REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 102 AND 145 OF 2015

GODFFREY MWAKI KIMATHI

JOSEPH NJUGUNA……………..……………………..1ST PETITIONERS

BENSON RIITHO MUREITHI..................................2ND PETTIONER

VERSUS

JUBILEE ALLIANCE PARTY.............................1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION….......….. 2ND RESPONDENT

FERDINAND NDUNGU WAITITU............1ST INTERESTED PARTY

KIRIRO WA NGUGI....................………2ND INTERESTED PARTY

RULING

Introduction

1.This decision is in respect of two consolidated petitions being petition no. 102 of 2015 and petition no. 145 of 2015.

2. The genesis of the petitions was the passing away of the late Member of Parliament for Kabete Constituency (hereinafter referred to as “the Constituency”), **George Muchai** on 7th February, 2015.

3. In order to replace the deceased political parties carried out party nominations after which the 1st interested party herein, **Ferdinand Ndungu Waititu** (hereinafter referred to as **Mr. Waititu**, was nominated by the Jubilee Alliance Party (hereinafter referred to as “the Party”), the 1st Respondent herein, as the Party’s flag bearer in the forthcoming by-elections slated for 4th May, 2015.

4. The petitioners were however not amused by the Party’s decision to nominate **Mr. Waitutu** as its candidate in the said by-election. To show their unhappiness they instituted these two petitions challenging the 2nd Respondent’s decision to clear **Mr Waititu** as the Party’s candidate.

5. On 21st April, 2015, this Court consolidated the two petitions and directed that the proceedings be undertaken in the file for the petition no. 102 of 2015. However, on 24th April, 2015 when the consolidated petitions came up for hearing, **Mr Wambugu,** learned counsel for the 1st petitioners, who had filed petition no. 102 of 2015, **Godfrey Mwaki Kimatha** and **Joseph Njuguna**, applied for leave to cease acting for the said petitioners on the ground that the said petitioners had failed to furnish him with sufficient instructions to enable him prosecute the petition. The application to cease acting was however not allowed as there was no evidence of proper service on the said petitioners. Considering the time left between the said date and the election date, the Court directed the hearing of the consolidated petitions to proceed. However, **Mr Wambugu** applied to withdraw petition no. 102 of 2015. The petitions having been consolidated, it meant there was only one petition before the court. Therefore instead of the Court allowing the withdrawal of petition no. 102 of 2015, the Court allowed the said two petitioners' case to be withdrawn.

6. It therefore follows that the only case before this Court is the case of the 2nd petitioner, **Benson Riitho Mureithi** (hereinafter referred to as "the Petitioner") in which he seeks the following orders:

> **1. That a declaration be issued under Article 73 of the Constitution as read with the Fifth and Sixth schedule to the Constitution, the Respondent is under a duty to have regard to personal integrity, character, and suitability prior to issuing the Interested Party with the clearance certificate to vie for the seat of Member of Parliament (MP), of Kabete constituency.**
>
> **2. That a declaration be issued that the Respondent has failed to have regard to the personal integrity, character, competence and suitability of the Interested Party when it issued him with the clearance certificate to vie for the sear of Member of Parliament of Kabete (MP), Constituency**
>
> **3. That a declaration be issued that the Respondent's failure or omission to consider the personal integrity, character, competence and suitability of the Interested Party when issuing him with the clearance certificate is illegal and unconstitutional.**
>
> **4. That a declaration be issued that the Respondent is to have regard to the personal integrity, character, competence and suitability of a candidate before issuing them with clearance to vie for any elective public office. The clearance of the Interested Party therefore is void *ab initio* and ought to be struck off to pave way for nomination of a suitable candidate.**
>
> **5. That an order do issue directing the Respondent to take steps to ensure that regard to the personal integrity, character, competence and suitability of a candidate before issuing them with clearance certificates to vie for any public office.**
>
> **6. That the 1st Respondent be ordered to nominate another person forthwith to vie for the parliamentary elections for Kabete Constituency.**
>
> **7. That the costs of, and incidentals to, this Petition be awarded to the Petitioner against the Respondent.**
>
> **8. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.**

The Petitioner's Case

7. The Petitioner's case is simple and straightforward. According to him, **Mr. Waititu** is not competent to view for Kabete Parliamentary seat. It was his view that **Mr. Waititu's** conduct does not meet the threshold of integrity, competence and suitability as required under Article 73 of the Constitution.

According to him, what makes **Mr Waititu** unsuitable to view for the said seat are **Mr Waititu's** past conducts which include, fraudulently and illegally transferring to himself properties belonging to the beneficiaries of the estate of one **Joseph Maingi Muretithi**, the Petitioner's father; fraudulently acquiring public utility plots; and incitement to violence and hate speech leading to injuries to among others police officers and deaths.

8. As a result of the foregoing the petitioner contended that **Mr Waititu** is currently facing both criminal and civil proceedings one of which he has disobeyed a Court order issued by the Environment and Land Court. Apart from that **Mr Waititu** was barred in **Benson Riitho Mureithi vs. J W Wakhungu & 2 Othes [2014] eKLR** (hereinafter referred to as "***Riitho Case***") from being appointed to Athi Water Board.

9. It was the petitioner's case that although he complained to the Independent Electoral and Boundaries Commission (hereinafter referred to as "the Commission"), the 2nd Respondent herein about **Mr Waititu's** unsuitability, without responding to the said complaint or investigating the same, the Commission proceeded to clear **Mr Waititu** and gave him the clearance certificate to vie for the said parliamentary seat.

10. While conceding that the proper procedure in cases where one complains about a party nominee's suitability is to move the Commission pursuant to its mandate under Article 88 of the Constitution before invoking the Court's jurisdiction, the petitioner contended that where such a complaint is raised and is not considered by the Commission, a party is properly entitled to invoke this Court's jurisdiction for the determination of the issue since Article 22 as read with Article 23 of the Constitution empowers this Court to uphold and enforce the Bill of Rights by hearing every application for redress of a denial, violation or infringement of/or threat to a right or fundamental freedom. In the petitioner's view Articles 73 and 99 of the Constitution had been violated. It was therefore asserted that this Court can exercise its jurisdiction over the Commission under Article 165(6) and (7) of the Constitution in instances where the Commission demonstrates either expressly or constructively that it has failed to carry out its constitutional mandate or in carrying out the mandate, it does so in a manner which results in a grossly unfair or perverse decision.

11. In the instant case, it was the petitioner's case that the Commission was under both Constitutional and statutory duty to consider **Mr Waititu's** integrity**,** suitability and character prior to issuing him with clearance certificate and that the failure to consider the same rendered the issuance of the clearance certificate unconstitutional. To the petitioner, since the Commission is the body mandated to oversee the elections in Kenya and is enjoined by the ***Elections Act*** (hereinafter referred to as "the Act") to ensure compliance with the provisions of the Act and the Constitution, where a political party nominates a candidate who does not meet the requirements of the Constitution, as does **Mr Waititu** in this case, the political party commits an offence and is apt to be disqualified by the Commission.

12. In support of his case, the Petitioner through his learned counsel, **Mrs Kariuki**, relied on **Janet Ndago Ekumbo Mbete vs. IEBC & 2 Others Petition No. 116 of 2013**, **Lika Angaiya Lubwayo and Another vs. Hon. Gerald Otieno Kajwang & Another Petition No. 120 of 2013**, **Minister of Health and Others vs. Treatment Action Campaign and Others [2002] LRC 216, 248 para 99**, **Commission for the Implementation of the Constitution vs. Parliament of Kenya & Others Petition No. 454 of 2014** and **Jane Cheperenger Ingo vs. IEBC & 2 Others Civil Appeal No. 200 of 2013**.

2nd Interested Party's Case

13. The petition was supported by the 2nd interested party, **Kiriro Wa Ngugi**, one of the candidates, in the said parliamentary race on the ticket of the Democratic Party of Kenya.

14. According to him, the contention that this Court does not have jurisdiction to entertain these proceedings on the basis of Article 88(4)(e) of the Constitution as read with section 74 of the Act is a red herring because the Commission does not have the jurisdiction to determine alleged violations of the Constitution and the law in the nomination process as its jurisdiction is limited to arbitrating disputes

between parties seeking nomination and political parties. In support of this position, the 2nd interested party relied on **Okiya Omtata Okoiti vs. Attorney General & IEBC [2013] eKLR** and **Republic vs. The IEBC & 2 Others [2013] eKLR**.

15. Since the Commission had failed to respond to the petitioner's complaint in respect of **Mr Waititu's** suitability, the petitioner and the voters of Kabete had a right to be heard on the issues hence the intervention by this Court. According to the 2nd interested party, where the conduct of the Commission is in question and the issue is whether the Commission has discharged its mandate in conformity with the Constitution in issuing a nomination certificate to a candidate, that dispute falls within the jurisdiction of the High Court under Article 165(3)(d)(ii).

16. It was contended that the Commission is under and constitutional duty and is obligated to establish before clearing any political party contestant their suitability to run for office and that this is not a perfunctory exercise whereby the Commission is simply acting as a conveyor belt in endorsing the decision of a political party. The Commission, it was the 2nd interested party's case is meant to discharge, exercise discretion and make an independent decision bearing in mind the rule of law, supremacy of the Constitution, and *inter alia* Articles 10, 99 and 73 .

17. Since the petitioner and the voters of Kabete are entitled to elect leaders who have complied with the Constitutional obligations under Chapter Six, it was contended that the clearance of **Mr. Waititu** to participate in Kabete by-elections by the Respondents in utter disregard of his personal integrity, competence and suitability is contrary to the public's interest and the scheme and design of the Constitution.

18. According to **Mr Issa**, under section 24 of the Act, the Commission must first consider the ethical and educational competencies of the nominees before proceeding to the stage of nomination. It was therefore his view that the provisions of section 24(1) are distinct from section 24(2) of the Act and if the Commission does not undertake its statutory and constitutional mandate, even after a complaint is lodged as was done in the present case, it cannot claim that its Committee ought to have been moved since that is the Court's mandate for determination as such grievance has nothing to do with the nomination process.

19. It was counsel's view that though in ***Riitho Case*** (supra) the court did not make a determination on the suitability of **Mr Waititu**, the issues raised therein are similar as the issues raised in the instant Petition as the Commission, just like the Cabinet Secretary in the said petition did not undertake its duty. To learned counsel, there is no distinction between appointive and elective posts as Article 73(2)(a) applies to both

20. In support of the aforesaid submissions, **Mr Issa** relied on **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR**, **Micro & Small Enterprises Association of Kenya vs. Mombasa County Government & 43 Others [2014] eKLR**, **Muslims for Human Rights (Muhuri) & 2 Others vs. Attorney General & 2 Others [2011] eKLR**, G**atirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** and **Nathif Jama Adam vs. Abdikhaim Osman Mohamed & 3 Others [2014] eKLR**.

21. The 2nd interested party therefore sought orders that the elections do proceed to the exclusion of **Mr Waititu** as an alternative to postponing the by-election.

1st Respondent's Case

22. Herein, the Party asserted that it carried out party primaries for the Constituency in accordance with the Party Constitution and the Rules.

23. Its position was that as the issues forming the subject of this petition were the subject of disputes before the Commission's Disputes Resolution Committee (hereinafter referred to as "the Committee"), the issues raised herein are res judicata. It was of the view of the party that the complaints raised in this

petition have been brought before the wrong forum hence amounts to an abuse of the court process. To the Party pursuant to Article 88(4)(e) of the Constitution as read with section 74(1) of the Act,, the right forum for the determination of the issues in this petition is the Commission.

24. In its view, a party cannot be disqualified from an election until the appellate process is exhausted. In this case, no court has made any finding with respect to **Mr Waititu's** integrity. To the Party, this petition is a mischievous attempt to distract duly qualified candidates from campaigning hence the Court ought to express its disgust by awarding substantial costs against the petitioner. The party's interpretation of Article 73(2) of the Constitution was that since **Mr Waititu** is not to be appointed by any public body to determine his integrity or lack of it, he is at the mercy of the court of public opinion and if the latter feels that he does not have any integrity issues and decide to nominate him in a free and fair process, the Courts do not have the authority to make any adverse findings.

25. In support of its position the Party through its learned counsel **Mr Kanjama** relied on **Samuel Kamau Macharia & Another vs. KCB & 2 Others [2013] eKLR**, **Joel Bulinga Anyambe & 146 Others vs. Unga Group Limited [2009] eKLR**, **Microsoft Corporation vs. Mitsumi Computer Garage Ltd [2001] 1 EA 127 at 136** and **Benson Riitho Mureithi vs. J W Wakhungu & 2 Others [2014] eKLR**.

2nd Respondent's Case

26. To the 2nd Respondent, the Commission, since Rules 8 and 9 of the Commission's ***Rules and Procedure on Settlement of Disputes***, ***2012*** (hereinafter referred to as "the Rules") section 74 of the Act and Article 88(4) of the Constitution give the jurisdiction to hear matters concerning nomination of candidates to the Commission, this petition was brought before the wrong forum hence this Court lacks the jurisdiction to hear and determine the same. To the Commission, the mandate to determine eligibility of a candidate to contest for an elective body or office, such as a seat in the National Assembly, lies exclusively with the Commission at the first instance and once a Returning Officer issues nomination certificate, his decision can only be challenged by the filing of a complaint with the Committee. However this procedure was never followed by the petitioner.

27. According to **Mr Nyamodi**, learned counsel for the Commission, what is at stake in this petition is the nomination to contest an election to a seat in the National Assembly which nomination is guided by the ***Election (General) Regulations, 2012*** (hereinafter referred to as "the Regulations") LN 139/12. According to learned counsel the nomination is by delivery of the nomination form to the Returning officer in a specified form in the schedule after which the returning officer issues a certificate. Since it is the returning officer who issues the certificate, it was contended that what is sought to be enforced against the Commission in this petition is conducted by the returning officer hence the petitioner's disaffection is with directed to the actions of the returning officer. It was submitted that this Court therefore lacks the jurisdiction in this petition since such a challenge ought to have been taken before the Committee. While conceding that this Court has the jurisdiction to examine the process of the Committee in arriving at its decision, the constitutional duty the petitioner sees to enforce having not been referred to the Committee, this Court lacks the jurisdiction to deal with or handle this petition. To buttress this point, learned counsel relied on **Constitutional Petition Number 359 of 2013** **Diana Kethi Kilonzo vs. IEBC and 2 Others** and **International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others Petition 552 of 2012 as consolidated with Petitions 554, 573 and 579 of 2012 [2013] eKLR**.

28. It was contended by the Commission under Rule 8 of the Rules, which rules are made pursuant to Regulation 99 the Regulations as read with Article 88(4) of the Constitution, a complaint to the Commission ought to be in Form 1 under the Rules which requires the complaint to make certain requests/prayers for determination. It was further contended that the purported complaint was lodged way before the nomination complained of was conducted and that the same complaint was never notified to the Party and **Mr Waititu** as required under rule 8(5) of the Rules. To the extent therefore that the letter referred to by the petitioner as the complaint did not comply with the Rules, it was submitted that there was in fact no valid complaint lodged with the Commission.

29. It was the Commission's case that since the issues presented in this petition were the same issues in **Benson Riitho Mureithi vs. J W Wakhungu & 2 Others** (supra) this court can not re-seat over the same matters hence this petition is an abuse of the court process.

30. According to the Commission, some the allegations made against **Mr Waititu** remain unresolved while others have been dismissed hence no determinations has been made on his integrity.

31. The Commission's position was that it is not tasked with making a decision as to whom to nominate as its role is regulatory and oversight over electoral matters. It disclosed that **Mr Waititu** had previously been successfully nominated to view for Governor of Nairobi County in the 2013 General Elections.

32. According to the Commission, a nomination should not be likened with an appointive position since unlike an appointment, a nomination is decided upon by the electorate hence the nominee will still be subjected to the process of elections where the electorate will decide whether the said nominated candidate is fit to represent them.

33. It was the Commission's case that throughout the nomination process, it adhered to the provisions of the Constitution, the Act, the ***Independent Electoral & Boundaries Act*** (IEBC Act) and other national legislation. To grant the orders sought, would in the Commission's view, work against public interest since it would mean possibly postponing the by-elections and repeating the nomination exercise.

34. In support of these submissions, **Mr Nyamodi**, the Commission's learned counsel relied on **Samuel Kamau Macharia & Another vs. KCB & 2 Others** (supra), **Speaker of the National Assembly vs. Karume [2008] 1 KLR 425**, **Suleiman Shabal vs. IEBC Petition No. 16 of 2014** and ***Riitho Case*** (supra).

1st Interested Party's Case

35. According to **Mr Waititu**, the 1st interested party, he only became aware of these proceedings through the media. Based on section 74 of the Act and Article 88 of the Constitution, he contended that this Court ought not to entertain these proceedings for want of jurisdiction.

36. As the people of Kabete had exercised their rights under Article 38 of the Constitution, he urged this Court to disallow the petition based on the principle of proportionality.

37. While denying and challenging the allegations made against him, **Mr Waititu** contended that though in ***Riitho Case***, he was barred from being appointed to the said Water Board, there was no finding in the said decision on his integrity hence the decision is not relevant to the petition. Further the said decision is the subject of a pending appeal.

38. As there is a competent forum for ventilating the issues raised herein within the Commission's Committee, **Mr Waititu's** position was that these proceedings are an abuse of the Court process.

39. With respect to the other allegations made against him, he averred that no findings had been made in respect thereof hence the principle of innocence unless found guilty ought to be applied. He therefore denied the allegations made on his integrity and urged the Court to dismiss the petition.

40. It was submitted on behalf of **Mr Waititu** by his learned counsel, **Mr Kinyanjui** that at the core of this petition is **Mr Waititu's** nomination which the petitioner seeks to be revoked hence it is a resolution of a dispute before the elections whose procedure is elaborately provided for under Article 8(4)(e) of the Constitution. Such a dispute is required by Regulation 8 of the Regulations to be dealt with by the Commission. However the letter relied upon by the petitioner as constituting the complaint does not amount to a complaint under the law since the complaint is required to be notified to the Commission and to the adverse parties. While regulation 8 requires notification on either the returning officer or the Commission, that there must be a complaint is mandatory. While reiterating the submissions made by the Commission on what the complaint ought to entail, **Mr Kinyanjui** added that the complaint is required to

be under oath and must contain the relief sought.

41. Without such a complaint it was submitted that there was no reason for the petitioner to approach this Court before going before the Committee.

42. However, even if this Court had jurisdiction, it was **Mr Waititu's** case that the issues sought are not available since the issue of his integrity is not within the domain of the Commission as the Commission is handicapped to investigate integrity issues as the operational statute is the Leadership and integrity Act which confers such obligation on the Ethics and Anti-Corruption Commission. It is only after a decision is made by the Ethics and Anticorruption Commission that the said decision can be used as a basis for disqualifying a candidate.

Determination

43. I have considered the petition, the cases of the various parties presented before me by way of answer to the petition, the preliminary objections, affidavits, submissions and authorities and this is my view of the matter.

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

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

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

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

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

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for**

the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

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

"Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the

dispute".

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

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

> ***The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—***
>
> ***(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;***

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

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

51. However, the 2nd interested party relied on section 24(1) and (2) of the ***Elections Act*** and contended that where a dispute relates to an omission by the Commission to carry out its Constitutional mandate, such a decision cannot be termed a nomination dispute so as to fall within the jurisdiction of the Commission as envisaged by Article 88(4)(e) of the Constitution as read with section 74(1) of the Act. Section 24 of the Act provides:

> ***24. (1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person—***
>
> ***(a) is registered as a voter;***
>
> ***(b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act; and***
>
> ***(c) is nominated by a political party, or is an independent candidate who is supported—***
>
> ***(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or***
>
> ***(ii) in the case of election to the Senate, by at least two thousand registered voters in the county.***
>
> ***(2) A person is disqualified from being elected a member of Parliament if the person—***

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

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

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

(d) is a member of a county assembly;

(e) is of unsound mind;

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

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

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

52. The 2nd interested party's view was that the two subsections of section 24 of the Act apply to different levels of qualifications of a candidate so that the criteria in both provisions are not referable to the nomination process as such.

53. It is however my view that Article 88(4)(e) is clear in its terms. It uses the phrase "*the settlement of electoral disputes, <u>including</u> disputes relating to or arising from nominations*". Therefore even if we were to agree that the integrity questions of a nomine are not nomination questions in the strictest sense we would still have to determine whether such issues are electoral disputes since the powers of the Commission are not restricted to nomination disputes but includes them. This issue was dealt with by a 5-judge bench of this Court in **<u>International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others</u>** (supra) where the Court held as hereunder:

> **"The Petitioners urge that this is not a dispute on the nomination of the 3rd, 4th and 5th Respondents, but rather, their non-compliance with Chapter Six of the Constitution. We have also taken into consideration the arguments set out by the Respondents with regard to jurisdiction of other statutory bodies in a matter such as this. All the parties in this petition acknowledge the High Court's unlimited jurisdiction under Article 165(3)(a) of the Constitution. This unlimited original jurisdiction however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners. See *Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425,* which held that:-**
>
> **"In our view there is considerable merit…..that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."**
>
> **Even if it was to be argued that the 3rd, 4th and 5th Respondents do not meet the integrity and leadership qualification as spelt out under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88(4)(e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC. Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3rd, 4th and 5th Respondents to IEBC and it failed or refused to act. Indeed in**

the case of *Narok County Council v Trans Mara County Council [2000] 1 EA 161* at page 164 it was stated

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

54. I therefore disagree with the position taken by the 2nd interested party that the subject matter of this petition was beyond the jurisdiction of the Commission.

55. A view has however been expressed that the Commission is not properly placed to determine the integrity of the nominees hence such determinations ought to be made by the Ethics and Anti-corruption Commission. I however associate myself with the view taken by the Court in **International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others** (supra) that the duty of determining the integrity of candidates falls squarely on the shoulders of the Commission. It cannot run away from this obligation by simply saying that it has no machinery to determine the integrity of the candidates. In my view the integrity of the electoral process encompasses the integrity of the players thereat and it is the duty of the Commission to ensure that the electoral process it presides over is free, fair and transparent. Therefore integrity of the candidates is part and parcel of the integrity of the electoral process. The Commission cannot conduct a sham or mock elections simply because it does not have the machinery to undertake its legal and constitutional obligations.

56. Therefore where an issue of integrity is properly raised before the Commission, the Commission must make a determination thereon one way or the other. It cannot shirk its responsibility by shifting the onus to other bodies. If it does not fulfil its legal and constitutional obligations, this Court will not hesitate to intervene and right the wrong. As was held in **Minister of Health and Others vs. Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002):**

> **"The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."**

57. This was appreciated in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012** where it was held:

> **"Where there are allegations that these organs have failed to discharge this obligation, the Court is obligated to step in, when called upon to do so, to investigate whether the process of recruitment and the individuals recruited meet the constitutional requirements. The High Court is the ultimate guardian of the Constitution on behalf of the people of Kenya. Where the people feel that an individual who was appointed to some office does not meet the requirements of that office, the High Court cannot turn them away simply because the responsibility for that appointment is reserved by the Constitution to the Executive or Legislature. Whereas the appointment is a preserve of the Executive and the right of concurrence is given to Parliament, the enforcement of the Constitution is left to the High Court."**

58. It was contended that the Court must make a distinction between elective and selective or appointive positions. This, it was contended, is due to the phraseology adopted by Article 73(2)(a) of the Constitution. That provision provides that the guiding principles of leadership and integrity include selection on the basis of personal integrity, competence and suitability, or election in free and fair

elections. In other words, it was contended that the principles of leadership and integrity of personal integrity, competence and suitability do not apply to elective process. However as rightly submitted on behalf of the petitioner, under Article 259 of the Constitution, "*the Constitution must be interpreted in a manner that promotes its purposes, value and principles and contributes to good governance*." One such principle as ordained under Article 10 of the Constitution is integrity a word which was defined in **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others, (case no. 263/11) (2011) ZA SCA 241** in the following terms:

> **"An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' Collins' Thesaurus (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'… On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience."**

59. And as was held in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others** (supra):

> **"Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our *politics and governance structures* by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice. It follows, therefore, that those organs and officials to whom the authority to select officials to certain State Organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions."** [Emphasis added].

60. It is therefore my view and I hold that the issues of integrity, competence and suitability as required under Article 73 of the Constitution apply to both elective and appointive positions. In so deciding I am guided by the principle that in interpreting the provisions of the Constitution one must always keep in mind that the Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual's full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purposive construction. See **R vs. Big M Drug Mart Ltd (1986) LRC 332; Attorney General vs. Momoddon Jobo [1984] AC 689.**

61. In so doing however, while a liberal and not an overly legalistic approach should be taken to constitutional interpretation the charter should not be regarded as an empty vessel to be filled with whatever meaning the court might wish from time to time. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. See

<u>Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi HCCC No. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375.</u>

62. In my view, the philosophies of the Kenyan society with respect to the Constitution of Kenya, 2010 was partly informed by the bad governance which characterised the previous systems of governance including but not limited to failure to inculcate issues of integrity into leadership. Therefore, the provisions of the Constitution must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole: in my view, provisions relating to the national values and principles of governance in Article 10 of the Constitution must be given purposive and generous interpretation in such a way as to secure the maximum fulfilment of those values and principles.

63. I therefore associate myself with **Mumbi Ngugi, J** in ***Riitho Case*** that public officers must be appointed on the basis of the criteria set out in Chapter 6 and based on the set principles set out in Article 10 of the Constitution. I also agree with the decision in **<u>David Kariuki Muigua –vs- Attorney General & Another Petition No. 161 of 2011</u>**, which dealt with an appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal, and in which the Court observed at Paragraph 13 and 15 as follows:

> **13.“However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that**
>
> **‘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.’**
>
> **Any appointments under the Standards Act should have been done in conformity with the provisions of the constitution and should have observed the national values and principles.**
>
> **15. There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”**

64. It was further contended that since in the elections the voters have an opportunity to –re-vet the nominees as it were, the Court ought not to interfere. In my view section 24(1)(b) of the Act is clear that it is the responsibility and obligation of the Commission to ensure that the nominees satisfy any educational, moral and ethical requirements prescribed by the Constitution and the Act. That is not the responsibility of the voters. Where the Commission unleashes on the public people who ought to be disqualified under section 24 aforesaid, it cannot evade this court’s censure by simply saying that the voters do have a chance to re-vet the nominees. Once the nominees are cleared the voters are entitled to assume that they are duly qualified and the only issue for the voters decision is who amongst the candidates is better placed to serve and articulate their interests.

65. It was also contended that since no finding has been made on **Mr Waititu’s** integrity, there is no basis upon which the Commission would bar him from contesting. This position seems to stem from the provisions of section 24(3) of the Act which provides that:

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

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

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

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

(d) is a member of a county assembly;

(e) is of unsound mind;

(f) is an undischarged bankrupt;

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

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

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

66. However apart from section 24(2), for one to be cleared to vie for a parliamentary seat one must satisfy the provisions of section 24(1), one of which is that he/she has to satisfy the educational, moral and ethical requirements prescribed by the Constitution and the Act. As was held in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others** (supra):

> **"To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the** *Democratic Alliance case* **held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity."**

67. I however agree with **Mumbi Ngugi, J** in ***Riitho Case*** that this is not the correct forum at which the integrity of **Mr Waititu** can be determined in the first instance. In these proceedings the Court is more concerned with whether or not the bodies entrusted with determining the issue did carry out their duty. As was properly held in **Diana Kethi Kilonzo vs. IEBC and 2 Others** (supra):

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

68. It is not in dispute that the Commission never determined **Mr Waititu's** integrity. Whereas it was contended that **Mr Waititu** had previously been cleared for gubernatorial post, the mere fact that at one

point in time a nominee was found to be a person of integrity does not bar issues of integrity being raised against him or her in subsequent nominations. Similarly, it is my view that the issue of integrity must be based on the prevailing circumstances and the mere fact that one was found to lack integrity at one point does not ipso facto permanently bar him or her from being nominated subsequently as long as he or she can prove that the circumstances have since changed in his or her favour. In other words integrity or lack of it is not a permanent feature.

69. That brings me to issue whether there was a validly made complaint before the Commission. The petitioner rightly conceded that the first port of call in electoral disputes is the Commission. Therefore, for this Court to entertain his petition, he ought to show that he did make a valid complaint to the Commission which the Commission failed to consider and determine. To this effect the petitioner relied on the letter dated 10th March, 2015. That letter was clearly not in Form 1 to the Rules. This however, is not necessarily fatal since section 72 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

> ***Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.***

70. This provision received judicial recognition in **Daniel Toroitich Arap Moi vs. John Harun Mwau Civil Application No. 131 of 1994 [2008] 2 KLR (EP) 90 (CAK).**

71. It was further contended that, the said letter did not contain any reliefs or prayers sought. I have perused the said letter and it is clear that the petitioner simply asked the Commission to "exercise due diligence in regard to the above to avoid public' lack of confidence in the electoral system and Government". There was for example no express prayer that **Mr Waititu** be barred from contesting the said by-elections. However, the more crucial point was that contrary to Rule 8, the said complaint was never brought to the notice of the 1st Respondent and **Mr Waititu**. The latter's contention that he only became aware of the existence of a dispute was through the media was never controverted. In my view the requirement that persons adversely affected by a complaint be notified reflects the constitutional provision in Articles 47 and 50(1) of the Constitution. Dealing with the issue the Court of Appeal in **M S K vs. S N K Civil Appeal (Application) No. 277 of 2005,** expressed itself as follows:

> **"At the outset it is important to restate the object of Rule 76(1) of the Court's Rules. Its object in obliging an appellant to serve copies of the notice of appeal on the parties directly affected by it is that the rights of a party likely to be directly affected by the result of the appeal should not be affected without the party being provided with an opportunity of being heard…The right of hearing is a constitutional right under section 77 of the Constitution and in addition it is the cornerstone of the rules of natural justice. It follows that although Rule 76 is a procedural rule based on the Appellate Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierarchy of fundamental rights, the right of hearing ranks very high. For this reason the failure to serve the notice of appeal renders a notice of appeal incompetent including the record itself."**

72. In my view proceedings which are instituted in violation of the rules of natural justice when such rules are expressly required to be complied with cannot be sustained since to do so would itself be unconstitutional.

73. I therefore agree that to the extent that the letter dated 10th March, 2015 was not brought to the notice of **Mr Waititu** or the Party, that letter did not constitute a valid complaint under the Rules and without such complaint, the jurisdiction of this Court has not been properly invoked.

74. It is on that basis that I find that the present petition is incompetent.

Order

75. In the premises the order which commends itself to me and which I hereby grant is that this petition be and is hereby struck out.

76. The Respondents and the 1st interested party have urged this court to award substantial costs as a means of deterring persons who institute similar proceedings from doing so. In my view such a course ought only to e resorted in exceptional circumstances since the court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**

77. As the Respondents and the 1st interested party have already been awarded half the costs in the withdrawn case, I am guided by the decision in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR** where it was held:

> **"So the *basic rule* on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to *penalize the losing party*; rather, it is for *compensating the successful party* for the trouble taken in prosecuting or defending the suit."**

78. In this case I am not satisfied that the petitioner's case was one that could be described as so hopeless ab initio. The mere fact that a case is misconceived does not warrant the Court resorting to such drastic steps as would discourage parties who believe in good faith that they have a genuine case. This Court ought not to use costs as a means of deterring persons from instituting what in their view is a justiciable case. Since in this decision I have not determined **Mr Waititu's** personal integrity, competence and suitability to vie for the Kabete Constituency by-election, I would not wish to resort to such drastic step.

79. In the result the order which commends itself to me and which I hereby make is that this petition be and is hereby struck out with half costs to the respondents and the 1st interested party.

80. It is so ordered.

Dated at Nairobi this 28th day of April, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chepkurui for Mrs Kariuki for the Petitioner

Miss Akinyi for Mr Kanjama for the 1st Respondent

Miss Wairimu for Mr Nyamodi for 2nd Respondent

Mr Harrison Kinyanjui for 1st Interested Party

Miss Chepkurui for 2nd Interested Party

Cc Patricia