



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 552 OF 2012 AS CONSOLIDATED WITH PETITIONS NUMBERS 554 OF 2012, 573 OF 2012 AND 579 OF 2012

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 24, 25, 38, 50, 73, 75, 80, 88, 99,
137, 140, 145, 159, 163, 165, 258, 259 and 260 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE SUITABILITY OF THE HON. UHURU MUIGAI KENYATTA, THE
HON. WILLIAM SAMOEI RUTO**

**AND THE HON. JAMES ONDICHO GESAMI TO CONTEST PUBLIC OR STATE OFFICE IN
THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF CHAPTER SIX OF THE CONSTITUTION ON LEADERSHIP AND
INTEGRITY**

BETWEEN

**INTERNATIONAL CENTRE FOR POLICY AND CONFLICT.....1ST
PETITIONER**

**CHARLES NDUNG’U MWANGI.....2ND
PETITIONER**

**PUBLIC CORRUPTION, ETHICS AND GOVERNANCE WATCH.....3RD
PETITIONER**

**HENRY NYAKUNDI NYANG’AYA.....4TH
PETITIONER**

**KENYA HUMAN RIGHTS COMMISSION.....5TH
PETITIONER**

**THE INTERNATIONAL COMMISSION OF JURISTS- KENYA CHAPTER.....6TH
PETITIONER**

VERSUS

**THE HON. ATTORNEY-GENERAL.....1ST
RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND
RESPONDENT**

**UHURU MUIGAI KENYATTA.....3RD
RESPONDENT**

**WILLIAM SAMOEI RUTO.....4TH
RESPONDENT**

**JAMES ONDICHO GESAMI.....5TH
RESPONDENT**

AND

**THE NATIONAL ALLIANCE PARTY OF KENYA (TNA)INTERESTED
PARTY**

JUDGMENT

Introduction

1. Kenya is at the threshold of holding its first general election since the promulgation of the new Constitution in 2010. The elections are scheduled for 4th March 2013. This momentous event is occurring against the backdrop of a culture of political fragmentation and proliferation of election-related violence in Kenya over the years, which culminated in the post-election violence witnessed in the years 2007-2008. The root causes of the fragmentation and violence were aptly captured in the report of the Commission of Inquiry into the Post Election Violence (CIPEV), popularly referred to as the Waki Report.

2. They included *inter alia*, the use of violence by politicians to gain power following the legalization of multi-party democracy in 1991; an entrenched culture of impunity; the concentration of power around the Presidency; the feeling among certain ethnic communities of historical marginalization; poverty and unemployed youth. The Waki Report recommended the creation of a Special Tribunal to prosecute the perpetrators of the 2007-2008 post-election violence. The failure to set up a local trial mechanism ultimately led to the proceedings against some Kenyans including the 3rd and 4th Respondents at the International Criminal Court (ICC). The ICC proceedings are the subject of three of the petitions before us.

3. An Independent Review Commission (the Kriegler Commission), was also established in 2008 to inquire into all aspects of the 2007 General Elections with particular emphasis on the presidential elections. The Kriegler Commission made various recommendations on constitutional, legal, administrative and dispute resolution reforms necessary for holding and managing free and fair elections in Kenya. Many of those reforms have been implemented. The new Constitution, promulgated on 27th August 2010, aims at nurturing democracy and laying the foundation for free and fair elections.

4. The Constitution was a culmination of the efforts of the Kenyan people to introduce a new order on how they should be governed under the supreme law of the nation. The document presented to the people

of Kenya therefore captures the spirit, tenor and context of the expectations of the Kenyan people. Indeed, the opening words of the Preamble to the Constitution read as follows, “**We, the people of Kenya**” and continues to state that the people of Kenya “**ADOPT, ENACT and give this Constitution to ourselves and to our future generations.**”

5. All power to be exercised therefore must flow from this Constitution. Indeed, judicial authority under Article 159 (1) of the Constitution is derived from the people and vests in, and shall be exercised by the courts and tribunals established under this Constitution. Additionally, national values and principles of governance as set out in Article 10 of the Constitution underpin the application of these provisions.

6. New institutions were created for the management of elections and resolution of election disputes, including the Registrar of Political Parties, the Independent Electoral and Boundaries Commission (hereinafter referred to as the IEBC), the Political Parties Disputes Tribunal and the Ethics and Anti-Corruption Commission (hereinafter referred to as the EACC). Judicial reforms have also been undertaken including the establishment of the Supreme Court of Kenya. The Constitution now contains an elaborate Bill of Rights. It also has a comprehensive legal and institutional framework to ensure responsible leadership, integrity and accountability.

Background to the Petitions before Consolidation

7. The 1st Petitioner, International Centre for Policy and Conflict, a non-governmental organisation, filed Petition No. 552 of 2012 dated the 30th of November 2012 against the Attorney General as the first Respondent, the IEBC as the 2nd Respondent, the Hon. Uhuru Muigai Kenyatta and the Hon. William Samoei Ruto as the 3rd and 4th Respondents respectively. They also filed written submissions dated 4th of February, 2013.

8. The second Petition No. 554 of 2012, was filed by Charles Ndung’u Mwangi and Public Corruption Ethics and Governance Watch, a non-governmental organisation, against the Hon. Attorney General as the 1st Respondent, the Hon. William Samoei Ruto as the 2nd Respondent, the Hon. Uhuru Muigai Kenyatta as the 3rd Respondent, the Hon. Raila Amolo Odinga as the 4th Respondent, the Hon. Stephen Kalonzo Musyoka, as the 5th Respondent, the Hon. Wycliffe Musalia Mudavadi as the 6th Respondent and the IEBC as the 7th Respondent. There were no submissions filed by or on behalf of the 2nd and 3rd Petitioners.

9. The third Petition No. 573 of 2012, was filed by Henry Nyakundi Nyang’aya against the IEBC and the Hon. James Ondicho Gesami as the 2nd Respondent. The petitioner in this case, filed an amendment to the petition on 21st of December 2012. He also filed written submissions on 14th and 31st January, 2013 respectively.

10. The 4th Petition No. 579 of 2012, was filed by the Kenya Human Rights Commission and the International Commission of Jurists-Kenya Chapter against the Attorney General as the 1st Respondent, the IEBC as the 2nd Respondent, Hon. Uhuru Muigai Kenyatta as the 1st Interested Party and Hon. William Samoei Ruto as the 2nd Interested Party.

Directions by the Court on Consolidation

11. Subsequent to directions issued by Majanja J, the four petitions were consolidated on the 24th of January 2013. He further ordered that proceedings would be taken in Petition No. 552 of 2012. The following directions were given with respect to parties in the consolidated petitions:

a) The Petitioners shall be as follows:

1. The International Centre For Policy And Conflict-1st Petitioner

2. Charles Ndungu Mwangi-2nd Petitioner
3. Public Corruption, Ethics and Governance Watch-3rd Petitioner
4. Henry Nyakundi Nyang'aya-4th Petitioner
5. Kenya Human Rights Commission-5th Petitioner
6. International Commission of Jurists-Kenya Chapter-6th Petitioner

b) The Respondents shall be as follows:

1. The Attorney-General-1st Respondent
2. Independent Electoral and Boundaries Commission-2nd Respondent
3. Uhuru Muigai Kenyatta-3rd Respondent
4. William Samoei Ruto-4th Respondent
5. James Ondicho Gesami-5th Respondent

c) Interested party

1. The National Alliance Party of Kenya (TNA)

12. The court ordered Respondents in the previous petitions who had not by then been served to be struck out from the proceedings. This consolidated petition is therefore between the six named Petitioners, the five named Respondents and the Interested Party.

The Petitioners' Case

13. The 1st Petitioner in the consolidated petition referred to the two cases involving the six Kenyans at the International Criminal Court (hereinafter referred to as the ICC). The 1st Petitioner contends that after an examination of the evidence presented by the prosecution as well as the exculpatory evidence put forward by the respective defence teams, the judges of the Pre-Trial Chamber, by a majority, confirmed charges against four of the six suspects, namely, William Ruto, Uhuru Kenyatta, Joshua Arap Sang and Francis Muthaura. In committing them to full trial, the ICC observed that it was satisfied as to existence of "substantial grounds to believe" that they were either contributors or indirect co-perpetrators to *inter alia*, crimes against humanity committed in Kenya between December 2007 and January 2008.

14. The 1st Petitioner further pointed out that the 3rd and 4th Respondents have publicly indicated their desire to run for Presidency and Deputy Presidency respectively in the 4th March, 2013 elections. The 1st Petitioner conceded that under the Rome Statute establishing the ICC there are no specific prohibitions barring any suspect committed to trial from holding public office or State office in the Republic of Kenya. The 1st Petitioner noted that the Pre-Trial Chamber made it clear in its ruling that the ICC has no such jurisdiction. The Pre-Trial Chamber instead opined that any question as to who can hold a public or State office can only be determined in accordance with the Kenyan municipal laws.

15. It is the contention of the 1st Petitioner that a person committed to trial at the ICC would not be able to properly discharge his or her duties as a public or State officer since they would be required to attend the hearings at the ICC on a full-time basis. The 1st Petitioner further contends that the honour, integrity and confidence bestowed on public office under Chapter Six of the Constitution and by Kenyans would be

seriously eroded. This is because the proceedings of the trial at the ICC may be broadcast live and watched not only by Kenyans but also worldwide, and therefore impair the ability of the 3rd and 4th Respondents to discharge their State functions if elected.

16. It is also the position of the 1st Petitioner that Chapter Six of the Constitution on Leadership and Integrity addresses the situation in which a leader is not only required to be elected and/or selected in a transparent process, but also bring a measure of dignity, legitimacy and trust of the people to the office. The 1st Petitioner further asserts that the process of trial may lead to the issuance of warrants of arrest of a sitting public officer, thus undermining the Country's sovereignty.

17. The 1st Petitioner is therefore seeking the following:

- (a) A declaration that the confirmation of charges against the 3rd and 4th Respondents both of whom hold public offices notwithstanding the confirmation of charges against them at the ICC or indeed any other person charged with such similar serious offences under Kenyan or international law would be a threat to the Constitution.**
- (b) A declaration that the presumption of innocence in favour of the two persons committed to trial before the ICC does not override or outweigh the overwhelming public interest to ensure protection and uphold tenets and principles of the Constitution set out under Article 10 and 73 of the Constitution.**
- (c) A declaration that this court has the jurisdiction to issue an advisory opinion or interpretation on a matter of overwhelming public interest outside of an adversarial or real dispute namely Chapter Six, Articles 73, 75 and 80 read together with Article 10 of the Constitution.**
- (d) A declaration that the 3rd and 4th Respondents committed to trial before the ICC or any other person charged on such similar terms to hold a public or State office would be a recipe for anarchy and perpetuate the culture of impunity.**
- (e) A declaration that subject to any person/candidate for the position of President, Deputy President, Governor, Senator, Member of Parliament or any other elective State office exhausting their right to appeal under Article 99 (3) of the Constitution, a person is disqualified from being elected to any office established under the Constitution within the Republic of Kenya if the person is subject to a sentence of imprisonment of at least 6 months as at the date of registration or the date of the election.**

18. The first issue that the 1st Petitioner addressed us on was on the question of whether the High Court has jurisdiction to entertain this petition. It was submitted that due to pending criminal proceedings a balance must be made between national values and limitation of individual rights. This is because popular elections do not override the constitutional requirements for probity, integrity and adherence to national values and principles. In this regard, the 1st Petitioner referred us to the case of the **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others**, (263/2011), [2011] ZASCA 241.

19. It was further contended that since Article 145 of the Constitution contemplates impeachment of the President in case he is charged under any national or international law or violates the Constitution, the same proposition applies before assumption of office. It urged the court not to give a restrictive interpretation to the application of the said Article to apply only after assumption of office.

20. This Court is urged to undertake an objective assessment of the 3rd and 4th Respondents' ability to serve in public office, given that they are currently facing trial at the ICC, rather than their individual desire to serve. This also applies to unresolved probity questions where one cannot justifiably state that his 'ability to serve' would not be affected. In this regard, the Indian case of **Centre for PIL & Another v Union of India & Another** 2011 (2) UJ908 (SC) was cited where the court ruled that the touchstone for appointment is the institutional integrity as well as the personal integrity of the candidate and if the

working of the institution would suffer should a candidate be appointed, then there was a duty not to recommend such a person for appointment.

21. The 1st Petitioner proposes that the test is one of objective evaluation, and not proof of criminal culpability, so that one does not require to have been found guilty. In its view, it is sufficient that there is existence of a criminal charge. The 1st Petitioner relied on the case of **Trusted Society of Human Rights Alliance v Attorney General and Anor** [2012] e KLR.

22. In regard to the 2nd and 3rd Petitioner's case, the factual basis is the same as that of the 1st Petitioner as against the 3rd and 4th Respondents. It is the 2nd and 3rd Petitioners' assertion that the Elections Act, 2011 and the Constitution preclude the 3rd and 4th Respondents from being cleared to contest elections in Kenya until the indiscretions demonstrated while serving in public office are addressed and concluded. Further, that they have committed crimes against the people of Kenya.

23. The 2nd and 3rd Petitioners seek the following reliefs in their petition:

a. An order compelling the State through the 1st Respondent to hand over to the Court and to the Petitioner, the list of names in the said envelope verified by an affidavit from Justice Philip Waki.

b. A Declaration that the International Criminal Court is a court subordinate to the High Court of Kenya, The Kenya Court of Appeal and the Supreme Court of Kenya.

c. A Declaration that the Petitioners are entitled to have access to, supplied with and use information, documents and other evidence held by the State in respect of all the matters raised herein against the 3rd and 4th Respondents or such other matters as may come to light or be relevant during the hearing of this Petition.

d. A Declaration that the candidature of the 3rd and 4th Respondents are contrary to the tenure, ideals and spirit of the Constitution of Kenyan especially Chapter Six and are prohibited in the circumstances.

e. A Declaration that a person is not eligible to run for any State office if he or she is or has been in breach or would be in breach of any code of integrity set out pursuant to Articles 73,75,76,77,78 and 80 of the Constitution.

f. An Order of injunction permanently restraining the 2nd Respondent from accepting now or in the future, nomination for elections from the 3rd and 4th Respondents for allegedly engaging in acts of violence, other crimes and civil strife contrary to the spirit and tenor of the Constitution of Kenya.

24. The 2nd and 3rd Petitioners did not file any additional documents, neither were they present at the hearing on the 6th of February 2013.

25. The 4th Petitioner, a civic leader in West Mugirango Constituency, stated that he filed this petition on his own behalf and in the public interest. His claim is against the 5th Respondent, (a former Member of Parliament of West Mugirango Constituency), who is currently vying for the same position in the forthcoming elections. It is his contention that the 5th Respondent had in many instances misused or caused to be misused the Constituency Development Fund (CDF) in a manner that is contrary to the national values and principles of governance and integrity as stipulated in the Constitution of Kenya.

26. The 4th Petitioner cited several provisions of the Constitution in support of his claim, including Article 10 (2), 73 (1) (a) and 73(2) which address questions of national values, leadership and integrity. The 4th Petitioner avers that the 5th Respondent has, in the course of exercising public duty, engaged in corrupt activities and misuse of public office where he transferred Kshs 1, 050,000/= to his personal

account from the CDF account. He further avers that the 5th Respondent, by an order of the High Court, was compelled by a writ of mandamus to refund the monies he had unlawfully withdrawn from the CDF account for his personal use.

27. The 4th Petitioner further contends that the 5th respondent ultimately refunded the said funds after due Court process. In the view of the 4th Petitioner, this constitutes a breach of trust thus deserving the disqualification of the 5th Respondent from vying for elective or being appointed to State office.

28. The 4th Petitioner further contends that since the 5th Respondent opted not to appeal but rather refund money to the CDF account that amounted to conclusive proof of his indiscretion. The 4th Petitioner therefore seeks:

(a) A declaration that the conduct of the 5th respondent of fraudulently transferring public funds amounting to Kshs 1, 050, 000/= to his personal account violates the national values and principles of governance as provided for by Article 10 (2) of the Constitution.

(b) A declaration that the conduct of the 5th Respondent of fraudulently transferring public funds amounting to Kshs. 1, 050, 000 to his personal account amounts to violation of Chapter Six provisions on leadership and integrity.

(c) A declaration that the 5th Respondent by virtue of his conduct in relation to the Kshs. 1, 050, 000/= transferred to his account from the CDF account, should be disqualified from vying for any elective posts on or before the general elections.

(d) A declaration that the 2nd Respondent should not register the 5th Respondent to participate in any elections on or before the general elections.

(e) A declaration that the 5th Respondent by virtue of his conduct in relation to the Kshs 1, 050, 000/= transferred to his account from the CDF account is ineligible to hold public office.

(f) An order that the costs consequent upon the petition be borne by the 5th Respondent.

(g) All such other orders as the court shall deem just in the circumstances.

29. On the question of whether the High Court has jurisdiction to entertain the petition, the 4th Petitioner acknowledges that the position in law is settled by the case of **Michael Wachira Nderitu & 3 Others vs. Mary Wambui Munene & 2 Others** (2013) eKLR, that a person cannot bring a challenge on the suitability or otherwise of a candidate seeking an elective position prior to the completion of the statutory process laid down by the law. The 4th Petitioner however submits that his case is distinguishable from that of the other Petitioners in that he is seeking not only to have the 5th Respondent barred from vying for an elective post (West Mugirango Parliamentary seat), but also to have the 5th Respondent declared unfit to hold public office.

30. It is the 4th Petitioner's further submission that the definition of public office in Article 260 of the Constitution is not only limited to elective office. He argues that this court has jurisdiction to determine this petition on the basis of the prayers sought in the petition, as the same goes beyond merely seeking to bar the 5th Respondent from seeking elective office.

31. The 4th Petitioner also cited the case of **Multiserve Oasis Company Ltd. v. Kenya Ports Authority & Another**, [2012] e KLR where the court, being faced with a similar question of jurisdiction, held:

“Moreover, the Constitution's stated principle [Article 159(2)(b)] that “justice shall not be delayed”, is apt to be defeated if the Plaintiff herein had to institute two separate processes-one

against the 1st defendant, and the other against the 2nd defendant”.

32. According to him, it would therefore defeat the provisions of Article 159 (2) (b) of the Constitution to institute another process should the 5th Respondent be elected or appointed to public office.

33. As to jurisdiction of the EACC, the 4th Petitioner conceded that it is responsible for overseeing and enforcing the implementation of Chapter Six of the Constitution and the Leadership and Integrity Act. The petitioner further contends that the EACC was a party in the Judicial Review application, where Musinga J (as he then was) issued a writ of mandamus. As such, the EACC was aware of the decision of Musinga J, yet it cleared and issued him with a certificate of clearance thus enabling him to participate in the forthcoming elections as a Parliamentary candidate. He thus argues that the EACC failed in its role to make an inquiry into the issue of integrity as regards the 5th Respondent.

34. The EACC is also accused of failing to make appropriate recommendations to IEBC to bar the 5th Respondent from presenting his nomination papers. It is therefore his contention that this Court now has the jurisdiction to address these questions. In this regard, he relied on the case of **Centre for PIL & Another v. Union of India & Another** (Supra) whose holding was cited with approval in the case of **Trusted Society of Human Rights Alliance case**(Supra) where it was held at page 15 that:

“While judicial review is not a merit review, where the appointing authorities do not adhere to the eligibility criteria, then such an appointment is to be struck down.”

35. In regard to the applicability of provisions of the Constitution and more particularly Chapter Six to the specific circumstances of the 5th Respondent, the 4th Petitioner has sought several reliefs in his petition which he seeks this Court’s intervention. Essentially, the 4th Petitioner argues that since there has been a determination by a Court of law on the question of the 5th Respondent’s integrity, then this Court is bound to allow the declaration sought by the 4th Petitioner.

36. The 4th Petitioner therefore urges the court to enforce and implement the principles of personal integrity and governance and give substantive bite to the provisions of Chapter Six of the Constitution as the court did in the **Trusted Society of Human Rights Alliance case**(supra).

37. The 5th and 6th Petitioners are non-governmental organizations. In their petition, they set out the background of events leading to the charging of the 3rd and 4th Respondents at the ICC. They point out that following the confirmation of charges, the trials of the 3rd and 4th Respondents are set to commence in April 2013.

38. They further assert that, under Article 63 of the Rome Statute, the 3rd and 4th Respondents would be required to be present in Court at The Hague during the entire trial with only exception being when an accused person disrupts the proceedings. It is also their contention that the ICC trial will commence barely a month after the general elections, and should a run-off take place, it is likely that the trials will begin before the President and Deputy President are sworn into office.

39. The two Petitioners then cited the provisions of the Constitution that set out the principles that govern the presidency and particularly Articles 131 and 132, to indicate that the office of the President is constitutionally obligated to be at the forefront in upholding and protecting the Constitution. They assert that these provisions clearly demonstrate that the absence of the President from Kenya for any extended period of time would result in significant violations of the Constitution, since certain key functions require the physical presence of the President in Kenya.

40. It is therefore their contention that the election of the 3rd and 4th Respondents will be an affront to the Constitution as it undermines the principles of sovereignty of the people and the nation, the integrity of the Constitution and the stability of the nation. In addition, the Petitioners cite the provisions of Chapter Six of the Constitution (Articles 73 to 80) on the integrity requirements, to support the argument that one

of the mechanisms of giving effect to Chapter Six of the Constitution is to ensure that leaders (including presidential candidates) who do not comply with Chapter Six of the Constitution be barred from holding public office.

41. It is also their contention that a President who is committed to or undergoing trial at the ICC is an affront to the integrity provisions of the Constitution. Further, that for a person whom the ICC has found the existence of sufficient evidence to establish 'substantial grounds to believe' that he or she has committed crimes against humanity (including murder, forcible transfer of populations), especially where humanity here refers to the people he seeks to govern, does not bring honour to the nation and dignity to the office. Neither does it promote confidence and integrity in the office; nor can it be said that a person who is likely to be absent from the country, will render committed service to the nation.

42. They explained that Article 259 of the Constitution enjoins this Court to interpret the Constitution in a manner that promotes its purposes, values and principles and enhances the rule of law, human rights and fundamental freedoms in the Bill of Rights, thus contributing to good governance.

43. They are therefore seeking the following prayers:

a. A declaration that the continued occupation and/or holding of the State offices of the Deputy Prime Minister and Member of Parliament by the 3rd and 4th Respondent respectively, while their charges have been confirmed by the ICC and they have not been acquitted and /or otherwise discharged, is in violation of Chapter Six of the Constitution on the requisite integrity and leadership standards for State officers and in particular Articles 2, 3, 10, 73 and 75.

b. A declaration that the nomination of the 3rd and 4th Respondents to contest for the offices of the President or Deputy President as the case may be will be a violation of the Constitution since if elected, they will be unable to uphold, protect or defend the Constitution on account of the charges against them at the ICC.

c. A declaration that the nomination of the 3rd and 4th Respondents to contest for the offices of President and Deputy President or to any other State office as the case may be will be a violation of the Constitution since if elected, they will be unable to perform the duties of the two offices required by the Constitution.

d. A declaration that the trial process of the ICC up to the confirmation of charges is sufficiently equivalent to meet the necessary legal threshold required to bar a person from being nominated to or assume State office.

e. A declaration that the nomination of the 3rd and 4th Respondents to contest for the offices of the President and Deputy President as the case may be will be a violation of the Constitution's principles on leadership and integrity and specifically the provisions of Articles 10, 73, 75 of the Constitution.

The Respondents' Case

(a) Jurisdiction

44. All the Respondents addressed us at length both in their pleadings and written submissions on the question of whether this Court has jurisdiction to hear and determine the matters raised in the petition. It was their contention that this Court did not have jurisdiction to hear the petition essentially on the ground that the issues touch on the conduct of a Presidential election. They urged the Court not to consider the question of integrity and violation of Chapter Six of the Constitution in isolation of the elections.

45. Ms. Munyi for the 1st Respondent relied on the Supreme Court decision in **Advisory Opinion Application No. 2 of 2012, In The Matter of The Principle of Gender Representation in The**

National Assembly and The Senate, (2012) e KLR in urging this Court to find that, in the case of the 3rd and 4th Respondents, being Presidential and Deputy-Presidential candidates, the only Court with jurisdiction under Article 163 (3) (a) as read with Article 140 of the Constitution is the Supreme Court of Kenya.

46. On its part, the 2nd Respondent, argued that it was premature for this Court to consider the matters in dispute because the Petitioners has not exhausted other mechanisms established by law, such as the Leadership and Integrity Act 2012. In this regard, the 2nd Respondent relied on the cases of **Francis Gitau Parsimei and Others v National Alliance Party and Others**, [2012] e KLR and **Bernard Samuel Kasinga v The Attorney General and Others**, Petition No. 402 of 2012 (unreported). The 2nd Respondent submitted that where the Constitution or statute establishes a dispute resolution procedure, then that procedure must be followed before any party resorts to the Courts.

47. The 2nd Respondent also relied on the case of **Michael Wachira Nderitu and Others v Mary Wambui Munene and Others**, [2013] eKLR, where the Court held that where mechanisms and procedures have been established by statute, in that case the Leadership and Integrity Act, to address questions touching on the integrity of one of the Respondents, then the Court will not have jurisdiction to hear the matter in the first instance.

48. In respect of the 3rd and 4th Respondents positions, the 2nd and 3rd Respondents argued that all questions touching on their suitability to contest the Presidential and Deputy Presidential elections is squarely within the jurisdiction of the Supreme Court. The 3rd and 4th respondents raised similar objections in regard to the jurisdiction of this Court. Just like the 1st and 2nd Respondents, they were emphatic that the questions put for determination by this Court touching on their integrity in accordance with Chapter Six of the Constitution cannot be considered outside the context of the Presidential election. In that respect, they reiterated the argument that in such instances it is only the Supreme Court which has jurisdiction.

49. It is a common ground by all the Respondents, that even if the 3rd and 4th Respondents did not meet the criteria set by Article 10, 99 and Chapter Six of the Constitution, there are other institutions other than Courts vested with power to deal with such disputes, including criteria for elective posts, in the first instance. In this regard, the 3rd and 4th Respondents relied on Article 88 (4) (e) of the Constitution which grants power to the IEBC to settle certain electoral disputes. It provides thus:

“The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”

50. Further, they relied on Section 74(1) of the Elections Act which states as follows;

“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.”

(b) Justiciability

51. The 1st Respondent submitted that this Court cannot be called upon to deal with abstract issues. In this regard, reference was made to the case of **John Harun Mwau & 3 Others v Attorney General and 2 Others**, [2012] e KLR which held that the jurisdiction to interpret the Constitution as conferred by Article 165(3) is exercised in the context of a dispute or controversy.

52. According to the 2nd Respondent, the question regarding eligibility of the 3rd, 4th and 5th Respondents is within the mandate of the IEBC and that the said body had not contravened the Constitution while executing its mandate as to require this Court’s intervention. This is because there is no factual or legal dispute between the IEBC and the Petitioners in regard to any matters raised in the petition. The 2nd

Respondent urged this Court to refrain from entertaining the petition because they do not reveal any real dispute.

53. Similarly, the 3rd and 4th Respondents argued that for the Court to be properly seized of a constitutional petition, its jurisdiction must be invoked by setting out the justiciable controversy with reasonable precision. They relied on the case of **Patrick Ouma Onyango & 12 Others v The Attorney General & 2 Others**, Misc App No. 677 of 2005, (unreported), where the Court endorsed the doctrine of justiciability of disputes. It is the 3rd Respondent's contention that the petition is based on speculative future contingencies as opposed to actual facts. The 5th Respondent adopts a similar position with the other Respondents in relation to the doctrine of justiciability.

(c) Leadership and integrity

54. It was submitted by the 1st Respondent that Articles 79 and 80 of the Constitution are key provisions, which operationalize leadership and integrity principles. It was argued that the EACC established by Article 79 is the institution with the mandate to ensure compliance and enforcement of Chapter Six of the Constitution in the first instance. Furthermore, by virtue of Article 80, Parliament fulfilled its mandate by enacting the Leadership and Integrity Act which operationalized Chapter Six of the Constitution. This Act entrenched the requirement that State officers should sign a specific leadership and integrity code upon election or appointment, the breach of which attracts sanctions (see Sections 40, 41 and 42 of the Act).

55. The 1st Respondent submitted that since the Leadership and Integrity Act had come into operation, especially the provisions that mandates EACC to enforce leadership and integrity principles, the question of whether the 3rd and 4th Respondents have violated Chapter Six of the Constitution should first be handled by the EACC.

(d) Separation of powers

56. The Respondents, particularly the 2nd, 3rd and 4th Respondents, argued that the Constitution deliberately dispersed powers to various institutions so as to enhance the operations of such institutions without interference from the other. In the case of IEBC, the 2nd and 3rd Respondents submitted that the IEBC is established under Article 248 (2) (c) of the Constitution as an independent Commission and as such, the performance and functions of the Commission were not subject to control or direction from any person or authority, including the Court. For emphasis they relied on Article 249(2) of the Constitution which grants the IEBC independence to act without direction or control from any other person. They explained that Courts could only exercise its jurisdiction over the IEBC where it has been demonstrated that it had failed and or refused to carry out its constitutional mandate. In support of this argument they referred the Court to the case of **Narok County Council v Transmara County Council** [2000] 1 EA 161.

57. Further, it was their case that where the Constitution grants specific powers to an institution such as IEBC to perform certain functions, such as the power to determine eligibility to vie for an elective post (see Articles 84 and 99 of the Constitution), as well as the dispute resolution mechanisms under the Elections Act, this Court cannot interfere with such mandate. This is because to do so would contravene the principle of separation of powers. This argument applies with equal force to the powers granted to EACC to make inquiry under the Leadership and Integrity Act where an issue of integrity and enforcement of Chapter Six of the Constitution has been raised.

58. It was submitted by the said Respondents that even if the Respondents were to raise the issue of eligibility of the 3rd and 4th Respondents before the IEBC, such dispute was untenable in view of the fact that the 3rd and 4th Respondents had already been nominated by their respective parties. Their nominations having been presented to and accepted by the IEBC.

(e) Presumption of innocence

59. This argument was advanced by the 3rd and 4th Respondents specifically in regard to the pending trial before the ICC. They submitted that in so far as no court of competent jurisdiction had found them guilty of a criminal offence, Article 50(2) (a) of the Constitution guaranteed their right to be presumed innocent until proved guilty. For added measure, they submitted that, under Article 25 (c) of the Constitution, the right to fair trial is one of the fundamental rights and freedoms under the Bill of Rights that cannot be subjected to any limitations.

60. It was their case, that the petition herein sought to limit their political rights under Article 38 of the Constitution yet no court of law had convicted them of any crime to disqualify them under Article 99 (3) of the Constitution. They urged this Court not to allow the petition.

The Interested Party's Case

61. The Interested Party's position was largely similar in tone and emphasis to that of the 3rd and 4th Respondents with regard to jurisdiction, justiciability, presumption of innocence and separation of powers. The Interested Party submitted that the approval of nomination by the IEBC of the 3rd and 4th Respondents to vie for office, and the publication of Legal Notice No. 19651 on 30th January 2013, meant that the petition has been overtaken by events and is no longer justiciable.

62. The Interested Party contested the jurisdiction of the High Court in view of Articles 2, 38, 50, 88, 94, 145 and 163 of the Constitution. It also alluded to the recently gazetted Supreme Court (Presidential Election Petition) Rules 2013 to demonstrate that the High Court lacks jurisdiction to determine the petition. It was further submitted that the only option available to the Petitioners is the impeachment process as provided under Article 145 and 150 of the Constitution.

63. The Interested Party further argued that as a political party it had an interest to ensure that the persons it has nominated to contest elective posts will do so without the Court's interference. It submitted that the Constitution guaranteed its political rights to field candidates. Failure to do so, would disenfranchise its members and hand over an easy victory to its political rivals.

The Issues for Determination

64. We find that the issues for determination arising from the pleadings and submissions made are as follows:

1. Whether the High Court has jurisdiction to hear and determine the petitions, and in particular :
 - a) The jurisdiction under Article 165 to interpret and enforce the Constitution.
 - b) Whether there are limitations by the jurisdiction conferred upon the Supreme Court.
 - c) Whether the jurisdiction is limited by powers of other bodies to deal with elections and issues of integrity under Articles 80, 88, 73.
 - d) Whether the jurisdiction is limited by the powers conferred upon the National Assembly under Article 145.
2. Are the present disputes justiciable?
3. What is the role of the High Court in interpreting Chapter Six of the Constitution, and in particular:
 - a) What are the general principles guiding the interpretation and applicability of Chapter Six?
 - b) What is the interplay between the provisions of the Bill of Rights (Articles 24, 25, 38, and 50) and Chapter Six?

- c) What is the effect of the ICC case on the integrity of the 3rd and 4th Respondents?
- d) What is the effect of the CDF case on the integrity of the 5th Respondent?
- 4. Are the petitioners entitled to the reliefs sought?
- 5. Who should bear the costs of the petition?

65. Before we proceed to consider these issues, we shall first address the preliminary matters arising in Petition 554 of 2012 brought by the 2nd and 3rd Petitioners. On 29th January 2013, we gave directions on the hearing of the consolidated petition. The Learned counsel for the 2nd and 3rd petitioners was present. The hearing was fixed for 6th February 2013. The Learned counsel indicated that she wished to withdraw from acting for the 2nd and 3rd petitioners. We directed her to file and serve a formal application for withdrawal. The application titled “Notice of Motion” was filed on 30th January 2013. On the 6th February 2013, neither the learned counsel nor the 2nd and 3rd petitioners appeared.

66. Given those circumstances, we would have dismissed the petitions summarily. However, in the interests of Justice, and noting the overriding objective, we still considered the merits of the petition. Prayer (a) sought to compel the 1st Respondent to hand over to court and to the Petitioners the list of names in an envelope known as the “Waki envelope” verified by an affidavit of Hon. Mr. Justice Phillip Waki. The latter is not a party to the petition. The court is thus being asked to act in a vacuum and in vain. That prayer fails.

67. A further declaration was sought that the ICC is a court subordinate to the High Court, the Court of Appeal and the Supreme Court of Kenya. That argument flies in the face of Article 2 of the Constitution, the International Crimes Act 2008 and the Rome Statute. The true position is that ICC and the Kenyan Courts exercise complementary jurisdiction in relation to international crimes set out in the Rome Statute as well as our International Crimes Act 2008. We also found the prayer speculative and without foundation.

68. Prayer (c) was seeking access to any information held by the State in respect ‘of all matters raised herein against the 3rd and 4th Respondents or such other matters as may come to light or be relevant during the hearing’. No ground was laid showing refusal by the State to provide such information. As stated, there was no appearance for or by the 2nd and 3rd Petitioners. We thus found no merit in the prayer. Prayers (d) and (e) are *pari materia* with the other three consolidated petitions. We shall deal with them in the course of the judgment.

69. Prayer (f) by the 2nd and 3rd Petitioners sought to injunct the 2nd Respondent ‘now and in the future from accepting nominations from the 3rd and 4th Respondents’. That in our view has been overtaken by events and is spent. In the end, the petition by the 2nd and 3rd petitioners fails for lack of merit and want of prosecution.

70. We shall now proceed to determine the substantive issues.

I. Jurisdiction

(a) Jurisdiction under Article 165 of the Constitution

71. All the Respondents and the Interested Party raised questions regarding whether this court has jurisdiction to hear and determine the matters placed before us. A specific argument was advanced to the effect that this Court, under Article 165 of the Constitution, did not have jurisdiction to deal with a question which essentially challenges the qualification of a candidate to offer himself or herself to be elected as the President of the Republic of Kenya. It was further argued that the court with the jurisdiction to determine matters relating to the election of the President is the Supreme Court.

72. Jurisdiction is indeed the first issue a court should deal with, because without it, the entire process becomes a nullity. In The Owners of Motor Vessel “Lillian S”. v Caltex Oil Kenya Ltd[1989] KLR 1at page 14 it was stated:

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

73. This was further expounded by Ojwang J. (as he then was)in Boniface Waweru v Mary Njeri and Another Misc. Application No. 639 of 2005 (unreported).

“Jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question.”

74. Article 165 (3) of the Constitution sets out the jurisdiction of the High Court. It provides as follows:

“165. (1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

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

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

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

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

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

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

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

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

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice. ”

75. Article 165 (5) of the Constitution limits the jurisdiction of this Court in two respects. Firstly, where

the dispute relates to a question reserved exclusively for the jurisdiction of the Supreme Court. Secondly, in respect of disputes falling within the exclusive jurisdiction of the Courts contemplated in Article 162 (2) of the Constitution.

76. In construing Article 165 on our jurisdiction, we are guided by Article 259 of the Constitution which provides as follows:

“(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.”

77. Article 259(3) provides that:

“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking”

78. In John Harun Mwau & 3 Others v Attorney General and 2 Others, [2012] eKLR, the High Court held that this Court should interpret the Constitution in a manner that remains relevant to its spirit. The Court stated that:

“We are conscious that our findings may be unpopular with a section of Kenyans who have pre-conceived notions about the elections but we hasten to remind Kenyans that our undertaking is not to write or re-write the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives. We are cognisant of the fact that the Sixth Schedule was a compromise political package arrived at between the various factions of politicians in order to ensure passage of the Constitution. We believe that we have discharged our constitutional responsibility and call upon all Kenyans to continue with the task of Constitution implementation and nation building.”

We cannot agree more.

79. In Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR, the Court stated that;

“In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation. In the Ugandan case of *Tinyefuza v Attorney General Constitutional Appeal NO. 1 of 1997*, the court held as follows:

“The entire Constitution has [to] be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy (sic) of the written Constitution.’

80. A similar principle was enunciated by the United States Supreme Court in Smith Dakota v North Carolina 192 U.S. 268 [1940]. The court stated: **‘It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.’**

81. In Ndynabo v Attorney General[2001] 2 E.A. 485 the court held as follows:

‘The Constitution is a living instrument, having a soul and consciousness of its own it must be construed in line with the lofty purpose for which its makers framed it... A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document’.”

82. The Supreme Court in **Re Interim Independent Electoral Commission** Constitutional Application No. 2 of 2011, adopted the principle established by the Namibian Case in **S. v. Acheson** 1991 (2) S.A. 805 that the spirit of the Constitution lies at the core of all constitutional interpretation in relation to the doctrine of the separation of powers as it applies under the Constitution of Kenya, 2010. Mahomed, A.J expressed himself in **S. v. Acheson** (supra) that:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and....aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

83. Subsequently, the Namibian Supreme Court, in **Minister of Defence, Namibia – vs – Mwandighi**, 1992(2) SA 355 at 362 held that “The Namibian Constitution must therefore be purposively interpreted, to avoid the ‘austerity of tabulated legalism.’ ”

84. As is clear from the foregoing, in interpreting the Constitution, the Court cannot consider a provision thereof in isolation of other provisions that may be relevant to the issues at hand. In the present case, the questions raised touching on the integrity of the 3rd, 4th and 5th Respondents cannot be considered outside the context of the elections.

(b) Limitations on Jurisdiction: the High Court vis-à-vis the Supreme Court

85. As regards the first aspect of the limitation placed on the jurisdiction of the High Court, Article 163(3) of the Constitution provides that:

“The Supreme Court shall have:

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections of the office of President arising under Article 140...”

86. It is clear from the above that the High Court has no jurisdiction to deal with any question relating to the election of the President. That includes the question whether one is qualified or disqualified to contest the position of President under the Constitution or any other law. The Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate** Advisory Opinion Application No. 2 of 2012, [2012] eKLR expressed itself with regard to how it interpreted its exclusive jurisdiction to deal with disputes arising out of a presidential election. The Court held as follows:

“[100] It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a *single event*; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as *political parties* which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the *Presidential election*.

[101] Does the *entire question* concerning Presidential elections belong to the Supreme Court’s

jurisdiction? Or is the Supreme Court's power limited by the express language of Article 140 of the Constitution? An analogy may be drawn with other categories of elections; Article 87(2), on electoral disputes, thus provides: "*Petitions concerning an election, other than a Presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*" It is clear that Presidential elections have separate provisions, in Article 163(3) (a) which provides:

"The Supreme Court shall have –

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140....."

On a literal construction, it may be stated that the foregoing reference to "the elections to the office of President" suggests the draftspersons contemplated that several rounds of election may be involved, before the emergence of a duly elected President.

[102] Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon *all* such disputes as would arise from the Presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election – while excluding those disputes which might arise *during* the conduct of election. "

87. It was then on the basis of this exclusive jurisdiction that the Supreme Court recently gazetted the procedural rules of the Court to guide it and the parties thereto in dealing with any questions or challenges to the validity of election of the President. The Rules referred to as "The Supreme Court (Presidential Election Petition) Rules 2013' define election under Rule 2 to mean;

"an election for the purposes of electing the President pursuant to the Procedure stipulated by the Constitution and the Elections Act".

88. Under the same rules, a petition means;

"A petition filed in Court in relation to presidential elections pursuant to Article 136, 137, 138, 139 and 140 of the Constitution".

Under Rule 12 of the said Rules;

"(1) A person may file a petition challenging—

(a) the validity of the election of the President- elect; or

(b) a declaration by the Commission under Article 138(5).

(2) The grounds upon which a petition under sub-rule (1) may be filed include—

(a) the validity of the conduct of a presidential election;

(b) the validity of the qualification of a President-elect;

(c) the commission of an election offence as provided under Part VI of the Elections Act;

(d) the validity of the nomination of a presidential candidate; or

(e) any other ground that the Court deems sufficient, provided such ground shall not be frivolous, vexatious or scandalous."

89. It is therefore clear from the foregoing that any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court. This includes the determination of the question whether such a person meets the test of integrity under Chapter Six of the Constitution in relation to Presidential elections. These two questions cannot be determined or considered by this Court outside the context of the elections that are due to be held on 4th March, 2013.

90. The High Court has also rendered several decisions touching on its jurisdiction to interpret and enforce the Constitution. In **John Harun Mwau & 3 Others v Attorney General and 2 Others**, Petition No. 65 of 2011[2012] eKLR, the High Court held as follows:

“We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. In this case the dispute before the court falls squarely within the province of Article 258 of the Constitution.”

91. In **Charles Omanga and Anor v IEBC & 2 Others**, Nairobi HCC Petition No. 2 of 2012, the Court held that:

“...the doctrine of separation of powers and checks and balances which run throughout our Constitution deliberately obligate the High Court to determine 'any question whether any law is inconsistent and in contravention of the Constitution'.”

92. In light of the above, the question placed for determination by the petitioners in this case essentially addresses issues that boil down to asking this court to make declarations whose ultimate aim would result in the determination of the question, whether the 3rd and 4th Respondents are qualified to offer their candidature for the office of President and Deputy President respectively. This is an issue which is within the exclusive jurisdiction of the Supreme Court. In the premises therefore, we are in agreement with the Respondents that the High Court lacks jurisdiction to deal with a question relating to the election of a president.

93. This is not to say that the High Court is divested of jurisdiction to inquire into matters of integrity relating to elective and appointive public office. The only caveat is that this particular matter is so intertwined to the issue of presidential elections in relation to the 3rd and 4th Respondents. We therefore find that in light of the provisions of Articles 163 and 165, our jurisdiction in this matter has been limited to interpreting the provisions of the Constitution in respect of the provisions of Chapter Six.

(c) Jurisdiction of IEBC and other Bodies on Eligibility of Candidates:

94. The jurisdiction and authority of IEBC, under Article 88(4) (e) of the Constitution to resolve disputes relating to nomination of candidates is one of the issues framed out by the court. This stems from the fact that the 3rd and 4th Respondents have presented themselves and been nominated to contest offices of President and Deputy President respectively during the 4th March 2013 election.

95. The 3rd and 4th Respondents are currently involved in high profile campaigns and have entered into a coalition through their political parties namely The National Alliance Party (TNA) and the United Republican Party (URP), to form the Jubilee Alliance. The Petition is based on the ground of confirmation of charges of crimes against the 3rd and 4th Respondents at the International Criminal Court in the Hague.

96. The AG (1st Respondent) is enjoined as principal legal adviser of Government of Kenya under Article 156(4) (a) and (b) as one who ought to uphold the Constitution and the rule of law, yet has not demonstrated any interest in having the issues raised here, resolved before the forthcoming general

elections.

97. The 2nd Respondent (IEBC) is blamed for accepting the nominations of the 3rd and 4th Respondent, in exercising its constitutional mandate of organizing and managing the general election under Article 88 (5) which *inter alia* gives it responsibility over registration of candidature for elections.

98. An Order is sought to the effect that the nomination of 3rd and 4th Respondent to contest the aforementioned offices is a violation of the Constitution on account of the ICC charges under the Rome Statute and the forthcoming trial is sufficient to meet the necessary legal threshold required to bar a person from being nominated to or assume State office. The issues raised regarding their ineligibility are that, since the ICC trial is likely to commence in April, then if there is a run-off on the Presidential Election on the basis of Article 138(5), it would impact on their being sworn into office, of computation of time lines required under articles 138, 140 and 141 of the Constitution.

Article 138 (5) provides that:

“If no candidate is elected, a fresh election shall be held within thirty days after the previous election and in that fresh election the only candidates shall be-

a)the candidate, or candidates who received the greatest number of votes; and

b) the candidate, or candidates who received the second greatest number of votes.”

99. Of concern too is the presence of the President not just at the swearing-in ceremony but also in performing other State duties such as addressing the newly constituted Parliament and the annual Parliamentary and National address. There are also general issues of integrity under Chapter six of the Constitution which affect the eligibility of the 3rd and 4th Respondents in their quest for the two highest offices in the land.

100. This fits in with the prayer seeking a declaration that a person is not eligible to run for any State office if he or she has breached or would be in breach of the Constitution. A permanent injunction is also sought to restrain the 2nd Respondent from accepting now or in future, nomination of the 3rd and 4th Respondents for election.

101. Some key questions to be answered are: what is the position in Kenya on eligibility for holding public office whether appointive or elective; and which body has jurisdiction to entertain a petition of this nature. The 5th and 6th Petitioners invoke provisions of Article 165 (3) (a) of the Constitution to justify filing of this case before the High Court. They plead that the High Court has jurisdiction to:

“hear any question relating to the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the court.”

102. They also invoke Article 258 of the Constitution which grants every person the right to institute court proceedings where the Constitution has been violated. Under Article 88 (4) (e) of the Constitution, the IEBC is vested with the following powers:

“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.”

103. This is reiterated under Section 4(e) of the IEBC Act which recognises the statutory function of the IEBC in settling electoral disputes relating to nominations before elections. Section 74(1) of the Elections Act further confirms this as follows:

“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.”

104. The 5th and 6th Petitioners’ counsel acknowledges this, but argues that since the 3rd and 4th Respondents do not qualify to be nominated by the IEBC, the High Court has jurisdiction to grant prayers sought. The Petitioners urge that this is not a dispute on the nomination of the 3rd, 4th and 5th Respondents, but rather, their non-compliance with Chapter Six of the Constitution. We have also taken into consideration the arguments set out by the Respondents with regard to jurisdiction of other statutory bodies in a matter such as this.

105. All the parties in this petition acknowledge the High Court’s unlimited jurisdiction under Article 165 (3) (a) of the Constitution. This unlimited original jurisdiction however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners. See **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, which held that:-

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

106. Even if it was to be argued that the 3rd, 4th and 5th Respondents do not meet the integrity and leadership qualification as spelt out under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88 (4) (e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC.

107. Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3rd, 4th and 5th Respondents to IEBC and it failed or refused to act. Indeed in the case of **Narok County Council v Trans Mara County Council [2000] 1 EA 161** at page 164 it was stated

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the division is to be made on a fair and equitable basis.”

108. In any event the prayer seeking that IEBC be restrained from accepting the nomination of 3rd, 4th and 5th Respondents has been overtaken by events as they have already been so nominated.

109. An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution.

110. Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. In this regard, we refer to the decision **In Re Francis Gitau Parsimei & others v. National Alliance Party and others** Nairobi Petition No. 356 of 2012 (unreported) in which the court emphasised the principle that:

“Where the Constitution and or a statute establishes a dispute resolution procedure, then that

procedure must be used.”

111. Indeed as was observed in the case of **Bernard Samuel Kasinga v AG & others** High Court Petition No. 402 of 2012 (unreported)

“The mere fact that the Constitution is cited or invoked is not enough to elevate the matter to a constitutional matter and confer a licence to the High Court to inquire, arbitrate,.....or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by statute.”

112. The Petitioners have neither demonstrated that they have invoked the mechanisms available under the IEBC Act and Leadership and integrity Act 2012 nor have they shown that the 2nd Respondent has violated provisions of the Constitution. This was the view taken in **Michael Wachira Nderitu and Others v Mary Wambui Munene and Others** High Court Petition No. 549 of 2012, where the petitioners sought orders to disqualify the 1st Respondent from vying for an elective post on grounds that she was ineligible for nomination due to issues concerning her integrity. The court held that such a matter is to be determined according to procedures and mechanisms provided for by the law applicable under provisions of the IEBC Act, Elections Act and Political Parties Act by dint of Article 88 (4) (e) of the Constitution. We share this view.

113. We also note that under Section 13 (2) of the Leadership and Integrity Act:

“(2) A person who wishes to be elected to a State office shall for the purposes of this section, submit to the IEBC a self-declaration in the form set out in the First Schedule.”

114. The requirement for the IEBC to receive the self-declaration forms is part of its mandate to check compliance with the Elections Act and the Elections (General) Regulations, 2012, which set out a vetting mechanism for all political parties regarding nomination of candidates vying for positions. The court has power to review decisions made by IEBC pursuant to these laws, except in cases relating to the election of a President or Deputy President.

115. The petitioners have submitted that if the 3rd and 4th Respondents are elected, they will be hindered by the ICC trial from attending the swearing in and performing their state duties. Before addressing the Kenyan situation, we propose to consider the procedure followed in other jurisdictions where the integrity of the president or chief executive of a country is put to question. The process may include removal of that official from office, as well as criminal or civil sanction, in what is commonly referred to as impeachment.

116. In the United Kingdom for instance, it is the House of Commons that holds the power of initiating impeachment. Parliament in the UK has held the power of impeachment since medieval times, the principle of responsible government being that the Prime Minister and other executive officers answer to Parliament which is elected by the people, rather than to the Sovereign. In the United States of America, Article 1 of the Constitution gives the House of Representatives the sole power to initiate impeachment proceedings, and the Senate the sole power to conduct the trial.

117. In Kenya, the National Assembly is vested with the power to initiate the removal of a President for violating the Constitution. The procedure is to be found in Article 145 which provides *inter alia* :

“(1) A member of the National Assembly supported by at least a third of all the members, may move a motion for the impeachment of the President-

a) on the ground of a gross violation of a provision of this Constitution or any other law;

b) where there are serious reasons for believing that the President has committed a crime under national or international law; or

c) **for gross misconduct.”**

118. The subsequent sub-articles of Article 145 (2) to (7) detail out the impeachment trial before the Senate. Likewise, the removal of the Deputy President (in reference to 4th Respondent if elected) is by way of impeachment as provided for under Article 150 of the Constitution – which is a replica of the procedure for the removal of the President. The doctrine of separation of powers is well enshrined in the Constitution. Article 145 of the Constitution is an example of its application. The Constitution deliberately distributes power among the three arms of government to ensure that no branch usurps the power of the other, and which this court must uphold.

119. Consequently, we hold that apart from the IEBC and the Supreme Court dealing with issues regarding the election of a President, the National Assembly and Senate are the only other institutions who may interfere with or invalidate the election of a President or Deputy President.

2. Justiciability of the matters before the Court.

120. There is the question raised of the justiciability of the disputes in the present actions. We were urged by the parties to find that as a court, we should not intervene in a political process because there are other bodies other than the court that are better suited. It was also argued that the Petitions do not concretize any constitutional violation perpetrated by the Respondents, that the petitions are speculative, and that the IEBC has the mandate at the first instance to adjudicate the controversy.

121. Black’s Law Dictionary defines ‘**justiciable**’ as “**proper to be examined in courts of justice**”. It further goes on to define a ‘**justiciable controversy**’ as “**a controversy in which a claim or right is asserted against one who has an interest in contesting it.**” The other definition given of a justiciable controversy is “**a question as may properly come before a tribunal for decision**”.

122. This court has had occasion to deal with justiciability or the political question doctrine on several occasions. The position of the court in **Trusted Society of Human Rights Alliance** case (supra) has been cited repeatedly by the parties to this suit. In this case, the court distinguished between a justiciable controversy (which is amenable to judicial review) and a policy decision by the political branches of government (which is a “political question” inappropriate for judicial review). The court stated:

“The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand.”

123. In **Patrick Ouma Onyango & 12 others Vs Attorney General and 2 others** Nairobi, High Court Misc. App. 677 of 2005 (O.S) [2005] eKLR the court asked whether it should interfere with a political or legislative process: It stated:

“The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters”.

124. The court relied on **Blackburn vs Attorney General** [1971] 1 WLR 1037 and particularly the decision of Salmon L.J;

“Whilst I recognise the undoubted sincerity of Mr. Blackburn’s views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treaty-making power of the sovereign. As to Parliament, in the present state of the law it can enact, amend and repeal any legislation it pleases. The role power of the court is to decide and enforce what is the law

and not what it should be now or in the future”.

125. In the Trusted Society of Human Rights Alliance case (supra), the court opined:

“Sharply put, the question presented in the case is whether it is constitutionally permissible for the court to review decisions by Parliament and the Executive on appointment to a state or public office either due to procedural infirmities of the appointment process or on legality on its merits when the procedural formalities for appointment have been followed. Paraphrased, once Parliament and the Executive allege that they have followed the formal procedures for appointment to an office under the Constitution, does that divest the Court of any jurisdiction to conduct a review of the appointment to determine conformity with the Constitution?...Therefore we have come to the conclusion that the doctrine of separation of powers does not disentitle the Court from entertaining the controversy surrounding the appointment of the Interested Party. A constructive reading of our Constitution; our previous case law on the question; and comparative jurisprudence from other jurisdictions on the question have led us to the conclusion that the High Court of Kenya can properly review both the procedures of appointment of the Interested Party as well as the legality of the appointment itself-including determining whether the Interested Party meets the constitutional threshold for appointment to the position.”

126. The issues raised in these petitions are not purely political questions. The arguments made by the Respondents and the Interested Party about justiciability must be weighed against the Constitutional principles on national values, leadership and integrity applicable to State and public officers. This court has jurisdiction to interpret these constitutional principles and determine whether they have been contravened, subject to the limitations discussed earlier.

127. While the High Court has unlimited jurisdiction and is clothed with power to interpret and enforce the Constitution, there are caveats to it. We agree that this Court should not deal with hypothetical and academic issues. There must be a real dispute or controversy. The 1st Petitioner had sought a declaration that we have jurisdiction to issue an advisory opinion “outside of an adversarial or real dispute”. We think the John Harun Mwau case (supra) has adequately answered that prayer.

128. Applying the above criteria, the prayers in petition Number 554 of 2012 by the 1st, 2nd and 3rd Petitioners were presented to court on 30th November 2012 long before the 2nd Respondent accepted nominations of the 3rd, 4th and 5th Respondents. The Petition Number 573 of 2012 by the 4th Petitioner was first presented on 14th December 2012 and Petition 579 of 2012 by the 5th and 6th Petitioners on 18th December 2012. At that point, the court was being invited to deal with hypothetical questions that fell outside its province. Furthermore, at that point in time there was no real dispute between the Petitioners and the 2nd Respondent. As at the time of hearing the petitions, however, the 2nd Respondent had accepted the nomination of the 3rd, 4th and 5th Respondents and we find that the petitions are properly before us.

3. The Role of the High Court in interpreting Chapter Six of the Constitution

(a)The Interpretation of the Integrity Provisions of the Constitution and their Applicability

129. Chapter Six of the Constitution lays down the principles upon which State Officers should conduct themselves. The chapter makes it clear that the power exercised by State Officers is a public trust that is to be exercised to serve the people. In exercising this power, State officers are required to demonstrate respect for the people of Kenya, make decisions objectively and impartially, refuse to be influenced by favouritism or corruption, serve selflessly and be accountable for their actions. Article 73 (2) provides that the principles of leadership and integrity include:

“(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not

influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.”

130. In interpreting the provisions of Chapter Six, we are guided by Article 10 and Article 259 of the Constitution. Article 10 obliges us to apply the national values and principles whenever we interpret the Constitution, including the values and principles of good governance, integrity, transparency and accountability. We have earlier in this judgment set out the principles that will guide this court in interpreting the Constitution. We must therefore not only give a holistic and purposive interpretation to Chapter Six of the Constitution, but an interpretation that will enhance good governance, the observance of the rule of law and human rights.

131. On the issue canvassed by the parties on the threshold of integrity required to be met, we note that the purpose of Chapter Six is to set higher standards of integrity for persons seeking to serve as State officers. Integrity is the firm adherence to moral and ethical values in one’s behaviour. Integrity is therefore not only about an individual’s own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar’s wife: they must be beyond reproach.

132. In this regard, we are in agreement with the statement made in Trusted Society of Human Rights Alliance vs The Attorney General and Others, Nairobi High Court Petition No 229 of 2012, [2012] eKLR wherein it was stated as follows:

“105. According to Black’s Law Dictionary (2nd Edition), “integrity, as occasionally used in statutes prescribing the qualifications of public officers, trustees etc., means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with “probity,” “honesty,” and “uprightness.”

106. In the Democratic Alliance Case cited earlier, the Supreme Court of Appeal of South Africa said this of integrity of public officers:

‘An objective assessment of one’s personal and professional life ought to reveal whether one has integrity. In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word ‘integrity’: ‘Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.’ Collins’ Thesaurus (2003) provides the following as words related to the word “integrity”: ‘honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.’ Under ‘opposites’ the following is noted: ‘corruption, dishonesty, immorality, disrepute, deceit, duplicity.’

On the available evidence the President could in any event not have reached a conclusion favourable to Mr. Simelane, as there were too many unresolved questions concerning his integrity and experience.

107. To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his

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

133. In addition, the Constitution and particularly the provisions of Chapter Six are aimed at improving the lives of citizens through good governance. The processes by which public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights must be in a manner that is free of abuse and with due regard for the rule of law. Impeccable moral and ethical standards on the part of State officers are important prerequisites, in inspiring confidence in the citizens. They also influence, motivate, and enable others to contribute towards the effectiveness and success of the public institutions in which State officers serve or lead.

134. We are also persuaded in this regard by the decision of the Supreme Court of India in **The Centre for PIL and Another vs The Union of India Writ Petition (C) NO. 348 of 2010**, that the integrity of State officers is crucial in maintaining institutional integrity.

135. The Petitioners have argued that an essential *sine qua non* in implementing the constitutional provisions on integrity is an objective criteria and assessment, that ought to be applied in determining whether persons offering themselves for State office are persons of integrity. The 3rd and 4th Respondents argue that different standards apply in elective offices as opposed to appointive offices, as those standing for election will face the judgment, vetting and assessment of the public as to their integrity. The only condition that applies is that the elections are free and fair.

136. We are in agreement with the Petitioners that an inquiry into the integrity of a candidate for State office whether appointed or elected, is an essential requirement for the enforcement of Chapter Six of the Constitution. The nature and procedures of such inquiry is for Parliament to decide by way of legislation enacted pursuant to Article 80 of the Constitution. The relevant legislation in this respect includes the Leadership and Integrity Act 2012, the Ethics and Anti-Corruption Commission Act 2011, the IEBC Act 2011, the Public Officer Ethics Act 2003 and the Political Parties Act 2011. These Acts provide mechanisms under which inquiry may be made concerning the integrity of the person who aspires to public office.

137. In our view, the key question is whether this Court is the right forum, in the first instance, to undertake an assessment of the integrity of persons presenting themselves for public office. The court ideally operates in an environment of competing legal claims founded on evidence. However, in the private sector, the enforcement of general standards of ethical conduct or professional responsibilities are, by their nature, generally collegial exercises, where peers must judge the conduct of those within their own group, profession, or own organization. In the public sector, enforcement of ethics is, to a large extent, similar to the above procedure in the private sector save that the same is regulated by statute. The mechanisms of inquiry would be set out in the parent statute. Such institutions, for example the IEBC and Ethics and Anti-Corruption Commission (EACC) are bestowed with the necessary powers to conduct, inquire and take disciplinary action.

138. The Court should not descend into that arena of inquiry. Its proper role is to ensure that the inquiry is undertaken to the acceptable standards set by the Constitution. This is what distinguishes the present petitions from the one in the **Trusted Society of Human Rights Alliance case** (supra). In the **Trusted Society case** some form of inquiry had been undertaken, and the Court found that despite the said inquiry, there were still unresolved questions about the integrity of the candidate in question. There is no evidence before us of any such inquiry having been undertaken in respect of the 3rd and 4th Respondents' integrity by the relevant institutions established by statute. Our findings as to the inquiries on the integrity of the 5th Respondent are discussed in detail elsewhere in this judgment.

(b) The Interplay between the Bill Of Rights and Chapter Six

139. The Petitioners' case, in a nutshell, is that the 3rd, 4th and 5th Respondents have fallen short of those principles and should be disqualified from contesting the next general election or from holding public office. The gravamen of the petition is the confirmation of charges at ICC or in the case of the 5th respondent, the Judicial Review decision on misappropriation of constituency development funds. The Respondents' case on the other hand is that they are entitled to a fair trial and to be presumed innocent and this should not be a bar to their contesting public office. The Interested Party submitted that its right as a political party to field candidates for the presidential election and to vote for those candidates would be prejudiced.

140. The Bill of Rights is a cornerstone of the Kenyan Constitution. Political rights have been set out extensively under Article 38 of the Constitution key among them being the right to form and participate in political parties. Every citizen has the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors. Additionally, every adult citizen has the right, without unreasonable restriction to be *inter alia*, a candidate for public office or office within a political party of which the citizen is a member and if elected, to hold office.

141. Article 50 (2) (a) provides that an accused person is presumed innocent until proved guilty. It underpins the principle of a fair hearing. Article 24 provides instances when these rights can be limited while Article 25 sets out the rights cannot be limited. All these rights are undergirded by the supremacy of the Constitution set out in Article 2.

142. There is then a critical interplay between the Bill of Rights on the one hand and Chapter Six of the Constitution on leadership and integrity on the other hand. Articles 10, 159 and 259 of the Constitution provide clear guidance on interpreting the Constitution. We have already discussed those principles of interpretation. See **John Harun Mwau & 2 others vs The Attorney General & 2 others**, Nairobi, High Court Petition 65 of 2011 [2012] e KLR. We are of the view that the protections afforded by the Bill of Rights, and particularly Articles 38 and 50 in the unique circumstances of this case must prevail for the following reasons.

143. Firstly, by dint of Article 2 of the Constitution and the International Crimes Act 2008, the ICC is a court exercising complementary jurisdiction. Although the 3rd and 4th Respondents have been indicted by that court, they have not lost their fundamental rights as Kenyans. Confirmation of the serious charges they face is a preliminary stage in the trial: they have not been convicted of a criminal offence.

144. Secondly, with regard to the right to a fair hearing, Article 25 of the Constitution provides that this is a right that cannot be limited or derogated from. Justice Sachs has succinctly captured the significance of the presumption of innocence and why it cannot be derogated from in **State Vs Coetzee** [1997] 2 LRC 593 at 677:

"There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of

cases.”

There is also a longstanding recognition of the right to a fair hearing in key international human rights instruments.

145. Thirdly, Article 24 of the Constitution states that:

“a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.”

146. The question that we have to consider with respect to the political rights of the 5th Respondent and the Interested Party is whether it is reasonable and justifiable to limit their rights. The right of the 5th Respondent to contest any public office would be violated despite acquittal of criminal charges that he stole or misapplied public funds. It is our finding that a limitation of his rights in these circumstances would be unreasonable.

147. The rights of the interested party, TNA, to field its candidates for the presidential election would be prejudiced by disqualification of the 3rd and 4th Respondents from running. And hand in hand with that would be the violation of the citizen to exercise his or her democratic right to elect representatives in a free and fair election by universal suffrage. There must then be a delicate balance particularly where a party seeks to enforce a constitutional right whose effect is to override another’s fundamental right. See S.W.M vs G.M.K Nairobi, High Court Petition 235 of 2011 [2012] e KLR. It is our finding that limiting the Interested Party’s political rights would be inimical to the exercise of democratic rights and freedoms of its members.

(c) The Effect of the ICC Cases on the Integrity of the 3rd and 4th Respondents

148. It is common knowledge, and this Court takes judicial notice of the fact that, the 3rd and 4th Respondents have been indicted at the International Criminal Court. The charges they are facing have been confirmed and indeed they are to appear for trial early in the month of April 2013. The 3rd Respondent is a presidential candidate nominated by the Interested Party namely the National Alliance Party (TNA) which is in coalition with the United Republican Party (URP) which has also nominated the 4th Respondent as the running mate of the 3rd Respondent.

149. The summary of the declarations sought against the 3rd and 4th Respondents is that the confirmation of the charges against them at the ICC would be a threat to the Constitution. Further, that the presumption of innocence in their favour should not override or outweigh the overwhelming public interest to protect and uphold tenets and principles of the Constitution as set out under Articles 10 and 73 of the Constitution. It is also argued that for the two Respondents to hold public or State office would be a recipe for anarchy and perpetuate the culture of impunity.

150. The petitioners submit that until acquittal by the ICC, the continued presence in the office of the Deputy Prime Minister by the 3rd Respondent and Member of Parliament by the 4th Respondent is a violation of Chapter Six of the Constitution. It is also the Petitioners’ case that the intended nominations of the 3rd and 4th Respondents to contest the offices of President or Deputy President as the case may be will be a violation of the Constitution since if elected they will be unable to uphold, protect or defend the Constitution on account of charges against them at the ICC. They shall also not be able to perform the duties of the two offices required by the Constitution.

151. The Petitioners also contend that the trial process of the ICC up to confirmation of charges, meets the necessary legal threshold required by the law in Kenya to bar a person from being nominated to or assume State office. The life of the 10th Parliament wherein both the 3rd and the 4th Respondents were Members of Parliament has ended. Therefore their continued holding of the position of Member of

Parliament does not arise.

152. Under the principle of complementarity the ICC is mandated to seek, obtain and use relevant materials to facilitate any trial relating to suspects before it. Kenya is a signatory to the Rome Statute and therefore a State Party with regard to the functions and procedures of the ICC. As and when the ICC requires Kenya to comply with any request under the Rome Statute, it is bound by law to do so. Kenya has however domesticated the provisions of the Rome Statute by enacting the International Crimes Act of 2008. That notwithstanding, there are set standards both in the Constitution and local statutes that are sufficient to address the matters placed before us by the Petitioners and Respondents. We subscribe to the submissions by the 3rd Respondent and the Interested Party that by virtue of the principle of complementarity under Article 1 of the Rome Statute, the ICC and the Kenyan courts cannot simultaneously adjudicate over the same matter. Upon confirmation of the charges against both the 3rd and 4th Respondents, only the ICC could bar them and it cannot, because the Rome Statute has no such provision.

153. The qualifications to run for State offices by the 3rd and 4th Respondents are set out in Article 99 (1) as read with Article 137 (1) of the Constitution. As at today's date, the nomination of the 3rd and 4th Respondents to run for the respective offices set out hereinabove has been completed. Other than the petitions before us, we are not aware of any other challenges resulting from the said nominations. We have already addressed the issue of jurisdiction relating to Presidential Elections and we say no more.

154. It has neither been alleged, nor has any evidence been placed before us that the 3rd and 4th Respondents have been subjected to any trial by any local court or indeed the ICC that has led to imprisonment for more than 6 months. The confirmation of charges at the ICC may have formed the basis for commencement of the trial against the 3rd and 4th Respondents. The end result however, cannot be presumed neither is there sufficient evidence that at the end of it all, a conviction may be arrived at.

155. We are alive to the serious nature of the charges the 3rd and 4th Respondents are facing at the ICC. However, we can only say that much. This is because under Article 50 of the Constitution, the 3rd and 4th Respondents are to be presumed innocent until the contrary is proved. The entrenchment of this Article is meant to ensure a fair trial in respect of every person before a court, tribunal or body. This right falls under the category of fundamental rights and freedoms that may not be limited as provided in Article 25 of the Constitution.

156. We have already placed on record the rights of the citizens of this country to make political choices, and indeed the rights of the 3rd and 4th Respondents to seek public office. Article 1 of the Constitution of Kenya places all sovereign power on the people of Kenya which shall be exercised only in accordance with the Constitution. It shall not be, and can never be the role of this court to exercise that power on behalf of the people of Kenya. That right must remain their best possession in a democratic society and is inalienable.

(d) The Effect of the CDF Case on the Integrity of the 5th Respondent

157. In Petition No. 573 of 2012, the Petitioner moved the court for several orders as set out above. The 4th Petitioner's Amended Petition is neither signed nor dated. The verifying affidavit contains a stamp of the Commissioner for Oaths but is not signed by the Commissioner. It contravenes express provisions of the Oaths and Statutory Declarations Act. It also violates elementary rules of amendments of pleadings. The amended petition is thus defective.

158. There is a line of authorities holding that if the amended pleading is struck out, the original action collapses. See **Mutuku & 3 others Vs United Insurance Company Limited** [2002] 1 KLR 250. But there is also a different approach in **British Insurance Company Limited Vs Samiullah** [1967] E. A. 659 and **Eastern Radio Services & another Vs R.J. Patel** [1962] E.A 818. The two latter decisions support the proposition that even after amendment, the court is entitled to refer to the original pleadings.

159. We are now enjoined by Article 159 of the Constitution to do justice to the parties without undue regard to technicalities. See **Kenya Commercial Finance Company Limited Vs Richard Akwesera Onditi** Court of Appeal, Nairobi, Civil Application NAI 329 of 2009 (unreported). The impugned amendments that were introduced brought in a new petitioner and address. We do not think it would be right to strike out the petition considering the nature of the original petition and the overriding objective of the court.

160. The main allegation against the 5th respondent is that the action of the 5th Respondent in transferring Kshs. 1,050,000/= from the CDF to his personal account violates the national values and principles of governance as provided by Article 10 (2) of the Constitution and Chapter Six on leadership and integrity. He should therefore be disqualified from vying for any elective post on or before the general elections. The petitioner also moved the court to bar the IEBC from accepting the nomination of the 5th Respondent to participate in the elections or hold public office.

161. Two legal actions relating to this petition are instructive. The first is **Republic vs CDF Board and Ethics and Anti-Corruption Commission ex-parte Thomas Mongare Moindi and 3 others** High Court Judicial Review No. 264 of 2010. In this matter there was an order *inter alia* for “*mandamus* compelling the respondent to restore funds withdrawn from the West Mugirango Constituency Development Fund account at the instance of the patron, Hon. Joseph Ondicho Gesami, for personal use contrary to the provisions of the Constituencies Development Fund Act”.

162. After hearing the application Musinga J (as he then was) made a finding that the applicants and the interested party had demonstrated that the respondent as well as the Constituency Development Fund Committee which included the 5th Respondent herein, had failed to ensure proper management of the fund in question. As a result there had been misappropriation and pilferage of the fund. Before the conclusion of the application before Musinga J (as he then was) the 5th Respondent in this petition was arrested and charged before a Magistrate’s Court at Kisumu vide **Criminal Case No 354 Of 2011**. However, after a full trial he was acquitted of the charge.

163. Notwithstanding the acquittal, the Constituency Development Fund Board wrote to the 5th Respondent demanding a refund of Kshs. 1,050,000/= otherwise it would involve the Ethics and Anti-Corruption Commission and freeze the Constituency account. The 5th Respondent resisted this move but eventually “very reluctantly” effected a transfer of the said sum to the West Mugirango Constituency Development Fund”. He then instituted a suit, this being **Milimani SRMCC NO. 45 of 2013**, demanding a recovery thereof. That suit is still pending determination.

164. It is common ground that the nomination of the 5th Respondent to contest an elective office has been completed. Therefore, the prayer to bar the IEBC from accepting his nomination has been overtaken by events. No appeal has been registered either with the IEBC or any other adjudicating body to address the issue of his nomination.

165. The qualifications and disqualifications of election as Member of Parliament are set out in Article 99 of the Constitution. None of those provisions have been cited as against the 5th Respondent. However, there is the allegation that his conduct in the entire transaction makes him ineligible to stand for any public office. Our simple answer is that there is no case standing in the path of the 5th Respondent and above all, having been acquitted of a criminal offence relating thereto, any objection would be unsustainable. As these were the only prayers against this particular party, we find that the petition must fail.

166. Before we conclude, we would like to thank all the counsel for their well-researched submissions and diligence. We may not have made specific reference to all authorities cited, but this should not be construed that they were wanting in substance.

167. For the record, this judgment comes at a time when several candidates are conducting campaigns across the country to advance their agenda for elective offices. Diverse views have been expressed on the

issues before the court both at national and international fora. The media has also extensively commented on the matters before us. We recognize and uphold the freedom of expression. We assure Kenyans that our judgment has not been influenced in any manner whatsoever by that discourse.

4. Are the Petitioners entitled to the Reliefs Sought?

168. After carefully considering the petitions and the responses thereto, and also after reviewing the written and oral submissions, including the authorities cited, this Court finds that the reliefs sought by the Petitioners and which have been set out hereinabove *in extenso*, cannot be granted for reasons that appear in the body of our judgment. A summary of our findings are as follows:

- a) We were urged to make declarations whose ultimate aim would result in the determination of the question, whether the 3rd and 4th Respondents are qualified to offer their candidature for the office of President and Deputy President respectively. This is an issue which is within the exclusive jurisdiction of the Supreme Court. In the premises therefore, this Court lacks jurisdiction to deal with a question relating to the election of a President or Deputy President.
- b) We hold that our jurisdiction in the unique circumstances of this matter, was limited to interpreting the provisions of the Constitution in respect of the provisions of Chapter Six on leadership and integrity.
- c) Where there exist sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. We found that the mandate of IEBC and other statutory bodies in dealing with the issues of eligibility and integrity were not exhausted by the Petitioners before invoking the jurisdiction of this Court.
- d) Despite the serious nature of the charges facing the 3rd and 4th Respondents at the ICC, under Article 50 of the Constitution, they are presumed innocent until the contrary is proved. This right falls under the category of fundamental freedoms and rights that cannot be limited under Article 25 of the Constitution.
- e) The 5th Respondent having been acquitted of a criminal offence relating to the allegations made against him, any attempt to curtail his political rights would be unreasonable.
- f) Article 1 of the Constitution of Kenya places all sovereign power on the people of Kenya which shall be exercised only in accordance with the Constitution. Limiting the Interested Party's political rights under Article 38 would be inimical to the exercise of democratic rights and freedoms of its members.
- g) We found that some of the prayers sought by the 2nd and 3rd Petitioners were speculative and overtaken by events. They were therefore spent. In the end, the entire petition by the 2nd and 3rd Petitioners fails for lack of merit and want of prosecution

5. Who should bear the Costs of the Petitions?

169. Costs follow the event, and are also at the discretion of the court. The Petitions that have been brought were on a matter of public interest. However, the Respondents have had to defend several petitions, and we hold they are entitled to costs. We award the 1st, 2nd, 3rd and 4th Respondents costs of the Petitions brought against them to be paid by the 1st, 2nd, 3rd, 5th and 6th Petitioners, jointly and severally. We also award the 5th Respondent costs to be paid by the 4th Petitioner. As regards the interested party we make no order as to costs.

Orders accordingly.

Delivered and Dated at Nairobi this 15th day of February 2013

A. MBOGHOLI MSAGHA

JUDGE

L. KIMARU

JUDGE

H. A. OMONDI

JUDGE

P. NYAMWEYA

JUDGE

G.K. KIMONDO

JUDGE