



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

Petition No. 359 Of 2013

BETWEEN

DIANA KETHI KILONZO.....1ST PETITIONER

WIPER DEMOCRATIC MOVEMENT-KENYA.....2ND PETITIONER

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION- DISPUTE

RESOLUTION COMMITTEE..... 2ND RESPONDENT

SALAD BORU- MAKUENI COUNTY RETURNING OFFICER....3RD RESPONDENT

AND

AGNES MUTINDI NDETEI.....1ST INTERESTED PARTY

RODAH NDUMI MAENDE.....2ND INTERESTED PARTY

PHILES NTHENYA MUINDE.....3RD INTERESTED PARTY

JOHN KURIA KIHICO.....4TH INTERESTED PARTY

JOHN HARUN MWAU.....5TH INTERESTED PARTY

LABOUR PARTY OF KENYA.....6TH INTERESTED PARTY

URBANUS KATHIMO MUTHOKA.....7TH INTERESTED PARTY

NARC PARTY.....8TH INTERESTED PARTY

JUDGMENT

Background

1. On 4th March 2013, Kenyans voted in the first General Elections under the Constitution of Kenya, 2010. In Makueni County, Mr. Mutula Kilonzo, now deceased, was returned as the duly elected Senator. Following his demise on 27th April 2013, the 1st respondent, the Independent Electoral and Boundaries Commission (hereinafter referred to as the “IEBC”) by Gazette Notice No. 7082 dated 29th May, 2013 declared the Makueni senate seat vacant. The Gazette Notice also required that each political party wishing to participate in the by-elections to replace Mr. Kilonzo to finalise its party nominations on or before 5th June 2013.

The Parties

2. The 1st petitioner, Ms Diana Kethi Kilonzo (hereinafter referred to as “Ms Kilonzo”) describes herself in the petition as a voter in Langata Constituency in Nairobi County having registered and been issued with acknowledgement slip number 0002058624 for elector’s number 000733112141125-6.
3. The 2nd petitioner, Wiper Democratic Movement-Kenya (hereinafter referred to as “Wiper Party”) is a political party duly registered under the **Political Parties Act, 2011 (No. 11 of 2011)** and has nominated Ms Kilonzo to vie for the Makueni County Senate seat.
4. The IEBC is established under **Article 88(1)** of the Constitution of Kenya, 2010. Its mandate is to conduct or supervise referenda and elections to any elective body or office established by the Constitution or legislation. The 2nd Respondent, the Independent Electoral and Boundaries Commission Dispute Resolution Committee (“the Committee”) is described as the Dispute Resolution Committee of the IEBC established pursuant to section 74(2) of the **Elections Act, No. 24 of 2011** (“the Act”). The 3rd respondent is the Returning Officer for Makueni County, appointed as such by the 1st respondent (the “Returning Officer”).
5. Agnes Mutindi Ndetei, Rodah Ndumi Maende, Philes Nthenya Muinde, John Kuria Kihiko, John Harun Mwau, Labour Party of Kenya, Urbanus Kathimo Muthoka and NARC Party are the 1st to 8th interested parties respectively. The 1st, 2nd, 3rd and 4th interested parties were claimants in the two complaints before the Committee whose proceedings are the subject of the present Petition. The 5th and 6th interested parties applied and were permitted not to participate in the proceedings, while the 7th and 8th interested parties were served but did not enter appearance.

The Dispute

6. On 27th June 2013, Ms Kilonzo presented her party nomination certificate to the Returning Officer, Makueni County who certified her candidature and issued her with a Nomination Certificate of the same date for the senate seat.
7. However, matters took a different twist when her eligibility came into question following the filing of two complaints before the Committee challenging her registration status. The first **Complaint No. 1 of 2013- Peoples Party of Kenya & 2 Others –vs- Diana Kethi Kilonzo and IEBC** was dated 1st July 2013. It was lodged by the People’s Party of Kenya and two other complainants namely John Kuria Kihiko and Joseph Kituku Mwanza being the Secretary General of Peoples Party of Kenya and member respectively. The second was **Complaint No. 3 of 2013- Agnes Mutindi Ndetei & 2 others v Kethi Kilonzo, Salad Boru, IEBC and Wiper Democratic Movement** lodged by the 1st, 2nd and 3rd interested parties.
8. The complainants contended that Ms Kilonzo’s nomination was improper for various reasons, among them that she was not a registered voter; that the Returning Officer lacked credible documents before him confirming Ms Kilonzo as a registered voter and thus clearing her to contest the Makueni senate by-election was contrary to the law; and that her nomination was

- irregular and lacked transparency.
9. They also contended that Ms Kilonzo had not been nominated by her party within 45 days before the election as required under the law; that her elector's number and acknowledgement slip did not exist in the voter register and biometric data; that her allegation that she registered at the Karen Registration Centre was false because there was no centre in Langata Constituency by that name; and that the acknowledgement slip was from the booklet used for the registration of former President Mwai Kibaki and was exclusively reserved for the President. They asked the Committee to revoke and withdraw the clearance and certification of Ms Kilonzo as a candidate for the by-election.
 10. These complaints had apparently been preceded by a letter dated 24th June 2013 complaining that Ms Kilonzo was not a registered voter. A follow-up letter dated 2nd July 2013 was sent to the Committee and copied to the IEBC. It was signed by the Secretaries-General of United Republican Party (URP) and NARC Party and The National Alliance Party's Secretary of Legal Affairs. This letter challenged the validity of Ms Kilonzo's registration on account of the identification documents she had used for registration.
 11. When the two complaints came before the Committee, they were consolidated and two issues framed for determination:

(i) Whether Ms Kilonzo is a registered voter; and

(ii) Whether Ms Kilonzo was validly nominated to vie for the election of Senator of Makueni County.

12. In its decision of 8th July, 2013, the Committee found that Ms Kilonzo was not a registered voter as envisaged under Section 2 of the Act and issued the following orders:

”

- a. ***The 1st Respondent having not been validly nominated, her nomination certificate issued to her by the Returning Officer Makueni County on the 27th June 2013 is hereby revoked.***
- b. ***The 3rd Respondent to take immediate steps to commence investigations to determine how the acknowledgment slip issued to the 1st Respondent herein was issued.***”

13. Vide Gazette Notice No. 9394 dated 8th July 2013, the IEBC gazetted the candidates for the Makueni Senate seat by-election and excluded Ms Kilonzo.

14. It is this decision that precipitated the proceedings now before us. Aggrieved by the Committee's decision, Ms. Kilonzo approached this Court under a certificate of urgency dated the 10th July 2013 seeking conservatory orders against the said decision.

15. When the matter came up before the Court, Lenaola J. certified it urgent and referred it to the Hon. Chief Justice to empanel a three-judge bench to hear and determine the petition. He also issued orders postponing the by-election from the 22nd July 2013 to the 26th of July 2013.

Preliminary Matters

16. The matter came up before us on 15th July 2013 for directions, when one Isaac Aluoch Polo Aluochier made an application seeking to be enjoined as a friend of the Court. The application was argued before us, with all the parties to this petition opposing it. We dismissed it, reserving reasons for the dismissal for inclusion in this judgment. We shall deal with our reasons for dismissing the application first before addressing our minds to the substantive issues before us.
17. The gist of Mr. Aluochier's application was that he wanted to be permitted to participate in the petition as a witness to show that the Wiper Party should be disqualified from nominating a candidate for the Makueni by-election. His contention was that it had breached the law when it

nominated the late Mutula Kilonzo, then a State officer, to vie for the Makueni Senate seat. Further, he agreed that the IEBC was equally culpable for not taking requisite action in respect of the alleged breach.

18. In our view, Mr Aluochier did not meet the criteria for admission as a friend of the court set out in **Article 22(3)(e) of the Constitution** as read with **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice 117 of 2013)**.

19. **Rule 2** defines a ‘friend of the court’ as “... *an independent and impartial expert on an issue which is the subject of proceedings but is not party to the case and serves to benefit the court with their expertise.*”

20. The Supreme Court, when presented with a similar application in **Raila Odinga & 5 Others -vs- Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR**, held that where, in adversarial proceedings, parties allege that an applicant for *amicus curiae* (‘friend of court’) is biased or hostile to one or more of the parties, or where the applicant through previous conduct appears to be partisan on an issue before the court, then such objection must be considered seriously. As such, Mr. Aluochier who brings no expertise and whose position on this matter and is hostile to the Wiper Party does not qualify as a friend of the Court.

21. Having disposed of the preliminary matter, we now turn to a consideration of the petition.

The Petition

22. In the petition dated 10th July 2013 and supported by two affidavits, one sworn by Ms Kilonzo and the other by Mr David Musila, the Chairman of Wiper Party, sworn on the same date, the petitioners seek the following reliefs from this Court:

(i) A declaration that the proceedings and decision of the 2nd Respondent have violated Articles 2(4), 12, 25, 35, 38(3), 47, 50, 81 and 83 of the constitution in relation to the Petitioners.

(ii) A declaration that the 2nd Respondent acted outside the jurisdiction conferred upon it under Article 88(4)(e) of the constitution and Section 74 of the Elections Act.

(iii) A declaration that the 1st Petitioner is a duly registered voter.

(iv) A declaration that the 1st Petitioner was duly and validly nominated by the County Returning Officer.

(v) A declaration that the 2nd Petitioner has a right to nominate a candidate to contest in the By-Election for Makueni County in the event that the 2nd Respondent’s decision revoking the nomination of the 1st Petitioner is upheld.

(vi) An order of certiorari to quash the decision and ruling of the 2nd respondent delivered on 8th July 2013.

(vii) An order of mandamus directed to the Independent Electoral and Boundaries Commission to include the name of Diana Kethi Kilonzo in the register of voters in NCC Social Hall, Lang’ata.

(viii) An order of certiorari to quash the decision and the gazette notice of 8th July, 2013 naming the candidates in the By-Election to the exclusion of the Petitioners.

(ix) An order of mandamus directed to the Independent Electoral and Boundaries Commission to include the name of the 1st Petitioner as candidate in the By Election for the Makueni County Senate Seat.

(x) Costs of the Petition.”

The 1st Petitioner’s Case

23. Ms. Kilonzo’s case as presented before us by her Counsel, Mr Orengo, Ms. Soweto and Mr Ndubi was that her fundamental rights and freedoms guaranteed under the Constitution were violated by the Committee when it heard and determined the complaints challenging her eligibility to vie for the Makueni Senate seat. She contends that there was a breach of the rules of natural justice, conflict of interest and bias in the proceedings; that her right to fair administrative action guaranteed under Articles 20 and 47 of the Constitution were contravened; that the Committee infringed her rights by sitting as judge in a dispute in which they were not only active actors but in which they were also the accused and as culpable as she was.
24. Mr. Orengo submitted that the nature of the complaints before the Committee was such that the IEBC and the Committee were aware that issues concerning the registration of voters, management and custody of the Voters’ Register and all relevant materials and records were central to the resolution of the complaints; that the issues being so directly connected with the general and specific performance and management of IEBC and its officers, there was a clear conflict of interest and actual or apparent bias on the part of the IEBC.
25. Ms. Kilonzo contended that witnesses in support of the complaints were employees of the IEBC and taking instructions directly or indirectly from both the IEBC and the Committee and could not reasonably be objective and impartial; that despite this clear conflict of interest and apparent bias, the Committee went ahead to hear and determine the matter; that the Committee is part and parcel of the IEBC and was therefore sitting as a judge over their collective actions, mistakes and/or failures which were directly in issue in the determination of the complaints.
26. Mr. Orengo read excerpts from the pleadings before the Committee to demonstrate that the complaint was principally against the IEBC and the Returning Officer and therefore they could not sit in judgment over their own affairs. He submitted that the Returning Officer was not an independent officer as asserted by the respondents but was in fact part and parcel of the IEBC and answerable to the IEBC either directly or indirectly. Counsel emphasised that the Committee had therefore acted as an accused, prosecutor, judge and executioner.
27. In her submissions on behalf of Ms. Kilonzo, Ms. Soweto re-emphasised the allegation of apparent bias levelled against the Committee. She argued that once the question of Ms Kilonzo’s registration process became an issue in the proceedings, none of the respondents could sit in judgment over the issue.
28. Ms. Kilonzo also impugned the Committee’s decision on the ground of jurisdiction, contending that there was procedural error and lack of jurisdiction on the part of the Committee in handling the matter as it did. She hinged this submission on **Rules 11 and 12 of the Rules of Procedure on Settlement of Disputes (“the Rules”)** made under the **Elections (General) Regulations, 2012 (“the Regulations”)** and contended that there ought to have been a complaint made to the Returning Officer in the first instance before the Committee could exercise jurisdiction over the matter. She submitted that there was nothing to show that there was such a dispute before the Returning Officer; that the Returning Officer was *functus officio* and could not recall the decision to grant a nomination certificate to Ms. Kilonzo; and that the Returning Officer could only exercise jurisdiction if there was a complaint made to him under the Rules. It was Ms. Kilonzo’s contention therefore that by exercising its appellate jurisdiction over the matter, the Committee made an error because the condition precedent to an appeal had not been met.

29. Ms. Kilonzo also faulted the Committee's decision for alleged breach of her right to a fair hearing. She contended that her rights protected under Article 50(1) on the right to a fair hearing by an independent and impartial tribunal were violated as the IEBC flagrantly discriminated against her by furnishing the complainants with evidence and material to support the allegations against her while refusing to supply her with the same material; that the Committee had already taken a predetermined position on the complaints against her and that the Committee was openly hostile, biased and discriminatory against her Counsel during the hearing.
30. She also urged the Court to find that her fundamental rights under Articles 20 and 50(2)(a), (c), (j) and (k) were contravened: That she was denied the right to be presumed innocent until the contrary is proved; the right to be informed in advance of the evidence that the IEBC sought to rely on, and the right to have reasonable access to that evidence and to have adequate time and facilities to prepare a defence. She contended further that the Committee refused to accord her adequate time to defend herself while affording the complainants noticeably more time to make their case without interruption by the Committee.
31. It is also her case that the IEBC had ambushed her with alleged evidence against her in spite of an earlier request by her Counsel for an affidavit by the IEBC of their response to the complaints, which affidavit was never provided. She asserts therefore that she was denied the right to adduce and challenge evidence brought against her.
32. Ms. Soweto called on the Court to take note of the fact that Ms Kilonzo presented her papers well in advance of the nomination day; that even before the presentation of the nomination papers, the Jubilee team had written stating that Ms Kilonzo was not a registered voter. It was Counsel's submission therefore that this created a nexus between the IEBC and the complainants as it was not clear how the complainants got wind of Ms. Kilonzo's registration status. Counsel further submitted that once the question of Ms. Kilonzo's eligibility was raised, it was incumbent upon the IEBC to contact her and address the issue with her or the Wiper Party; that the IEBC did not do so but instead chose to ambush her with a complaint of its own over the authenticity of the documents at the hearing of the complaint before the Committee.
33. Ms. Kilonzo also alleged breach of her right to equal protection of the law and the right to non-discrimination under Article 27. She contended that her fundamental rights under Article 27 had been contravened as the respondents had applied the law in a manner that was selective, discriminatory and prejudicial to her. She pointed out that IEBC had accepted the registration of another voter and candidate on the strength of an expired passport, but sought to exclude her right to vie on the same ground; that unlike other voters whose acknowledgement slips were recognised even in the absence of their names from any of the IEBC's register of voters, her acknowledgment slip was rejected.
34. Ms. Kilonzo also complained that the IEBC infringed on her political rights under Article 38 and her legitimate expectation as the duly nominated candidate under the Wiper Party to vie for the senatorial seat. She submitted that once IEBC had accepted her nomination in spite of its knowledge of the queries raised regarding her registration status, it could not turn around and revoke her nomination.
35. Mr Ndubi referred the court to the decision of the Court of Appeal in **Kones v Republic & another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP)** for the proposition that all election related disputes, including nomination disputes, fall under the jurisdiction of the court. Counsel faulted the respondents for shifting the burden of proof from themselves to Ms. Kilonzo and argued that the IEBC had a constitutional duty from which it could not abdicate to register voters.

The 2nd Petitioner's Case

36. The Wiper Party's case is discernible from the petition and the affidavit of Mr. David Musila the

- chairperson to the party dated 10th July, 2013 and submissions. Wiper Party alleges that its fundamental rights under Article 38 have been contravened in that its right to nominate a candidate to contest the Makueni County Senate seat in the by-election has been taken away. It bases its case on the fact that Kenya is a multi-party State and that to exclude the political party from the process would undermine the constitutional underpinnings of democracy upon which the State is founded.
37. Mr. Kajwang, Learned Counsel for Wiper Party, emphasized that his client was a corporate body with distinct and exercisable freedoms and rights under the Constitution quite apart from Ms Kilonzo's, and that it was entitled to enjoy such rights. He contended that these rights included the right to equal protection and equal benefit of the law (Article 27), the right to fair administrative action (Article 47), and the right to a fair hearing (Article 50). Mr. Kajwang made reference to various constitutional provisions such as Article 4 which recognises Kenya as a sovereign and multi-party democratic State and Article 38 on political rights. He submitted that the definition of the term 'person' under Article 260 included an association such as the Wiper Party. Counsel called on the Court to intervene and preserve the right of the political party which stood to be disenfranchised if it was denied the opportunity to field another qualified candidate in the elections.
38. Mr. Kajwang further submitted that there was no evidence that Wiper Party actively colluded with Ms. Kilonzo in the matter of her irregular registration or that it violated the provisions of Section 72(2) of the Act by fielding Ms Kilonzo while knowing that she was not qualified.
39. The Wiper Party argued that denial of its rights to field another candidate will disenfranchise the voters of Makueni, in violation of their rights under Article 38; that to deny it the opportunity to field a candidate would be in breach of its legitimate expectation to participate in political contest in a multi-party democracy and it urged the court to hold that it had a right to nominate another candidate to participate in the by-election if the rejection of Ms Kilonzo's nomination was upheld.

The 1st and 3rd Respondents' Case

40. The case for the IEBC and the Returning Officer was presented by Mr. Kimani Muhoro and Mr. Mahat Somane in reliance on the response to the Petition dated 15th July, 2013 and the Replying Affidavits sworn by Praxedes Tororey, the Director of Legal and Public Affairs of the IEBC, and Mr. Salad Buro Guracha, the Returning Officer.
41. They contend that political parties were required to submit the names of their nominees by 5th June 2013 to enable the IEBC to confirm the qualification of nominees such as their voter registration status ahead of the IEBC nomination; that aspirants were required to collect the nomination papers from the Returning Officer between 26th and 27th June, 2013 and that on receiving the names of the nominees the Returning Officer verified the registration status of the nominees.
42. With regard to the registration status of Ms Kilonzo, the IEBC and Returning Officer aver that it could not be conclusively verified whether she was a registered voter relying on the information available then; that the Returning Officer inspected the various registers save for two registers that were in the ballot box and which were subject of an election petition. However, she was given the benefit of doubt and her nomination papers accepted.
43. It is their argument that the complaints with regard to her registration arose out of her having presented a voter registration acknowledgment slip that indicated that she was a registered voter in Langata Constituency, Karen Registration Centre, NCC Social Hall Polling Station, yet she was allegedly not a registered voter.
44. Mr. Muhoro submitted that there were a lot of questions with regard to the validity of the acknowledgement slip, that there were many irregularities with regard to the slip that were shown in evidence before the Committee; that the slip was under investigation; and that Ms. Kilonzo admitted that she went to register as a voter with an expired passport and a copy of her identity

card.

45. Mr. Somane submitted that the Returning Officer has remedial powers to deal with any issues that arise at nominations as provided for under **Regulation 14(1)** of the Regulations, and that the 1st and 3rd respondents discharged their duties as custodians of election information in accordance with the Constitution.
46. He submitted further that at the hearing before the Committee, Ms. Kilonzo was accorded a fair hearing that was expeditious, efficient, lawful and reasonable and procedurally fair and thus in conformity with her rights as contemplated by Articles 20 and 47; and that the Committee had jurisdiction to hear and determine all disputes arising out of the nomination process by dint of Article 88(4)(e) as read with **Section 2** of the **Act** and **Regulation 99(2)** of the **Regulations**.

The 2nd Respondent's Case

47. The Committee opposed the Petition on the basis of the Replying Affidavit dated 15th July, 2013 sworn by the Committee's Chairman; Mr. Thomas Letangule. Its case as presented by its lead Counsel, Mr. Nyamodi, is that this petition and the averments contained in the affidavits in support of the Petition amount to an appeal against the Committee's decision and this Court lacks jurisdiction to entertain appeals therefrom.
48. Mr Nyamodi submitted that under **Article 88(4)(e)**, the IEBC has the exclusive constitutional mandate to determine all disputes arising out of the electoral process before a declaration of results by the Returning Officer. He contended that this Court's mandate on a matter emanating from the Committee was limited to a review of the processes under which the decision was taken; that the court's role was limited to making a finding as to the constitutionality of the process employed by the Committee in discharging that constitutional mandate; and that the Court could only exercise its constitutional role if the Committee carried out its duty in breach of its constitutional duty.
49. With respect to the proceedings before the Committee, counsel denied that there was a conflict of interest in its sitting to hear and determine the matter adding that the proceedings were conducted constitutionally, lawfully and in an open manner where all the parties were given an unhindered opportunity to ventilate their issues. Counsel also submitted that the allegation raised by the petitioners about contravening the principles of natural justice by being judges over its own cause, was never raised during the Committee hearings but at the submissions stage. Mr. Nyamodi submitted, however, that it sat on an appeal over a decision of the Returning officer whose office was independent of the IEBC; and that the granting of a nomination certificate was a decision from which an appeal could be preferred.
50. Regarding the complaints before it, the Committee contended that they were pleaded with sufficient particularity; that the IEBC was a respondent together with Ms. Kilonzo; and that the petitioners had a fair opportunity to respond. The Committee maintains therefore that it discharged its mandate in a manner that was regular and lawful.
51. With regard to the acknowledgement slip in Ms Kilonzo's possession, it was the Committee's contention that on the evidence presented before it, its finding was that it had been unlawfully obtained from the IEBC.
52. Counsel urged the Court to rely on the principle of harmonization and to interpret the Constitution as a whole. He relied on the decision in ***Centre for Rights Education and Awareness (CREAW) and Others –vs- The Attorney General, Nairobi Petition No 16 of 2011 (Unreported)***.

The Interested Parties' Case

53. The 1st, 2nd, 3rd and 4th interested parties opposed the Petition. The 1st-3rd Interested Parties relied on the affidavits sworn by Agnes Mutindi Ndeti and Philes Nthenya Muinde on the 15th of July,

2013. Their case was presented by Mr. Mbai and Mr. Mutinda.

54. The contentions by the 1st-3rd interested parties is that they were petitioners in the proceedings before the Committee as they had an interest with regard to the nomination of Ms. Kilonzo. They contend that she was not registered as a voter and should not have been nominated to vie in the forthcoming by-elections. They support the position of the Committee with regard to its jurisdiction to hear their complaint filed under Article 252(2).

55. Mr Mbai submitted that the three Interested Parties pursued the only option available to them which was filing the complaint before the Committee, and that they could only do that after Ms Kilonzo's nomination had been accepted by the Returning Officer. It was Counsel's submission that Ms Kilonzo knew or ought to have known that her registration was in issue and ought to have confirmed whether she was duly registered.

56. Counsel submitted that in the proceedings before the Committee, Ms Kilonzo admitted that she was aware that her name was not on the register of voters and therefore her registration status ceased to be an issue. Mr Mutinda emphasized that the proceedings were proper, and the Committee had jurisdiction to hear the matter because the interested parties' rights were about to be violated. Counsel pointed out that it was clear from the proceedings before the Committee that Ms. Kilonzo's counsel had more time in cross-examining the witnesses.

57. The 4th interested party, whose case was argued by Mr. Kigotho, filed an Answer to the Petition dated 15th July, 2013 and written submissions. He averred that every citizen has a right to be registered as a voter and that for one to enjoy this right one has to personally present himself or herself to the designated registration centres gazetted for registration. Further, that a citizen has a duty to ensure that he or she is included in the register and ascertain that his or her particulars are correct.

58. According to the 4th interested party, it is the duty of a political party to nominate a candidate who meets the requirements of the Constitution and the electoral laws, which he contends the Wiper Party failed to do.

59. The 4th interested party contended that neither Ms. Kilonzo nor the Wiper Party undertook due diligence to inspect the register to confirm Ms. Kilonzo's registration status before presenting her for nomination as a candidate. With regard to Ms. Kilonzo's acknowledgment slip, Counsel submitted that the serial number appearing on it did not belong to any of the booklets issued in the country. He urged the court to uphold the decision of the Committee and dismiss the petition with costs.

Analysis and Determination

60. Having heard the oral submissions of the respective parties in this petition and read their pleadings and respective written submissions, and having considered the issues that the parties proposed as falling for determination in this matter, we take the view that the following are the main issues for determination:

- a. **Whether the High Court has jurisdiction to hear and determine this matter, and if so, the extent of such jurisdiction.**
- b. **Whether the Committee had jurisdiction to hear and determine the complaints giving rise to this petition**
- c. **Whether the respondents violated the petitioners' constitutional rights.**
- d. **Whether the respondents violated the legitimate expectations of the petitioners.**

Jurisdiction of the High court

61. We will start with a consideration of our jurisdiction and the extent of such jurisdiction. Where the jurisdiction of the court has been made an issue in any proceedings, it is incumbent upon the court to dispose of the issue before doing anything else.

62. The respondents and the interested parties have submitted that our jurisdiction over the decision of the Committee is supervisory in nature under **Article 165(6)** which provides that:

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

63. It is their case that this court can only check whether the 2nd respondent has complied with the law, acted reasonably and adhered to the rules of natural justice. They argue that this court cannot usurp the decisional powers of the Committee.

64. On their part, the petitioners are of the view that this Court has jurisdiction to do that which is just. They argue that the petition is brought under Articles 22, 23 and 165 and they claim breach of fundamental rights. It is their case that Article 23 gives this Court original jurisdiction to hear and determine matters touching on the contravention of fundamental rights and freedoms.

65. We agree that the Court must indeed establish its jurisdiction before embarking on the hearing of any matter. This was observed by the Supreme Court in an advisory opinion **In The Matter of the Interim Independent Electoral Commission [2011] eKLR** where the Court stated as follows at paragraphs 29 and 30 of its opinion:

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

66. The Supreme Court again re-emphasized the significance of jurisdiction in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others [2012] eKLR** where it was stated at paragraph 68 that:

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

a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

67. We entirely agree with the Supreme Court. Jurisdiction is indeed comparable to a driving licence, for no motorist can lawfully embark on a journey without a valid driving licence. Once a judicial body establishes that it has no jurisdiction to handle a dispute, then it has no business proceeding further with the matter. What also emanates from the Supreme Court decisions is that jurisdiction emanates from express terms of the law and in the case of the High Court, it emanates from the Constitution. This leads us to the constitutional provisions providing for this court’s jurisdiction.

68. **Article 165(3)** grants jurisdiction to this Court in the following terms:-

“(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.”

69. As can be seen from the above provisions of the Constitution, this Court has both original and supervisory jurisdiction. There is, however, a delicate balancing act involved where the Court is asked to exercise its supervisory jurisdiction. The words of this Court in the case of **Jeanne W Gacheche & 6 Others v The Judges and Magistrates Vetting Board & 2 Others** [2012] eKLR should act as a guiding light in such circumstances. In that case, this Court observed that:-

“In our view therefore, we see it our duty to carve out a delicate balance that will ensure that the exercise of the court’s jurisdiction does not undermine the substratum of the vetting process or whittle down the clear intention of the ouster clause of shielding the mandate of the Vetting Board from judicial intrusion. In furtherance of this balance, we will ensure that the court only intervenes to the extent permissible by law and by the

dictates of justice. That balance will have been created if this court is able to ensure that the Vetting Board shall retain its place as the constitutionally mandated body to authoritatively, impartially and independently adjudicate upon matters relating to the removal or the process leading to the removal of judges as contemplated by Section 23(2) of the Sixth Schedule of the Constitution, with the only caveat that no aspect of the exercise of its function shall drift beyond the four corners of the mandate.”

70. It is imperative that the Court takes charge where the Constitution allows it to do so. The Court must exercise its jurisdiction to the full limit allowed by the Constitution in order to ensure that the Constitution is obeyed and respected by tribunals and other bodies under its supervisory jurisdiction. It must be noted that the IEBC - and by extension the Committee and the Returning Officer – is commanded by **Article 88(5)** to exercise its powers and perform its functions in accordance with the Constitution and national legislation. This is also underlined in **Article 249** which provides among the objects of the IEBC just like other Commissions and independent offices as being to, “**secure the observance by all State organs of democratic values and principles**” and to “**promote constitutionalism.**” Article 249(2) further provides that such commissions, **‘(a) are subject only to this Constitution and the law; and (b) are independent and not subject to direction or control by any person or authority.’**
71. In exercising its supervisory jurisdiction over the respondents, the Court must ensure that the respondents have complied with the spirit and letter of the law. In our view, where the respondents fail to do that which is demanded of them by the Constitution, this Court will step in, at the request of an aggrieved party, to provide appropriate relief as required by **Article 23(3)**.
72. On reading the pleadings in this matter we have come to the conclusion that we have two disparate petitions before us. On one hand, Ms Kilonzo challenges the constitutionality of the decision of the respondents. She appeared before the Committee and her case was heard and determined. In our view, her case calls for the exercise of our jurisdiction as specified by Article 165 Clauses (3)(d)(ii) and (6). Doing anything more would amount to granting her another opportunity to present her case afresh. We would be stepping into the shoes given to the IEBC by the Constitution.
73. We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities. As was stated in **International Centre for Policy and Conflict and 5 others -vs- The Hon. Attorney-General & 4 others [2013]eKLR;**

“[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...”

74. On the other hand, Wiper Party’s case is unique in that it seeks that this Court exercises its original jurisdiction. Although the Party participated in the proceedings before the Committee, the issue of its right to field a candidate in the by-election was never addressed. It is our considered opinion that Wiper Party’s case does indeed raise a novel issue touching on the Bill of

Rights. The right to political participation enshrined in **Article 38** can only be enjoyed where there is vibrant and free competition among political parties. It is therefore imperative that this Court exercises jurisdiction to inquire into the allegation that there may be violation of this right flowing from the decision of the Committee. In saying so, we have in mind **Article 165(3)(b)**, which grants the Court: ***“jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”***

We therefore find and hold that we have jurisdiction to hear and determine the petitioners’ claims in the terms already outlined.

Jurisdiction of the Committee

75. The other jurisdictional issue that arose was whether the Committee had authority to hear the matter in the first instance. The petitioners submitted, first, that the Committee had no jurisdiction to hear the matter since doing so would amount to sitting as a judge in its own cause considering that the IEBC and the Returning Officer, who had been accused of improper conduct by the interested parties, are one and the same thing with the Committee. Secondly, it was argued that there was no decision made by the Returning Officer which could have been appealed against by the interested parties. It is the petitioners’ case that the interested parties could only have invoked the Committee’s appellate jurisdiction in the matter. Thirdly, it was submitted that the Committee could only hear disputes involving members of a particular party and since there was no complaint from any member of the Wiper Party, the Committee had no business entertaining the interested parties’ complaints. Finally, it was contended that the Committee has no jurisdiction under Articles 22, 23 and 258 to hear and determine matters concerning the contravention of the Constitution.

76. The power to hear and determine complaints relating to nominations is donated to the IEBC by **Article 88(4)(e)** of the Constitution. That power is also found in **Section 74** of the Act and **Regulation 99** of the **Regulations**. We find it important to quote the provisions verbatim.

77. **Article 88(4)** provides that:

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

.....

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

78. Section 74 of the Act states that:

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

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

79. The Rules of Procedure on Settlement of Disputes (“**the Rules**”) made by IEBC in accordance with **Section 109** of the Act provides the procedure for settlement of electoral disputes by the Committee. The Rules were published vide **Legal Notice No. 139** of 3rd December, 2012. In the Rules a ‘dispute’ means “**a complaint, challenge, claim or contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by a Returning officer.**”

80. Rule 9 provides that;

9 (1) any person objecting to the nomination of a candidate may file a complaint with the Commission on any of the following grounds:-

- a. **That the candidate is not qualified to be elected under any law;**
- b. **That the candidate does not have all the qualifications required under any law;**
- c. **That the candidate was convicted of an election offence at any time material to the nomination;**
- d. **That conduct of the nomination process was invalid;**
- e. **That the candidate did not accept his nomination according to the rules promulgated by the Commission;**
- f. **Any other ground that the Commission deems sufficient provided such ground shall not be frivolous, vexatious or scandalous.**

(2) An objection with respect to the nomination of an independent candidate may, in addition to any other ground, based on any of the following grounds:-

(a) the candidate failed to get the required number of registered voters supporting his candidacy, as specified by the Act;

(b) the candidate was nominated by a member of a political party;

(c) the candidate is a member of a political party.

81. **Rule 11** gives the returning officer authority to decide any dispute arising from the nomination of a candidate within his electoral area. **Rule 12** provides that a returning officer shall issue a reasoned written decision within seven days after the application or objection is made. **Rule 13** provides that a person aggrieved by the decision of a returning officer may appeal such decision to the IEBC.

82. In the case before us, there was no formal complaint before the Returning Officer. It is alleged that formal complaints about Ms Kilonzo’s ineligibility had been made to the IEBC through the complaints registered by the interested parties. We are, however, not able to verify from the record whether this information had reached the Returning Officer.

83. Commenting on the role of a Returning Officer in hearing a dispute, P.D.T Achary writing about election laws in the Indian jurisdiction in **Bharat’s Law of Elections** 1st Edition(2004) pages 56-57 observed that:

“Improper acceptance of a nomination and non-compliance with the provisions of the Constitution or the Representation of People Act, 1951 or any rules or orders made under the Act are two of the various grounds laid down in Section 100 of the RP Act for declaring an election void.”

84. The learned author then went on to cite the decision in **Durga Shankar v Raghuraj Singh AIR 1954 SC 520** where Mukherjee, J discussed the issue of improper acceptance of nomination and held that:-

“If the want of qualification of a candidate does not appear on the face of the

nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is an objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination.”

85. The learned author then analyses the implication of an acceptance of an improper nomination by the Returning Officer and comments as follows:

“Section 36(7) of the R.P. Act, 1951 provides that the certified copy of an entry in the electoral roll of a constituency is a conclusive proof that the person referred to in that entry is an elector for that constituency. Thus the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly proved. It would have been an improper acceptance if the want of qualification was apparent on the electoral roll itself or on the nomination paper and the Returning Officer ignored that defect. It would have been an improper acceptance if an objection had been raised and an inquiry made as to the absence of qualification in the candidate and the Returning officer had come to a wrong conclusion on the materials placed before him. When no such thing was done, the action of the Returning Officer cannot be termed as an improper acceptance.”

86. We are persuaded that the opinion of the learned author captures what an irregular acceptance of nomination is. **Rule 6** of the **Rules** provides that in determining the question as to whether a candidate has been validly nominated by a political party, the returning officer is to be guided by *inter alia* “(a) the constitution and nomination rules of the political party concerned; and (b) the provisions of the Constitution, the Elections Act and the Elections Regulations.” On the face of it, the acceptance of Ms Kilonzo’s nomination by the Returning Officer was irregular. The requirements for one to contest a parliamentary seat are found in **Article 99** of the Constitution and **Section 24** of the Act. One of the requirements for eligibility for an election as a member of Parliament is registration as a voter—See **Article 99(1)(a)** and **section 24(1)(a)**.

87. Section 2 of the Act defines the word “**Voter**” to mean “**a person whose name is included in a current register of voters**”. The same Section 2 defines a “**Principal Register of Voters**” as “**a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically.**” For avoidance of doubt, “**election**” is defined under the same section to mean, “**a presidential, parliamentary or county election and includes a by-election.**”

Section 3 of the Act provides that:

“3. (1) An adult citizen shall exercise the right to vote specified in Article 38 (3) of the Constitution in accordance with this Act.

(2) A citizen shall exercise the right to vote if the citizen is registered in the Principal Register of Voters.”

88. The meaning of a Principal Register of Voters was dealt with at length by the Supreme Court in the case of **Raila Odinga & 5 others (Supra)**. In that case, the Court stated that:

“[248] The 1st and 2nd Petitioners’ cases turn on the validity or invalidity of the “Principal Register of Voters.” The point was taken up in evidence, and was substantially canvassed in the submissions. What is the “Principal Register of Voters”? In the light of the provisions of the Constitution [Articles 38(3) {sic} and 83] and of the Elections Act, 2011 [Sections 2, 3, 4], and of the evidence adduced in Court, we must

conclude that such a register is not a single document, but is an amalgam of several parts prepared to cater for divers groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country's population. The register can also take several forms, as contemplated by Section 2 of the Elections Act, which stipulates that such a register "includes a register compiled electronically."

[249] The multiplicity of registers is a reality of Kenya's voter registration system which is recognized in law and widely acknowledged in practice. The register once developed and finalized, is disaggregated and dispersed to various electoral units, to facilitate the process of voting. Such units include the polling stations, the wards, the constituencies, the counties, and even the Diaspora voting centres."

89. On a document known as the "Green Book" prepared by IEBC, the Supreme Court at paragraph 255 validated the said document as follows:-

"[255] It was urged for the 1st Petitioner, that the 1st and 2nd Respondents had compiled the "Green Book" which was not provided for in the law – and that the Green Book undermined both the credibility and the legality of the registration process. In our finding, from the evidence, the "Green Book", though not provided for in law, is a primary document that was used by the 1st Respondent to originate the primary register of voters, which later evolved into a Provisional Register, and then a Final Principal Register. It is not apparent to us that such an original record, the "Green Book," employed by IEBC, required to be provided for by law."

90. The Principal Register of Voters is therefore an identifiable document. Section 8 of the Act requires the IEBC to maintain an updated Principal Register of Voters. Ms Kilonzo's name was searched for in the Principal Register and in the Green Book, but it was not found. On the available evidence, one can say that Ms Kilonzo is not a registered voter. An acknowledgement slip without the backing of the Principal Register is not proof of registration as a voter. A window for verifying one's registration and the correctness of the information in the register is normally provided so that a potential voter can confirm if he/she is indeed registered. **Section 6** of the Act provides for inspection of the register of voters while **section 12** provides for claims regarding registration. The latter section states that; "12. (1) A person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time."

91. Ms Kilonzo proceeded on the assumption that an acknowledgement slip is evidence of registration. Whether or not a person is registered as a voter can only be confirmed by inspecting the register of voters. We note that even the origin of the acknowledgement slip Ms Kilonzo had is in question. The Committee, after hearing the evidence, as it was entitled to do, concluded that the acknowledgment slip was obtained irregularly.

92. The evidence that was placed before the Committee is that Ms Kilonzo's name did not appear in the Principal Register of Voters for the registration centre where she had allegedly registered. Despite this clear discrepancy, the Returning Officer nevertheless accepted her nomination leading to the complaints by the interested parties. This is a dispute which squarely fell under Rule 9(a) and (b) of the Rules. **Rule 9** of the **Rules** gives IEBC the power to hear such a dispute. By dint of **Rule 14** IEBC can delegate, to the Committee, its authority to settle disputes filed under the Rules. In our view therefore, the Committee was exercising original jurisdiction when it admitted the case against Ms Kilonzo. The complaints against her were not frivolous, vexatious or scandalous in terms of **Rule 9** of the **Rules**. They went to the root of the electoral law and the Committee was obliged by the law to hear the dispute. It cannot be accused of having acted outside its powers by examining and setting aside the decision of the Returning Officer.

93. The complaints that were presented to the Committee by the interested parties were not appeals since the Returning Officer had not made any decision as no objection had been made to him. In the absence of **Article 88(4)(e)**, the next port of call for the interested parties would have been an election court. The Constitution, the Act, the Regulations and the Rules all point to the fact that the decision of the Returning Officer as regards nomination of a candidate is not final. Under the already cited Rule 9, any person can file a complaint with IEBC challenging the nomination of any candidate. We opine that the interested parties who had genuine grievances concerning the nomination of Ms Kilonzo had a right to approach the Committee in the first instance. As we have already pointed out, the Committee had jurisdiction to hear those complaints.

94. The petitioners also submitted that the Committee has no powers to overturn the decision of the returning officer. It is the petitioners' case that once a candidate is given a nomination certificate by a returning officer, the only avenue open to an aggrieved party is to approach an election court. In support of this argument the petitioners cited the decision of the Court of Appeal in the case of **Kones v Republic & Another ex-parte Kimani Wa Nyoike & 4 Others (supra)** where it was held that the only valid way of challenging the electoral process, including nomination of members to the National Assembly, is through an election petition as provided by the Constitution and National Assembly and Presidential Elections Act. In our view however, this is a 2006 decision and the legal terrain has substantially changed. The Constitution and the National Assembly and Presidential Elections Act referred to in that judgment have since been repealed. A reading of **Article 88(4)(e)** of the current Constitution and **Section 74** of the Act clearly shows that the IEBC now has power to settle disputes, including nomination disputes, other than election petitions and disputes subsequent to the declaration of election results. The mandate to settle disputes therefore runs up to the election date. The Committee hence had jurisdiction to hear the complaints of the interested parties.

95. The petitioners have argued that since the interested parties are not members of the Wiper Party, the Committee should not have entertained their complaints against them. However, looking at Article 88(4)(e) of the Constitution, it is clear that it does not restrict complaints to members of the same political party. Further, **Article 252(2)** provides that a complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22(1) and (2). Even more succinct are provisions of **Rule 8(3)** of the **Rules** which provide as follows regarding institution of a complaint:

“(3) An objection or complaint may be filed by —

(a) a registered voter or a political party in the electoral area where the dispute arose alleging that a candidate has not been validly nominated;

c. a candidate alleging that he or she has been unfairly denied nomination by the party from which he or she sought to be nominated;

d. any person claiming that a candidate who has been nominated as a candidate is not qualified to be so nominated;

e. a person aggrieved by an electoral activity.”

Our understanding from the foregoing is that one does not have to be a member of a given political party in order to make a complaint against that political party or its members.

96. In light of our findings above, we conclude that the Committee had jurisdiction to hear the matter that was placed before it by the interested parties.

97. Finally, Ms Kilonzo submitted that the Committee acted beyond its jurisdiction by handling matters touching on the Constitution. We do not find any merit in such assertion. Article 3(1) provides that:-

“Every person has an obligation to respect, uphold and defend this Constitution.”

Article 20 further provides that the Bill of Rights applies to all law and binds all State organs and all persons. Article 21 goes further to provide that, ‘*it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*’

98. We are all expected to live by the constitution and every person has a duty to follow the dictates of the constitution. The Committee cannot be condemned for doing that which is required of it by **Article 88(5)** of the Constitution.

Violation of the Petitioners’ Constitutional Rights

The Right to a Fair Hearing

99. Closely interlinked with the question of the Committee’s jurisdiction to hear the complaint lodged before it with regard to Ms Kilonzo’s eligibility to vie for the Makueni senate seat, is the question of her right to be heard, in terms of the provisions of **Article 50(1)**, by a court or tribunal that is fair and independent.

100. As we have indicated above, Ms. Kilonzo’s case before us entails the exercise of our jurisdiction to review the proceedings before the Committee and determine whether they were conducted in accordance with the Constitution and the tenets of natural justice. In so doing, we shall consider her various contentions with regard to the violation of her constitutional rights and breach of the rules of natural justice by the Committee.

101. Ms. Kilonzo alleged violation of her rights under **Article 50(1)**. The provisions of this Article are as follows:

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

102. She contends that her rights under this provision were violated by the Committee as it failed to adhere to the rule that no man shall be a judge in his own cause, and that the Committee was promoting its own cause by its association with the IEBC. She asserts therefore that the Committee breached the rules of natural justice; that there was a conflict of interest and bias, and the Committee should have either rejected the complaints made by the interested parties, or referred them to another independent and impartial tribunal or body as contemplated under **Article 50(1)**, and in accordance with its mandate under **Article 88(5)** of the Constitution to exercise its powers and perform its functions in accordance with the Constitution and national legislation.

103. Ms Kilonzo submits further that the respondents contravened her rights by sitting in judgment in a matter where they were not only actors but were the accused; that the IEBC, the Committee and the Returning Officer are the parties against whom the complaints by the interested parties were directed; that they were aware that central to the resolution of the matter was the registration of voters, management and custody of the voters’ register; and that there was likelihood of bias when the witnesses before the Committee were subordinates of the members of the Committee.

104. The Committee in its response, which was also supported by the IEBC and the Returning Officer, counters that these assertions by Ms. Kilonzo are incorrect. It submits that the Returning Officer is independent from the IEBC and is a statutory office established under **section 2** of the Elections Act; that the role of the IEBC with regard to the Returning Officer is confined to appointing the County Returning Officer in accordance with the provisions of regulation 3(1); that such appointment is carried out by the IEBC in its capacity as the custodian of the electoral process under Article 88; and that the Returning Officer is assigned specific statutory duties and

sanctions provided in the Act for violation of these duties.

105. The Committee asserts that it sat on appeal on the decision of the Returning Officer who had rendered his decision on Ms Kilonzo's eligibility to vie for the Makueni Senate seat; that such decision had been rendered after the Returning Officer was seized of the complaint with regard to Ms Kilonzo's eligibility, which had been raised by The National Alliance (TNA); and the Returning Officer had made the decision that she is eligible to vie and had given her the nomination certificate to vie for the seat on the Wiper Party ticket.

106. The Committee asserts further that it exercised its appellate jurisdiction founded on **Rule 13** and delegated to it under **rule 14** of the Rules, by IEBC. It states that the exercise of its jurisdiction is consistent with its mandate under these Rules, Article 88 (4)(e), section 74 of the Act and Regulation 99(1) and (2) of the Regulations.

107. We believe that there can be no serious dispute about the desirability of observing due process in public administration, one of the core elements of which is that there should be no bias in the adjudicating authority. Further, it is indisputable that the law will not countenance a situation in which one is, in the words used by Mr. Orengo, learned Counsel for Ms. Kilonzo, 'judge, jury and executioner.' The IEBC, the Committee and the Returning Officer are all public entities which are under a duty to observe the rules of natural justice in performing the functions entrusted to them by the public. As Hilary Delany observes in his book, *Judicial Review of Administrative Action Second Edition, Thomson Reuters*(2009) page 223:

The maxim 'nemo judex in causa sua' requires that persons or bodies bound by the rules of natural justice should act in a fair and impartial manner. Its role is not confined to cases of actual bias – which are relatively rare in practice – but relates to the public perception of the impartiality of the decision-making process and to the maintenance of public confidence in the administration of justice and the carrying out of administrative functions'

108. In the present case, can it be said that the Committee, in determining the question of the eligibility of Ms. Kilonzo to vie for office, was acting as a judge in its own cause? Was it 'promoting its own cause' by its association with the IEBC? What was the personal interest that the Committee was pursuing in order for an inference of bias to be drawn? The petitioners have relied on the decision of the court in the English case of **Locabail (U.K.) Ltd. -Vs- Bayfield Properties Ltd. and Another [2000] Q.B. 451**. In this case, the duty of all legal arbiters was expressed to be;

'to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice.'

109. A consideration of whether or not the Committee has violated the principle that no one shall be a judge in his own cause, must start with a consideration of the constitutional provisions with regard to the powers, function and mandate of the IEBC. We have already set out elsewhere in this judgment the provisions of **Article 88(4)(e)**. We take the view that in enacting the above provisions, the clear intention of the people of Kenya was that all disputes relating to elections, except election petitions and disputes arising after the declaration of results, and certainly all disputes involving or related to nomination of persons to contesting elections for various offices established under the Constitution, would fall within the exclusive mandate of the IEBC.

110. In our view, this mandate to adjudicate disputes such as the one currently before us is a mandate ordained by the Constitution. Provided that it is exercised in accordance with the Constitution and the law as **Article 88(5)** requires, it cannot be said to be a violation of Ms. Kilonzo's rights under **Articles 47** and **50(1)** or to be a violation of the principle that no one shall be a judge in his own cause.

111. Similarly, the functions of the Committee and the Returning Officer, and their placement within the IEBC, are constitutionally and statutorily underpinned. The Act, the Regulations and the Rules on the basis of which the respondents have performed their functions are also constitutionally and statutorily underpinned. To impugn them is, in effect, to ask us to find fault with their constitutional basis.

112. Ms. Kilonzo has urged us to find, in effect, that the exercise by the Committee of the powers donated to it by the Constitution violates her rights under Articles 47 and 50. In so doing, she is effectively posing a challenge to the validity of Article 88(4)(e). This, however, is not something that we can entertain for **Article 2** insulates the Constitution against challenges such as the one currently before us by providing at **Article 2(3)** as follows:

“(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.”

113. In any event, as a state organ that derives its mandate and authority from the Constitution, the court must at all times be conscious of its mandate under Article 165 of the Constitution in interpreting any provision of the Constitution and considering whether there has been a breach thereof. In doing so, it must bear in mind the principle of harmonization enunciated by Musinga J (as he then was) in the case of **Centre for Rights Education and Awareness (CREAW) and Others –vs- The Attorney General Nairobi Petition No 16 of 2011 (Unreported)** where the Court observed as follows:

“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 to get a proper interpretation. In the Ugandan case of Tinyefuza v The 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 of the written constitution.”

114. A similar principle was enunciated by the United States Supreme Court in **Smith Dakota v. North Carolina (1940) 192 US 268** as follows:

“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 above 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”.

115. Ms Kilonzo does indeed have a right to a fair hearing under Article 50(1) of the Constitution. This right, in respect of a dispute pertaining to the electoral process in exercise of her rights under Article 38, is constitutionally required to be exercised before the Committee in accordance with the Constitution, the Act, Regulations, and the Rules enacted in accordance with the IEBC’s mandate under Article 88(4)(e). As long as the dispute is heard and determined in accordance with these provisions, Ms. Kilonzo cannot properly be heard to argue that her rights under Article 50(1) were violated. As Majanja, J observed in **Francis Gitau Parsimei & 2 Others –vs- The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012:**

“5. On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of Chapter Seven of the Constitution titled, “Representation of the People.” These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011

and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.”

116. The question then is: Did the Committee, in hearing the complaint before it, deal with it in accordance with the Constitution and National legislation? This leads us to a consideration of the second aspect of Ms. Kilonzo’s complaint against the Committee.

Fair Hearing Before the Committee

117. Ms. Kilonzo has alleged breach of the right to a fair hearing in the actual proceedings before the Committee. She contends that the Committee had already taken a pre-determined position on the issue, that it demonstrated its intention not to give her a fair hearing; that it maintained that the issue before it was simple and insisted that she should only adduce evidence that was already preconceived in its mind; that it was openly hostile to and biased against her Counsel during the hearing.

118. Ms. Kilonzo has also alleged breach of her rights under Article 50(2)(a)(c),(j) and (k). She contends that she was denied the right to be presumed innocent until the contrary is proved; that she was denied the right to be informed in advance of the evidence that the Committee sought to rely on, and was denied the right to adduce and challenge evidence brought against her. The basis of this contention is that the IEBC alleged that her acknowledgment slip was stolen and the Committee made an adverse finding against her without proof. She has relied on the decision of the Court in the case of **Joseph Mwenda Mbuko vs Provincial Police Officer Central Police & 2 Others (2013) eKLR**.

119. We believe the latter part of this complaint pertaining to the alleged breach of Ms. Kilonzo’s rights under Article 50(2)(a)(c)(j) and (k) can be easily disposed of. Ms. Kilonzo was not on trial in the proceedings before the Committee, which is not a court that exercises criminal jurisdiction to try offences. Consequently, and with respect to Ms. Kilonzo’s Counsel, the provisions of Article 50(2) in their entirety have no application to the matters at hand. This Clause is clear that it has application to an accused person facing criminal charges, which Ms. Kilonzo was not. It is clear from its wording that the provision is intended to apply to accused persons facing criminal charges.

120. The evidence before the Committee was that Ms Kilonzo’s acknowledgement slip, along with 4 other slips, had been stolen. However, there was no allegation made that Ms. Kilonzo was personally culpable. What the Committee did, while rejecting the slip as evidence of her registration, which, in our view, it was properly entitled to do, was to order that the matter be investigated.

121. This does not however mean that Ms. Kilonzo was not entitled to a fair hearing, which leads us to an examination of the allegation of bias and discrimination against her and her Counsel in the course of the hearing. We have read the proceedings before the Committee. We note that while it is true that the Committee indicated that Ms. Kilonzo’s Counsel would have 30 minutes for cross-examination, there is nothing to indicate that the other parties got longer periods for cross-examination. Indeed, we note that all the parties were allowed to present their evidence, and to cross-examine the opposing sides’ witnesses. In Ms. Kilonzo’s case, her Counsel, Ms Soweto and Mr. Ndubi cross-examined all the IEBC witnesses, particularly Ms. Immaculate Kassait, at some length. We also note from the proceedings that Ms. Kilonzo was permitted to adduce evidence pertaining to other acknowledgment slips and other evidence with regard to irregularities in the registration and or voting process.

122. We are therefore, in the circumstances, unable to find a basis for Ms. Kilonzo's contention that she was denied a right to a fair hearing by the Committee. We agree with the submissions of Counsel for the respondents that what would constitute a fair hearing and accord with the rules of natural justice will vary and depend on the circumstances of each case. In this regard, the words of Tucker L J in **Russel vs Duke of Norfolk (1940) 1All ER 109**, at 118 relied on by the respondents are instructive:

'The requirements of natural justice must depend on the circumstances of the case, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth ... one essential is that the person concerned should have a reasonable opportunity of presenting his case.'

123. P.D.T Achary in his book, 'Law of Elections' (cited above) notes as follows regarding the right to be heard at pages 54-55:

"The applicability of the principles of natural justice is fundamental to the exercise of power by the Commission whether it acts under the law or under the provisions of Article 324...

One of the essential ingredients of natural justice is a fair hearing. It assumes great importance...An 'elaborate and sophisticated methodology of a formalised hearing' may not be necessary as it may be injurious to promptitude which is essential in a election under way. But, he has a right to notice and to be heard in a situation like this, the 'quantum and quality of hearing being conditioned by the concatenation of circumstances.' It can be minimal and even formal. The Court says:

"We consider that in the vital area of elections where the peoples' faith in the democratic process is hyper-sensitive it is republican realism to keep alive audi alteram partem even in emergencies, even 'amidst the clash of arms.' Its proteam shades apart, we recognise that hearing need not be elaborate ritual and may in situations of quick despatch, be minimal, even formal, nevertheless real...."

We agree with and wholly adopt the learned author's sentiments.

124. In this case, we take the view that Ms. Kilonzo was accorded a fair hearing in every respect. A fair hearing does not connote the number of hours or minutes that one is allowed to present their case. We are persuaded in this view by the discussion on this issue with reference to the right to a fair hearing guaranteed by **The European Convention on Human Rights and Fundamental Freedoms (1950)**. On this discussion in **Halsbury's Laws of England^{4th} Edition Reissue Volume 8(2) Constitutional law and Human Rights** where the authors observe that the right to fair hearing applies to both civil and criminal cases, and that:

'Everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage, the principle of equality of arms.'

125. There is nothing before us that suggests that Ms. Kilonzo was in any way disadvantaged in presenting her case, and we can therefore find no basis whatsoever for the allegation that she was in any way denied the right to a fair hearing enshrined in our Constitution.

Equality before the Law and Non-discrimination

126. It has been submitted on behalf of Ms. Kilonzo and pleaded in the petition and affidavit in support that the Committee discriminated against her and denied her equal benefit of the law, thus violating rights to which she is entitled under **Article 27** which provides as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

.....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

127. Ms. Kilonzo contends that her rights to non-discrimination and entitlement to equal benefit of the law were violated in two respects. First, by rejecting the documents that she stated she used to register, namely her expired passport and a copy of her identity card, the Committee violated her rights as it had allowed others to register, vie for office and or vote with similar documents. Secondly, she contends that she was treated in a discriminatory manner as others, whose names were not in the voter register, had been allowed to vote with acknowledgement slips, and consequently, there was no basis for denying her the right to vie for the Makueni Senate seat.

128. If we understand Ms Kilonzo's argument correctly, she is saying that because the IEBC has perpetrated illegalities in the past by allowing persons to register using irregular documents and also allowed them to vote on the basis of acknowledgment slips without their names being on the voter register, then we should condemn the Committee for failing to condone the illegality in her case and for failing to accept her acknowledgement slip as proof of registration. She makes this plea despite the many and fundamental inconsistencies in her acknowledgment slip brought out in the evidence presented before the Committee by Ms. Kassait.

129. As Kenyans, we must ask ourselves why we enacted a Constitution with such lofty aspirations as are contained in **Articles 10** and **73** of the Constitution. We believe that the people of Kenya were serious about transforming their society into a society governed by the national values and principles of governance enshrined in **Article 10(2)**:

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

130. If we are correct, in our belief about the wishes and desires of Kenyans to transform their society, and we believe that we are, then it would be to turn their lofty ideals into mere rhetoric if we were to hold that the Committee violated Ms. Kilonzo's rights under Article 27 by not permitting her to benefit from an illegality, even if, as she contends, others have benefited from such illegalities in the past. Our duty under the Constitution is to uphold the rule of law and the values enshrined in the Constitution, and it would be to abuse this duty if we were to uphold Ms. Kilonzo's contentions. **(See also Trusted Society of Human Rights Alliance v Attorney**

Petitioners' right to Legitimate Expectation

131. The question of legitimate expectation was raised by both the petitioners in the broad brush-strokes of the Petition, where they complain about the breach of the rules of natural justice, unfair administrative action and breaches of the Constitution. Specifically, however, the petitioners pleaded the issue at paragraphs 15, 19, 23 and 26 of the Petition. Having carefully read these paragraphs, the issues that, in our view stand to be determined by this court under this general head are as follows:

- a. Whether the respondents infringed Ms Kilonzo's legitimate expectations to present herself as a candidate for the by- election of the Makueni Senatorial seat;
- b. Whether the respondents violated the Wiper Party's legitimate expectations to field a candidate in the Makueni by-election;
- c. Whether the Wiper Party, as a political party, has a legitimate expectation and right to nominate and field another or an alternative candidate to vie for the Makueni by-election.

132. We will first address ourselves to the doctrine of legitimate expectation, and thereafter address each limb of the above issues separately.

133. At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation. The Supreme Court of India in **J.P. Bansal v State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001** observed as follows regarding the doctrine:

“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and Others v Minister for the Civil Service(1985 AC 374(408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...”

134. It is not enough that an expectation should exist; it must in addition be legitimate, to be worthy of protection. As expressed by **HWR Wade C.F Forsyth** in *Administrative Law, Tenth Edition (2009)* page 449:

“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law”

Further, the same author points out that (pages 450-451):

“An expectation whose fulfilment requires that a decision-maker should make an

unlawful decision cannot be a legitimate expectation....the expectation must be within the powers of the decision-maker before any question of protection arises.”

135. In **Keroche Industries Limited v. Kenya Revenue Authority & 5 Others** [2007] eKLR Nyamu, J (as he then was) found that the applicant’s claim that its legitimate expectation to continue paying tax on a specific tariff which the respondents had been accepting over the years based on the mode of licensing products, had been thwarted. The court cited the English case of **R (Bibi) v Newham London Borough Council** [2001] 1 WLR 237 and quoted the three practical questions which Schiemann LJ gave for the Court to pose in ascertaining whether a claim based on legitimate expectations is properly grounded. These are quoted by Nyamu J as follows:

“(1) What has the public authority whether by practice or promise committed itself to;

(2) Whether the authority has acted or proposes to act unlawfully in relation to its commitment;

(3) What should the court do”

136. In the case of **Haoucher v Minister for Immigration and Ethnic Affairs** [1990] 169 CLR Deane J. observed as follows;

“Regardless of whether one can identify a right in the strict sense or a legitimate expectation, the requirements of procedural fairness must be observed in any case where,

by reference to 'the particular statutory framework' (see Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475 at 504), it is proper to discern a legislative intent that the donee of governmental executive power or authority should be bound by them. There is a strong presumption of such a legislative intent in any case where a statute confers on one person a power or authority adversely and directly to affect the rights, interests, status or legitimate expectations of a real or artificial person or entity in an individual capacity (as distinct from merely as a member of a section of the general public). The rationale of that strong presumption is to be found not so much in sophisticated principle as in ordinary notions of what is fair and just.”

With these principles in mind, we now turn to examine the respective parties’ legitimate expectations.

Ms Kilonzo’s Legitimate Expectations

137. In respect of this issue, it was asserted in paragraph 15 of the petition that Ms Kilonzo’s ***“... fundamental rights under Articles 38 and 47 of the Constitution were contravened in that [her] legitimate expectation to be a candidate for political office has been taken away unprocedurally and for extraneous motives.”***

138. Two grounds were given to explain her legitimate expectation. First, that complaints against her were made before the nomination; and secondly, that having gone to the nomination prepared and knowing that there was a complaint against her the Returning Officer duly accepted her nomination, the Committee cannot now turn around and revoke it.

139. In order to place her legitimate expectations in a proper context, we must examine the circumstances under which such expectations were raised. We have noted that in the evidence contained in the proceedings before the Committee, Ms. Kilonzo makes the following admissions. First, that she did not vote in the last election; second, that in registering she did so using an expired passport and photocopy of her national Identity card; third, that she could not explain the location of Ngong Road Primary School where she allegedly registered; fourth, and this is also in her own argument in the Petition, that she was aware that there were complaints that her

registration was in question; fifth, that despite such complaints and being a diligent lawyer well versed with election law, she did not deem it necessary to check in the register to confirm her registration.

140. We also think that it is essential, in discussing the legitimate expectation of a potential political candidate in regard to an election process, to take into account the competing legitimate expectations of voters and other political parties and interested parties, all of whom have a stake in the elections.

141. Further, there are other bodies such as IEBC who are mandated to conduct the election in strict accordance with the law so as to ensure the proper legitimate conduct of the electoral process. It is amidst these competing interests that the soundness and eventual certification of the electoral process as a free and fair process in terms of **Article 81** may be made.

142. We also note that under **Section 6(1)** of the Elections Act, the Principal Register of Voters may be inspected by members of the public at all times for the purpose of rectifying the particulars therein. It is true, of course, that that section places the obligation on the IEBC to cause the said Register to be opened for inspection by members of the public at all times. In the same breath, it is also true that the burden of ensuring proper registration once a person has applied for registration cannot be shifted onto the elector.

143. What is disturbing, however, was the attitude taken by Ms Kilonzo although she well knew that questions had been raised concerning her registration and the issue was live before she proceeded for nomination. In her own words in examination in chief during the proceedings before the Committee, she said:

“I did not bother to check in the register if indeed I had been registered....

And in cross examination she is recorded as having said:

“I am a trained lawyer and a diligent one....

....it is true that I did not check in the register to confirm my name had been entered in the Green Book”

144. It would naturally be expected that a diligent and knowledgeable lawyer, seeking to ensure, from her best efforts, a credible, free and fair electoral process, and intent on ensuring her constitutional rights are truly safeguarded, and desirous of safeguarding the Constitution, would have at least bothered to check on her registration status. We cannot shift the burden of ensuring accurate registration on her. However, it would have been expected that a prudent and diligent citizen would have acted in a manner that would not compromise her own legitimate expectation.

145. The question that arises, then, is whether this legitimate expectation on her part is well grounded. As we have stated earlier, under **Article 252(2)**, it was open to any member of the public who could institute court proceedings, to lodge a complaint concerning Ms Kilonzo's registration. The Article provides as follows;

(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22(1) and (2).

146. Equally, and as we have already stated, it was the exclusive constitutional mandate of the IEBC under Article 88(4)(e) to settle all pre-election disputes, including those relating to registration and nomination. Accordingly, Ms. Kilonzo's legitimate expectations must be circumscribed within this legal environment, and we hold that to be the case.

147. We conclude on this aspect as follows. Having already found that the IEBC properly conducted itself in respect of the complaint or dispute on nominations, we are unable to agree with Ms.

Kilonzo that her legitimate expectation to be a candidate was contravened by way of breach of her political rights under Article 38, or of her right to fair administrative action under Article 47.

Wiper Party's Legitimate Expectations

148. The question of Wiper Party's legitimate expectation falls under two limbs; the legitimate expectation of the Wiper Party to field a candidate and the legitimate expectation of the party, in the event that Ms. Kilonzo's nomination is rejected, to field another candidate.

Expectation to field a candidate

149. On the first of these limbs, the petition in paragraphs 19 and 26 states:

“19. The 2nd Petitioner is an active participant in the political fabric of the Country, and had a legitimate expectation to field it's candidate as a contestant in the By-Election”

“26. The 1st Respondent has contravened the Petitioners' right and legitimate expectation that the Respondents would respect uphold and to{sic} promote the Constitutional principles and values at all times contrary to Articles 19, 20 and 27 of the Constitution.”

150. The petitioners' submissions on this point were that the Committee failed in its duty to make its decision with due regard to the affected parties' interests and without bias, and thereby failed to uphold and promote the constitutional values and principles that the Bill of Rights is an integral part of Kenya's democratic state (Article 19); that the Bill of Rights applies to all, binds all state organs and should be enjoyed by all persons, including the Wiper Party to the fullest extent; that the Court is obliged to adopt an interpretation that most favours the enforcement of a right or fundamental freedom (Article 20); and that all persons including the Wiper Party are equal before the law and have a right to equal protection thereof (Article 27).

151. In relation to the Wiper Party's right to equal protection, enjoyment of the Bill of Rights, and promotion of constitutional values and enforcement provisions, it was not argued that the Party was denied an opportunity before the Committee. The Wiper Party was a party to the proceedings before the Committee and was represented, according to the record of proceedings of the Committee, by two counsel; Mr Dan Maanzo and Mr T Kajwang.

152. It was not indicated with particularity by the petitioners how Articles 19, 20 and 27 of the Constitution were specifically contravened with regard to Wiper Party. What is clear from the general slant of the petitioner's representations on this point is that the Wiper Party has a legitimate expectation and interest as a political party whose role is to compete for political power; that it has members wishing to exercise their full political rights, and in particular, to field a candidate in the Makueni by-election; and that this legitimate expectation is under threat on account of the actions of IEBC and the Committee; that such legitimate expectation cannot be taken away in light of the objects of the Party's existence and the over-arching constitutional protections to political rights in Kenya which, under the Constitution, is a multi-party democracy.

153. We recognize the new paradigm brought about by the Constitution. The role of the people of Kenya shows through every facet of its philosophical and jurisprudential life, and throughout its enforcement continuum through legislation. It is enacted by “We, the People of Kenya”. The Preamble recognizes, *inter alia*, the aspirations of all Kenyans for a government based on the essential values of equal rights and democracy, and that the people participated in its formulation. **Article 1** reposes sovereign power in the people to be exercised through their democratically elected representatives; that all state organs enjoy delegated power from the people. **Article 38** grants every citizen freedom to make political choices including the right to participate in the affairs of a political party, and to campaign for a political party or cause. **Article 81** creates the fertile soil for functioning of the electoral system, including universal suffrage based on the

aspiration for fair representation and equality of vote; and **Article 91** provides for political parties to, *inter alia*, respect the right of all persons to participate in the political process and to promote the objects and principles of the Constitution.

154. All these are not mere platitudes. In our view, the growth of democracy cannot any longer be stifled and must be promoted by dint of the constitutional imperatives recited above. We think that the political process in Kenya can only be robust if political parties have opportunity to fully participate. It is true that the Wiper Party sought to participate in the Makueni by-election, but its candidate faltered. It is also true that we have found that the Party's candidate, Ms Kilonzo, faltered on legal grounds.

155. Based on the material before us, however, the reasons for Ms. Kilonzo's ineligibility may not be attributable to the Wiper Party. We would therefore give the Party the benefit of doubt, and make the finding that the Party may not have had notice of Ms Kilonzo's registration status.

156. In addition, we are of the view that the IEBC mismanaged its constitutional mandate with regard to Ms. Kilonzo's registration status. It could have exercised greater diligence given all the powers and information in its possession to establish early enough her registration status. Instead of doing that, it sat back and watched as the tragic events shown in these proceedings played out. That was a blot on its constitutional mandate.

157. In our view therefore, the Wiper Party's legitimate expectation to field a candidate is constitutionally underpinned, but such legitimate expectation cannot be limited in this case to the candidacy of Ms Kilonzo. The Wiper Party's legitimate expectation, remains inviolable, except as it may otherwise be affected under the law.

Whether Wiper Party has a Legitimate Expectation to Field an Alternative Candidate

158. This issue was urged through paragraph 23 of the petition which states as follows:

“ The purpose of the process by the 2nd Respondent should not be to hinder a political party from participating in the election process; the 2nd Petitioner therefore has a right based on its legitimate expectation to be afforded the opportunity to nominate another candidate if one of its candidates is rejected under the Regulations”

159. The central argument made by Mr Kajwang for the Wiper Party on this issue was that politics are founded on multi-party democracy, and that such basic political rights cannot be easily denied. Further, he argued that the Wiper Party had committed no offence or done anything unlawful that would lead to its exclusion from the political process. He denied the allegation of the 4th Interested party that the Wiper Party had breached Sec 72(2) of the Act, since it had not been shown that it had knowingly done anything wrong to merit being denied its legitimate expectation. Wiper Party therefore sought to be allowed to nominate another candidate.

160. Section 72(2) of the Act provides as follows:

“ (2) Where a political party knowingly nominates a candidate who does not meet the requirements of the Constitution, the political party commits an offence and shall be disqualified from nominating a candidate to contest in that election or in the next election in that electoral area.”

161. The offence created under this provision clearly requires that there be evidence that the Party nominated a candidate who does not meet the requirements of the Constitution. Where evidence is available, the party is automatically disqualified from nominating a candidate. This is one of the provisions which, if proved, would disentitle the Party from enjoying its political rights, and its legitimate expectation.

162. We have carefully perused the evidence on record. We find that there was no evidence before the Committee, and there is none before us, that Wiper Party knew that Ms Kilonzo was not a registered voter. We do not see therefore how Section 72(2) of the Act can be invoked as urged by Mr Kigotho for the 4th interested party.

163. The Constitution is about opening space for citizens so that they can liberally express themselves within its confines. That is the promise of the Constitution which underpins the legitimate expectation of the Wiper Party. One of the cornerstones of exercising political rights is the right to elect a candidate of one's choice on the platform of any of the lawfully registered parties. This goes hand in hand with the right of citizens to participate in the affairs of a political party and to campaign for a political party or cause.

164. In Petition No 552 of 2012 as Consolidated with Petition Nos 554 of 2012, 573 of 2012 and 579 of 2012; **International Centre for Policy and Conflict and 5 others -vs- The Hon. Attorney-General & 4 others**, (supra), the five judge bench of this Court expressed its thoughts on the enjoyment of political party rights as follows:

“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 Interested Party's political rights would be inimical to the exercise of democratic rights and freedoms of its members.”

165. We agree with the sentiments of the five judge bench in the Integrity case above. Consequently, it is our finding that limiting the Wiper Party's political rights would be inimical to the exercise of democratic rights and freedoms of its members. We would go further and add that **Article 1(2)** of the Constitution clearly provides that:

“(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.”

166. In our view, so long as a political party has not contravened any law, there is no reason to deny it the opportunity of fielding a candidate in any election. We note that Wiper Party may not have been vigilant and diligent when it came to the fielding of Ms Kilonzo. Nonetheless, we find that the order that addresses itself to the circumstances and requirements of the Constitution and our society is to allow Wiper Party to exercise its right to nominate another candidate for Makueni County Senate seat. Ideally, Wiper Party ought to have presented its application for availing an alternative candidate to the Committee. However, in the circumstances of this case and given the time constraints, this Court will exercise its mandate under Article 23(3) to grant the appropriate reliefs.

167. We reject the submission of Mr Nyamodi for the Committee that there were no prayers sought by the Wiper Party on this issue. Our perusal of the Petition shows that at paragraph 39(v), the Petitioners sought the following prayer:

“A declaration that the 2nd Petitioner has a right to nominate a candidate to contest in the By-Election for Makueni County in the event that the 2nd Respondent's decision revoking the nomination of the 1st Petitioner is upheld”

Disposition

168. For all the foregoing reasons, we come to the following conclusion and issue the following Orders:

- a. **The Prayers at Paragraph 39 (i); (ii); (iii); (iv); (vi); (vii); (viii) and (ix) of the Petition are hereby dismissed.**
- b. **Prayer 39(v) of the Petition is hereby allowed. Consequently, we hold and declare that the Wiper Party has a right to nominate a candidate to contest in the Senatorial By-Election for Makueni County**
- c. **In order to allow for timely printing of ballot papers by the IEBC and to meet other logistical necessities:**
 - i. **The process of nomination of a candidate for Wiper Party shall be conducted no later than Six O’Clock (6:00) p.m. today, 19th July, 2013;**
 - ii. **The Wiper Party candidate shall be presented to the Makueni County Returning Officer at a place to be determined pursuant to further directions to be issued by this court upon the reading of this judgment;**

169. In light of the fact that this Petition raises issues of great public interest, we make no order as to costs.

170. Lastly, we wish to thank the counsel for the parties for their courtesy to each other and to the Court during the hearing of this matter, and for their diligence in prosecuting their respective clients’ cases.

DATED DELIVERED AND SIGNED THIS 19TH DAY OF JULY, 2013

_____	_____	_____
RICHARD MWONGO	MUMBI NGUGI	W.K. KORIR
JUDGE	JUDGE	JUDGE

Counsel:

Mr. Orengo, Ms Soweto, Mr Ndubi and Mr Kajwang for the petitioners

Mr. Kimani Muhoro and Mr. Somane for the 1st and 3rd respondents

Mr Nyamodi and Mr Sigei for the 2nd respondent

Mr. Mbai and Mr. Mutinda for the 1st, 2nd and 3rd interested parties.

Mr. Kigotho for the 4th interested party.