



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.497 OF 2014

BETWEEN

DAVID MURIUKI NDWIGA.....PETITIONER

AND

HON. BISHOP DR. ROBERT MUTEMI MUTUA.....1ST RESPONDENT

WIPER DEMOCRATIC MOVEMENT-PARTY.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

LUCY N. NDUNGU.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner, David Muriuki Ndwiga, describes himself as an adult of sound mind and a Kenyan citizen. He states that he is a valid member of Wiper Democratic Movement, the 2nd Respondent, a political party duly registered with the Registrar of Political Parties. He states further that he has instituted these proceedings, pursuant to **Article 22** of the **Constitution**, in his capacity as a member of the 2nd Respondent and a registered and valid voter in the Republic of Kenya.

2. The 1st Respondent, Hon. Bishop Dr. Robert Mutemi Mutua, is a nominated member of the National Assembly having received nomination from the 2nd Respondent while the 3rd Respondent, the Independent Electoral and Boundaries Commission (hereafter ‘the Commission’) is a Commission established under **Article 88** of the **Constitution** and is charged with the mandate of conducting and supervising elections among others. The Registrar of Political Parties, Ms. Lucy N. Ndungu, was subsequently enjoined to these proceedings as the Interested Party.

3. The Petitioner is aggrieved by the manner in which the 1st Respondent was nominated and has thus filed this Petition challenging *inter alia* the constitutionality of the same and argues that his continued holding of the office is in contravention of the Constitution.

The Petitioner’s Case

4. The Petitioner's case is contained in his Petition dated 28th September, 2014 together with his Affidavit in support, two other Affidavits sworn by him on 12th March, 2015 and 13th March 2015 respectively, and Written Submissions dated 26th May, 2015.

5. The Petitioner's case is that sometime in 2013, the 1st Respondent was listed and subsequently nominated by the 2nd Respondent as a nominated Member of the National Assembly in line with **Article 90** of the **Constitution**. That on or about March the same year, the question whether the 1st Respondent was a valid member of the 2nd Respondent was brought to the 1st Respondent's attention but he failed to respond affirmatively. Further, that the Petitioner, being a valid member of the 2nd Respondent, took it upon himself, as a citizen and guided by **Article 38** of the **Constitution**, after the 2nd Respondent's wishes had prevailed and settled to nominate the 1st Respondent, despite being given misleading, misapprehended information pertaining to his membership, decided to pursue the matter solely. In that regard, the Petitioner states that the 1st Respondent was at all material times a member of the United Democratic Forum (UDF) Party, a fact he alleged was equally known to the 3rd Respondent.

6. The Petitioner contends that he sought to know, by several correspondences addressed to the Registrar of Political Parties, and to the 2nd and 3rd Respondents, whether the 1st Respondent was or was not a valid member of the 2nd Respondent. The confirmation he received was that the nomination of the 1st Respondent was irregular, invalid and did not meet the threshold of a valid nomination as required by **Section 74** of the **Elections Act**.

7. The Petitioner's other case is that the 2nd Respondent's Chairman, during an interview with a TV News reporter from Channel K24, admitted that the 1st Respondent was nominated on assumption that he was a valid member of the Party. That he therefore wrote a letter to the 2nd Respondent's Secretariat enquiring about the membership and invalidity of the 1st Respondent's nomination as a Member of the National Assembly but no reasonable redress was given and that is what largely prompted the institution of the present Petition.

8. For the foregoing reasons, the Petitioner further alleges that the entire nomination process of the 1st Respondent was a sham, contravened the laid down procedure in the **Elections Act**, infringes the constitutional rights of valid members of the 2nd Respondent and as such, the unconstitutionality ought not to be sanctioned in any way. That it is only fair therefore, both in principle and law, that the nomination be revoked forthwith and the Petition be allowed in the interests of justice and in upholding the rule of law and constitutionality.

9. The Petitioner now urges the Court to grant the following orders:

1. A declaration that the entire nomination process of the 1st Respondent as a Member of the National Assembly by the 2nd and 3rd Respondents and the continued holding of the office by the 1st Respondent was and is still in violation of Article 38 of the Constitution.

2. A declaration that the nomination of the 1st Respondent by the 2nd Respondent was conducted contrary to Article 90 as read together with Section 74 of the Elections Act and was not free and fair, accurate, transparent and impartial.

3. A declaration that the nomination and subsequent listing of the 1st Respondent by the 2nd Respondent and the 3rd Respondent as a nominated Member of National Assembly was conducted contrary to Article 90 as read together with Section 74 of the Elections Act, was thus ultra vires and unlawful.

4. A declaration that the 3rd Respondent acted and or exercised its constitutional mandate outside the constitutional spectrum and the Elections Act, by accepting the nomination of the 1st

Respondent while it was within its knowledge that the 1st Respondent was invalidly listed and subsequently nominated by the 2nd Respondent.

5. An order of permanent injunction restraining the 1st Respondent from continuing to occupy the position and office of a nominated Member of National Assembly.

6. An order of certiorari to quash the decision of the 2nd Respondent to list and subsequently nominate the 1st Respondent as a nominated member of the National Assembly.

7. An order of certiorari to quash the decision of the 3rd Respondent to nominate the 1st Respondent pursuant to the nomination and listing conducted ultra vires by the 2nd Respondent.

8. An order of mandamus compelling the 3rd Respondent to declare the position currently held by the 1st Respondent of a nominated member of National Assembly vacant.

9. Such other orders as this Court shall deem fit and just to grant.

10. Cost of the Petition.

The 1st Respondent's Case

10. The 1st Respondent opposes the Petition through his Affidavit sworn on 23rd October, 2014. He maintains that he is a Member of Parliament duly nominated by the 2nd Respondent to represent special interests as provided by **Article 97 (c)** of the **Constitution** and that the decision by the Party to nominate him was informed by the role that he has always played as a dedicated member towards its prosperity, since its inception.

11. The 1st Respondent states further that he has been a staunch member of the 2nd Respondent Party and a prayerful supporter of the Party leader for as long as the Party has been in existence and he holds a Party membership card No. 3008002. That as a member and Chairman of a Council of Elders christened 'Atumia ma Thome', he assisted in organizing meetings and political rallies in Kitui, Machakos and Makueni Counties involving elders, and other Party leaders, where he alleged that he led prayers and spoke in favour of the Party with the aim of reconciling members of the Kamba community and urging it to vote as a block in the General Elections held in 2013.

12. The 1st Respondent also deposed largely to the various actions he had undertaken as a member of the 2nd Respondent and he maintains that he is a loyal member of the Party. He asserts that he has never been a member of the United Democratic Forum Party and that he only recently discovered that his Identity Card number was erroneously used whilst an application form for membership was being generated for the said Party, in respect of a different person namely, Estha Muthaa, a female based in Nairobi, whereas he is a male from Kitui. That upon receiving the information that his name had been erroneously entered in the United Democratic Forum Party list, he wrote a protest letter to the Registrar of Political Parties and in that regard, he argues that this Petition is a product of a political witch-hunt perpetrated by his political detractors in reaction to his refusal to relinquish his Parliamentary seat in favour of the Party Leader in 2013 after the Party Leader had lost the elections as a running mate for the Presidential candidate of the CORD Coalition.

13. It is the 1st Respondent's further deposition that the 2nd Respondent's Chairman, at the instance of the Petitioner, wrote a letter dated 30th August 2013, where he was required to show cause why he should not face the Party's disciplinary action on various grounds including being a member of another political party. In that regard, he contends that he responded to the said letter and was subsequently invited by the Chairman wherein he was informed that he had not committed any offence to warrant any disciplinary action being taken against him.

14. He further contends therefore that the Petition herein is ill-advised, ill-timed and only tainted with malice as the same is bent on violating his constitutional rights under **Article 38** since the Petitioner primarily seeks to remove him from office. That, he was nominated by his Party to represent special interests specifically persons with disability, a duty, he deponed, he is passionate about and is executing as a member and Secretary of the Kenya Disability Parliamentary Association/Caucus. That in any event, from the correspondences by the Petitioner, dating back to April 2013, he ought to have challenged the nomination at the appropriate time in the year 2013, which he never did. As such, he urges that the Petition is an abuse of the Court process, lacks merit and ought to be dismissed with exemplary costs.

The 2nd Respondent's Case

15. In response to the Petition, the 2nd Respondent has filed a Notice of Preliminary Objection dated 17th December, 2014 in which it asserted that the Petition is frivolous, vexatious, defective and an abuse of the Court process. Its position was that the Court does not have the jurisdiction to issue the orders sought as, the procedure for the removal of a Member of the National Assembly has not been invoked; the time frame set under the **Elections Act** for filing of Petitions challenging elections of a Member of the National Assembly has expired and the Petition herein is therefore time barred; and that although the process through which a Member of the National Assembly is elected is different i.e., through election and not nomination, the procedure for removal of every Member thereof is the same i.e through an election Petition only.

16. For the foregoing reasons, it is its contention that the Petition ought to be dismissed with costs to it.

The 3rd Respondent's Case

17. The 3rd Respondent opposes the Petition through an Affidavit in reply sworn on its behalf by its Legal Affairs Manager, Mahamud Jabane, on 5th December, 2014 and Written Submissions dated 3rd July, 2015.

18. Its case is that the issues raised in the Petition with regard to the validity of the membership of the 1st Respondent to the 2nd Respondent and to the 1st Respondent's subsequent nomination under the provisions of **Article 90** of the **Constitution** as read with the **Elections Act** are frivolous. That, the 1st Respondent is a Member of Parliament and under the provisions of **Articles 87** and **105** of the **Constitution**, the question as to the validity of his nomination can only be determined by way of an election Petition and through the mechanisms set out in law and as such, the present Petition is also misconceived and misguided.

19. The 3rd Respondent further contends that the **Political Parties Act** confers jurisdiction upon the **Political Parties Dispute Tribunal** to settle disputes between a member of a political party and his political party and consequently, the present dispute is one that should be resolved by the Party and/or **Political Parties Dispute Tribunal** and not this Court. That the said Act also provides in that regard that the **Political Parties Dispute Tribunal** has no power to hear and determine a dispute between a member of a political party and a political party unless the dispute has been heard and determined through the internal political party dispute resolution mechanisms and as such, the Petitioner has not exhausted the internal dispute resolution mechanisms of the 2nd Respondent.

20. In addition, that the Petitioner's allegations against the 1st Respondent are grave in nature and constitute offences punishable by law upon appropriate investigations and conviction but no investigations have so far been conducted by the appropriate organs of State.

21. Furthermore, according to the 3rd Respondent, this Court lacks the jurisdiction to determine the matters herein and there is a presumption of regularity couched in the maxim *omnia praesumuntur rite et solemniter essa acta* standing in favour of the 3rd Respondent, and that the allegations in the Petition are therefore bereft of legal backing.

22. For the foregoing reasons, it was its final argument that the prayers sought herein are untenable and cannot be granted by this Court and therefore the Petition ought to be dismissed.

The Interested Party's Case

23. The Interested Party's case is contained in her Affidavit sworn on 17th December 2014 and Written Submissions dated 22nd June 2015.

24. She argues that the Petition herein reveals no cause of action against her but in any event, she has been mentioned in regard to the 1st Respondent's membership only. In that regard, she contends that on or about 7th April, 2014, the Petitioner inquired about the membership status of the 1st Respondent and was given a response indicating that the latter was a nominated Member of Parliament by the 2nd Respondent. That the Interested Party notified both the 2nd Respondent and the United Democratic Forum Party of the differing membership status of the 1st Respondent. As a result, the United Democratic Forum Party consequently responded indicating that the 1st Respondent was not its member and expressly requested to have his name removed from their Party membership list and the request was effected therein.

25. The Interested Party further contended that it has never received any communication regarding the revocation of the nomination of the 1st Respondent by the 2nd Respondent and so he is lawfully nominated as Member of the National Assembly vide Gazette Notice No. 50 of 20th March, 2013.

26. For the above reasons, the Interested Party urges the Court to grant any such orders as it deems fit and sound in the circumstances.

The Petitioner's Rejoinder

27. The Petitioner has reiterated the assertions in his Affidavit in support and contends further that the Interested Party is legally and constitutionally the official custodian of records of membership of persons to a political party and that its records are final in law as to the membership of any person to any political party at any given time. That the 1st Respondent's annexure marked 'RMM1' does not originate from the Interested Party and as such cannot be relied on for authentication of the validity of the 1st Respondent's membership at the time of the nomination and that in any event, the same does not detail the date when it was issued or the date of the 1st Respondent's membership entry.

28. According to the Petitioner, the 1st Respondent is also estopped from attributing his membership to the United Democratic Forum Party to a mistake by the Interested Party when he, as an aspiring leader, never took any steps to remedy the same at the time and he has in any event not shown any proof or any efforts to either verify or even officially complain about the issue and demand for rectification of the same, prior to his inclusion to the Party list and subsequently being sworn in as the 2nd Respondent's nominated Member of the National Assembly. In that regard, the Petitioner's further argument is that the 1st Respondent slept on his own right to have the official records held by the Interested Party verified and corrected and as such, he cannot seek mercy based on the same as the maxim that equity aids the diligent and not the indolent squarely applies to him.

29. The Petitioner's other contention is that the purpose and object of his Petition is to ensure fair political representation as enshrined under **Article 38** of the **Constitution** and that the impugned nomination herein cannot be said to be fair as the same constitutes an infringement of his constitutional rights. Additionally, that the filing of this Petition was instigated by the failure of the 2nd and 3rd Respondents as well as the the Interested Party to effect any remedial action upon the issues raised herein being brought to their attention.

30. Finally, he argues that there is a clear distinction between an Election Petition and a Constitutional Petition and that the purpose of his Petition is to seek for declaratory and Judicial Review orders pursuant

to **Article 23** of the **Constitution**, and for which this Court possesses sufficient jurisdiction to adjudicate and make a determination on. That, a political party's Manifesto or Constitution is subservient to statutes and the **Constitution** and as such, it should always be in line with relevant laws as the same cannot override the provisions of any law in regard to the nominations. In addition, that the membership status of an individual is not determined by any organ of a political party and that the bearing of a party membership card is not conclusive proof of membership to a political party.

The Parties Submissions

For the Petitioner

31. The Petitioner, in his Written Submissions, set out three key questions that in his view, fall for determination namely:

- i. Whether the nomination and subsequent gazettelement of the 1st Respondent was unprocedural and therefore unconstitutional;
- ii. Whether the nomination and subsequent gazettelement of the 1st Respondent infringed and continues to infringe on his constitutional rights; and
- iii. Whether he is entitled to the costs of this Petition.

32. On the first issue, it is his submission that the 1st Respondent was not a member of the 2nd Respondent Party at the time his name was submitted to the 3rd Respondent for consideration for nomination and subsequently at the time of his nomination. In that regard, his argument is that the said action was in contravention of **Article 90** and **Sections 13** and **34 (8)** of the **Elections Act**. He submits further that pursuant to **Section 34** thereof, it is within the mandate of the Interested Party to ascertain whether the 1st Respondent was indeed a valid member of the 2nd Respondent and that it is only upon that determination that a finding can be made whether the prayers he is seeking in his Petition are judiciously merited.

33. On the second question for determination, the Petitioner submits that having established that the 1st Respondent was unconstitutionally nominated, the said action has resulted to an infringement of his rights. In that regard, his argument is further that a right guaranteed by the **Constitution** is absolute and unless limited by the **Constitution** or any law, the right cannot be infringed on an account of a provision in a Statute or from any interpretation conjunct from a statute and that, not even time frames legislated and which limits times within which a claim should be brought in Court, can bar a constitutional Court from enforcing basic and fundamental rights deemed to be infringed.

34. The Petitioner therefore asserts that the 1st Respondent's failure to disclose material details about his membership status and his subsequent nomination was contrary to **Article 90 (2)** of the **Constitution** and was a clear violation of the Petitioner's right to free, fair and regular elections and representation based on fairness, universal suffrage and free expression of the will of the electors for elective public office as enshrined in **Article 38** of the **Constitution**.

35. The Petitioner finally submits that upon the establishment that his constitutional rights were infringed, he is entitled to the costs of this Petition and further states that he is not in any way challenging the election of the 1st Respondent in the manner known to Election Petitions, but instead he is seeking a declaration that the nomination process leading to his subsequent nomination was flawed, unlawful, unprocedural and unconstitutional.

For the 1st Respondent

36. The 1st Respondent on his part has outlined three issues, which according to him, fall for

determination namely:

- i. Whether he is a bona fide member of the 2nd Respondent;
- ii. Whether he was validly nominated by the 2nd Respondent; and
- iii. Whether the Petition herein is properly before the Court.

37. On the first issue, his argument is that by dint of **Section 7** of the **Political Parties Act**, it is the role of a political party to recruit its members and as such, in the present case, the 2nd Respondent does not in any way dispute having recruited him and hence the Petitioner's allegations cannot stand and remain speculative and scandalous. That if the Petitioner had any issues with his recognition as a member of the 2nd Respondent, the proper recourse would be the filing of a claim in the Political Parties Tribunal whose jurisdiction is outlined under **Section 40** of the **Political Parties Act**. Accordingly, that he cannot be said to have violated any of the Petitioner's rights under the **Constitution** and as such, he urges the Court to declare him a bona fide member of the 2nd Respondent and therefore lawfully nominated to the National Assembly.

38. Further and on the validity of his nomination, the 1st Respondent has submitted that pursuant to **Article 90** of the **Constitution**, the 2nd Respondent made a list of party members which was submitted to the 3rd Respondent, 45 days before the General elections, as required under **Section 35** of the **Elections Act**, and the Petitioner never launched a complaint to the 3rd Respondent pertaining to the same and therefore, that is an indication that the present Petition is an afterthought actuated by malice and only made to frustrate him. Accordingly, that the Petitioner having slept on his right to file a complaint with the 3rd Respondent, cannot be heard to complain now.

39. Further, in the 1st Respondent's view, by dint of **Section 34 (7)** of the **Elections Act**, a political party list as submitted to the 3rd Respondent cannot be altered within the term of Parliament and therefore the prayers sought by the Petitioner cannot be granted in the circumstances and have in any event been overtaken by events. While relying on **National Gender and Equality Commission vs Independent Electoral and Boundaries Commission, Petition No. 147 of 2013**, he reiterated that once a political party nominates a candidate under **Article 90** of the **Constitution** and the candidate is duly gazetted by the 3rd Respondent, that person stands elected and therefore, the election of such a person can only be challenged by way of an election Petition.

40. On whether the Petition is properly before the Court, it is the 1st Respondent's position that under **Article 105** of the **Constitution**, the validity of an election can only be determined by way of an Election Petition and hence this Court lacks the jurisdiction to determine the same and the orders sought herein can only be granted by an Election Court as contemplated under **Article 87 (1)** of the **Constitution** as read with **Section 6** of the **Elections (Parliamentary and County Election) Rules**. He relies on the decisions in **Orie Rogo Manduli vs Catherine Mukiti Nabwola and Others [2013] eKLR** and **The National Alliance vs The Independent Electoral and Boundaries Commission [2013] eKLR** for that proposition.

41. Further, it is his submission that under **Article 82 (2)** of the **Constitution**, the challenge to elections, other than that of a President, are to be made within 28 days after the declarations of the election results and the Petitioner has never filed an Election Petition while he had the opportunity to do so. In that regard, he relies on the case of **Francis Gitau Parsimei and 2 Others vs National Alliance Party and 4 Others [2012] eKLR** and argues that the Petition herein is misconceived and misguided and ought to be dismissed with costs.

For the 2nd Respondent

42. The 2nd Respondent relies on its Notice of Preliminary Objection in support of its arguments. I have summarised these arguments elsewhere above.

For the 3rd Respondent

43. The 3rd Respondent has outlined four key issues for determination namely;

- i. Whether it discharged its mandate during the process of nomination of the 1st Respondent;
- ii. Whether the 1st Respondent is a valid member of the 2nd Respondent Party;
- iii. Whether the procedure for removal of a Member of Parliament has been adhered to; and
- iv. Whether the Petition is properly before this Court.

44. On the first issue, it is its submission that under **Article 88 (4) (e)** of the **Constitution**, it is the constitutional body responsible for settling electoral disputes including disputes arising from nominations of candidates but excluding Election Petitions and disputes subsequent to declaration of election results. In its view therefore, the Petitioner has not exploited the said mechanism as set out in the **Constitution** and hence the Petition is misguided and a blatant abuse of the Court process.

45. On the validity of the 1st Respondent's membership, that since the 1st Respondent has submitted that he was a valid member of the 2nd Respondent at the time when the nomination took place, any question involving the validity of his nomination ought to be determined as stipulated under **Articles 87** and **105** of the **Constitution** by way of an Election Petition.

46. The 3rd Respondent relies on the decision in **Kipkalya Kones vs The Republic and Another ex parte Kimani wa Nyoika and 4 Others, Civil Appeal No. 94 of 2005** in support of its arguments pertaining to the procedure for challenging elections and nominations to the National Assembly and further maintains that the Petitioner ought to have invoked the proper procedure as stipulated in the **Elections Act**.

47. On whether the Petition is properly before the Court, it is its argument that this Court lacks the jurisdiction to determine the matter or to issue the orders sought as the jurisdiction to hear and determine election Petitions is a special jurisdiction that is conferred by the **Constitution** and furthermore, judicial review cannot be invoked to circumvent the requirements of the electoral laws, as was held in the case of **Republic vs The County Returning Officer, Taita Taveta and 2 Others ex parte Sarah Mutile Mutwiwa, Judicial Review App. No. 96 of 2013**.

48. For the foregoing reasons, the 3rd Respondent maintains that the Petition is incompetent, incurably defective and an abuse of the Court process and as such, ought to be dismissed with costs.

For the Interested Party

49. According to the Interested Party, two key issues fall for determination, namely, whether the 1st Respondent was a member of the 2nd Respondent Party or the United Democratic Forum Party, and whether her office discharged its statutory mandate to investigate the membership complaint raised by the Petitioner.

50. On the first issue, the Interested Party reiterates her position that that the 1st Respondent was a member of the 2nd Respondent Party and even produced his Party membership card to confirm that fact. Furthermore, the 2nd Respondent Party also confirmed that he was its member.

51. The Interested Party further maintained that it discharged its duty as stipulated under **Section 34** of

the **Political Parties Act** because, after receiving the Petitioner's complaint, it embarked on an inquiry and investigation of the 1st Respondent's membership status and notified the 2nd Respondent as well as the United Democratic Forum Party of the anomalies in the Register. That the issue was addressed and that she has never at any time received any communication regarding the revocation of the 1st Respondent's nomination as the political parties' membership data it maintains originates from the political parties themselves and she cannot amend the data, to add or remove a member from the record, without express instructions from a political party.

52. For the above reasons, the Interested Party's position is that she lawfully discharged her mandate in accordance with the law and the Petition as against her is misguided.

Determination

53. I have considered the Parties' respective pleadings and submissions and also the questions for determination as outlined by each of them, which I have reproduced elsewhere above. I have condensed the questions raised by the Parties into one key issue for determination namely, whether there has been a violation of the **Constitution** in the process leading to the 1st Respondent's nomination to the National Assembly and if the answer to that question is in the affirmative, then I shall proceed to determine the remedies available to the Petitioner, if any.

54. It is imperative however that I should dispose of the Preliminary Objection raised by the 2nd Respondent which is to the effect that this Court does not have the jurisdiction to determine the matter and grant the orders sought. If I find that there is no jurisdiction as alleged, then I will not address the other issues at all.

55. In that context, the question of jurisdiction is a fundamental one that goes to the heart of every matter before this Court. In that regard, the Court in **Garthwaite vs Garthwaite [1964] 2 All ER 233** espoused the concept of jurisdiction in the following terms:

"In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense), or as to circumstances in which it will grant a particular kind of relief which it has jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances". (Emphasis added)

56. It therefore follows that the subject matter of an issue, the persons involved and the kinds of relief to be granted are important in determining whether it has jurisdiction. Does this Court then have the Jurisdiction to determine the question whether the 1st Respondent was validly nominated as a Member of the National Assembly? In answering that question, I would also have to determine whether the 1st Respondent can, by this Judgment, be removed from that position as is prayed albeit in a crafty manner.

57. In that regard, whereas the Petitioner maintains that he is not challenging the election of the 1st Respondent but is instead seeking a declaration that the nomination process followed and leading up to his nomination was unconstitutional, the orders he is seeking are quite the opposite. For instance prayers (5) and (8) are primarily to the effect that the current office held by the 1st Respondent should be declared vacant. That in essence is a challenge to his nomination to the National Assembly and in any event, the gist of the Petitioner's case is that the 1st Respondent's nomination was unconstitutional and contrary to the **Elections Act** among others which would still raise the question of the validity of that nomination and remedies available in the circumstances.

58. In that regard, the jurisdiction of this Court in constitutional matters is well outlined under **Article 23** as read with **Article 165 (3)** of the Constitution whose effect is that this Court has the mandate to hear and determine questions pertaining to the infringement of fundamental rights among others. In the present case however, the Petitioner's key grievance stems from the nomination and subsequent election of the 1st Respondent. The Petitioner has challenged the said nomination and in Prayer (2) of his Petition, he seeks a declaration that the nomination was in contravention of **Article 90** of the **Constitution** and **Section 74** of the **Elections Act**.

59. In that context, **Article 90** provides thus:

1. Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

2. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-

a. Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

b. Except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

c. Except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

3. The Seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election. (Emphasis added)

60. **Section 74** of the **Elections Act** on the other hand states that:

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

2. An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

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

61. It is thus apparent that the **Independent and Electoral Boundaries Commission**, the 3rd Respondent herein, is granted the mandate in regard to the conduct and supervision of elections and nominations to Parliament. Furthermore, by dint of **Section 74** of the **Elections Act**, it is responsible for settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. The foregoing is reiterated in **Article 88 (4) (e)** of the Constitution which states that:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election.”

62. I need not belabour the point but the foregoing would show that the first port of call whenever a dispute arises pertaining to nominations is the **Independent Electoral and Boundaries Commission**. Has the Petitioner invoked the said jurisdiction? From the material before me, no such efforts were made. Instead, the Petitioner has alleged an infringement of **Article 90** and his rights under **Article 38** of the **Constitution** which guarantees every Kenyan citizen political rights.

63. I note in that regard that the 1st Respondent's nomination was done in 2013 whilst the instant Petition was filed a year later sometime in October, 2014. It would thus appear that the Petitioner waited for almost a year in order to challenge the nomination before this Court. I reiterate in that context that the appropriate forum to do so is the **Independent Electoral and Boundaries Commission** and this Court cannot usurp such jurisdiction as the Petitioner herein is inviting me to do.

64. I say so because the Legislature has manifested its intentions through various Legislations providing for the mechanisms for the resolution of electoral disputes and it is not in doubt that a challenge to the nomination of a candidate is an electoral dispute and that is why **Article 82 (1)** of the **Constitution** mandates Parliament to enact such legislation for the nomination of candidates. The Article states that:

Parliament shall enact legislation to provide for-

a. ...

b. The nomination of candidates;

c. ...

d. The conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections;

e. ... (Emphasis added)

65. Parliament pursuant to the above provisions enacted the **Independent Electoral and Boundaries Commission Act** which is *an Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution, and for connected purposes.*

66. In agreeing with the Respondent's submissions that this Court does not have the jurisdiction to determine the matter herein and granting the orders sought, I must also reiterate the holding of this Court in **Isaiah Gichu Ndirangu and 2 Others vs Independent Electoral and Boundaries Commission and 4 Others, Petition No.83 of 2015** where it stated thus:

"[50] ... I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under the Constitution. I also appreciate that Article 258 of the Constitution grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. I however take the view that Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.

[51] I take the further view that the existence of Articles 165 and 258 of the Constitution is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties...

67. In that case what was in issue was whether a member of a County Assembly had been validly nominated by a political party amidst allegations that she belonged to a different political party.

68. I reiterate the above holding and it therefore follows that this Court does not have the jurisdiction to determine the question of the validity or otherwise of the nomination of the 1st Respondent. Moreover a Petition challenging the same, a year after the nomination without utilizing the appropriate forum, is certainly an abuse of the process of this Court.

69. On this point, I need to add that in **National Gender and Equality Commission vs IEBC (supra)**, the High Court made the categorical finding that any challenge to the nomination of a member of Parliament once sworn in must only be done by way of an election petition and not a constitutional petition as the Petitioner herein has purported to do. If that be the case, then this Court has no jurisdiction to declare the position of the 1st Respondent vacant neither can the 3rd Respondent so declare as is prayed in the present Petition.

70. But suppose I am wrong and in fact what is before me is a proper Petition seeking to enforce **Article 38** rights? That Article for avoidance of doubt provides thus:

1. Every citizen is free to make political choices, which includes the right-

a. To form, or participate in forming, a political party;

b. To participate in the activities of, or recruit members for, a political party; or

c. To campaign for a political party or cause.

2. Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

a. Any elective public body or office established under this Constitution; or

b. Any office of any political party of which the citizen is a member.

3. Every adult citizen has the right, without unreasonable restrictions, -

a. To be registered as a voter;

b. To vote by secret ballot in any election or referendum; and

c. To be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

71. In that regard, the Petition is all about the process leading to the Petitioner's nomination to Parliament. What right that the Petitioner is specifically entitled to has been breached thereby? He submits that his right to free, fair and regular elections has been infringed? How so, I do not know.

72. It must also be noted that the 1st Respondent was nominated to represent special interests (in this case the disabled). How has that fact infringed on the Petitioner's political rights? Where is the law that for one to represent special interests in the National Assembly, any other factor should come into play? I see none.

73. Without proof of infringement of his right then the Petition has fallen short of the edict in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Trusted Society for Human Rights vs Mumo Matemu and 5 Others, Petition No. 229 of 2012** that he who alleges violation of rights and freedoms must at the very least indicate how such a violation was done.

74. One last point must be made; shed of all the craftiness of legal drafting of pleadings, the present Petition is an election petition seeking nullification of the 1st Respondent's nomination to the National

Assembly. It was clothed as an **Article 38** constitution Petition but it is not and it is now obvious why.

Disposition

75. For the above reasons, I am inclined to down my tools at this juncture and to strike out the Petition herein for want of jurisdiction.

76. As for the costs, let each Party bear its own costs as I see no need to tax the Petitioner with such costs.

77. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Esami holding brief for Mr. Nyamu for 1st Respondent

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE