



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 549 OF 2012

BETWEEN

MICHAEL WACHIRA NDERITU 1ST PETITIONER
SILVESTER KIHURIA MURIITHI 2ND PETITIONER
DANIEL WACHIENI KARINGA 3RD PETITIONER
KIAMBITI K. KIHUMBA 4TH PETITIONER

AND

MARY WAMBUI MUNENE

AKA MARY WAMBUI 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS ... 2ND RESPONDENT
HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 1ST INTERESTED PARTY

**THE NATIONAL ALLIANCE PARTY (TNA) 2ND INTERESTED
PARTY**

RULING

Introduction and background

1. The petitioners are registered voters in Othaya Constituency, Nyeri County. Their grievance arises from the fact that the 1st respondent, Mary Wambui, has declared her resolve to present herself as

a candidate for the office of Member of Parliament for the Othaya Constituency.

2. The issue for determination in this case is whether the High Court can determine and declare that a person who has expressed interest in vying for political office has educational qualification and is a person with the requisite integrity in terms of **Chapter Six** of the Constitution.

Petitioners' Case

3. The petitioners' case against Mary Wambui is twofold. The first grievance is that she does not meet the education threshold required for one to qualify for election as a Member of Parliament.
4. The second grievance is that Mary Wambui has been adversely cited in various official reports prepared by constitutional bodies mandated to inquire into matters of public interest. These reports include a report by the Kenya National Commission on Human Rights titled, ***"On the Brink of the Precipice: A Human Rights Account of Kenya Post – 2007 Election Violence." The Report of the Commission of Inquiry into the 2007 Post Election Violence*** (the Waki Report); the report titled ***"Report of Investigation into the Conduct of the Artur Brothers and their Associates"*** prepared by the National Assembly Departmental Committees on Administration, National Security and Local Authorities and Administration of Justice and Legal Affairs and the 2006 Shadrack Kiruki led Commission of Inquiry, ***"Report on the Commission of Inquiry into the activities of the Artur Brothers."*** The petitioners also allege that the Mary Wambui has been adversely mentioned in an investigative journalistic piece which aired in the local media by the title, ***"Jicho Pevu"*** and other press reports.
5. As a result of the adverse reference, the petitioners contend that the Mary Wambui does not meet the test of leadership and integrity spelt out in **Chapter Six** of the Constitution on ***"Leadership and Integrity"*** and that of the ***Leadership and Integrity Act (Act No. 19 of 2012)***. The petitioners also contend that the issues touching on the integrity, competence and suitability of the 1st respondent have not been conclusively investigated and are unresolved and the 1st interested party, the Independent Electoral and Boundaries Commission ("IEBC") may register her as a candidate for election to the office of Member of Parliament in accordance with **Article 88(4)(f)** contrary to the national values and principles enshrined in **Article 10** and in breach of the rights and fundamental freedoms of the petitioners.
6. The petitioners aver that there is sufficient and plausible information available for the Attorney General ("AG") and the 3rd respondent, the Director of Public Prosecutions ("the DPP"), to warrant proper inquiry and that the two institutions have failed to act on this information which is in the public domain. The petitioners contend that only a proper inquiry by the AG and the DPP into allegations made against Mary Wambui can ascertain her suitability to contest an election.
7. The petitioners case is also demonstrated by the reliefs sought in the petition dated 29th November 2012 as follows;
 1. *Pending the hearing and determination of the petition, conservatory orders be issued in terms of the Chamber Summons filed herewith.*
 2. *An injunction directed at the 1st respondent compelling her to submit to the petitioners certified copies of her O-level and other educational certificates.*
 3. *A declaration that there are serious and plausible allegations levelled against the 1st respondent in;*

- a. *The report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled “On the Brink of the Precipice A Human Rights Account of Kenya’s Post 2007 Election violence.”*
- b. *The report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007-2008 Post Election Violence commonly called “The Waki Report”.*
- c. *The Parliamentary Report on the Investigation into the Conduct of the Artur Brothers and their Associates.*
- d. *The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brothers, Commissioned by His Excellency the President of Kenya, Mwai Kibaki and released in August 2006.*
- e. *The Journalistic Investigative Report by the Kenya Television Network (KTN) titled “JICHO PEVU”*

Which allegations demonstrate that the 1st Respondent by herself or in association with others has breached Articles 10 and 75(1) of the Constitution of the Republic of Kenya.

4. *A declaration that the 2nd and 3rd respondent have failed and or neglected to perform their constitutional duty to inquire into the allegations levelled against the 1st respondent in*
 - a. *The report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled “On the Brink of the Precipice A Human Rights Account of Kenya’s Post 2007 Election violence.”*
 - b. *The report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007-2008 Post Election Violence commonly called “The Waki Report”.*
 - c. *The Parliamentary Report on the Investigation into the Conduct of the Artur Brothers and their Associates.*
 - d. *The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brothers, Commissioned by His Excellency the President of Kenya, Mwai Kibaki and released in August 2006.*
 - e. *The Journalistic Investigative Report by the Kenya Television Network (KTN) titled “JICHO PEVU”*

AND such failure and/or neglect is in breach of Articles 27(1), 35, 47, 156 (6), 157 (4) and 157 (11) of the Constitution of the Republic of Kenya.

5. *An injunction do issue compelling the 2nd and 3rd respondents to inquire into the Allegations against the 1st respondent in:*
 - a. *The report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled “On the Brink of the Precipice A Human Rights Account of Kenya’s Post 2007 Election violence.”*
 - b. *The report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007-2008 Post Election Violence commonly called “The Waki Report”.*
 - c. *The Parliamentary Report on the Investigation into the Conduct of the Artur Brothers and their Associates.*
 - d. *The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brothers, Commissioned by His Excellency the President of Kenya, Mwai Kibaki and released in August 2006.*
 - e. *The Journalistic Investigative Report by the Kenya Television Network (KTN) titled “JICHO PEVU”*

AND to make public the results of their findings pursuant to their Constitutional mandate and duty as set out at Articles 35, 47, 156 (6), 157 (4) and 157(11) of the Constitution of the Republic of Kenya.

6. A declaration that the allegations raised in:

- a. The report by the National Commission on Human rights (now the Kenya Human Rights and Equality Commission) titled “On the Brink of the Precipice A Human Rights Account of Kenya’s Post 2007 Election violence.
- b. The report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007-2008 Post Election Violence commonly called “The Waki Report”.
- c. The Parliamentary Report on the Investigation into the Conduct of the Artur Brothers and their Associates.
- d. The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brother, Commissioned by His Excellency the President of Kenya, Mwai Kibaki and released in August 2006.
- e. The Journalistic Investigative Report by the Kenya Television Network (KTN) titled “JICHO PEVU”

Demonstrate that the 1st respondent does not meet the principles and values set out at Articles 10 and 73 of the Constitution of the Republic of Kenya.

7. A declaration that the 1st respondent does not meet the principles and values set out at Articles 10 and 73 of the Constitution of the Republic of Kenya.

8. A declaration that on account of the serious and plausible allegations contained in;

- a. The report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled “On the Brink of the Precipice A Human Rights Account of Kenya’s Post 2007 Election violence.”
- b. The report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007-2008 Post Election Violence commonly called “The Waki Report”.
- c. The Parliamentary Report on the Investigation into the Conduct of the Artur Brothers and their Associates.
- d. The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brother, Commissioned by His Excellency the President of Kenya, Mwai Kibaki and released in August 2006.
- e. The Journalistic Investigative Report by the Kenya Television Network (KTN) titled “JICHO PEVU”

The said 1st respondent does not meet the requirements of Articles 73 and 99 (1) of the Constitution of Kenya.

9. A declaration that the 1st respondent does not satisfy the educational, moral and ethical requirements prescribed by the Constitution for a person aspiring for election to the office of Member of Parliament.

10. A declaration that the registration of the 1st respondent as a candidate for election to the office of Member of Parliament shall subjugate and breach Articles 73, 88(4), 88(50), 99(1), 99(2), 156(6), 157(4) and 157(11) of the Constitution of the Republic of Kenya.

11. A permanent injunction directed at the interested parties restraining the interested parties by themselves, their employees and/or agents from nominating and or registering the 1st respondent as a candidate for election to the office of Member of Parliament for Othaya Constituency or any elective office.

12. A declaration that the respondents have by their acts and omissions set out in this petition threatened and or infringed the petitioners rights under Articles 10, 10(2), 27(1), 27(4), 35, 38(1), 38(2), 47, 73, 73(2), 75(1), 88(4)(f), 88(50), 99(1), 99(2), 156(6), 157(4) and 157(11) of the Constitution of Kenya.

13. Any other order that this Honourable Court shall deem mete and just.

14. The costs of this petition be awarded to the Petitioners.

8. The petition was accompanied by a chamber summons dated 29th November 2012 which seeks the following orders;
 1. *That on the grounds more specifically set out in the Certificate of Urgency filed herewith this application be certified urgent and service thereof be dispensed with in the first instance.*
 2. *That pending the hearing and determination of this application a conservatory order do issue restraining the interested party from nominating and for registering the 1st respondent as a candidate for the office of Member of Parliament for Othaya Constituency or any other elective office.*
 3. *That pending the hearing and determination of the Constitutional petition filed herein, an order do issue compelling the 1st respondent to release to the petitioners certified copies of her O-level and other educational certificates.*
 4. *Pending the hearing and determination of this petition filed herein, an order do issue directing the 2nd and 3rd respondent to investigate and make public the finding regarding the allegations made against the 1st respondent in the following reports;*
 - a. *The report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled "On the Brink of the Precipice A Human Rights Account of Kenya's Post 2007 Election violence."*
 - b. *The report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007-2008 Post Election Violence commonly called "The Waki Report".*
 - c. *The Parliamentary Report on the Investigation into the Conduct of the Artur Brothers and their Associates.*
 - d. *The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brother, Commissioned by His Excellency the President of Kenya, Mwai Kibaki and released in August 2006.*
 - e. *The Journalistic investigation reports cited in the petition and the affidavit of Michael Wachira Nderitu sworn in support thereof.*
 5. *Pending the hearing and determination of the petition filed herein an injunction do issue directed at the 2nd and 3rd respondents compelling them to release to the public;*
 - a. *The Report of the Commission of Inquiry into the Artur Brothers chaired by former Commissioner of Police Mr Shadrack Kiruki.*
 - b. *The names of persons contained in the Envelope as issued by the Commission of Inquiry into Post Election Violence commonly referred to as the Waki Report.*
 6. *Subsequent to the 1st, 2nd and 3rd respondents' satisfactory compliance with Orders 3 and 4 above, the petitioners be at liberty to appropriately amend any of the documents filed herein, and or file any such documents as may be necessary.*
 7. *This Honourable Court be pleased to issue any such further orders as it deems meet and just,*
 8. *The Costs of this Application be awarded to the petitioners.*
9. The petition is supported by the affidavit of Michael Wachira Nderitu sworn on 29th November 2012 which restates the matters in the petition. In addition, the petitioner has annexed the subject reports referred to and excerpts of press reports that have mentioned Mary Wambui adversely.

The Preliminary Objections

10. Prior to the hearing of the application, the 1st respondent through her advocates, Dr Khaminwa, Mr Monari and Mr Njoroge raised preliminary objections to the petition and application. The grounds may be summarized as follows;

- i. The Honorable Court lacks jurisdiction to entertain the petition and the application.
 - ii. The petition and application are premature and therefore an abuse of the court process.
 - iii. The petition and the application are an abuse of the principle of the separation of powers doctrine.
11. The parties duly filed written submissions and made oral arguments in support of and in opposition to the objections. Having heard the matter and considered the submissions, I think the central issue for determination is whether this Court has jurisdiction to entertain this petition. I shall therefore confine my decision to matters that are strictly necessary for the determination of the preliminary objections. In considering this objection, I shall take the facts as pleaded by the petitioners in the petition as true and correct and make my finding thereon (See *Mukisa Biscuit Manufacturing Co., Ltd v West End Distributors Ltd* [1969] EA 696, *George Oraro v Barack Eston Mbaja Nairobi HCCC No. 85 of 1992 (Unreported)* [2005] eKLR.)

Submissions on Jurisdiction

12. The thrust of the 1st respondent's argument is that although the High Court has unlimited original jurisdiction in civil and criminal matters under **Article 165**, in this case the matters complained of are subject to a constitutional and legislative procedures which ought to be followed. Mr Monari, argued that, if in fact the case was dealing with the nomination of Mary Wambui to contest the Othaya Constituency Parliamentary seat then the provisions of **Article 88(4)(e)** ought to be followed. **Article 88(4)(e)** provides that the IEBC shall be responsible for, "*the settlement of electoral disputes, including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results.*" The provisions of **Article 88(4)(e)** are restated in **section 34(e)** of the *Independent Electoral and Boundaries Commission Act, Act No. 8 of 2011 ("IEBC Act")* and **section 74** of the *Elections Act, Act No. 24 of 2011*. Counsel relied on the case of *Narok County Council v Trans Mara County Council (2000) 1 EA 161* as supporting the general principle that where the Constitution or legislation establishes a specific procedure for ventilation of a dispute then that procedure ought to be followed.
13. Mr Monari submitted that the prayers directed to the IEBC, the DPP and Attorney General cannot lie as these offices and the Commission are independent under the Constitution and in the absence of any allegation that they have failed to or refused to carry out their constitutional or statutory mandate, this court should not intervene in their work. Counsel relied on *Francis Anyango Juma v Director of Public Prosecutions and Commissioner of Police Nairobi Petition No.160 of 2012 (Unreported) [2012] eKLR* and *International Centre for Policy and Conflict v Attorney General and Another Nairobi Petition No. 398 of 2012 (Unreported) [2012] eKLR*.
14. The 1st respondent also argued that the court lacks jurisdiction to entertain this cause as there is an absence of justiciable controversy which would entitle the court to exercise its jurisdiction. Counsel relied on several cases; *Patrick Ouma Onyango & 12 Others v Attorney General and Others Nairobi HC Misc. Application No. 677 of 2005 [2005] eKLR* *Anarita Karimi Njeru v Republic (No. 1) [1979] KLR 154* and *Trusted Society of Human Rights Alliance v Attorney General Nairobi Petition No. 229 of 2012 (Unreported)*.
15. The 1st respondent argues that the facts set out in the petition are merely speculative as she has not presented herself for nomination as a candidate for the Othaya Constituency Parliamentary seat. No decision has been made by any person or body in relation to any matter concerning Mary Wambui's right to contest the Othaya Constituency parliamentary seat. Therefore any of the matters presented for determination are matters of "*speculative future contingencies as opposed to actual facts.*"
16. Mr Gachie, opposed these grounds on the basis that the High Court under **Article 165** has jurisdiction to deal with the matters set out in the petition as they fall squarely within the "*questions*" the court is empowered to deal with under **Article 165(3)**. Counsel relied on three cases to support this argument; *Dennis Mogambi Mong'are v Attorney General Nairobi Petition*

No. 146 of 2011 (unreported), Centre for Rights Education and Awareness (CREAW) and Others v Attorney General Nairobi Petition No. 16 of 2011 (Unreported) and judgment by the Supreme Court of Philippines *Angelo P Magno v People of the Philippines and 7 Others GP No. 171542*.

17. Counsel further contended that the argument that the petitioners' grievances do not constitute justiciable controversies cannot stand because a reading of **Article 165(3)(d)** provides that the High Court has jurisdiction to hear "**any question**" and that this broad statement was meant to give the High Court power to listen to anything and it upon hearing the matter that the court will determine whether it has any merit. Mr Gachie submitted that the Court cannot refuse to listen to an aggrieved party and that the court should hear the matter and make a decision on it.
18. Mr Gachie submitted that Parliament has enacted the ***Elections Act, 2011*** and the ***Leadership and Integrity Act, 2012*** which set out educational qualifications of intended state officers as well as other leadership and integrity standards to be met by potential state officers and it is the duty of the High Court to interpret and apply the law in light of the jurisdiction imposed on it by the Constitution. Counsel maintained that the petitioner's case is one founded on the provisions of **Chapter Six** of the Constitution and the matters placed before the Court require the court to address itself to the declarations sought. It is on the basis of these declarations by the Court, that the other bodies like the IEBC would be entitled to take action in accordance with the law. Counsel submitted that there was imminent breach of **Article 99** which sets out the qualifications of a person to be eligible for election and this provision entitles the Court to make such necessary findings which will be a basis for the IEBC and the other bodies to act.
19. Counsel for the 2nd and 3rd respondents and the interested parties did not make any submission and agreed to abide by the outcome of the decision.

Determination

20. The petitioners' case is to be determined in light of the prayers sought in the petition. Prayers 2, 3, 6, 8, 9 and 10 of the petition implicate Mary Wambui's education and integrity qualifications to be a candidate for the Othaya Constituency Parliamentary election. The question for consideration is whether, if all the allegations made in the petition are true, this court can issue these declarations.
21. **Article 99** provides for such qualification for a person to be nominated and elected for the office of Member of Parliament. **Article 99** provides as follows;
- 99.(1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—*
- (a) is registered as a voter;*
 - (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; 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 Independent Electoral and Boundaries 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.

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

22. These qualifications are not self-enforcing but are given effect by the IEBC through the provisions of the **IEBC Act** and the **Elections Act, 2011** which give effect to the various provisions of the Constitution governing the electoral process as a whole, the right to vote and the right to contest elections. The processes governing nomination of candidates for parliamentary elections are set out in **sections 13 and 16** of the **Elections Act, 2011**. In summary, on the nomination date gazetted for that purpose by the IEBC, a candidate nominated by a party or an independent candidate will present himself or herself to the IEBC for nomination and the IEBC will consider whether that candidate meets the constitutional and statutory provisions entitling them to be registered as a candidate nominated to contest the election. Should any dispute arise at this stage as to a candidate's suitability then the provisions of **Article 88(4)(e)** would apply and the IEBC is empowered to deal with any disputes.

23. The question then is whether the petitioner is in the proper forum to agitate the issues relating to the qualification or otherwise of Mary Wambui to be nominated as a candidate. On this score I agree with the position taken by the 1st respondent and the cases cited on her behalf. In this respect I would do no better than quote my decision in **Francis Gitau Parsimei & Others v National Alliance Party and Others. Nairobi Petition No. 356 of 2012 (Unreported)** where I stated, "[5] On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of **Chapter Seven** of the Constitution titled, "**Representation of the People.**" These provisions are operationalized by the **Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011**. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions. [6] It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of the electoral process, this principle has been emphasized time and again in a long line of cases; **The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported), Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, Wanyoike vs Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43.**"

24. I therefore find and hold that if there is any issue of qualification as to whether the Mary Wambui is qualified to be a person to contest or vie for a parliamentary seat it is not a matter for determination by the High Court in terms of **Article 88(4)(e)**. It is a matter to be determined according to the procedures and mechanisms provided by law applicable to the entire electoral process.
25. Similarly, as concerns **Chapter Six** on “*Leadership and Integrity*” **Article 80** has empowered Parliament to, “*enact legislation establishing procedures and mechanisms for the effective administration of this Chapter.*” **Chapter Six** on “*Leadership and Integrity*” captures the desire of Kenyans to instil values of integrity and leadership in those who are entrusted with the responsibility of state and public officers. These provisions are not self-enforcing as **Article 88(5)** is clear that Parliament is required to enact legislation to give effect to those provisions. These provisions have been given effect by the *Leadership and Integrity Act, 2012* which provides for procedures and mechanisms for enforcement.
26. I have considered the petition and supporting affidavit and I do not think that the petitioner has invoked any of the procedures or mechanisms prescribed by the *Leadership and Integrity Act, 2012* and there is no evidence that the petitioner has lodged any complaint or grievance relating to the 1st respondent assuming, and without deciding, that the Act is applicable to Mary Wambui. In any case, my reading of **Article 99(2)(h)**, relied upon by the petitioners, is clear that if any finding of contravention of **Chapter Six** must be made, it must be in accordance with law enacted for that purpose and that law includes the *Leadership and Integrity Act, 2012*.
27. The prayers in the application for conservatory orders and prayers 4, 5 and 11 seek to compel the 2nd and 3rd respondent to inquire into the allegations relating to Mary Wambui. The petitioners have referred to various reports where there are allegations or adverse comments against Mary Wambui. A perusal of the petition does not disclose anything to show that any complaint has been lodged against Mary Wambui and that the AG and DPP have refused to act or acted contrary to the Constitution and the law.
28. The Office of the Attorney General is established under **Article 156**. The AG is the principal legal advisor to the Government, represents the national government in court and other legal proceedings where the national government is a party other than criminal proceedings and performs such other duties as are conferred by legislation or by the President. In carrying out these duties the Attorney General is required to promote, protect and uphold the rule of law and defend public interest. A reading of the petition does not disclose how the AG has failed in exercising the constitutional responsibilities in relation to matter concerning Mary Wambui.
29. The Office of the DPP is constitutionally mandated under **Article 157** to order investigations on any information or allegation of criminal conduct and institute criminal proceedings against any person before any court. This court would not ordinarily interfere in the running of that office and the exercise of its discretion provided it is within the Constitution and the law. The office of DPP is subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution. Apart from the general allegation made against the 1st respondent, there is nothing in the petition that demonstrates any breach of the Constitution or of the petitioners’ fundamental rights (See *Francis Anyango Juma v Director of Public Prosecutions and Commissioner of Police Nairobi* **Petition No. 160 of 2012 (Unreported) [2012] eKLR** and *Chirau Ali Mwakwere v Robert Mabera Nairobi* **Petition No. 6 of 2012 (Unreported) [2012] eKLR**).
30. I agree with Dr Khaminwa, who submitted that Kenya is not a mandatory prosecution State, that the Office of the DPP is vested with the discretion to investigate and prosecute criminal offences. Nothing has been placed before the court to show that this power has been abused or exercised in a manner contrary to the Constitution and the law. I therefore find and hold there is no cause of action against the Attorney General and the Office of the DPP.

31. Finally, I am constrained to agree with the 1st respondent's submissions that this petition is premature and that no justiciable case has been presented for determination. The fact that the petitioner has expressed her intention to contest a parliamentary seat does not of itself give the petitioner the right to move the court to determine certain "questions" relating to her conduct or qualification. Furthermore, the fact that there are allegation in public adverse to the 1st respondent does not create an opportunity for any party to move the court to deal with the "questions" raised by these swirling allegations. The "questions" referred to in **Article 165** are real questions, controversies or disputes placed before the Court for determination.

32. In **Andrew Okiya Omtata Okoiti & Others v Attorney General Nairobi Petition No. 351 of 2012 (Unreported)** the Court observed as follows, "[18] *The petitioners' case is that the High Court should intervene to resolve raging controversies surrounding the Presidential power and capacity to be sued and related important questions that would have grave implications on the implementation of the Constitution. The jurisdiction of the High Court under Article 165 is wide but it does not exist in a vacuum to be exercised when a party requests the Court to answer a "question." The "question" contemplated in Article 165 must arise from a real controversy or case. Indeed the right granted to parties to challenge an act of any person, office, organ or authority contemplates a real controversy or case. [19] Article 22(1), which gives a party the right to enforce the Bill of Rights, states, "Every person has the right to institute Court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or is infringed." A similar provision is to be found at Article 258(1), which provides, "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with a contravention." Thus, for a party to move the court there must be a contravention or threat of contravention. Whether there is a contravention or threat of the Bill of Rights or any other provisions of the Constitution is a question of fact in each case. What is clear, in my view, is that the "questions" referred to in Article 165 cannot be divorced from the factual situation of the case that demonstrates the threat or contravention of specific provisions of the Constitution and not just a controversy in the popular sense of the word. My reasoning is further underpinned by the fact that it is only the Supreme Court that is empowered to issue an advisory opinion under the provisions of Article 163(6) as read with Article 165(5)(a) clearly demonstrating that, apart from the Supreme Court in the instance cited, all other courts are required to address themselves to resolution of real issues (See also **Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011 (Unreported)**, **Harun Mwau and Others v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported)** and **Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)**). [20] In other jurisdictions the exercise of judicial power implies the existence of a true dispute. In the case of **Muskrat v United States 219 US 346(1911)** Justice Day of the United States Supreme Court stated that judicial power is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. Chief Justice Marshall of the United States Supreme Court also observed in the famous case of **Marbury v Madison 5 US 137; 2 L.Ed 60 (1803). 1 Cranch** that the right to declare an Act of Congress unconstitutional could only be exercised when a proper case between opposing parties is submitted for judicial determination. The same principle case be found in other cases from Australia and the United Kingdom to the same effect, i.e., **Re Judiciary Act 1903 – 1920 & In Re Navigation Act 1912-1920 (1921) 29CLR 257** and **The Queen (on the application of (1)A(2)B by their litigation friend and Official Solicitor (3)X (4)Y Claimants v East Sussex County Council [2003] EWHC 167.**"*

33. This case is predicated on the fact that Mary Wambui may on some date in the future present herself for nomination as a candidate for elective office. She has not presented herself and this court can go no further than state that this case is premature. Even if she presents herself to the nominating authority, that authority will be required to address itself to the Constitutional requirements of the position and it is not for this Court to substitute itself at this stage as the body required to satisfy itself that the 1st respondent is qualified in all respects to be nominated as a candidate to vie for a parliamentary seat.

34. The matters I have dealt with are sufficient to dispose of the case and I do not think it is necessary to determine the other aspects of the preliminary objection.

Conclusion and disposition

35. Mr Gachie has argued that the Court should hear the petition to determine whether there is in fact a case against the respondents. In my view, there is no magic in a hearing and in this case I am satisfied that assuming that all the facts pleaded in the petition are true and correct, the petitioner would not be entitled to the relief sought as I have outlined.

36. In summary, I have found as follows;

- a. If there is any issue of qualification as to whether the Mary Wambui is qualified to be a person to contest or vie for a parliamentary seat, it is not a matter for determination by the High Court in terms of **Article 88(4)(e)**. It is a matter to be determined according to the procedures and mechanisms provided by law applicable to the electoral process under the provisions of the **IEBC Act, 2010**, the **Elections Act, 2011** and where applicable the **Political Parties Act, 2011**.
- b. There is no cause of action against the Attorney General and the Director of Public Prosecutions, the 2nd and 3rd respondents.
- c. As the 1st respondent has merely expressed an intention to vie for the office of Member of Parliament, there is no dispute presented to the court for determination and as such there is no question for Court to determine under **Article 165**.

37. The result of my determination is that the 1st respondent's preliminary objection succeeds and therefore the petitioners' case is dismissed. It is hereby dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 4th day of January 2013

D.S. MAJANJA

JUDGE

Mr M. Gachie instructed by Gachie Mwanza and Company Advocates for the petitioners.

Dr Khaminwa with him Mr Monari and Mr Njoroge instructed by Daly and Figgis Advocates for the 1st respondent.

Mr Njogu, instructed by the Director of Public Prosecutions, the 2nd respondent.

Ms S. Munyi, Litigation Counsel, instructed by the State Law Office for the 3rd respondent.

Mr Munge instructed by Muriu Mungai and Company Advocates for the 1st interested party.