



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 301 OF 2016

ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER

VERSUS

AHMED ISSACK HASSAN & 14 OTHERS.....RESPONDENTS

JUDGMENT

INTRODUCTION

1. By a Petition dated 13th July 2016 , purportedly brought under sections 7 and 8 of the Fair Administrative Action Act, 2015, the petitioner sued the Chairman and members of Independent Electoral and Boundaries Commission as 1 - 9 Respondents, four judges of the Supreme Court then in office as the 10 – 13 Respondents and the National Assembly and the Judicial Service Commission, respectively, as 14 and 15 respondents and set out his case in paragraphs 1-5 as follows:

“Paragraphs 1 – 5 of Petition -

1. On 6 April 2016 the Petitioner lodged a petition each with the National Assembly and with the Judicial Service Commission (JSC), the former petition for the removal of the nine commissioners of the Independent, electoral and Boundaries Commission (IEBC) and the latter petition for the removal of six judges of the Supreme Court of Kenya (SCOK). Upon both the National Assembly and the JSC not being responsive to the petitions, the Petitioner on 21 June 2016 wrote to each of them reminding them of their constitutional duty, pursuant to Article 259(8) of the Constitution¹, of dealing expeditiously with the said petitions, and requesting feedback within 14 days of the said date. On account of the two state organs continuing to be non-responsive with respect to the petitions lodged with them on 6th April 2016, the petitioner has deemed it fit, pursuant to the provisions of Article 165 of the Constitution², and section 7³ and 8⁴ of the fair administrative Action Act, 2015 (FAAA 2015) to invoke the appellate jurisdiction of the High Court over both the National Assembly and the JSC.

2. With respect to the National Assembly, Respondent No 14, it is observed that whereas it has failed to respond to my petition of 6th April 2016, it expeditiously dealt with another petition against respondent Nos, 1 to 9 lodged several weeks after my own, around 9th June 2016 by one Barasa Nyukuri, a petition that was tabled in the National Assembly and then forwarded to the Justice and Legal Affairs committee (JLAC) of the National Assembly, to be dealt with as required

by law. As of the time of lodging the instant petition, the JLAC is in the process of dealing with this Nyukuri petition, having invited various persons to present information before it, including the said petitioner and the nine IEBC commissioners. It therefore appears that the National Assembly has discriminated against the petitioner, in not treating his petition according to legal provisions, yet it appears to have so dealt with the Nyukuri petition according to legal provisions. This Honourable Court is therefore invited to take notice that this discriminatory treatment is contrary to Article 27 of the Constitution⁵, and to effect due sanctions against the National Assembly for so contravening the Constitution, and by so doing denying, violating and infringing upon the Petitioner's equality and non-discrimination right under Article 27 of the Constitution.

3. Section 2 of the Fair Administrative Action Act, 2015 (FAAA 2015) defines "failure", in relation to the taking of a decision, includes a refusal to take the decision", with "administrative action" defined to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates⁶. Section 7(1)(a) of the FAAA 2015 provides that a person aggrieved by an administrative action or decision may apply for a review of the administrative action or decision to a court accordance with section 8 of the FAAA 2015. With respect to the jurisdiction of the court, section 7(2)(j) of the FAAA 2015⁷ provides that the court may review an administrative action or decision if there was unreasonable delay or failure to act in discharge of a duty imposed under any written law.

4. With respect to the jurisdiction of an appellate court *cis-a vis* the judicial or administrative forum from which an appeal lies, section 3(2) of the Appellate Jurisdiction Act⁸ provides that the appellate court has the power, authority and jurisdiction vested in the lower judicial or administrative for, from which an appeal lies. And section 3(3) of the Appellate Jurisdiction Act⁹ provides that the law applicable in the appellate court for purposes of the appeal is the law applicable to the matter in the lower judicial or administrative form from which an appeal lies. Therefore, considering the earlier cited constitutional and these cited statutory guidelines, it is submitted that the High Court has the power, authority and jurisdiction vested in the National Assembly and in the JSC with respect to any quasi-petitioner's petitions both dated 5 April 2016, with the law applicable to such appeals being that applicable when the respective petitions were under the consideration of the National Assembly and the JSC.

5. Accounting for why the petitioner has consolidated the appeals to his petitions in the National Assembly and the JSC, it should be noted that the underlying facts in the two petitions are the same, though the petition to the National Assembly dealt with a greater scope of the instances making the subject of the said facts. Essentially, with respect to the National Assembly petition, the petitioner sought the removal of the IEBC Commissioners, Respondent Nos 1 to 9 inclusive, on account of their serious violations of the Constitution and other law, and their gross misconduct, as concerns their handling of the general elections of 4th March 2013. With respect to the JSC, the petitioner sought the removal of six SCOK judges, now reduced to four in the instant petition following retirement of two SCOK judges, respondent Nos. 10 to 13 inclusive, on account of breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament, and for gross misconduct or misbehaviour, as concerns their handling of the presidential election dispute arising from the general elections of 4th March 2013. Also, as both the National Assembly and the JSC have been non-responsive to the petitioner's petitions of 5 April 2016, the legal provision granting the High Court jurisdiction over the said state organs with respect to their failure to take the requisite decisions pursuant to the petitions is indeed the same, as already elaborated above."

2. Against that background, the petitioner sought relief by way of final orders as follows:

"PETITIONER'S PRAYERS DATED 14TH JULY 2016

1. Finds that respondent Nos 1 to 9 **contravened Articles 3, 73(1)(a)(i) and 88(5) of the Constitution**, in allowing about 84 nonqualified candidates to be nominated for the 2013 general elections, including 4 whose election bids were treasonable, and in declaring as president one of

these non-qualified candidates whose election bid was treasonable

2. Finds that Respondent Nos 1 to 9 **contravened section 22 of the Election Act, section 42 of the Penal Code and section 45 of the Anti-corruption and Economic Crimes Act, 2003.**

3. Being satisfied that this **petition discloses grounds under Article 251(1)** of the Constitution with respect to respondent Nos 1 to 9 resolves to send the petition to the president that he may carry out his duties under article 251(4) and (6) of the Constitution

4. Finds that respondent Nos 10 to 13 **contravened articles 3, 48, 73(1)(a)(i) and 159(2) of the constitution** in failing to invalidate the election as President of Uhuru Kenyatta during the presidential election petitions against his election as his effort in establishing a national government in Kenya was unlawful and treasonable. By so contravening these constitutional articles, Respondent Nos 10 to 13 breached Rule 2 of the Judicial Service Code of conduct and Ethics, pursuant to Article 168(1)(b) of the Constitution.

5. Finds that Respondent Nos 10 to 13 **contravened section 42 of the Penal Code and section 45 of the Anti-Corruption and Economic Crimes Act, 2003, and by so doing grossly misconducted or misbehaved themselves, pursuant to Article 168(1)(e) of the Constitution.**

6. Being satisfied that **this petition discloses grounds under Article 168(1) of the Constitution**, with respect to respondent Nos 10 to 13, resolves to send the petition to the President, that he may carry out his duties under Article 168(5) and (9) of the Constitution.

7. Finds that Respondent no 14 **contravened the petitioner's equality and non-discrimination right under Article 27**, in failing to deal with his petition dated 5 April 2016 and lodged with the National Assembly on 6 April 2016 as required by law, yet dealt with another petition lodged around 9th June 2016 by one Barasa Nyukuri seemingly as required by law.

8. Orders respondent No 14, the National Assembly **to pay exemplary damages to the petitioner of an amount sufficiently high to deter wanton discriminatory conduct contrary to Article 27 of the Constitution**, suggested to be in the order of Shs10 million, with the said sum to be recovered by the State from the public officer or officers within the national Assembly who were responsible for the contravention of the petitioner's equality and non-discrimination right under article 27 of the Constitution, pursuant to section 79, 196(5) 199 and 202 of the Public Finance Management Act 2012.

9. Orders the respondents as apportioned by this Honourable court as among them to pay the petitioner's costs."

3. The Petition was not supported by any affidavit but a bundle of documents entitled Petitioner's Bundle dated 13th July 2016 containing the two petitions to the National Assembly and the Judicial Service Commission both dated 5th April 2016 together with the petitioner's letters of 21st June 2016 to the two organs demanding that they undertake their constitutional duty as concerns the two petitions within 14 days of the letters, in default of which the petitioner would take appropriate action towards respecting, upholding and defending the Constitution. It would appear that the two bodies did not comply with the Petitioner's demand and he consequently filed the petition before the Court.

Responses

4. The 14th Respondent filed submissions and grounds of opposition to the Petition both dated 22nd September 2016.

5. The 1-9 Respondents also filed grounds of opposition dated the 23rd September 2016.

6. The 1-9th Respondents filed further grounds of opposition dated the 4th October 2016 and a list of authorities dated 6th October 20116.
7. The Petitioner filed Submissions in reply to the grounds and submissions of the 14th Respondent dated 2nd October 2016 and to the 1-9 respondents' grounds of opposition dated 5th October 2016.
8. The 10-13 and 15 Respondents did not enter appearance.

The Parties' Cases in Brief

9. The petitioner contended the 1-9 Respondents had contravened relevant parts of Articles 3, 73 and 88 of the Constitution in permitting nonqualified candidates to be nominated for the 2013 general election as a consequence of which they contravened section 22 of the Elections Act and section 45 of the Anti-corruption and Economic Crimes Act and therefore liable to removal from office under Articles 251 of the Constitution. As regards the judges of the Supreme Court, it was contended that they had contravened Article 3, 48 and 159 of the Constitution in failing to invalidate the election as President of Uhuru Kenyatta upon an election petition presented against his election, and that by their conduct the judges had violated the Judicial Service Code of Conduct and Ethics and therefore liable to removal under Article 168 (1) (b) of the Constitution. Consequently, the petitioner prayed that the Courts finds established sufficient grounds for removal of the IEBC Commissioners and the judges of the Supreme Court and therefore to send the petitions to the President to for his further action towards their removal in accordance with the Constitution.

10. The petitioner also complained of discrimination by the National Assembly in allegedly dealing with a petition by one Barasa Nyukuri filed on 9th June 2016 and failing to deal with his petition field on 6th April 2016, and sought compensation for breach of his right to equality and non-discrimination under Article 27 of the Constitution.

11. The 1-9 Respondents objected that the commissioners should not have been sued in their individual capacities when the IEBC has corporate status and capacity to be sued in accordance with Article 253 of the Constitution; that the Court lacked jurisdiction to deal with removal of commissioners under Article 251; that in accordance with Article 163 (7) the High Court could not review the decision of the Supreme Court; that the petition lacked sufficient particularity with regard to the violations by the respondents; on the merits that the petitioner sought to compel the constitutional bodies to exercise their mandate in specific ways, that section 12 (1) and (2) of Schedule 6 to the Constitution of Kenya 2010 exempted from the provisions of Articles 99 (2) (a), 137 (2) (b) and 193 (2) (a) of the Constitution, the 84 members of Parliament who were serving in the offices of Prime Minister, Deputy Prime Minister, Minister and Assistant Minister under sections of the former Constitution and that in any event the judicial review court could not delve into the merits of the decision but only the decision making process.

12. The 14th Respondent similarly the issues of the jurisdiction of the Court, the want of factual basis for the claim and lack of specificity required in pleading constitutional infringement and merging constitutional application ad application under the Fair Administrative Action Act, and on the merits the decision of the supreme court judges was protected by the principle of independence of the Judiciary under Article 160 (1) of the Constitution and that *"the petitioner's petition to National Assembly dated 6th April 2016 did not comply with the mandatory requirements set out in section 3 of the Petitions to Parliament (Procedure) Act 2012 which set out the mandatory form of petitions that a petition to Parliament must meet therefore leading to non-admittance of the petition to the House for tabling. Accordingly the claim by the petitioner is premature and vindictive [and] the Petitioner's Petition to the National Assembly dated 6th April 2016 generalized complaints without any focus on facts, law or the Constitution."*

13. The 10-13 Respondents, the Judges of the Supreme Court and the 15th respondent Judicial Service Commission did not file any responses.

Issues

14. Three issues emerge from the pleadings and submissions of the Parties, namely:

- a. Whether the Court has jurisdiction to determine the questions raised in the petition and to make the orders sought against the Respondents.
- b. Whether there is evidence of violation of the Constitution, generally; and
- c. Particularly, whether the Petitioner has been discriminated against by the National Assembly by the hearing of a petition by another person before the petitioner's petition which allegedly first in time.

Determination

Jurisdiction of the Court

15. In accordance with Article 165 (6) and (7) of the Constitution relating to the supervisory jurisdiction of the Court, pursuant to which this petition is brought, the order or direction that the Court may make must be geared towards the fair administration of justice by the subordinate court, person or body exercising judicial or quasi-judicial authority. It does not and cannot authorise the Court to exercise the jurisdiction of the subordinate Court, person or body charged with the judicial or quasi-judicial function. To hold otherwise will be to assert a concurrent jurisdiction of the High Court over matters within the competence of subordinate courts or tribunals without sanction of the Constitution, when what is contemplated in proceedings under the Fair Administrative Action Act, 2015 is an application or an appeal from the administrative action.

16. The Petitioner relied on section 78 of the Civil Procedure Act which provides as follows:

“78. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

17. The general power of an appellate Court under section 78 of the Civil Procedure Act which empowers an appellate court to exercise the powers of the court of original jurisdiction cannot authorise the assumption of a jurisdiction which is reserved by the Constitution to the competence of another constitutional body. The Civil Procedure Act predates the Constitution of Kenya 2010 and is according to Clause 7 of the Sixth Schedule of the Constitution to be interpreted with such alteration and modification as to give effect to the Constitution, as follows:

“7. (1) All law in force immediately before the effective date continues in force and shall be

construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”.

18. As a Constitutional Court, the remedies that may be granted are set out in Article 23 of the Constitution, and they do not include exercising a concurrent original jurisdiction over the matter in dispute before the inferior tribunal. This accords with the general principle of judicial review that it is a special procedure concerned with the process for the making, rather than the substantive content, of the impugned decision. I agree that in exceptional cases the judicial review mechanism may be used to challenge the merits of decision taken by administrative bodies such as where the exigencies of the matter do not allow for protracted litigation, and the High Court as the supervisor court may exercise the powers of the supervised court. However, when the inferior tribunal may be allowed to deal with the merits of the case, the Court should defer to the decision making process of the inferior tribunal. I do not consider that in fashioning an appropriate relief as it is empowered under Article 23 (3), the Court may create a jurisdiction to deal with a matter which is under the express constitutional text reserved for the competence of another constitutional organ.

19. The Court cannot usurp jurisdiction given to other constitutional bodies where they fail to act in accordance with their mandate. It is plain that while the Court may issue judicial review orders where applicable to compel performance of constitutional or statutory duty but the Court cannot itself perform the function reserved by the Constitution for other bodies. This is the effect of the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR that –

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

20. The jurisdiction for the settlement of disputes relating to nominations for elections is a matter within the province of the IEBC in accordance with Article 88 (4) (e) of the Constitution and restated in section 74 (1) of the Elections Act as follows:

“74. Settlement of certain disputes

(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.”

21. However, even assuming that the IEBC unconstitutionally allowed the nomination of the named persons, the jurisdiction for removal of the IEBC commissioners and judges of the Supreme Court who are respondents in this petition lies exclusively under the constitutional text to various constitutional bodies other than the Court. See Article 251 of the Constitution with respect to members of constitutional commissions such as the IEBC, which provides in relevant parts as follows:

“251. (1) A member of a commission (other than an ex officio member), or the holder of an

independent office, may be removed from office only for—

(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;

(b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence; or

(e) bankruptcy.

*(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present **a petition to the National Assembly** setting out the alleged facts constituting that ground*

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.

(4) On receiving a petition under clause (3), the President—

(a) may suspend the member or office holder pending the outcome of the complaint; and

(b) shall appoint a tribunal in accordance with clause (5).

(5) The tribunal shall consist of—

(a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;

(b) at least two persons who are qualified to be appointed as High Court judges; and

(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.

(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.

22. With regard to removal of Judges, Article 168 in material parts provides:

“168. (1) A judge of a superior court may be removed from office only on the grounds of—

(a) inability to perform the functions of office arising from mental or physical incapacity;

(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;

(c) bankruptcy;

(d) incompetence; or

(e) gross misconduct or misbehaviour.

(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.

(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judges removal.

(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.

(5) The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission—

(a) in the case of the Chief Justice, appoint a tribunal consisting of—

(i) the Speaker of the National Assembly, as chairperson;

(ii) three superior court judges from common-law jurisdictions;

(iii) one advocate of fifteen years standing; and

(iv) two other persons with experience in public affairs; or

(b) in the case of a judge other than the Chief Justice, appoint a tribunal consisting of—

(i) a chairperson and three other members from among persons who hold or have held office as a judge of a

superior court, or who are qualified to be appointed as such but who, in either case, have not been members of

the Judicial Service Commission at any time within the immediately preceding three years;

(ii) one advocate of fifteen years standing; and

(iii) two other persons with experience in public affairs.”

23. Moreover, in the celebrated case of ***The Speaker of National Assembly v. Karume***, [2008] 2 KLR (EP) 423, the Court of Appeal held that where an alternative mechanism is established for the determination of particular grievances not only under the Constitution or statute that procedure should be strictly followed –

“In our view there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed.”

See also ***Silas Make Otuke v Attorney General & 3 others*** [2014] eKLR

24. I agree with the requirement ***Anerita Karimi Njeru v. Attorney General*** (approved in ***Mumo Matemu v. Trusted Society of Human Rights Alliance*** Civil Appeal No. 290 of 2012 [2013] eKLR) on precision and particularity of pleading for purposes of defining the claim to be met by the respondent and for determination by the Court. I however do not agree with counsel for the respondents that the petition is so hopelessly drawn as to obscure the nature of the petitioner’s claim as to make it liable to be struck out under the rule. I consider that although the petitioner could have been a better pleader if he had set out in a systematic way the provisions of the constitution violated and the manner of their violation by the respondents, the petition does contain all the relevant claims and manner of violation, and the respondents and the court are not embarrassed in dealing with the petitioner’s case. The Petitioner’s style of pleading

only makes it a little difficult to follow but not hopelessly bad as to be liable to striking out. The petitioner is a self-representing non-lawyer and due allowance may be given to him in the spirit of the Constitution which under Article 22 (3) contemplates informality of procedure for enforcement of rights.

25. Indeed without too much difficulty, Counsel for the 14th Respondent has in his submissions dated 22nd September 2016 been able to appreciate the Petitioner's case as follows:

“In trying to discern, notwithstanding the invocation of several articles of the Constitution, the plain reading of the Petition and the Prayers the Petition presents some issues touching on:

- a. Validity of the nominations of 84 candidates in the 2013 General Elections;*
- b. Removal of State officers;*
- c. Failure by the Supreme Court Judges to invalidate the election of the President;*
- d. Violation of his right in Article 27 (Equality and Discrimination)”*

Breach of right to equality and non-discrimination

26. Whether there is evidence of violation of rights and contravention of the Constitution is another inquiry altogether. The guiding principle in discrimination is that not all differential treatment violates the right to equality. Discrimination must involve a differentiation on illegitimate grounds. See *Nyarangi & 3 Ors. v. Attorney General* [2008] KLR 688 and *John Kabui Mwai & 3 Ors. Kenya National Examination Council & 2 Ors.* [2011] eKLR. There may be many reasons why a subsequent petition before the National Assembly, or indeed any judicial or quasi-judicial body may be heard before an earlier petition filed before the same body. It may be because, as urged by the Counsel for the 14th Respondent, the later petition, unlike the petitioner's petition complied with the formal rules for filing of a petition set out in section 3 (e) of the Petition to Parliament Act, 2012 and the National Assembly Standing Order NO. 223 (e). It was submitted that this fact was communicated to the Petitioner by a letter dated 3rd August 2016, which is after the Petition had been filed. It is wrong to produce evidence by attachment to submissions, and as the letter of 3rd August 2016 is not otherwise produced, the Court is not influenced thereby.

27. However, the Petitioner has not demonstrated differentiated treatment on any illegal grounds as there is no evidence as to the nature content and format and time of filing of the subsequent petition by one Barasa Nyukuri to the National Assembly. For this want of evidential grounding the petitioner's case in discrimination fails. Having so found, the Court does not go into inquiry as to damages.

Conclusion

28. It is elementary that the High Court cannot determine, except through the process of a criminal trial the alleged contravention of penal sections of the Elections Act, the Penal Code and the Anti-Corruption and Economic Crimes Act. Section 3 of the Criminal Procedure Code makes this provision as follows:

“3. Trial of offences under Penal Code and under other laws

(1) All offences under the Penal Code (Cap. 63) shall be inquired into, tried and otherwise dealt with according to this Code.

(2) All offences under any other law shall be inquired into, tried and otherwise dealt with according to this Code, subject to any enactment for the time being in force regulating the manner or place of inquiring into, trying, or otherwise dealing with those offences.

(3) Notwithstanding anything in this Code, the High Court may, subject to the provisions of any

law for the time being in force, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise that jurisdiction according to the course of procedure and practice observed by and before the High Court of Justice in England at the date of the coming into operation of this Code.”

[emphasis added]

Accordingly, the Court cannot in these proceedings competently find as prayed by the Petitioner that the persons named in the Petition have contravened the penal legislation set out therein.

29. The Petitioner did not adduce evidence of the alleged violations of the constitutional provisions and of his right to equality and non-discrimination, and I cannot, therefore, find any violation thereof.

30. As relevant to this Petition, the primary jurisdiction of the High Court is set out in Article 165 (3) of the Constitution as follows:

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(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) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(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;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

31. There has not been any tribunal proceedings for the removal of a person from office so as to trigger the appellate jurisdiction of the Court in terms of Article 165 (3) (c) so that the petition is in this respect premature in the sense of *Silas Make Otuke v. Attorney General*, supra. The jurisdiction to interpret the Constitution under Article 165 (3) (d) of the Constitution does not, in my view, extend to performing the very roles set apart for the constitutional bodies by, as in this case, recommending the formation of

tribunals for the removal of the IEBC Commissioners or the judges of the Supreme Court.

Supervisory jurisdiction

32. The High Court has in addition supervisory jurisdiction of subordinate judicial and quasi-judicial bodies under **Article 165 (6) and (7) of the Constitution as follows:**

*“(6) The High Court has **supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function**, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and **may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**”*

33. Under their respective mandates under the Constitution, the National Assembly and the Judicial Service Commission have a duty **‘to consider the petition’** and if meritorious send it to the President for his further action in accordance with the Constitution. For the default of the two bodies – the National Assembly and the JSC - in performing this duty, this Court in exercise of its supervisory jurisdiction under Article 165 (6) and (7) of the Constitution is entitled to enforce the performance of those duties to ensure fair administration of justice.

34. Articles 1 (3) and 2 (2) of the Constitution of Kenya entrenches Constitutionalism, that is the principle of government limited by law. Constitutionalism supports constitutional democracies such as Kenya where the Constitution and other law provide the basis for all exercise of power. Organs of the State are bound to comply with constitutional and statutory provisions relating to their respective functions. The National Assembly and the Judicial Service Commission have constitutional duties in accordance with Article 251 (3) and 168 (4) of the Constitution, respectively, to consider petitions for the removal of Commissioners and Judges. While the Court may not direct the constitutional bodies or other bodies exercising judicial or quasi-judicial functions as to how to exercise discretion in the performance of their duties, it may properly within its judicial mandate under Article 165 (6) and (7) of the Constitution and as an imperative of the rule of law, direct that the said bodies do exercise their constitutional mandate in accordance with the Constitution and the law.

35. With regard to the National Assembly, it was conceded by the Petitioner that the Clerk of the National Assembly had in a communication, albeit late, dated 3rd August 2016 intimated that the National assembly was unable to proceed with the Petition as framed, and corrective measures were advised, as follows:

“Republic of Kenya

The National Assembly

Parliament Buildings

P. O. Box 41842-00100

NAIROBI

3rd August 2016

Mr.t Isaac Aluoch Polo Aluochier

P O Box 44848-00100

NAIROBI

Dear Mr Isaac Aluoch Polo Aluochier

RE: PETITION FOR THE REMOVAL FROM OFFICE OF THE MEMBERS OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ON ACCOUNT OF THEIR SERIOUS VIOLATION OF THE CONSTITUTION AND OTHER LAW AND GROSS MISCONDUCT

The above subject on your Petition refers.

Kindly note that Petitions to the National Assembly are governed by the Constitution, Petitions to Parliament (Procedure) Act, 2012 and the National Assembly Standing Orders.

We have examined your Petition against the provisions of the Constitution, the Petition to Parliament (procedure) Act, 2012 and the National Assembly Standing Orders and observed that:-

1. Contrary to Article 95 of the Constitution and Standing Order 219, the prayers of the Petition fall outside the authority of the National Assembly as the jurisdiction to determine that the Commissioners of the Independent, Electoral and Boundaries Commission acted in contravention of the Constitution, the Elections Act, 2011, the Penal Code Cap.63 and the Anti-Corruption and Economic Crimes Act, Cap 65 by allowing state officers to be nominated to various elective positions in the 2013 general elections, falls within the purview of the Ethics and Anti-Corruption Commission and the High Court pursuant to Articles 79 and 165 of the Constitution;

2. Contrary to section 3(e) of the Act and Standing Order 223(e), the Petition has not indicated its subject-matter on every sheet of the Petition.

In view of the above, the Petition fails to meet the requirements of the Constitution, the Act and the Standing Orders and cannot be presented to the House.

Yours faithfully

JUSTIN BUNDI C.B.S.

CLERK OF THE NATIONAL ASSEMBLY”

36. The standards of review of administrative action as set out in section 7(2) of the Fair Administrative Act are as follows:

“(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) the action or decision was procedurally unfair;*
- (d) the action or decision was materially influenced by an error of law;*
- (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;*
- (f) the administrator failed to take into account relevant considerations;*
- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;*
- (h) the administrative action or decision was made in bad faith;*
- (i) the administrative action or decision is not rationally connected to-*
 - (i) the purpose for which it was taken;*
 - (ii) the purpose of the empowering provision;*
 - (iii) the information before the administrator; or*
 - (iv) the reasons given for it by the administrator;*
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;*
- (k) the administrative action or decision is unreasonable;*
- (l) the administrative action or decision is not proportionate to the interests or rights affected;*
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;*
- (n) the administrative action or decision is unfair; or*
- (o) the administrative action or decision is taken or made in abuse of power.”*

37. From the foregoing discussion of the matter, the Court has not seen anything in the Petition to challenge the finding of the National Assembly on the standards of review set out above.

38. As regards, the Judicial Service Commission, there was no evidence that the Commission had considered and determined the Petition lodged by the Petitioner on 6th April 20116. The Fair Administrative Action Act, 2015, section 7 (2) (j) required the hearing and determination of the Petition within a reasonable time. However, under section 7 (3) of the Act, the Court may not grant review unless the conditions therein set out exist as follows:

“(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

- (a) the administrator is under duty to act in relation to the matter in issue;*
- (b) the action is required to be undertaken within a period specified under such law;*

(c) the administrator has refused, failed or neglected to take action within the prescribed period.”

The Judicial Service Commission is empowered under Article 168 (4) to consider a petition for removal of judges but no timelines for a determination thereon is prescribed.

39. However, in view of Article 168 (4) of the Constitution, which requires the Judicial Service Commission to consider a petition against judges and there being no evidence that the Judicial Service Commission has considered the Petitioner’s Petition, the Court will, therefore, direct that the Judicial Service Commission do perform its constitutional duty in the determination of the Petition filed before it by the Petitioner, in accordance with the Constitution and the law. Of course, the Court cannot prejudge the merits of the Petition before the Judicial Service Commission, and therefore does not determine the objection by the Respondents’ Counsel that Petitioner’s case against the Judges is an affront to the principle of the Independence of the Judiciary.

Orders

40. Accordingly, for the reasons set out above, the Court makes the following orders:

- 1. Prayer No. 1 of the Petition is declined.*
- 2. Prayer No. 2 of the Petition is declined.*
- 3. Prayer No. 3 of the Petition is declined.*
- 4. Prayer No. 4 of the Petition is declined.*
- 5. Prayer No. 5 of the Petition is declined.*
- 6. Prayer No. 6 of the Petition is declined.*
- 7. Prayer No. 7 of the petition is declined.*
- 8. Prayer No. 8 of the Petition is declined.*

41. However, pursuant to public interest in constitutionalism and the rule of law and in fashioning an appropriate relief to fit the situation where there is no indication that the Judicial Service Commission (JSC) has performed its duty under Article 168 (4) of the Constitution, the Court directs that the JSC discharges said duty under the Constitution by considering the Petition filed before it by the Petitioner on the 6th April 2016.

42. As this is a matter of public interest there shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 23RD DAY OF DECEMBER 2016.

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G. V. ODUNGA

JUDGE

APPEARANCES:

Mr. Issac Aluoch Polo Aluochier, the Petitioner in Person

M/S Mukele Moni & Company, Advocates for the 1st – 9th Respondent

Mr. S. M. Mwendwa, Advocate for the 14th Respondent