



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION NO.13 OF 2013

BETWEEN

ALFONCE MULANDI WOLILE1ST PETITIONER

MUTHUI MWENGA2ND PETITIONER

AND

MUTULAKILONZO JUNIOR.....1ST RESPONDENT

SALAD BORU.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC) 3RD RESPONDENT

RULING

Introduction

1. The issue for determination in this decision is whether the election petition should be struck out on the basis that it raises matters already determined by a judgment of the High Court in the case of *Diana Kethi Kilonzo & Another v Independent Electoral and Boundaries Commission and others*, Nairobi Petition No. 359 of 2013 [2013]eKLR.
2. In determining this issue, it is important to set out the litigation history, which is not disputed. This history can be gathered from the supporting affidavit of Alfonse Mulandi, the 1st petitioner, sworn on 20th August 2013, the replying affidavit of Mutula Kilonzo Junior, the 1st respondent, sworn on 9th September 2013 and his further affidavit sworn on 30th September 2013.

Litigation History

3. Following the death of Hon. Mutula Kilonzo Snr, the Makueni senatorial seat was on 29th May 2013 declared vacant by the 3rd respondent and a by-election was accordingly called. Party nominations took place between the 26th and 27th June 2013. Five candidates presented themselves for nomination as candidates for the Makueni Senate seat by-election and were issued with nomination certificates by the 2nd and 3rd respondents. These candidates were: Kaloki Philip Kyalo Kabuti(National Rainbow Coalition), Katumo Albanus Muthoka(Independent Candidate), Kitundu Jane Wavinya Muoka(Party of Kenya), Mwau John Harun (Party of Independent

Candidates of Kenya) and Diana Kethi Kilonzo(Wiper Democratic Movement Kenya Party).

4. On 1st July 2013, two complaints were filed before the Independent Electoral and Boundaries Disputes Resolution Committee (“the Committee”) challenging the nomination of the Wiper Democratic Movement of Kenya Party’s (“Wiper party”) candidate, Ms Diana Kethi Kilonzo, namely; ***DRC Complaint No. 1 of 2013, People’s Party of Kenya & Others v Diana K Kilonzo & Others*** and ***DRC Complaint No, 3 of 2013, Agnes Mutindi Ndeti and 2 others v Diana K Kilonzo &Others.***
5. The two consolidated complaints were heard and by a decision delivered on 8th July 2013, the Committee ruled as follows;
 - A. ***The 1st respondent having not been validly nominated, her nomination certificate issued to her by the Returning Officer, Makueni County on 27th June 2013 is hereby revoked.***
 - B. ***The 3rd respondent takes immediate steps to commence investigations to determine how the acknowledgement slip issued to the respondent herein was issued.***
6. Being dissatisfied with the Committee’s decision, Diana Kilonzo and Wiper party launched ***Petition No. 359 of 2013*** in the High Court. In the petition, they sought the following prayers;
 - 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 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.*
7. The petition was contested and the matter duly heard by a High Court bench comprising Mwango PJ, Mumbi Ngugi and Korir JJ.

By a judgment delivered on 19th July 2013, the court dismissed the petition but further held as follows;

(b) Prayer 39(v) of the Petition is 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 Independent Electoral and Boundaries Commission and to meet other logistical necessitates:

- i. *The process of nomination of a candidate for Wiper party shall be conducted not 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.*
8. Wiper Party, having been granted the right to nominate a candidate for the by-election, consequently nominated the 1st respondent as its Party's flag bearer for the Makueni Senate seat.
 9. As the by-election was scheduled for 26th July 2013, Wiper Party moved the court to ensure that its nominee's name appeared on the ballot paper. In the application before the court, it prayed that, *"That the honourable court be pleased to order the 1st respondent ('IEBC') to include the names of the nominees of Wiper Democratic Movement of Kenya, in a printed form on the ballot papers in compliance with the judgment of the court dated 19th July 2013."*
 10. The court, Mwongo PJ, considered the application and held that although the ***Elections Act, 2011***, the Rules and Regulations do not provide for affixation of an adhesive sticker with names of nominees for Wiper, the legal option available would be to order for reprinting of ballots but in view of the Constitutional deadline requiring the by-election to be held within 90 days of the vacancy, such an option was foreclosed. In the decision, the learned judge concluded that, *"Weighing all the options available to the court and the best interests of the Nation and of the people of Makueni, and noting that parties and candidates will have agents at every polling station to check on ballot papers and on strict compliance with the elections processes, I will order that the elections shall proceed. The IEBC will conduct the elections in a fair, transparent and just manner in the full glare of observers, eagle eyed agents and the public. This will also diffuse the possibilities of a potential constitutional crisis since at the end of the by elections, parties will have full opportunities to contest a petition. I prefer to err in favour of allowing further opportunity for competitive election rather than a constitution hiatus. I therefore order that the Makueni by election shall proceed with the ballot papers as printed and in the manner proposed by the IEBC. Orders accordingly."*
 11. The election then proceeded after the ruling. In the by-election conducted on 26th July 2013, the 1st respondent was returned as the duly elected Senator for Makueni County. The results were announced as follows;

Mutula Kilonzo Junior	163,229 votes
Philip Kaloki	9,762
John Harun Mwau	6,431
Urbanus Muthoka Katumo	517
Jane Kitundu	387

It is this election that is now subject of the petition dated 12th August and filed on 20th August 2013.

The application

12. The 1st respondent has now moved the court by a Notice of Motion dated 16th September 2013 seeking orders that the petition dated 12th August 2013 be struck out or dismissed.
13. The 1st respondent argues that in so far as the matter before the court concerns the nomination

process, the court lacks jurisdiction to deal with this dispute as such jurisdiction is vested in the IEBC by virtue of **Article 88(4)(e)** of the Constitution and the High Court's jurisdiction in this respect is limited to reviewing the decisions of the IEBC.

14. The 1st respondent also argued that the issues raised in the petition were determined by the judgment in **Petition No. 359 of 2013** and as such, this matter is a disguised appeal and this court cannot sit on appeal, review, reopen or supervise the decision of the High Court. Further, that the questions of law raised are now *res-judicata*.
15. It is also the 1st respondent's case that Wiper party is an essential and necessary party to these proceedings for several reasons. First, it was a party to **Petition No. 359 of 2013** and indeed the primary beneficiary of the decision in that case and therefore any decision made in this case is likely to affect its interests hence it must be a party to these proceedings. Second, the petitioners have made allegations of wrong doing and breaches of the law by the party and it ought to be heard in the matter. Third, the 1st respondent was nominated due to his membership of the party and as a result of **Petition No. 359 of 2013**, the party ought to have been joined to these proceedings. The 1st respondent also argues that the by-election took place after and in accordance with the decisions made in **Petition No. 359 of 2013** and it is proper that the party ought to have been joined to these proceedings.
16. The 1st respondent also argues that the by-election took place after and in accordance with the decisions made in **Petition No. 359 of 2013** and there being no appeal from the decision of the court by any of the parties, this petition cannot lie.
17. The 1st respondent has also argued that the petition is incompetent and incurably defective on the ground that the 2nd petitioner, being illiterate subscribed his thumbprint without a certificate of illiteracy. Further that 1st petitioner's affidavit in support of the petition is not dated and therefore violates the provisions of the **Oaths and Statutory Declaration Act (Chapter 15 of the Laws of Kenya)** and ought to be struck out.
18. The 1st respondent's application was supported by the 2nd and 3rd respondents. Their position is that in so far as the petition seeks an order that the 1st respondent was not validly nominated, then the petition cannot lie. Counsel for the 1st and 2nd respondents stated that process of nomination was carried out in accordance with the timelines and frames set out in the court decision in **Petition No. 359 of 2013** and the court, as an Election Court, cannot sit to review a previous decision of the High Court.

Petitioner's Response

19. The petitioners oppose the petition through the Replying affidavit of Alfonse Mulandi Wolile, the 1st petitioner, sworn on 24th September 2013. The affidavit sets out legal arguments which were outlined by their counsel.
20. The petitioners argue that the petition is not about the nominations *per se* but about the entire electoral process. It is further argued that the election is not a single event but a continuous process which begins with the declaration of the vacancy of the seat up to the time of announcement of election results; as such the court has jurisdiction to hear and determine issues arising from any act related to any event in that process which has a direct impact or influence on the final results. Counsel submitted it is wrong for the respondents to portray the petition as challenging the nomination when the petition clearly challenges the election held on 26th July 2013.
21. The petitioner avers that the petition raises weighty legal and constitutional issues which the court should not wish away. That the petition is not an appeal against the decision in **Petition No. 359**

of 2013 and that the 1st respondent has not discharged his burden of showing that the previous suit raised substantially similar issues as this suit.

22. As regards the joinder of Wiper Party, counsel submits that non-joinder is not fatal to these proceedings. The petitioners aver that there is no requirement that the political party be a respondent and that if it wishes to join the proceedings, it is entitled to make such an application for joinder. The petitioners also submit that it is the 1st respondent who made the application for nomination and his argument that he is not responsible for errors or breaches in the nomination process is preposterous. The petitioners argue that the Constitution and the law override the interest of the 1st respondent and his political party which is the issue in this petition.
23. The petitioners' complaint is that the court has the right to interrogate the entire election process in order to satisfy itself of the legality. They contend that the High Court in **Petition No. 359 of 2013** ordered the 3rd respondent not to print any ballot papers for the Makueni Senatorial by-election until the matter was heard and determined but that the IEBC went ahead and printed ballot papers against the court orders which resulted in giving undue advantage to the 1st respondent over other candidates.
24. In response to the arguments that the petition is incompetent, the petitioners aver that there is no requirement for certificate of illiteracy to be made in such matters and even if there were, the same does not go into the substance of the issues raised in the petition.

Determination

25. As I stated at the beginning of the judgment the issue for determination is whether these proceedings ought to be struck out on the ground that the issues raised were determined in **Petition No. 359 of 2013**.
26. It is not disputed that the court has jurisdiction to strike out a case which attempts to re-litigate issues that have been determined by a court of competent jurisdiction. Public interest demands that there must be finality to litigation and the court will repulse an attempt by a party to resurrect issues that have been buried by judicial determination.
27. The question for determination must be approached by reference to the pleadings before the court and the ultimate result captured in the judgment. In the petition, the petitioner has outlined 22 questions for determination as follows;
- i. *Whether an election conducted contrary to the Constitution, national legislation and the prescribed Code of Conduct by the 3rd Respondent is free and fair, accurate, transparent and impartial.*
 - ii. *Whether an election conducted contrary to the Constitution, national legislation and the prescribed code of conduct by the 3rd Respondent is valid.*
 - iii. *Whether the nomination of a candidate for the Makueni Senate by-election on a date was not fixed by the 2nd and 3rd Respondents is valid.*
 - iv. *Whether the nomination day by the 2nd and 3rd Respondents for the Makueni Senate by election fixed by any other person or authority including the court contrary to the Constitution, national legislation and the Code of Conduct is valid.*
 - v. *Whether the nomination of the 1st Respondent by his party on the 19th of July, 2013, after the close of nomination by the 2nd and 3rd Respondents on the 27th of June, 2013, was valid.*
 - vi. *Whether the nomination of candidates for the Makueni Senate by-election by the 2nd and 3rd Respondents, within less than 21 days before the day when the polls and/or election is to take place, contrary to Section 13(2) of the Elections Act, is valid.*
 - vii. *Whether the nomination of the 1st respondent by his party on the 19th of July 2013 after the close of substitution and nomination of the other candidates by the 2nd and 3rd respondents contrary to*

- section 13(2) of the Elections Act is valid.
- viii. Whether the 2nd and 3rd respondents acted in accordance with the constitution and national legislation, more specifically Section 13(2) of the Elections Act, by accepting the nomination of the 1st respondent on the 20th of July 2013, which was about 23 days after the close of nomination of candidates for the Makueni Senate by-election which had closed on the 27th of June, 2013.
- ix. Whether the 2nd and 3rd respondents acted contrary to the Constitution and national legislation, more specifically section 16(2)(b) of the Elections Act, by nominating the 1st respondent on a day that was not fixed by the Commission and not published in the Kenya Gazette as required.
- x. Whether the 1st respondent, being a lawyer and officer of the Court, and also as a candidate bound by the code of conduct, acted in accordance with the law in presenting himself for nomination as a candidate for the Makueni Senate by-election on the 20th of July 2013, knowingly after the close of nomination of candidates by the 2nd and 3rd respondents on the 27th of June 2013.
- xi. Whether the 1st respondent, being a lawyer and an officer of the Court and also as a candidate bound by the code of conduct, acted in accordance with the law in presenting himself for nomination as a candidate for the Makueni Senate by-election on the 20th of July 2013, knowing that it was not at least 21 days before the day on which the polls were to take place.
- xii. Whether the nomination of the 1st Respondent on the 19th of July, 2013, was contrary to Section 13(2) of the Elections Act, Articles 82(1)(b) and 84 of the Constitution and further, if such a nomination was valid.
- xiii. Whether the nomination of the 1st Respondent on the 20th of July, 2013, by the 2nd and 3rd Respondents was contrary to Section 16(2)(b) and (c) of the Elections Act, Articles 82(1)(b), 84, 88 (4)(k) and (5) of the Constitution and further, if such a nomination was valid.
- xiv. Whether the nomination of the 1st Respondent on the 20th of July 2013, which was about 23 days after the close of nomination on the 27th of June, 2013, by the 2nd and 3rd Respondents, and which was less than 21 days to the date when the polls were to be conducted on the 26th of July, 2013, was valid.
- xv. Whether an election conducted with one or more candidates nominated contrary to the Constitution and national legislation is valid.
- xvi. Whether, time frames within which nominations should be conducted are to be complied with strictly or can be waived and manipulated by the 2nd and 3rd Respondents as they wish to favour one candidate or a political party.
- xvii. Whether a valid ballot paper should be printed in one motion with the visual view of all candidates in a similar manner.
- xviii. Whether a ballot paper with the 1st Respondent embossed and/or pasted with adhesive prominently to attract the visual view of the voter was discriminatory against the other candidates in favour of the 1st Respondent and further, whether such a ballot paper was proper, while the time it would have taken to print the 1st Respondent's stickers would have been the same amount of time it would have taken to print a fresh ballot paper.
- xix. Whether the acts of the 2nd and 3rd Respondents violated Articles 73 and 88 of the Constitution, the Elections Act, the Public Officer Ethics Act and the 3rd Respondent's Code of Conduct.
- xx. Whether in future the candidates to an election shall have discretion to present their nomination papers contrary to the Constitution, National Legislation and the code of conduct prescribed by the 3rd Respondent and whether the 3rd Respondent will be bound to accept such a nomination.
- xxi. Whether the 3rd Respondent has powers or a mandate to waive the requirements of the electoral process prescribed under the Constitution, National Legislation and the Code of Conduct. [Emphasis mine]

28. While some of the issues are general in nature, it is clear that the gravamen of the petitioners' case is how the nomination was carried out and whether it complied with the Constitution and the law and the consequences of breach, if any. The issues raised by the petitioners underpin the prayer in the petition, that, "The 1st respondent was not **validly nominated** and therefore was not validly

elected as the Senator for Makueni County on 26th July 2013.” (Emphasis mine).

29. Did the previous decisions in **Petition No. 359 of 2013** deal with nomination for the Makueni Senatorial seat by-election? It is evident that the court dealt with the nomination by Wiper Party despite the fact that the time of nomination had expired. This can be gleaned from the terms upon which the petition was allowed and which I have quoted at paragraph 7 above. The orders make it clear that the Wiper Party candidate was to present his nomination papers pursuant to direction issued by the Court at a specific time and place.

30. In light of those proceedings and decisions, can the election court be called upon to pronounce on matters that are subject of previous court decision? **Article 88(4)(e)** of the Constitution empowers the IEBC to deal with nomination disputes in the following terms;

(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—

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters’ roll;

(c) the delimitation of constituencies and wards;

(d) the regulation of the process by which parties nominate candidates for elections;

(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;

..... [Emphasis mine]

31. **Section 74** of the **Elections Act, 2011** further reinforces this as follows;

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 or arising from nominations but excluding election petition and disputes subsequent to the declaration of election results.

(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.

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

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

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be-

(a) filed within thirty days of the decision of the Magistrate’s Court; and

(b) heard and determined within six months from the date of filing of the appeal.

32. A party who is dissatisfied with the decision of the IEBC under **Article 88(4)(e)** of the Constitution is entitled to apply to the High Court for review of the decision. Under **Article 105** the High Court has exclusive jurisdiction to deal with disputes after the declaration of elections.
33. Under the constitutional set up, nomination disputes are the preserve of the IEBC and where the issue has been dealt with by the IEBC and subsequently by the High Court they cannot be re-litigated in an election petition. In ***Kituo Cha Sheria v John Ndirangu Kariuki and Another Nairobi EP No. 8 of 2013 [2013]eKLR***, Kimondo J., observed as follows; “[29] *The petitioner does not challenge any aspects of the conduct of elections on 4th March 2013. It does not challenge the 1st respondent’s win. When one unpacks the petitioner’s case, it fundamentally impeaches the nomination of the 1st respondent by the 2nd respondent to contest the Embakasi Central seat. As I will discuss shortly, elections are not an event but a process. In that long process starting from registration of voters, nomination of candidates to the actual election, the Constitution and the law have anointed independent organs, besides the Courts, to deal with specific electoral disputes. In my view the petition as drawn does not find full support in Article 38.*” In drawing a distinction with the Supreme Court in ***In the matter of the Gender Representation in the National Assembly and Senate Advisory Opinion No 2 of 2012 [2012] eKLR*** where it was observed that an election is not a single event but a process, in continuum, the learned Judge went on to state thus; “[32] *A parallel can be drawn. In the equivalent continuum of a national assembly election, there are various independent state actors and institutions with jurisdiction to settle nomination disputes. They include the IEBC under the Independent Electoral and Boundaries Commission Act and the Ethics and Anti-corruption Commission under the Ethics and Anti-corruption Act. For example article 88 (4) (e) that I cited earlier bestows on the IEBC jurisdiction to hear and resolve nomination disputes. This is reinforced by section 74 (1) of the Elections Act. The petitioner here did not seek redress, for example, from the IEBC on nomination of the 1st respondent. This issue was addressed at length by a 5 Judge bench of the High Court in International Centre for Policy and Conflict & 5 others v Attorney General and 4 others High Court, Nairobi Petition 552 of 2012 [2013] eKLR. The court held: “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.”*
34. This does not mean that nomination disputes are taken completely out of the realm of the jurisdiction of the High Court. In the ***Kituo Cha Sheria v John Ndirangu Kariuki (Supra)***, the court noted that despite **Article 88(4)(e)**, the Election Court is not divested of jurisdiction to deal with matters arising from nominations where these are raised at the hearing of the election petition. The learned judge observed, “[34] *That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would be perfectly in order for the court to right the wrong. In Luka Lubwayo and another v Gerald Otieno Kajwang and another Nairobi Petition 120 of 2013 [2013] e KLR the court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene. Article 105 (1)(a) seems to widen the scope of the court in a petition to determine whether a person has been validly elected as a member of parliament. The question of validity may encompass the clearance to run.*”
35. The case of an election petition being determined on the basis of the nomination process is illustrated by the Indian case of ***Gopal Ramji Dhenge v The Returning Officer, Lakhani (1964) 66 BOMLR 542*** where the returning officer disqualified a candidate for the election on the ground that his proposer was disqualified because the proposer had subscribed as proposer to four nomination papers filed by the same candidate. One of the candidates who had been proposed was therefore disqualified. Eleven other candidates were cleared. Seven of the candidates later withdrew leaving four to contest the elections. The 3rd respondent was declared the winner having garnered 3,479 votes. The petitioner who was a voter filed the petition to challenge the results of the election on the grounds that the rejection of the nomination paper of one of the candidates was wrong and illegal. While upholding the petition, the court stated, “*It is then contended that the decision to the effect that the nomination was wrongly rejected is not enough to show that the*

result of the election is affected and that in that sense, the petitioner has failed to prove that the election itself is liable to be set aside. In our opinion, so far as the effect of rejection of nomination paper of a candidate who is eligible to contest is concerned, it is now well-settled that it is not predictable as to what the result would have been if the candidate whose nomination paper is wrongly rejected were in the arena of contest We have, therefore, come to the conclusion that the petitioner has a right to challenge the improper rejection of a nomination paper of a candidate at the election, that the rejection of the nomination of respondent No. 9 was improper and unauthorized and that it has materially affected the result of the election.” (Emphasis mine)

36. The conclusion to be drawn from the legal provisions and the cases I have cited is that a party who is aggrieved by the nomination process is entitled to elect whether or not to invoke the nomination dispute resolution process before the election or wait for the election to take place and thereafter file a petition. In this latter case, such party will of course not just be challenging the conduct of the nomination exercise but will have an additional burden of demonstrating that such a pre-election process went to the root of the election itself and materially affected its result. It will be up to the court to **make up its mind on the evidence as a whole whether there was substantial compliance with the law as to elections or whether the act or omission affected the results.** (See in *Re Kensington North Parliamentary Election case [1960] 2 All ER 150*). However, once the pre-election procedure is invoked and a decision made either by the Court or Committee, the decision may operate as an estoppel on record. Furthermore, sight should also not be lost of the fact that even with the nomination timelines, allowance must be given of any challenges that might arise therein. In *Mable Muruli v Hon. Wycliffe Ambetsa Oparanya and 3 others, Kakamega EP No. 5 of 2013 [2013] eKLR* the Court considered the effect of a nomination dispute prior to the election on the nomination deadline. Justice Chitembwe opined in part as follows; “The fact that candidates who were not satisfied with the decisions of the returning officers had the right to pursue appeals shows that the deadline for nomination of candidates was not the 1.2.2013. A successful candidate before the IEBC Tribunal or the court could have still participated in the elections despite rejection of his or her documents by a returning officer. The petitioner herein pursued the matter further and I do agree with her that the nomination deadline went beyond 1.2.2013. Nomination is a process of clearing candidates who are to participate in the elections. The appeals to the IEBC Disputes Resolution Tribunal is part of the nomination process and until when it is exhausted nomination still runs. This does not mean that a candidate can go ahead and present his or her nomination papers after the nomination deadline has ended. However, a candidate whose complaint or appeal against the decision of the returning officer to clear his or her nomination is successful before the IEBC Tribunal or the High Court is deemed to have been validly nominated as the other candidates despite the clearance being given after the nomination deadline. The appeal process is not intended to only correct a few errors by returning officers but to clear those candidates who could have been unfairly treated and allow them to participate in the elections. Therefore despite the deadline of 1.2.2013, the nomination process ended when all the complaints had been dealt with by both the IEBC Tribunal and the court.” [Emphasis added]

37. This matter ought to be looked at through the lens of the court orders in *Petition No. 359 of 2013* and the effect of those orders which sanctioned the nomination process now being challenged through this petition. The issue of nomination of the candidate for the Makueni by-election was dealt with by the IEBC Dispute Resolution Committee and by the High Court which reviewed and set aside the Committee’s decision and directed how the election should be held and the election held in compliance therewith. I therefore find and hold that all the issues surrounding the nomination for the Makueni by-election have been heard and determined by the High Court and cannot be re-opened by the same High Court sitting as an Election Court.

38. As the decision in *Petition No. 359 of 2013* was one issued by the High Court, the High Court sitting as an Election Court cannot embark on a process that would result in unearthing and reviewing the decision or exercising what is in substance supervisory authority or in effect entertaining a collateral attack of the decision of the High Court. This course is not permitted by **Article 165(6)** of the Constitution.

39. Closely related to this is the issue of challenging the constitutionality of a court decision. Put it another way, a judgment of the High Court cannot be said to be in violation of the Constitution. The Court of Appeal in *Methodist Church in Kenya Trustees Registered & another v Rev. Jeremiah Muku & another, Civil Appeal 233 of 2008*[2012]eKLR favoured the view that collateral attack of a High court decision under the guise of a petition to enforce fundamental rights and freedoms was an abuse of the process of court. The case also underlined the principle that a judgment of court cannot be challenged on the basis of a breach of the fundamental rights and freedoms stating that a judge cannot be faulted for ascertaining the law. Further, that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanisms and procedures prescribed by the ordinary law for correction of errors such as appeal or review. The court cited with approval the case of *Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385, 399* where the Privy Council held at page 399: “*In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event..*”
40. A consideration of the issues raised by the petitioner and the ultimate prayer in the petition which seeks to annul the election on the basis of the nomination, I find that to proceed with the matter would lead the court through the forbidden path. The nomination was completed and once the election was carried out in accordance with the court’s instructions, the court became *functus officio* and cannot now be called upon to review the decisions upon which the nomination of the 1st respondent was grounded.

Disposition

41. In light of my findings that these proceedings are an abuse of the court process, it is unnecessary to consider the other issues raised by the 1st respondent. The Notice of Motion succeeds and the petition is therefore struck out with costs to the respondents.
42. I think the deposit of Kshs.500,000/00 shall be sufficient to cover the costs of the parties and in exercise of my powers under **Rule 36** of the *Elections (Parliamentary and County Elections) Petition Rules, 2013*, I direct the 1st respondent shall be awarded Kshs.250,000.00 while the 2nd and 3rd respondents are awarded Kshs.150,000.00 as costs. The balance of Kshs.100,000.00 shall be refunded to the petitioners.
43. The final orders are therefore as follows;
- a. **The petition dated 12th August 2013 be and is hereby struck out and dismissed.**
 - b. **The petitioners shall bear the respondents costs assessed as follows;**
 - i. **1st respondent is awarded Kshs.250,000/00**
 - ii. **2nd and 3rd respondents are awarded Kshs.150,000/=**
 - c. **The costs shall be paid out of the security deposit and the balance shall be paid out to the petitioners.**

DATED and DELIVERED at MACHAKOS this 23rd day of October 2013.

D.S. MAJANJA

JUDGE

Mr Musyoki instructed by B. Musyoki and Company Advocates for the petitioners.

Ms Kilonzo instructed by Kilonzo and Company Advocates for the 1st respondent.

Mr Muhoro instructed by Muhoro and Company Advocates for the 2nd and 3rd respondents.