contest as he is a convict. Counsel submitted that this amounted to dereliction of the 2<sup>nd</sup> Respondent's constitutional duty. Counsel further submitted that no evidence of appeal had been submitted. Likewise, counsel submitted that there was no evidence that the application for leave to file an appeal had ever been allowed.

42. Counsel further submitted that the court had jurisdiction to entertain the matter as the core issue before the court was not an election petition but only a question as to whether the relevant provisions of the Constitution had been observed.

43. The Petitioner further submitted that even though the issues raised in the current petition are similar to those which had been raised in Election Petition No 8 of 2013, the Petitioner was not a party to the latter petition and in any event the latter petition was never determined on its merits. Then relying on the case of **Dr Thuo Mathenge & Another v Nderitu Gachagua & 2 others [2013]eKLR**, counsel submitted that the court had jurisdiction to determine issues of nomination. Counsel in concluding urged the court to avoid any technicalities and allow the Petition instead.

### *1<sup>st</sup> Respondent's submissions*

44. In his submissions, Mr Ongoya for 1<sup>st</sup> Respondent contended that the issues related to Article 99 and Chapter 6 of the Constitution and therefore the values established thereunder were never intended to apply retrospectively.

45. Counsel submitted that the 1<sup>st</sup> Respondent had demonstrated that even though he had been convicted he had not yet exhausted all mechanisms of appeal and that in any event the burden lay on the Petitioner to show that the appeal or review avenues had been exhausted.

46. Finally, it was counsel's submission that the Petitioner has raised a question of validity of the election of the 1<sup>st</sup> Respondent which could only be presented within 28 days after the elections. He reiterated that the orders sought are drastic and should be only granted in the clearest of cases.

### *2<sup>nd</sup> Respondent's submissions*

47. Ms. Okimaru associated herself with the submissions of the 1<sup>st</sup> Respondent.

48. She reiterated that one should only move the court by way of election petition where a sitting member of parliament's suitability is challenged. She restated that the duty of the 2<sup>nd</sup> Respondent is to clear candidates and that all that was required was full disclosure by the candidates as required by the ethics and integrity statutes. And this had been done. Counsel submitted that the 2<sup>nd</sup> Respondent could not go beyond Article 99(2)(h) and 99(3) of the Constitution.

## **DISCUSSION AND DETERMINATION**

### ***Issues***

49. Five main issues may be reserved here. They are:

- a. Whether the court has jurisdiction to determine this petition?
- b. Whether there was a violation of Article 99 of the Constitution when the 1<sup>st</sup> Respondent was allowed to vie and be elected into office?
- c. Whether the Articles 3, 10, 73, 99 and 103 are retrospective in application?
- d. Whether the 2<sup>nd</sup> Respondent abdicated its function and duty under the constitution?
- e. Whether the Petitioner is entitled to the orders sought?

50. Before addressing the issues, it would be important to state that the facts are basically not in dispute.

51. There is no controversy that on 14 January 2004 the 1<sup>st</sup> Respondent was convicted for abuse of office in *Nairobi Chief Magistrate's Anti Corruption Case No 25 of 2002 ( Republic v John Ndirangu Kariuki & Another)*. The 1<sup>st</sup> Respondent was duly sentenced after trial. It is not in dispute the 1<sup>st</sup> Respondent settled for the option of a fine and paid the fine of Kenya Shillings 100,000/= on each count. It is further not in dispute that the Petitioner protested at the 1<sup>st</sup> Respondent's nomination. The protest was made to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent however still cleared the 1<sup>st</sup> Respondent to contest in the general elections of the year 2013. The 1<sup>st</sup> Respondent won the Embakasi Central Constituency seat and was declared the duly elected Member of Parliament. An election petition was filed by the Kituo Cha Sheria, a nongovernmental organization. The election petition which challenged the 1<sup>st</sup> Respondent's election was however dismissed for want of standing and or capacity by the petitioner. It was not dismissed on merits.

## ***A question of jurisdiction***

52. It is contended by the Respondents that the Petition is an abuse of the process and indeed not a Constitutional Petition but an election Petition in disguise. The Respondents contend that the 1<sup>st</sup> Respondent can only be removed as a Member of Parliament through an election Petition filed pursuant to and in full compliance with the provisions of the Elections Act (Cap 7). The Respondents add that indeed an election Petition had been filed but the same was dismissed. In consequence, the Respondents state that the court has no jurisdiction to entertain the current Petition or issue the reliefs prayed for.

53. The Respondents placed reliance on the cases of the **Speaker of the National Assembly -v- Hon. Njenga Karume [2008 ] 1KLR 425** and **The National Alliance Party & Another -v- The Independent Electoral and Boundaries Commission [2013]eKLR**, both for the proposition that where a procedure for the redress of any particular grievance, is laid out and prescribed by the Constitution or an Act of Parliament, that procedure right to be strictly followed. Accordingly, the Respondents stated that the Election Act 2011 which promotes Article 105 of the Constitution clearly outlines the procedure to be followed when the question to be determined by the High Court is whether a person has been validly elected as a member of Parliament or whether the seat has become vacant.

54. The Petitioner's position is that the court has jurisdiction under Article 165(3) of the Constitution as the question before the court is one of Constitutional interpretation and in particular one of the 1<sup>st</sup> Respondent's constitutional disqualification to run for election to an elective office.

55. The Petitioner further contends that the reliefs sought are merely declaratory which may or may not be granted by the court. The Petitioner additionally points out that the other question is whether a Constitutional Commission in the 2<sup>nd</sup> Respondent has performed or acted in accordance with the Constitution or abdicated its Constitutional duty.

56. I must point out as has been done on several occasions that a question of jurisdiction ought always to be determined at first instance and on the earliest opportunity. Once the court ascertains that there is want of jurisdiction then it must down its tools and proceed no further with the matter as any decision made in the absence of jurisdiction is of no use and is void: see **Owners of Motor Vessel 'Lillian S' -v- Caltex Oil (K) Limited [1989] 1 KLR 1**.

57. In the instant Petition, the question of jurisdiction had been earlier raised by the 2<sup>nd</sup> Respondent through a formal application dated 29<sup>th</sup> September 2013. The 2<sup>nd</sup> Respondent sought to have the Petition struck out for want of jurisdiction. The application was heard by Justice Mumbi Ngugi on 3<sup>rd</sup> March 2014. In a reserved ruling delivered on 6<sup>th</sup> June 2014, Justice Mumbi Ngugi dismissed the application. Effectively, the question of jurisdiction was resolved by the court on 6<sup>th</sup> June 2014.

58. In dismissing the application challenging the court's jurisdiction, the court further observed as follows:

***“[29] In my view, the question that arises is whether the present petition challenges ‘the electoral process,’ in which case the matter should have been brought within the timelines set out in the Elections Act, being 28 days after the declaration of the results for Embakasi Central Constituency.***

***[30] As I understand it, the petitioner does not in any way impugn the electoral process resulting in the election of the 1<sup>st</sup> respondent. Rather, the question is whether he was constitutionally and statutorily eligible to vie for elections, and if he was not, whether the 2<sup>nd</sup> respondent abdicated its duty by allowing his participation in the elections.***”(emphasis mine)

59. The record reveals that the 2<sup>nd</sup> Respondent thereafter preferred an appeal against Justice Mumbi Ngugi's decision. The appeal is Court of Appeal Civil Appeal No. 257 of 2014. It is still apparently

pending. Despite a stay of proceedings herein for 90 days to enable the 2<sup>nd</sup> Respondent pursue its appeal or obtain a formal stay of proceedings, the appeal has never been prosecuted. There is also no stay of proceedings.

60. I am of the view that with the pendency of the Appeal No. 257 of 2014, it would be inappropriate if not superfluous for me to revisit the issue of jurisdiction and make a further determination thereon.

61. Secondly, there is the fact of specific collateral estoppel or issue preclusion, in other words. This court (Mumbi Ngugi J) has already made a finding that the court has jurisdiction to determine the Petition. It put to rest and entombed that issue at least at the High Court level. I should not and indeed I am precluded through the doctrine of issue preclusion from revisiting the decision on an issue already pronounced on merits by this court and which the parties are pursuing an appeal.

62. Suffice to point out only that having read the decision by Justice Mumbi Ngugi of 6<sup>th</sup> June 2014, I state that I entirely agree with the same with the only addition being that this court's jurisdiction *in re* constitutional petitions is founded on Article 165 (3) which reads as follows:

***(3) Subject to clause (5), the High Court shall have-***

***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

***(c) ...***

***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-***

***(i) the question whether any law is inconsistent with or in contravention of this constitution.***

***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with or in contravention of , this Constitution.(emphasis added)***

63. The questions identified by Justice Mumbi Ngugi as raised by the Petition and also earlier reserved by myself in paragraph [49]above, appear to fall squarely within the provisions of Article 165(3).

64. The Respondents also pointed out that the reliefs sought are of a nature that only an Election Petition court may grant under the Elections Act (Cap 7). I must quickly point out that the reliefs a court considering allegations of violations of the Constitution may grant are not limited or straight jacketed in any way. The court besides making appropriate declarations must also be innovative to fashion such relief as is appropriate for the circumstances of each case and which may be necessary to protect and enforce the Constitution: see **Mary Makokha Baraza -v- Judicial Service Commission & 9 Others [2012]eKLR** and **Fose -v- Minister of Safety and Security [1997] ZACC 6**.

65. I return the verdict that this court has the requisite remit to hear and decide the instant Petition.

***Whether there was a violation of Article 99 of the Constitution***

66. Put in another way, the issue is whether the Respondents violated Article 99 of the Constitution when the 1<sup>st</sup> Respondent was cleared to contest for the Embakasi Central Constituency seat during the general elections of 2013.

67. The Petitioner's case in this regard is straight forward.

68. According to the Petitioner the 1<sup>st</sup> Respondent is a convict. He was convicted in 2004. The conviction entailed two counts of abuse of office. That was in the case of **Nairobi Chief Magistrates Anti-Corruption Case no. 25 of 2002 Republic –v- John Ndirangu & another**. The 1<sup>st</sup> Respondent was fined Kshs 100,000/= on each count. In default he was to serve one year in jail. That was the sentence. He honoured the non-custodial sentence and paid the fine. He never appealed against either the conviction or the sentence within the prescribed period under the Criminal Procedure Code (Cap 75). Then he went mute. Ten years later, the 1<sup>st</sup> Respondent filed an application for leave to appeal out of time. The application is yet to be heard.

69. The Petitioner states that it informed the 2<sup>nd</sup> Respondent of all these facts. Attempts by the 1<sup>st</sup> Respondent through the judicial process to restrain the 2<sup>nd</sup> Respondent from acting on the Petitioner's information were also rejected by the court in **Nairobi Judicial Review Application No. 452 of 2012 Republic -v- Commission on Administrative Justice & Another Ex p John Ndirangu Kariuki**. The court declined to prohibit the 2<sup>nd</sup> Respondent from acting on or considering the information availed by the Petitioner on the 1<sup>st</sup> Respondents alleged disqualification.

70. The Petitioner states that armed with all these facts the 2<sup>nd</sup> Respondent should not have cleared the 1<sup>st</sup> Petitioner to contest in the general elections of 2013.

71. In response, the 1<sup>st</sup> Respondent as well as the 2<sup>nd</sup> Respondent contend that the issue of the 1<sup>st</sup> Respondent's competence was already considered by a court of competent jurisdiction and rejected in favour of the Respondents when this court (Kimondo J) dismissed an election Petition filed against the Respondents. The petition raised the same issue.

72. The petition in question was Nairobi Election Petition No. 8 of 2013. It was filed by Kituo Cha Sheria, a non-governmental organization. It was dismissed on 24<sup>th</sup> May 2013.

73. The 2<sup>nd</sup> Respondent also states that it never violated the Constitution as the Petitioner had been cleared by the Ethics and Anti-Corruption Commission, which is the constitutional body enjoined to deal with ethical and corruption related issues.

74. Finally, the 1<sup>st</sup> Respondent also states that he could not be banned from contesting as he was/is yet to exhaust all the possibilities of appealing against the conviction and sentence or of having the same reviewed.

75. The central question in this Petition revolves around Article 88 of the Constitution as well Article 99 of the Constitution.

76. Article 88 deals essentially with the 2<sup>nd</sup> Respondent's establishment and mandate. In so far as the same is relevant, under Article 88(4)(e) of the Constitution, the 2<sup>nd</sup> Respondent is under a constitutional compulsion to settle electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to or arising after the declaration of results.

77. The question brought forth by the Petitioner regards the nomination of the 1<sup>st</sup> Respondent. The Petitioner had prompted the 2<sup>nd</sup> Respondent to consider the 1<sup>st</sup> Respondent's qualifications. The 1<sup>st</sup> Respondent then dragged both the Petitioner and the 2<sup>nd</sup> Respondent to court over the same. There was definitely, in my view, a dispute over the nomination of the 1<sup>st</sup> Respondent which the 2<sup>nd</sup> Respondent was duty bound to resolve absent any resolution by the court.

78. Coupled with various provisions of the law especially section 24 of the Elections Act 2011 as well as Article 99 of the Constitution, the phrase "*disputes relating to or arising from nominations*" under Article 88 must be read and understood liberally to mean such disputes or questions as may arise prior to the nominee being cleared or at the time of clearance or after clearance by the 2<sup>nd</sup> Respondent. The phrase

cannot be limited to challenges raised after a person has been duly cleared by the 2<sup>nd</sup> Respondent. I have no doubt that in addressing issues regarding the nomination of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent was duty bound to consider all relevant statutory and constitutional provisions including Article 99 of the Constitution.

79. Article 99 of the Constitution provides that unless disqualified by the Constitution a person is eligible for election as a Member of Parliament if he is a registered voter and is nominated by a political party. If he is not an independent candidate he must be supported by at least one thousand registered voters in the constituency he seeks to represent or, in the case of an election to the Senate, two thousand voters registered in the county. Thirdly, the person must also satisfy any educational, moral and ethical requirements prescribed by Parliament or the Constitution.

80. Article 99(2) of the Constitution states the constitutional grounds for disqualification. The Article reads, in so far as is relevant, that

**2. A person is disqualified from being elected a Member of Parliament if the person**

**a- f ...**

**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 clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted. (emphasis)**

81. The Petitioner has invited the court to consider the constitutionality of the 2<sup>nd</sup> Respondent's actions in not disapproving of the 1<sup>st</sup> Respondents nomination and in allowing the 1<sup>st</sup> Respondent to be on the ballot in 2013. The question is whether there was a violation of Article 99 of the Constitution by the Respondents

82. There is need to interrogate the relevant constitutional provisions. A brief reflection and interpretation of the relevant Constitutional provisions is further made necessary when the Respondents contend that the Article 99 was never intended to operate retrospectively.

83. A short rehash of the guidelines on constitutional interpretation may be necessary.

84. Firstly, the Constitution has itself set out a clear parameter for its interpretation. Under Article 259, the Constitution is to be construed in a manner that promotes its purposes, values and principles, advances the rule of law, human rights as well as fundamental freedoms and rights. It must also be construed in a manner that not only permits the development of the law but also contributes to good governance.

85. Secondly, the Constitution ought to be construed in a holistic manner with all the provisions sustaining and supporting each other rather than destroying the other: see **Olum -v- AG [2002] 2 EA 508**

86. Thirdly, while where there is no ambiguity attempts to depart from the straight texts of the Constitutional provisions should be avoided (see **Joseph Mbalu Mutava -v- AG & Another [2014]eKLR**), the widest possible interpretation in its context should always be accorded: see **Advocates Coalition for Development and Environment & Others -v- Attorney General & Anor [2014]3 E A 9.**

87. Fourthly, constitutional provisions containing fundamental rights ought to be given dynamic progressive purposive liberal and flexible interpretation with a view to preserving and expanding the right. Any law, and by extension constitutional provision, which limits fundamental rights or freedoms

ought however to be strictly construed to protect the right: see **Re The Matter of the Interim Independent Electoral Commission SCK Constitutional Appl No. 2 of 2011 [2011]eKLR at para 51.**

88. It is not in dispute that in contesting for the Embakasi Central Constituency seat the 1<sup>st</sup> Respondent was exercising his undoubted political right under Article 38(3) (c) of the Constitution. That right is however subject to express constitutional claw-backs indexed under Article 99(2). It is also ought not be in a controversy that by virtue of Article 88 of the Constitution, as promoted by both the Independent Electoral and Boundaries Commission Act (Cap 7A) and the Elections Act (Cap 7), the 2<sup>nd</sup> Respondent is enjoined not only to participate and regulate processes by which political parties nominate candidates but also to register the nominated candidates. The 2<sup>nd</sup> Respondent is also under a constitutional command to resolve any disputes arising from nominations.

89. The 2<sup>nd</sup> Respondent is under a constitutional and statutory duty to receive and register the candidates nominated by various political parties. That is certainly clear from Section 28 of the Election Act (Cap 7) and Article 88(4)(f) of the Constitution. Clearly as well, Article 99(2) of the Constitution and Section 24(2) Elections Act which are distinctively similar word for word, do not anticipate the nomination and consequent registration of a candidate disqualified under both the Article 99(2), and Section 24(2) of the Elections Act.

90. A holistic and purposeful reading of Article 99 of the Constitution would certainly lead to the more plausible conclusion that the 2<sup>nd</sup> Respondent must not register any candidate who is disqualified by the provisions of Article 99(2) of the Constitution and Section 24(2) of the Elections Act 2011. This is more so where the 2<sup>nd</sup> Respondent's attention is drawn to the disqualification index whether informally or formally through a challenge to the nomination. It is no doubt the duty of the 2<sup>nd</sup> Respondent to ensure that unqualified persons are not allowed to register and contest in an election. It would certainly be in line to so hold considering that the Constitution under Chapter 6 cherishes places a very high premium on integrity to hold public office.

91. In the instant case the Petitioner accused the Respondents of violating Article 99(2) of the Constitution, in particular clause 2(h). It is stated that the 1<sup>st</sup> Respondent was disqualified as he had been convicted of offence which fetched an aggregate fine of Kshs. 200,000/= upon sentencing. The offence entailed two counts of abuse of office. The conviction was in the year 2004.

92. A cursory reading of Article 99(2) (h) of the Constitution would lead to the rather obvious inference that the 1<sup>st</sup> Respondent fell in the category of those disqualified from contesting for a Parliamentary. The same inference can be made if one reads Section 24(2) (h) of the Elections Act, where abuse of office is also indexed as a disqualification factor. In the instant case the 1<sup>st</sup> Respondent was found, in accordance with the law to have abused a public office. The finding had been made by a competent court duly seized with jurisdiction after a trial and not through mere public opinion.

93. The 1<sup>st</sup> Respondent however states and rightly so that Article 99(2) (h) is not absolute but is subject to the provisions of Article 99(3). The latter Article states that the disqualification factors indexed under Article 99(2) do not apply unless "*all possibility of appeal or review of the relevant sentence or decision has been exhausted*".

94. In **Esposito Franco –v- Independent Electoral and Boundaries Commission [2013]eKLR** the court reviewed Article 99(3) and held that the said Article 99(3) applied in relation to Articles 99(2)(g) and (h) of the Constitution.

95. I would certainly agree with that proposition save to add that Article 99(3) applies in respect of the disqualifying factor under Article 99(2) (f) as well. A decision as to a person's bankruptcy may be made by the court or the Registrar General as the case may be pursuant to proceedings commenced under the relevant insolvency laws. Such a decision may be the subject of an appeal or review. Effectively, that would fall under Article 99(3). Article 99(3) applies to the disqualifications indexed under Article 99(2)

(f), 99(2)(g) and 99(2)(h). So long as an appeal or review application against a bankruptcy order, a sentence of imprisonment of at least six months or a decision of conviction for abuse or misuse of office is still pending, then a person will not be deemed disqualified. It is a constitutional claw-back which appears to take away the intended gains of Chapter six as well as Article 99(c) of the Constitution but which seeks to promote the rule of law in so far as it recognizes the right to appeal. It must be respected.

96. In the instant case, the 1<sup>st</sup> Respondent has argued that the protection of Article 99(3) was and is still available to him. The 2<sup>nd</sup> Respondent supports the same position. Both Respondents contend that the 1<sup>st</sup> Respondent has not exhausted all possibility of appeal against the sentence and conviction. The basis of the Respondents' argument is an application filed in court seeking to appeal against the conviction and sentence. The application is registered as High Court Misc. Criminal Application No. 614 of 2012.

97. It is to be noted that the application was just that. It was not an appeal as contemplated by Section 350(1) of the Criminal Procedure Code (Cap 75). Instead, the application seeks the permission of the court to appeal out of time. The question is whether such an application would operate as an appropriate bar to any of the disqualification indices under Article 99(2)(f)(g) or (h).

98. It is long settled in law that parties do not have inherent rights of appeal. Appeals are creatures of statute, even in criminal cases: see for example **Attorney General -v- Shah No. 4 [1971] EA 50**. Appellate jurisdictions spring only from statute and where statute provides for the mode and medium of how that right is to be exercised and it is not taken, the right of appeal is lost.

99. In the criminal justice system, the Criminal Procedure Code (Cap 75) provides for the right of Appeal. Sections 349 and 350 provide for the mode and medium of appeal as well. The Appeal ought to be filed within 14 days from the date the order or sentence appealed from has been made. The appeal is to be made by way of a Petition and a copy of the judgment or order appealed against attached. Where the appeal is not made within the prescribed time then that right will be lost unless the appellate court in exercise of its hermetical jurisdiction extends the time for appeal. The proviso to Section 349 provides as much when it states that:

***“provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has lapsed”.***

Effectively, there will be no appeal unless with the court's permission on the peculiar and particular facts of each intended appeal is granted.

100. Effectively as well, it is clear that an appeal may be filed out of time. The possibility of appeal is in existence even after the time limit for appealing has expired. The judicial discretion whether or not to allow an appeal is strictly with the appellate court and no other person.

101. Article 99(3) is explicit that *“unless all possibility of”* appeal or review of the relevant sentence or decision has been exhausted the disqualification indices will not apply. In my view, it is necessary to give Article 99(3) and in particular the appellation *“unless all possibility of”*, a more liberal interpretation.

102. Article 99 provides generally for both qualifications and disqualification of candidates seeking the elective position of Member of Parliament. Oxymoronically, the Article promotes and limits an individual's political rights under Article 38(3). Every adult citizen has a right to be a candidate for public office without unreasonable restrictions. There are constitutional and statutory restrictions but they must not be construed in an unreasonable manner. The limitations must be strictly construed. Article 99(3) is itself not a limitation of any right. Instead, it seeks to enhance rights; the political rights.

103. In my view consequently, the right to apply for leave to appeal out of time is covered and contemplated by Article 99(3) when it refers to possibility of appeal. As the application for leave to appeal can be lodged at any time after the expiry of the statutory fourteen (14) days, it cannot be said that all possibility of appeal or review has been exhausted immediately time expires.

104. It is for the court seized with the application for leave to consider the circumstances, including any delay in filing the application and make a determination whether or not to grant permission for the appeal to be lodged out of time. It could grant permission. It could deny permission. The odds however exist until a determination is made by the court.

105. In consequence, where a party has an application pending before the appellate court seeking permission to appeal out of time such a party cannot be said to be a disqualified candidate until the application for leave has been heard and determined.

106. In the instant case the position duly obtains. There is admittedly an application for leave to appeal out of time. It was filed, perhaps so late in time. This court however lacks the jurisdiction to interrogate the merits of the application. Likewise the 2<sup>nd</sup> Respondent cannot determine the success or failure of such an application.

107. The 1<sup>st</sup> Respondent had not exhausted all the possibility of appeal against the sentence and conviction levied on him in 2004 to lead to his automatic disqualification from contesting the seat of member of parliament in 2013.

108. In so concluding, I have had to weigh the weight the Constitution has placed on the need for integrity in leadership for good governance against a similarly weighty premium the same Constitution has placed on the protection and advancement of fundamental freedoms and rights, in this case political rights. The need to promote fundamental rights and see to the realization of the potential of all human beings would tilt towards ensuring that even a convict must have his days in court, including the very last day. That appears to the spirit of Article 99(3) when it talks of all possibility of appeal being exhausted.

### ***Retrospectivity***

109. I was urged by the Respondents' counsel to also find that the Constitution does not operate retrospectively. While relying on the case of **Orengo –v- Moi and 12 Others (No. 3) [2008] 1 KLR (EP) 715**, Mr. Ongoya asserted that the Constitution like statutes must be interpreted to operate prospectively. Counsel pointed to Articles 3, 73, 99 and 103 of the Constitution.

110. It is a clear and acceptable legal principle that laws shape to future matters and are not applied to acts of the past unless express provision is made for past time or matters pending. Law in other words ought not be retrospective. The treatise **Maxwell on Interpretation of Statutes 12<sup>th</sup> Ed 1969 pp 215-224** gives the exposition that law is deemed to be retrospective when it creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already past. **Maxwell** further suggests that law is however not properly called retrospective because a part of the requisites for its action is drawn from a time antecedent.

111. The rationale of the rule must be that law ordinarily is intended to “give fair warning of their effect and permit individuals to rely on their meanings from date of enactment” per Mokgoro J in **Veldman v Director of Public Prosecutions, Witwatersrand Local Division[2005]ZACC 22 (CC)** at **para 26**.

112. The rule against retrospection is however only a presumption. It could be permeated and overcome either by express words in the law itself showing that the provision is intended to be retrospective or by indispensable and discrete implication showing such intention.

113. In **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others [2012]eKLR** , the Supreme Court appreciated that constitutional provisions may act retrospectively. The presumptive effect of the rule against retrospectivity was dealt with when the Court stated as follows:

***“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody***

***retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.” (Emphasis added).***

114. It ought therefore be relatively clear that the Constitution does not interfere with rights which vested before it came into force. The converse also subsists that laws which are inconsistent with the Constitution even though they were previously purely valid laws also acquire a status of Constitutional invalidity, unless there is an express provision to the contrary or the implication to the contrary is purely overwhelming on a holistic reading of the Constitution.

115. The relevance of Chapter six and alongside it Article 99 is found in the high importance and huge premium the Kenyan people placed through the Constitution in the values of accountability, transparency, integrity and good governance. Those are deemed as national values under Article 10. They thread through the Constitution. I have little doubts that Kenyan people clamoured for these values.

116. I also have little doubts that while it was not the wish of Kenyans that the Constitution opens wounds, the Constitution stands as a stark reminder that only persons of integrity ought to assume positions of leadership with a view to attaining good governance. The Constitution could not certainly have been intended to cleanse persons with criminal records.

117. With regard to candidates for election to Parliament, the wordings of Article 99(2) are relatively clear. The applicable and relevant time is date of registration as a candidate. It matters, in my view, very little when one became of unsound mind or was declared a bankrupt or was sentenced to imprisonment for more than six months. If on the day of registration the event was still intact then he was disqualified. Thus if one was of unsound mind at time of registration as a candidate he was disqualified. Likewise if he was still an undischarged bankrupt, he was also disqualified. The use of the words “is” and “at time of” in all the sub-clauses of Article 99(2) is telling.

118. Clearly, the additional provision at Article 99(3) would imply that the Constitution draftsmen appreciated that most of the liabilities could be rectified and detached either before or even after the promulgation of the Constitution. An adverse finding could be reviewed or appealed against. A conviction or sentence could also be reviewed or appealed against. The cleansing process was to be in accordance with the law. Truly, if dishonesty in the running and management of public affairs had been proven in court of law even prior to the promulgation of the Constitution one could not be expected to argue that subjectively his integrity had been revived, the moment the new Constitution was promulgated.

119. In my view, it makes better sense to hold that the provisions of Article 99 apply and were intended to so apply. Constitutional value would be better promoted and upheld.

### ***In neglect of duty***

120. I come to the final question of whether the 2<sup>nd</sup> Respondent was derelict in the exercise of its duties or abdicated its duties.

121. The 2<sup>nd</sup> Respondent as I have established was under a constitutional compulsion to register candidates for elections: see Article 88(4)(f). The duty under Article 88(4)(f) is not to be exercised whimsically. It has to be exercised pursuant to constitutional and statutory provisions. The 2<sup>nd</sup> Respondent does not just register any person as a candidate. Besides being nominated by a political party, a candidate must also meet the constitutional threshold. He must not be disqualified by virtue of any disqualification index under Article 99(2).

122. Like all independent commissions guided by Chapter 15 of the Constitution, the 2<sup>nd</sup> Respondent is also under a duty to promote Constitutionalism whilst also securing the observance of democratic values and principles. In the execution of its constitutional and statutory mandate, the 2<sup>nd</sup> Respondent is however independent. It is not subject to the direction and control of any body or person. It is only guided by the Constitution and the law. Where therefore the Constitution says that one is disqualified from contesting an election and a nominated person's eligibility is questioned, it is incumbent upon the 2<sup>nd</sup> Respondent before registering such a person as a candidate to confirm that the disqualification is indeed applicable.

123. The 2<sup>nd</sup> Respondent has through its Replying Affidavit in this matter indeed established that it has an elaborate process of clearing candidates before registering them to contest elections. The candidates as well as their respective political parties are expected to fill in an array of forms. They are also expected to execute statutory declarations and confirm that they are qualified and not disqualified, by law for election. The 2<sup>nd</sup> Respondent also takes the candidates through a questionnaire answered by the candidates under oath. Moral and ethical questions are posed. Candidates are asked whether they have been convicted of offences and sentenced to six months in prison or more. Candidates are asked if they have been subjected to disciplinary or criminal proceedings for breach of the Public Officer Ethics Act or code prescribed there under.

124. In the instant case, the parties are at a consensus that the Petitioner drew the 2<sup>nd</sup> Respondent's attention to the fact that the 1<sup>st</sup> Respondent had been nominated by a political party but was disqualified under the Constitution. The 1<sup>st</sup> Respondent indeed even prompted the 2<sup>nd</sup> Respondent through court in **NBI JR Appl. No. 452 of 2012 Republic –v- Commission of Administrative Justice & The IEBC Ex p John Ndirangu Kariuki**. The said suit was dismissed by the court on 28<sup>th</sup> January 2013. The judgment it stated partly as follows:

***“[13]...However at the time these proceedings were instituted there is no evidence that the 2<sup>nd</sup> respondent had commenced the process of determining the eligibility of the applicant to hold public office and that there was imminent danger that the ex parte applicant was going to be denied the opportunity of being heard before a determination was made. Courts do not issue orders at large in judicial review applications. Whereas such orders may be granted in declaratory suits, the Court is not expected to go to a fishing expedition in an application for judicial review unless it is shown that the applicant's rights and fair hearing have been or are in imminent danger of being contravened”*** (emphasis mine)

125. Evidently, the 2<sup>nd</sup> Respondent was aware that there was a complaint regarding the 1<sup>st</sup> Respondent's suitability to contest for an election. Evidently, there existed a complaint that even the 1<sup>st</sup> Respondent was aware of. The 2<sup>nd</sup> Respondent as founded by the court did not however act on the complaint.

126. Before me it was contended and submitted that the 1<sup>st</sup> Respondent having been cleared by the Ethics and Anti-Corruption Commission, another Chapter 15 commission, the 2<sup>nd</sup> Respondent could do no more than simply register the 1<sup>st</sup> Respondent as a candidate. There was no evidence placed before me of any attempt after 28<sup>th</sup> January 2013 [date of decision in Judicial Review] that the 2<sup>nd</sup> Respondent vetted the 1<sup>st</sup> Respondent's representations including the alleged existence of an appeal.

127. Truly, the 2<sup>nd</sup> Respondent is a state organ. It is duty bound “to respect uphold and defend” the Constitution under Article 3 of the Constitution. Secondly, the 2<sup>nd</sup> Respondent under Article 252(1) has a duty to conduct investigations on its own initiative or on a complaint besides performing its duties independently. It should not be the subject of any control or direction by a third party. Reports by third parties should supplement its work but not direct its work. Such reports should not be the sole and binding basis of its decisions.

128. I have not seen and neither have I read anything to suggest that the 2<sup>nd</sup> Respondent indeed performed its duty by investigating the complaint by the Petitioner herein as to the qualification of the 1<sup>st</sup>

Respondent to contest the election of 2013. The totality of my findings would reveal that the 2<sup>nd</sup> Respondent in simply relying on the report by another party neglected its duties. No wonder there is no status report on the application for leave to appeal which application was filed over ten years after the appeal doors had been shut and which application the 2<sup>nd</sup> Respondent amazingly and flimsily construed as an appeal.

129. The 2<sup>nd</sup> Respondent must be faulted.

## CONCLUSION

### *Summary of findings*

130. I have arrived at the destinations with regard to the issues reserved for determination.

131. On the issue of jurisdiction, this court had the necessary remit to consider and decide the Petition by as this issue had already been determined by this court (Mumbi Ngugi J) on 6 June 2014. I am obliged to observe the dogma of issue preclusion in the circumstances of this case, considering further that an appeal is currently pending on the same issue before the Court of Appeal.

132. Secondly, I arrive at the conclusion that there was no violation of Article 99 of the Constitution when the 2<sup>nd</sup> Respondent registered the 1<sup>st</sup> Respondent as a candidate and allowed him to vie in the 2013 general elections. The 1<sup>st</sup> Respondent has till date not exhausted all the possibilities of appeal against conviction and sentence. Article 99(3) applies not only to clause 99(2)(g) and (h) but also to clause 99(2) (f). Additionally, Article 99(3) must be construed in a manner that is least restrictive to the constitutional right to make political choices including to be a candidate for a public office.

133. Thirdly, Article 99 of the Constitution applies retrospectively. The relevant time for consideration is the time for registration of a person as a candidate under Article 88(4)(f) of the Constitution and whether the factor of disqualification exists at that point of time. It matters not when the factor came into being. The principles of good governance, integrity, transparency and accountability dictate that the Constitution ought not to be used to cleanse criminals or those whose integrity have been found to be wanting and are unlikely to promote or protect the said ideals and values. Persons with criminal records relating to abuse or misuse of office are barred from contesting to be elected to the elective bodies or public office.

134. Fourthly, I find that the 2<sup>nd</sup> Respondent abdicated its duties and functions under the Constitution. As a constitutional commission it could not and cannot wholly rely on the Ethics and Anti-Corruption Commission's or any other person's direction and control in the execution of its constitutional mandate. Neither could the 2<sup>nd</sup> Respondent take and accept without any further interrogation a letter written by the candidate that an appeal was pending. The 2<sup>nd</sup> Respondent can and must conduct its own investigations once a person's qualification is brought to question. It failed or neglected to do so in respect of the 1<sup>st</sup> Respondent whose qualification had been rightly questioned.

### *Reliefs and Disposition*

135. What remains for consideration is now what reliefs, if any, should be fixed by the Court.

136. Appropriate reliefs are not necessarily those sought or proposed by a party, even if he is successful. The court must be cognizant of the fact that reliefs fixed by the court in constitutional petitions may have an impact on others and not only the parties to the petition. The Constitution is relatively flexible on the remedies available. Consequently, appropriate relief depends on the circumstances of each case: see **Bidco Oil Refineries Limited v Attorney General & 3 Others NBI HCCP No 177 of 2012 [2012]eKLR** . As was stated in the case of **Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012]eKLR**:

*“ The new Constitution gives the court wide and unrestricted powers which are rather exclusive*

***and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.”***

137. Here the Petitioner sought various declaratory orders.

138. I have returned the verdict that while the 2<sup>nd</sup> Respondent was derelict in the discharge of its duties, it cannot be said that the 1<sup>st</sup> Respondent was not qualified to vie for the position of Member of Parliament for Embakasi Central Constituency. I consequently cannot make an order declaring the office of Member of Parliament for Embakasi Central Constituency vacant.

139. I cannot however ignore the clear intendment of the Article 99 generally. The purpose was to promote good governance by ensuring that only ethically upright persons of integrity are nominated registered and ultimately elected to Parliament. The question marks on the 1<sup>st</sup> Respondent's candidature are yet to be erased. The tag of a criminal conviction hangs over him. The pending application for leave to appeal out of time will lead to either the question marks being entrenched or erased. If the 1<sup>st</sup> Respondent's character and personality neither brings honour and dignity to the nation and to the office of Member of Parliament nor promotes public confidence in the integrity of the office he holds then it would be appropriate that he vacates office.

140. The application for leave to appeal must and ought to be determined soonest. It beats reason why it is yet to be heard nearly four years on. The 1<sup>st</sup> Respondent may be accused of lacking the necessary alacrity but the judicial system also must take the flak. It may be necessary to prompt an intervention if only to ensure an expeditious disposal of justice and to promote good governance by ensuring that the question marks dotting an honourable member of parliament are finally interrogated.

141. On the issue of costs, the petition was a largely in my view a public interest litigation. Both parties have shared success and there would be no need to condemn either to costs.

142. In light of the above, the Petition partially succeeds and I make the following orders.

***(a) There shall issue a declaration that the 2<sup>nd</sup> Respondent acted in dereliction of its constitutional and statutory duty in failing to investigate whether the 1<sup>st</sup> Respondent was qualified as a candidate to contest for a public office.***

***(b) The Petitioner and the 2<sup>nd</sup> Respondent are ordered to jointly liaise with the Registrar of the High Court and ascertain why the application by 1<sup>st</sup> Respondent for leave to appeal out of time being High Court Misc. Criminal Application No. 614 of 2012 is yet to be disposed of more than three years since it was filed in court. The Petitioner as well as the 2<sup>nd</sup> Respondent may prompt the hearing of the application if the 1<sup>st</sup> Respondent is not doing so.***

***(c) Each party shall bear its own costs of the petition.***

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day April, 2016**

**J.L.ONGUTO**

**JUDGE**