REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 414 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER OF COUNTY ASSEMBLY OF NYANDARUA.....RESPONDENT

SAMUEL KIMANI GACHUHI.....INTERESTED PARTY

EX PARTE DAVID MWANGI NDIRANGU

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th December, 2013, the applicant herein, **David Mwangi Ndirangu**, seeks the following orders:

> **1. That an order of certiorari to bring to the High Court the decision, ruling order and or proceedings made between the 8th day of August, 2013 to 10th day of September 2013 by the Respondent for the purposes of being quashed.**
>
> **2. That an order of Mandamus compelling the speaker of the County Assembly of Nyandarua Honourable Ndegwa Wahome to swear in Mr. David Mwangi Ndirangu the Applicant herein to the County Assembly of Nyandarua which he declined to do on the 8th day of August 2013 and offer him all the benefit that flows to the office holder of a nominated member to the County Assembly of Nyandarua.**

Applicant's Case

2. The application was supported by a verifying affidavit sworn by the applicant herein on 15th November, 2013.

3. According to the applicant, having participated in the elections of March 4th 2013, The National Alliance (TNA) Party of Kenya (hereinafter referred to as TNA) was entitled to nominate members to the County Assembly of Nyandarua as prescribed by law and pursuant thereto the foregoing, TNA submitted its list of nominees to the County Assembly of Nyandarua to the Independent Electoral and Boundaries Commission (hereinafter referred to as the IEBC) as by law required.

4. The applicant averred that on the 15th day of March 2013, the IEBC published in the Daily Nation Newspaper the names of individuals whose names were submitted to them by Political Parties and wherein the applicant was included in the said list as having been nominated by TNA to the County Assembly of Nyandarua. Further on the 21st day of May, 2013, the IEBC Dispute Resolution Committee published in the Daily Nation Newspaper the amended nominees to County Assembly Special Seats list of the political parties to various County Assemblies and the applicant's name was once again in the said list alongside others nominated by TNA to the County Assembly of Nyandarua.

5. It was deposed that being dissatisfied with the publication of the party list in the Newspaper by the IEBC, there were instituted protracted legal battles to bar and or challenge the aforestated list, wherein complaints were made to the IEBC Dispute Resolution Committee who sufficiently deliberated on the matter and gave a well-reasoned determination. On the 7th day of June 2013, the IEBC nominated Dispute Resolution Committee dismissed the complaints made before it by **Mrs. Lydiah Nyaguthii Githendu**, **Esther Njogu** and **David Ndungu Njuguna** after submission by parties thereto followed by able and informed deliberations on the issues raised regarding Nyandarua County Assembly nominees presented by TNA to the IEBC. Still being dissatisfied by the said verdict of the aforestated Dispute Resolution Committee, the said persons filed a JR Application being JR No. 218 of 2013 and Petition 238 of 2013 wherein the same were adequately canvassed and considered judgments given after all the parties were heard by a three (3) Judge bench wherein giving their well-reasoned ruling they dismissed the application.

6. It was deposed that thereafter on the 17th day of July 2013, the names of the Respondents in the suit and complaint mentioned above were gazetted as the duly nominated members to the County Assembly of Nyandarua by the National Alliance Party and according to the applicant, the aforestated Petitioners and the Applicant in JR No. 218 of 2013, Petition 238 of 2013, did not obtain any stay of execution pending appeal before the High Court and neither did they obtain the same before the Court of Appeal such as to stop gazettement by IEBC and as such the IEBC went ahead and gazetted the nominated members. It was therefore the applicant's case that it was incumbent upon the Respondent herein as a duty to swear in all the gazetted persons to the County Assembly of Nyandarua without any reservations. However, the said Respondent swore in all members except the applicant on the 8th day of August 2013 and which he purported to cleanse and or disguise by giving a ruling to shun and or ignore the gazette as well as Court order regarding the nomination of the deponent herein on the 10th day of September, 2013.

7. It was therefore contended that the Respondent's conduct amounts to abdication of duty and as such a breach of the principles of natural justice for unfairness and that the Speaker further harbours premeditated thought of refusing to swear in the *Ex parte* Applicant when he delays his decision and thereby guilty of breach of legitimate expectation. Further, the Speaker has breached the principle of legitimate expectation when he entertains a matter beyond his scope as well as the scope of the County Assembly of Nyandarua and further failing to give proper directions for the matter to be addressed by way of a petition in a court of law as by law required. In addition, the Speaker is guilty of breach of legitimate expectation when he exhibits malafides by failing to challenge the nomination of the *Ex parte* Applicant herein and or in the suits challenging his nomination before a court of law an opportunity that was available to him and within the stipulated time frame for election and or nomination petition and only resorts to illegally challenge the nomination of the *Ex parte* Applicant herein.

8. Based on legal advice the applicant believed that:-

(a) the Respondent herein is a public officer to whom a duty is bestowed upon to swear him in but who rather blatantly ignores and or refuses to do so and as such was and is in breach of the National values and principles of governance as envisaged in the Constitution of Kenya 2010 and further his actions are *ultra vires*.

(b) further as a public officer the Respondent is not supposed to be partisan upon assumption of the office of the Speaker to the County Assembly of Nyandarua as doing so automatically brings in conflict of interest between the Speaker's personal interests and public interest.

(c) further to (b) above, the Speaker's conduct amounts to compromising public or official interests in favour of a personal interests as well as demeaning the office he holds.

(d) the Honourable court upon his request, quash the decision made by the speaker Count Assembly of Nyandarua and compel him to conduct his duty of swearing the applicant in to the County Assembly of Nyandarua.

(e) once an individual is gazetted the law is that the hands of the Speaker are tied to exercising the duty to swear him in as in the applicant's case and nothing else.

(f) without prejudice to the foregoing, once gazettement is made, the same can only be reversed by a Court of law and not any other person save that the person who caused it to be published may withdraw it for just cause and as such the Speaker acted *ultra vires* his powers by disregarding the gazette notice and refusing to swear the applicant in.

9. According to the applicant, the speaker breached the rules of natural justice and the principle of governance when he entertained an objection by a one member of the County Assembly by the name **Moses Kimani** to the swearing in of the Applicant herein an issue that was beyond their scope and thus *ultra vires*. Further, by virtue of the speaker giving more reasons in his decision than those provided in objection, it is evident that he is guilty of breach of legitimate expectation and that the vendetta a held by a one **Mr. Moses Kimani** the County Assembly member for Weru and the Speaker is further aggravated when they opt to go on to comment on their unlawful act of failing to swear the *Ex parte* Applicant herein in Inooro Radio at Engineer Catholic Hall on the 8th November, 2013 chest thumping themselves that they are authority and no other.

10. In the applicant's view, it was evident from the foregoing that the conduct of the speaker county assembly of Nyandarua in actual sense reveals that he stage managed the refusal to swear in the *Ex parte* Applicant herein and uses funny reasons as scape goat.

11. In a supplementary affidavit sworn by the Applicant on 2nd March, 2014, it was deposed that the complaint by the Respondent is informed by misapprehension of the meaning and/or purport of **Article 177(1)(c)** as the fail to notice that the applicant was nominated under marginalized category; that the law does not leave it to be interpreted and/or for interpretation by all and sundry, notwithstanding whether one holds the office of Speaker or, other, and that it is a question of policy left on qualified political party leadership to decide the order of priority for nomination of a nominee against another would be interested and would be equally qualified person; that the applicant liaised with TNA which reconfirmed that they nominated him in consideration of a number of factors that include the age and social origin by which the elderly and experienced had been left out and/or marginalized, as the other special seats were filled by the youth, and persons with disability; and that he was a member of TNA and had duly paid for his nomination and thus was duly qualified to be nominated as he was.

12. In the applicant's view, the Respondent's replying affidavit filed only clouded the real issue before the court which is the illegal acts of the Respondent to refuse to swear him as a member of the County Assembly of Nyandarua as required by law despite having been duly nominated and gazette. Based on his advocate's advice he deposed that:

(a) Judicial Review matters does not look at the merit of the decisions complained against but whether the said decision was lawful.

(b) The Respondent's replying affidavit only deals with the merit of his decision and not whether he had the power to do so.

(c) The Respondent had appointed himself the adjudicator of issues party nomination and gazettement without any legal basis.

(d) The Respondent is confirming that he usurped the role of the various forums created by statute to deal

with issues party nominations and elections.

(e) The Respondent appears to be ill equipped with the knowledge and the ambit of the powers bestowed upon him as the Speaker of a County Assembly and has instead proceeded to display his political bias and partisanship in a manner likely to render him unfit to hold the position of a Speaker of the County Assembly.

13. It was submitted on behalf of the applicant that the applicant was never afforded an opportunity to respond to the allegations raised by the interested party on the floor of the house on the day of the swearing in. It was submitted that there is no provision of the law allowing the Respondent to swear in a gazetted nominee. It was submitted that the electoral disputes are settled by the IEBC pursuant to Article 88 of the Constitution and the Political Parties Tribunal pursuant to the provisions of the ***Political Parties Act*** Cap 7A, laws of Kenya hence there is a clear procedure that ought to have been followed but was ignored and reliance was placed on the decision of **Ong'udi, J** in **Wachira Martin Ngiri & 3 Others vs. IEBC & 5 Others e[2013] KLR**.

14. It was submitted that all the issues raised against the nomination list by TNA were adjudicated by the IEBC Dispute Resolution Committee and neither the Respondent nor the interested party raised any issues. With respect to the need to comply with the rules of natural justice the applicant relied on this court's decision in **R vs. Public Procurement Complaints Review & Appeals Board & Another ex parte Invesco Assurance Co. Ltd [2014] eKLR.**

15. It was therefore submitted that e Respondent's action was motivated by personal animosity, spite or vengeance and made in bad faith and that the Respondent cannot purport to be the adjudicator of issues of party nominations and gazettement without legal basis, as the same is a preserve of TNA, IBC and the High Court and upon gazettement the same can only be reversed by a Court of law hence the Respondent acted *ultra vires*.

16. It was therefore submitted that the Respondent's decision as supported by the interested party reeks of illegality, irrationality and procedural impropriety hence the application ought to be allowed. In support of these submissions the applicant also relied on ***Judicial Review of Administrative Action in Kenya*** by **Dr. P L O Lumumba** and **P O Kaluma**, **Korir, J's** decision in **Republic vs. Kenya Bureau of Standards & 2 Others ex parte Gladys Nyawira Wanjohi** and **Pastoli vs. Kabale District OCAL Government Council & Others [2008] 2 EA 200**.

Respondent's Case

17. In response to the application the Respondent, **James Wahome Ndegwa**, filed a replying affidavit sworn on 12th February, 2014.

18. According to him, being lawful elected speaker of County Assembly of Nyandarua County one of his duties is to swear into office all elected and nominated members of the County Assembly. However, the extended dispute arose when he declined to swear in the *Ex parte* Applicant herein as a nominated member to represent the list of the marginalized group after an objection was raised on the floor of the house for reasons that the said nomination was unlawful, illegal, unconstitutional and an affront to the rule of law. According to him, the nominating party had also denounced the name of the *Ex parte* Applicant before a tribunal constituted by the IEBC.

19. In his view, as per the Constitution, for one to be nominated in the list of the marginalised group, he or she had to have at least one of following:

(a) Come from a marginalized community or group

(b) Be disabled and/or

(c) Be over 18 years but under thirty-five years.

20. Further, **Article 260** of the Constitution of Kenya 2010 defines marginalized communities and groups and defines disability as including "any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have a substantial or long-term effect on an individual's ability to carry out ordinary day-today activities". In his view, the *Ex parte* Applicant does not have any physical, sensory, mental, psychological or other impairment, condition or illness and therefore, does not qualify to represent the group of disabled group in Nyandarua County.

21. Apart from that he contended that since the same article defines youth as meaning the collectively of all individuals in the Republic who have attained the age of eighteen years but have not attained the age of thirty-five years the *Ex parte* Applicant does not fall under the definition of a youth and therefore cannot be nominated to represent a group which he himself is not considered as a youth by the Constitution of Kenya, 2010.

22. He averred that the *Ex parte* Applicant had contested in the TNA party nominations for Weru ward and was therefore unlikely that he could also have been in the parallel party list since **Section 34(9)** of the ***Elections Act,* 2011** provides that only the presidential candidate and his running mate can be in both ballot paper and the party list. Further **Section 36(1) (3**) of the ***Elections Act, 2011*** provides that a party list in allocating special seats under **Article 177 (1) (a**) of the Constitution of Kenya, 2010 shall prioritise a person with disability, the youth and any other candidate representing a marginalized group. Therefore from the said **Section 36(1)(3)** of the ***Elections Act, 2011*** the Applicant's nomination was not one of priority since as a matter of fact he was not a person with disability, a youth and any other marginalized group.

23. The Respondent therefore deposed that two wrongs cannot make it right and that is why he could not swear in the Applicant just because his party had allegedly nominated him and the IEBC had as well irregularly gazetted his name, the lawful way ought and should be followed. Further as leader and with the guidance of Chapter Six of the Constitution of Kenya, 2010 he chose to follow the spirit the Constitution which does not tolerate impunity, when he took oath of assumption of office he took upon myself the duty to always respect, uphold, preserve, protect and defend the Constitution of the Republic of Kenya.

24. He further asserted that the Ex parte Applicant's prayer that there be an order of certiorari to bring to the High Court the decision ruling order and or proceedings made between the 8th August 2013 to 10th September 2013 for quashing has no merit and that the said decision, ruling and/or dated 10th September 2013 should instead help this honourable court determine this matter in a just and fair manner to the satisfaction of all parties herein and to upholding the provisions of the Constitution of Kenya, 2010. Since the *Ex parte* Applicant alleges no injustice occasioned to a particular group of persons that he purports to be representing and no particular prayer is made by him for the benefit of the group he purportedly represented, the application herein is mischievous, and amounts to engaging the honourable court to undertake a barren academic discourse.

25. It was the Respondent's case that the *Ex parte* Applicant's continuous reference of JR No. 218 of 2013, Petition 238 of 2013 is unnecessary and illogical since the *Ex parte* Applicant's case herein and the said Jr. No. 218 of 2013, Petition 238 of 2013 have completely different facts and the issues for determination are completely different. To him, his ruling never breached any of the *Ex parte* Applicant's legitimate expectation and denied discussing the refusal to swear him in any other forum apart from the floor of the August house.

26. He therefore averred that the Applicant had not demonstrated at all any grounds to merit grant of orders prayed for and I pray that his application be dismissed with costs.

27. It was submitted on behalf of the Respondent that t was incumbent upon the Speaker in deciding whether or not to swear the applicant to consider whether such decision would be in line with the Constitution which he swore to protect and defend. Therefore in deciding not to swear the applicant, it was submitted that the Speaker did not act ultra vires.

28. It was further submitted based on **Majanja, J's** decisions in **Republic vs. Registrar of Companies ex parte James Banga Yankan & 6 Others [2013] eKLR** and **Republic vs. Commissioner of Lands & Another ex parte Jimmy Mutinda [2014] eKLR**, the case of **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** and this court's decision in **Republic vs. City Council of Nairobi & 2 Others [2014] eKLR** that to issue the order of mandamus in the circumstances herein would not be efficacious and would be in vain.

29. It was submitted that the applicant in seeking an order of mandamus to compel an act which has already been done hence the said relief cannot issue. It was further submitted that the applicant has not demonstrated that the Speaker was under any obligation to swear the applicant and had neglected to do so. In so submitting the Respondent relied on **Kenya National Examinations Council vs. Republic [1997] eKLR**, **Welamondi vs. Chairman of Electoral Commission of Kenya Bungoma HC Misc. App. No. 81 of 2002** and **Peter Odoyo Ogada & 9 Others vs. IBC & 14 Others [2013] eKLR**.

30. To the Respondent, the order os certiorari being discretionary can be refused even where grounds exist and reliance was placed on **Republic vs. Registrar of Kenya Industrial Property Institute ex parte Peter Waite Magua**.

31. It was submitted that in line with the duty conferred upon the Speaker by the Constitution he after considering the views of members in the County Assembly as well as more importantly the provisions of the Constitution arrived at the decision not to swear in the applicant as to do so would be to further an illegality and act in blatant disregard of the Constitution hence the orders sought herein ought not to be granted. **Interested Party's Case.**

32. On his part the interested party herein, **Samuel Kimani Gachuhi**, filed a replying affidavit on 14th May, 2014.

33. According to him, he was a member of County Assembly for Weru Ward in Nyandarua County duly elected on TNA ticket to represent the wishes and aspirations of the residents of Weru Ward in the County Assembly of Nyandarua. He deposed that on or about 17th January 2014, the *Ex parte* Applicant herein together with himself and other candidates participated in the TNA party nominations for Weru Ward held on the 17th January 2013 wherein he was duly declared the winner and authorized to contest the said seat on the TNA ticket in the General Elections held on 4th March 2013.

34. In his view, in accordance with the provisions of **Section 35(1)** of the ***Elections Act No. 24 of 2011,*** the *Ex parte* Applicant herein having applied for and contested in the said TNA nominations for Weru Ward could not have and was not qualified for and or eligible to be nominated as a Member of the County Assembly of Nyandarua by the said TNA, any other political party or any other body or at all as contemplated under **Article 90** and **177** of the Constitution of Kenya, 2010. According to him, the *E parte* Applicant herein is a very well-known resident of Weru Ward and an old male adult of sound mind and of good physical health and attributes with no disability at all and as such is not at any material time eligible and or qualified to be nominated as a member of the County Assembly of Nyandarua County in the marginalized group pursuant to the provisions of **Article 260** or **197** of the Constitution of Kenya, 2010 or at all. Further, the *Ex parte* Applicant herein being an adult male could not qualify for nomination as a member of county assembly since the elected members of the Nyandarua County Assembly were all male and hence his purported nomination violated Article 197(1) of the Constitution of Kenya, 2010 which provides that not more than two thirds of the members of the County Assembly shall be of the same gender.

35. It was therefore the interested party's position that that the purported nominations and or the publication of the *Ex parte* Applicant as a nominated member of the County Assembly of Nyandarua was therefore illegal, unconstitutional and fraudulent therefore null and void *ab initio* hence the intended swearing in of the *Ex parte* Applicant as a nominated member of the County Assembly of Nyandarua was a patent illegality and blatant disregard of the provisions and the spirit of Constitution of Kenya 2010, the applicable laws of the land and the wishes of the people of Nyandarua County in particular the youth, women and the marginalized groups.

36. As a duly elected member of the County Assembly of Nyandarua and as a patriotic and law abiding citizen of this Country, the interested party believed that he had the right, obligation and constitutional mandate to ensure that the provisions, letter and spirit of the Constitution of Kenya was dully observed and respected and as such his objection to the swearing in of the *Ex parte* Applicant was lawful, justified, valid and made honestly, in good faith and in the interest of justice and in fulfilment of his mandate as a member of County Assembly for Weru Ward.

37. According to him, the *Ex parte* Applicant has made numerous malicious, untrue and scandalous allegations against him which allegations the *Ex parte* Applicant knew to be untrue, false and unsubstantiated but spuriously been made with the sole and malicious intention to disparage and injure his character and standing in the society particularly in the eyes of the residents of Weru Ward and Nyandarua County and also to seek the court's sympathy to accept his otherwise illegitimate and illegal nomination. He further denied that he had colluded with the Speaker of Nyandarua County or with any other person or group of persons to block the nominations of the *Ex parte* Applicant herein or at all and that he did not hold any vendetta, ill will or malice against the Ex-parte Applicant as alleged or at all but that e verily and honestly believed that the said purported nomination was a violation of the constitution and the laws of the land. He reiterated that the purported nomination of the *Ex parte* Applicant was unlawful and patently against public interest and policy and the spirit of the constitution and prayed that the same be disallowed by the honourable court.

38. It was submitted that the Respondent who is the presiding officer of the county assembly is charged with the constitutional responsibility of not only ensuring that the County Assembly is constituted in terms of Article 175 of the Constitution but also that he members of the said Assembly are persons who are duly qualified under Article 177(1) of the Constitution. It was submitted that the purported publication of the name of the ex parte applicant by IEBC as representative of the marginalised group was itself unlawful and in flagrant violation of Article 90 of the Constitution and ought to have been declared null and void ab initio.

39. It was submitted that the applicant has failed to show any law or procedure which was violated and that he failed to show that there was any requirement for a notice to be given before raising the issue.

40. According to the interested party, based on **John Harun Mwau vs. Andrew K. Mullei & 3 Others [2009] KLR** as read with **Prebble vs. Television New Zealand [1994] 3 All ER 407**, the Court cannot question the proceedings and decisions stemming from Parliament. Based on this Court's decision in **Commissioner of Lands & Another vs. Kithinji Murugu M'agere [2014] eKLR**, it was contended that the order of mandamus cannot issue to compel an illegal action.

Determinations

41. Having considered the issues raised in the instant application, this is the view I form of the matter.

42. The first issue for determination is whether the decision of the Respondent can be questioned before this Court. In **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, **Ngcobo, J** who delivered the leading majority judgement concerning a matter relating to the National Council of Provinces (NCOP) which I presume is the equivalent of our Council of Governors, expressed himself as follows:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court…It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily**

ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only."

43. The learned continued:

"A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the legislature. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section

167(4)(e) of the Constitution. Before leaving this topic, there is one matter to which I must refer. The complaint is directed at the NCOP and not at the National Assembly. In terms of section 42(1) of the Constitution, Parliament consists of the National Assembly and the NCOP. The national legislative authority vests in Parliament. These democratic institutions represent different interests in the law-making process. The National Assembly represents "the people . . . to ensure government by the people". The NCOP "represents the provinces to ensure that provincial interests are taken into account" in the legislative process.29 Both must therefore participate in the lawmaking process and act together in making law to ensure that the interests they represent are taken into consideration in the law-making process. If either of these democratic institutions fails to fulfil its constitutional obligation in relation to a bill, the result is that Parliament has failed to fulfil its obligation. I am therefore satisfied that the question whether the NCOP has failed to facilitate public involvement in its legislative processes concerns a dispute over whether Parliament has fulfilled a constitutional obligation as contemplated in section 167(4)(e). Only this Court has the jurisdiction to decide such a dispute."

44. It was further held

> **"The obligation of Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, raises the question of the competence of this Court to grant relief in respect of the proceedings of Parliament. The enforcement of the obligation to facilitate public involvement in the legislative processes of Parliament invariably requires this Court to interfere with the autonomy of the principal legislative organ of the state. This interference infringes upon the principle of the separation of powers. Yet, as will appear later in this judgment, the enforcement of the obligation to facilitate public involvement in the law-making process is crucial to our constitutional democracy".**

45. He however held:

> **"Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a "settled practice" or general rule of jurisdiction that governs judicial intervention in the legislative process. The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or "settled practice". Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object. The primary duty of the courts in this country is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice." And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand."**

46. The Judge added:

> **"I have found that the NCOP failed to fulfil its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers. This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, 'there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.' But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government."**

47. In conclusion the learned Judge held:

> **"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution o say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme . . . ; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid……."**.

48. In our jurisdiction the majority of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 eKLR** pronounced itself as follows:

> **"The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate. It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation. Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in *Biti & Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another* (46/02) (2002) ZWSC10....held: *"In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament….In Smith vs. Mutasa it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens…."* The position is not different in the case of Canada, as emerges from *Amax Potash Ltd. vs. Government of Saskatchewan* [1977] 2 S.C.R. 576 [at p.590]: *"A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."* This principle is clearly stated in other**

Canadian cases as well; for instance, *Re Manitoba Language Rights* (1985) 1 SCR 721. It is a long-established principle in the United States, by the well-known decision in *Marbury vs. Madison,* 5 U.S. 137 (1803), where Marshall, C.J. thus held: *"So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. "If then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislatures, the Constitution, and not such ordinary act, must govern the case to which they both apply."* And in the South African case, *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11, it was held [para.38]: *"…under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations."* On the possibility of the Court intervening in the process of legislation at any of its several stages of enactment, the Court in the *Doctors for Life International case,* thus held [para.55]: *"If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost."* Is it conceivable that the Court may countermand ongoing legislative processes? This question is answered in the *Doctors for Life case* [para.68]: *"Courts [in the Commonwealth] have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a 'settled practice' or general rule of jurisdiction that governs judicial intervention in the legislative process."*

49. The Court proceeded to hold that:

"It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of *the exigency of each case*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution. It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another. However, where a question arises as to the interpretation of the Constitution, this Court,

being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution…Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts and, ultimately, the Supreme Court."

50. Article 165(3)(b) and (d)(i) and (ii) of the Constitution bestows upon this Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of this Constitution and 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.

51. In the matter before the Court, it is contended that the action taken by the Respondent was ultra vires his powers and that it was in breach of the Rules of natural justice. Clearly the applicant is contending that his rights under Articles 47 and 50 of the Constitution had been infringed and that the action taken by the Respondent said to be done under the authority of the Constitution or legislation is inconsistent with, or in contravention of, this Constitution by virtue of being *ultra vires* the powers of the Respondent. In my view it is only this Court that has the power to determine these issues. It is accordingly incorrect to contend that this Court has no such power.

52. As was held in **Kipkalya Kiprono Kones vs. Republic & Others Ex Parte Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226; [2008] 3 KLR (EP) 291:**

"Section 123 of the Constitution is clearly intended to ensure that the rule of law which is the primary duty of the Courts to enforce, is complied with by all organs of the state, and no state organ is permitted to say that the Constitution confers on it powers the exercise of which cannot be questioned by the Courts."

53. Since it is admitted by the Respondent and the interested party that the Respondent is a State Organ, his/her powers can properly be challenged before this Court.

54. The main issue for determination in this matter in my view is whether the Respondent in declining to swear in the applicant acted within his powers or *ultra vires* the said powers. Article 177 of the Constitution provides for the membership of the County Assemblies. Nowhere in that Article is the Speaker expressly empowered to determine who sits in the National Assembly. Article 178(2)(a) of the Constitution empowers the Speaker to preside over the County Assembly. It is contended the Respondent is charged with the Constitutional responsibility of not only ensuring that county Assembly is constituted in terms of Article 175 of the Constitution but that the members of the County Assembly are persons duly qualified under Article 177(1) of the Constitution.

55. With due respect to the Respondent the Respondent is attempting to usurp the powers which do not belong to him. The Respondent needs to be reminded of this Court's decision **Constitutional Petition**

Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others in which it was held that:

> "**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."**

56. Article 88(4)(e) clothes the IEBC with powers to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

57. Section 74 of the ***Elections Act*** provides:

> ***(1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.***
>
> ***(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.***
>
> ***(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.***

58. As was held in **The National Gender and Equality Commission vs. The Independent Electoral and Boundaries Commission & Another [2013] eKLR**:

> **"Section 34(6) of the Elections Act, 2011 specifically provides that, "The party lists submitted to the Commission under this section shall be in accordance with the Constitution or the nomination rules of the political party concerned." This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances...While the parties have submitted at length on the need to define the terms such as "special interest" to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinise the lists forwarded to it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists."**

59. The question that arises is therefore whether at the time of the swearing in of the Members of the County Assembly who have otherwise been duly nominated, the Speaker of the County Assembly is empowered to decline to swear the said nominated members on the ground that the said members do not meet the qualification for nomination. The issue of the purpose of swearing in was dealt with in **Kipkalya Kiprono Kones vs. Republic & Others Ex Parte Kimani Wanyoike** (supra) where it was held by the Court of Appeal as follows:

> **"It is within the mandate of the Electoral Commission, where the name of the person**

proposed for nomination… is unqualified to return the name of the unqualified person to the relevant parliamentary political party and ask that party to propose the name of a qualified person as one would hardly expect the Commission headed by a person who has held or is qualified to hold the office of a Judge to forward to the President the name of an unqualified person to be appointed as a member of the National Assembly…Apart from such matters, the role of the commission is to receive names from the parliamentary political parties and then forward the names to the President for appointment and once the President has appointed the persons whose names are submitted to him by the Commission, those persons become nominated members of the National Assembly and can only await the swearing in by the Speaker and it is to be noted that all members of the Assembly, whether elected or nominated must be sworn-in by the speaker…*So that it is not the swearing-in by the speaker which confers the right to membership of the Assembly; that right is conferred by election, in case of an elected member and by appointment by the President, in case of a nominated member and the swearing-in by the Speaker is merely to enable the member to participate in the proceedings of the Assembly after the Speaker has been elected*. [Emphasis mine].

60. It was contended by the Respondent that by virtue of his Oath of Office as required by Article 74 of the Constitution as read with the First Schedule to the County Governments Act No. 17 of 2012, the Respondent swore to amongst other things uphold, preserve, protect and defend the Constitution and it was therefore incumbent upon the Speaker in deciding whether or not to swear in the applicant to consider whether such decision would be in line with the Constitution which he swore to protect. Whereas this position is generally correct, it must be noted that this power is not a preserve of the Speakers of the County Assemblies or State Organs or Officers. This is a power reserved to all Kenyans by the Constitution since Article 3(1) of the Constitution provides that *"Every person has an obligation to respect, uphold and defend this Constitution."* However this does not give every Kenyan the power to authoritatively interpret the Constitution. Whereas every Kenan is entitled to hold an opinion as to what a particular provision of the Constitution means, it is only the Curt which has power to authoritatively interpret the Constitution and by purporting to authoritatively interpret the Constitution and arrive at a decision whose effect was to overrule the IEBC, the Respondent was with due respect a pretender to the throne.

61. The applicant having been duly nominated the Respondent was under an obligation to swear him. A *mandamus*, it has been held, issues to enforce a duty the performance of which is imperative and not optional or discretionary. The order is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right. See **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707.**

62. In this case the applicant had acquired a legal right to be sworn in as a Member of the County Assembly for Nyandarua. It is clear that there is no specific legal remedy for enforcing that right. In these circumstances a mandamus would issue. Whether his nomination was proper or not is another matter altogether. However the Respondent had no powers to bar him from or decline to swear him as such. If there was a problem with his nomination the Respondent and the interested party ought to have resorted to legal means of declaring him unsuitable or unqualified to sit in the Assembly in the capacity in which he was nominated but had no powers to take upon themselves to declare the applicant unsuitable to serve as a nominated member in the Assembly. To urge this Court to find that the applicant was not qualified to sit in the said Assembly amounts to urging the Court to usurp the powers of the IEBC. That this Court cannot do so more so when there is no application or petition before this Court seeking such a remedy.

63. I therefore have no hesitation in finding that the Respondent's action was ultra vires.

64. Apart from that it is not disputed that the applicant was not heard before a decision adverse to his interests and legitimate expectations was taken. That was clearly in violation of Article 47 of the Constitution.

65. In the premises I find merit in the Notice of Motion dated 10th December, 2013.

66. Since I am not satisfied that there are other convenient, beneficial and effective remedies, there is no reason why the orders sought herein cannot be granted.

Order

67. Consequently the orders which commend themselves to me and which I hereby grant are as follows:

1. An order of certiorari is hereby issued bringing to this Court the decision, ruling order and or proceedings made between the 8th day of August, 2013 to 10th day of September 2013 by the Respondent for the purposes of being quashed which decisions are hereby quashed.

2. An order of mandamus is hereby issued compelling the speaker of the County Assembly of Nyandarua Honourable Ndegwa Wahome to swear in Mr. David Mwangi Ndirangu the Applicant herein to the County Assembly of Nyandarua and offer him all the benefits that flows to the office holder of a nominated member to the County Assembly of Nyandarua unless he is otherwise lawfully disqualified.

3. The costs of this application are awarded to the applicant.

Dated at Nairobi this 21st day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wilson for the Applicant

Mr Githinji for the Respondent

Cc Patricia