



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 382 OF 2017**

**IN THE MATTER OF ARTICLE 22(1) & (2) (C), 23, 24, 38, 252,  
253(b), 258, 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CHAPTER SIX OF THE CONSTITUTION OF KENYA 2010**

**(LEADERSHIP AND INTEGRITY)**

**AND**

**IN THE MATTER OF THE CONTRAVENTION AND VIOLATION OF ARTICLES**

**88(4) & (5), 180 (2) AND 193 (1) (B) OF CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 25 OF THE ELECTIONS ACT**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011**

**AND**

**IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, 2012**

**AND**

**IN THE MATTER OF THE OATHS AND STATUTORY DECLARATION ACT, CAP 15 LAWS OF KENYA**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....PETITIONER**

**VERSUS**

**GRANTON GRAHAM SAMBOJA.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**AND**

KENYATTA UNIVERSITY.....1<sup>ST</sup> INTERESTED PARTY

DOMINIC MWAMBI MWASARU.....2<sup>ND</sup> INTERESTED PARTY

## RULING

### PETITION

1. The Petitioner through a Petition dated 1<sup>st</sup> August 2017 filed on the even date seek several prayers being thus:-

*a) A declaration that the IEBC in exercising its mandate of managing elections is bound by the Constitution and national legislation.*

*b) A declaration that Articles 88(4)(f) and 193(1)(b) of the Constitution of Kenya and Section 4(f) of the Independent Electoral and Boundaries Commission Act, 2011 bestow upon the IEBC a duty to inquire into the eligibility of candidates for election and to register only those candidates who meet the legal requirements for the positions that they aspire to hold.*

*c) A declaration that by dint of Article 193(1)(b) a report in the nature of an integrity verification report submitted by EACC notifying the IEBC that the 1<sup>st</sup> Respondent does not satisfy the educational requirement prescribed by section 22 of the Elections Act, 2011 bestowed upon the IEBC an obligation to inquire into the veracity of the report or in any other lawful manner satisfy itself of the eligibility of the 1<sup>st</sup> Respondent as a candidate for the position of Governor, County Government of Taita Taveta in the 2017 General Elections.*

*d) A declaration that the IEBC failed to discharge its responsibility to undertake further investigations or any other judicious inquiry in respect of the 1<sup>st</sup> Respondent relative to the integrity verification report submitted to it by the Petitioner.*

*e) A declaration that the IEBC failed to discharge its constitutional obligations under Article 88(4)(f) of the Constitution in the manner envisaged under Article 88(5) of the Constitution by registering the candidature of the 1<sup>st</sup> Respondent for the position of Governor of Taita Taveta in the 2017 General Elections in the face of the Integrity report submitted to it by the Petitioner indicating that the 1<sup>st</sup> Respondent did not have a Degree from Kenyatta University or any University recognised in Kenya and consequently did not meet the educational requirements prescribed by section 22(2) of the Elections Act, 2011 law for the said position.*

*f) A declaration that the 1<sup>st</sup> Respondent's political rights under Article 38(3)(c) of the Constitution are not absolute and are subject to the eligibility criteria stipulated under Article 193(1) (b) of the Constitution.*

*g) A declaration that the 1<sup>st</sup> Respondent is not eligible for election as a Governor in the general elections slated for 8<sup>th</sup> August 2017.*

*h) A declaration that any election of the 1<sup>st</sup> Respondent to the position of Governor of the County of Taita Taveta or of any other County in the Republic of Kenya without meeting the educational and ethical qualifications prescribed by law for candidates for such an office is null and void.*

*i) A permanent injunction barring the 1<sup>st</sup> Respondent to the position of Governor of the County of Taita Taveta or of any other County in the Republic of Kenya without meeting the educational and ethical qualifications prescribed by law for candidates for such an office is null and void.*

*j) A permanent injunction barring the 1<sup>st</sup> Respondent from holding any public office for breaching the ethical requirements of Chapter Six of the Constitution of Kenya.*

*k) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.*

*l) Costs of the Petition.*

### PETITIONER'S CASE

2. Considering the prayers in the Petition herein it is clear that the substance of the Petition is about the qualification and the eligibility of the 1<sup>st</sup> Respondent to contest in the gubernatorial race as a Governor for Taita Taveta County in the previous General Elections held on 8<sup>th</sup> August 2017, and whether the 2<sup>nd</sup> Respondent failed to perform its mandate under the Constitution with respect to the Petitioner's integrity verification Report and in allowing the 1<sup>st</sup> Respondent to participate in the said elections.

3. Further on review of the prayers sought, the following items emerge:-

*a) That the Petitioner invites this Court to interrogate the eligibility and registration of the 1<sup>st</sup> Respondent as a gubernatorial candidate,*

b) In the alternative and without prejudice to the foregoing, the Petitioner invites this Honourable Court to interrogate the mandate of the 2<sup>nd</sup> Respondent in finding the 1<sup>st</sup> Respondent eligible for the gubernatorial seat, thereby, registering him accordingly,

c) That the Petitioner invites this Honourable Court to interrogate and seize a query as to educational requirements as provided for under the Elections Act, 2011,

d) That the Petitioner invites this Honourable Court to interrogate the act and/or omission by the 2<sup>nd</sup> Respondent to register the candidature of the 1<sup>st</sup> Respondent for the Governor of Taita Taveta County in the 2017 General Elections,

e) That the Petitioner invites this Honourable Court to interrogate the eligibility of the 1<sup>st</sup> Respondent for election as a Governor,

f) That the Petitioner invites this Honourable Court to determine that the elections of the 1<sup>st</sup> Respondent to the position of Governor of Taita Taveta County or any other county is null and void,

g) That the Petitioner invites this Honourable Court to bar the 1<sup>st</sup> Respondent from contesting in any general election without meeting the educational and ethical qualifications prescribed by law.

#### **THE 1<sup>ST</sup> RESPONDENT'S PRELIMINARY OBJECTION**

4. The 1<sup>st</sup> Respondent **Granton Graham Samboja** through the firm of Maanzo & Co. Advocates through a **preliminary objection dated 24<sup>th</sup> January 2018** raised six (6) grounds of objection to the Petition being thus:-

a) That this Court is a constitutional court and has not been gazetted as an Election Court under the Election's Act, 2012 and the rules made thereunder, and therefore this Court does not have jurisdiction to hear, consider and determine a petition challenging the eligibility to contest gubernatorial election, the validity or otherwise of the Election to gubernatorial position and the declaration and or nullification of the results of an Election to the gubernatorial position of the 1<sup>st</sup> Respondent as the Governor of the county of Taita/Taveta.

b) That a petition challenging the eligibility and the validity of the declaration of the results for the Election as a Governor of county of Taita/Taveta of the 1<sup>st</sup> Respondent, can only be lodged, in accordance with the law, upon declaration of the results of the Election, in an duly gazetted Election Court. This petition was lodged on 1<sup>st</sup> of August, 2017 before the date of the General Election which was held on 8<sup>th</sup> of August, 2017 and is therefore pre-mature, unconstitutional, unlawful and in flagrant violation of the High Court (Election Petitions) Rules and therefore ought to be struck out in Limine.

c) That the issue of validity of the declaration of Election of the 1<sup>st</sup> Respondent Granton Graham Samboja as the Governor of the County Government of Taita/Taveta has been determined by a competent election Court in Election Court in Election Petition No.1 of 2017 filed in Voi and the same is consequently Res Judicata.

d) That the Petition is incurably defective in so far as it seeks to nullify the declaration of Election of the Governor of Taita/Taveta County without enjoining the County Returning Officer who made the declaration of Eligibility to contest the said Election and the declaration of Election of the Governor of Taita/Taveta County.

e) That the Petition is incurably defective in so far as it seeks to nullify the declaration of Election of the Governor of Taita/Taveta County without enjoining the Deputy Governor of the said County as a party to the Petition.

f) That prayers (a)-(f) in the said Petition dated 1<sup>st</sup> August, 2017, which seeks to enforce chapter (6) of the constitution in Elections, and in particular Article 193 (1) (b) of the Constitution and Section 22(2) of the Election Act 2011, constitute substantially the same and similar questions of law which are pending for determination in a previously instituted Advisory Opinion Reference No. 1 of 2017 in the Supreme Court which was lodged on 20<sup>th</sup> April, 2017 and to which both the EACC and IEBC are parties and therefore lodging a petition in this Court with the said questions of law which are pending determination in a previously instituted case in the supreme Court in abuse of the Court process and the Petition ought to be struck out in Limine.

#### **THE 2<sup>ND</sup> RESPONDENT'S RESPONSE**

5. The 2<sup>nd</sup> Respondent filed a response to the Petition dated 19<sup>th</sup> October 2017 and a Replying Affidavit sworn by Mohamud Mohamed Jabene, in opposition of the Petition.

#### **ANALYSIS AND DETERMINATION**

6. What is now coming up for determination is the preliminary objection by the 1<sup>st</sup> Respondent dated 24<sup>th</sup> January 2018 and more specifically challenging the jurisdiction of this Honourable Court to hear and determine the Petitioner's Petition. All parties herein filed submission in support of their respective opposing positions as regards the 1<sup>st</sup> Respondent's preliminary objection. Upon perusal of the preliminary objection and parties rival submission the following issues do arise for consideration:-

a) *Whether the Honourable Court has jurisdiction to entertain the Petition herein.*

**b) Whether the 2<sup>nd</sup> Respondent failed to discharge its duties under Article 88(4) (f) and 192(1)(b) of the Constitution in disregarding the petitioner's integrity Verification Report dated 20<sup>th</sup> May 2017.**

**A. WHETHER THE HONOURABLE COURT HAS JURISDICTION TO ENTERTAIN THE PETITION HEREIN?**

7. The 1<sup>st</sup> Respondent contention is that this Court is a Constitutional Court and has not been gazetted as an Election Court under the **Elections Act 2012** and the rules those under, hence it lacks jurisdiction to hear, consider and determine the present petition challenging the eligibility to contest gubernatorial Election, the validity or otherwise of the Election to gubernatorial position and declaration and/or nullification of the results of an Election to the gubernatorial position of the 1<sup>st</sup> Respondent as the governor of the County of Taita/Taveta.

8. It is further urged that a petition challenging the eligibility and the validity of declaration of results for the election of a Governor can only be lodged in accordance with the law, upon declaration of the results of the Election, in a duly gazetted Election Court. The 1<sup>st</sup> Respondent contended that this Petition having been lodged on 1<sup>st</sup> August 2017 before the date of the General Election which was on 8<sup>th</sup> August 2017, is premature, unconstitutional, unlawful and in flagrant violation of the **High Court (Election Petitions) Rules**.

9. The Petitioner contend that the IEBC called for Integrity Verification Report from the commission which established and advised IEBC that the 1<sup>st</sup> Respondent did not meet the educational requirement stipulated under **Article 193(1)(b) of the Constitution** and **Section 22 of the Elections Act, 2011** to contest for the position of Governor and that he was of questionable integrity for fabrication and presenting forged academic certificates. The IEBC however failed to engage its internal vetting mechanisms or in any other lawful way to satisfy itself of eligibility of 1<sup>st</sup> Respondent as a Candidate for position of Governor.

10. The Petitioner contend that the petition herein seeks an interpretation of the constitutional duty of the IEBC in ensuring that candidates seeking elective posts satisfy integrity threshold and eligibility criteria required by the Constitution. Specifically, the Petition seeks this Honourable Court's interpretation of the place and space of Integrity Verification in the distinct duty and onus of the IEBC to inquire into and satisfy itself on the qualification of candidates intending to vie for elective positions, before registration and gazetting of the candidates, in compliance with the Constitution, the **Elections Act, Leadership and Integrity Act, 2011** and the **Independent Electoral and Boundaries Commission Act, 2011**.

11. The Petition as drawn and filed is clear that it is in respect to elective post but the Petitioner maintains that the substratum thereof falls within the ambit of a constitutional petition, which is the preserve of this Honourable Court. Specifically, (1) the place and purpose of an integrity verification report (2) the constitutional and statutory duty of the IEBC to inquire and satisfy itself of the eligibility and the qualification of candidates before registration, (3) eligibility criteria to vie for an elective position which is a constitutional requirements (4) the integrity test befitting of a person seeking election into a state office, and (5) the 1<sup>st</sup> Respondent's rights vis-à-vis the eligibility criteria stipulated under **Article 193(1)(b) of the Constitution**.

12. In view of the above it is Petitioner's averment that this Honourable Court is clothed with the jurisdiction pursuant to **Article 165(3)(d) of the Constitution** to hear any question respecting the interpretation of the Constitution and **Article 165(6) of the Constitution** which endows the High Court with supervisory jurisdiction over acts of neglect of duty under the Constitution. In emphasising the jurisdiction of this Honourable Court under **Article 165(3)(d) of the Constitution**, the Honourable Justices of the Supreme Court in **Advisory Opinion Reference No.1 of 017 KNCHR v AG & 17 Interested Parties**, held at paragraph 54 that they noted that the High Court has been entrusted with the mandate to interpret the constitution, and that at paragraph 56, that not even the Supreme Court's advisory opinion jurisdiction could usurp the High Court's constitutional interpretation jurisdiction.

13. The Petitioner further contend that the instant Petition is not an Election Petition envisaged and provided for in the **Elections Act, 2011**. The Petitioner urge that it does not seek to challenge the conduct of the election of the 1<sup>st</sup> Respondent as Governor County Government of Taita Taveta. That also it does not seek to determine the validity of the election to gubernatorial position or the validity of the declaration or nullification of the results of an election. It is therefore stated by Petitioner that consequently, the County Returning officer and the Deputy Governor are not proper parties to the Constitutional Petition. It is also noteworthy that the Commission does not have the mandate to challenge the validity of an election. The commission does not fall within the category of parties to an election petition within the meaning of **Section 2 of the Elections (Parliamentary and County elections) Petitions Rules, 2017** and would therefore be an improper party in an election Petition.

14. It is Petitioner's contention that the Petition seeks, succinctly, (1) an enforcement of **Chapter Six of the Constitution** on the integrity of a person seeking state office (2) a pronouncement of the constitutional qualification / eligibility criteria required of a person seeking an elective post and (3) to illuminate the abdication of duty by the IEBC to undertake its constitutional mandate. The commission, vide this Petition seeks to enforce its mandate under **Chapter Six of the Constitution** following the laxity by the IEBC to discharge its mandate under **Article 88(4)(e) of the Constitution**. The Commission challenges the clearance of the 1<sup>st</sup> Respondent to contest for position of Governor in the 2017 general elections on the basis of lack of the requisite educational requirements and failure of the integrity test. The commission thus invites this Honourable Court to intervene and exercise its constitutional interpretation jurisdiction and supervisory jurisdiction under **Article 165(3) (d) and (6) of the Constitution**.

15. The Petitioner places reliance in support of its proposition in the Supreme Court's reasoning in the case of **Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) Petition No. 7 of 2018 eKLR** where the Supreme court developed principles balancing the jurisdiction of the IEBC dispute Resolution Committee established pursuant to **Article 88(4)(e) of the Constitution** and the Election Court under **Article 105(1) of the Constitution** in resolving a pre-election dispute. In the same breadth, the Supreme Court reaffirmed this Honourable Court's supervisory jurisdiction under **Article 165(3) and (6) of the Constitution**.

16. The 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent are of the view that this Court lacks jurisdiction to entertain the Petition as filed. The 2<sup>nd</sup> Respondent rely on two limbs; first that the Constitutional and Human Rights Court is not an election court and secondly the Constitutional

Court is not a Criminal Court either.

17. It is contended that from various reliefs sought by the Petitioner, it is clear that the substance of the Petition is to invite this Honourable Court to make a finding, with respect to the Criminal liability of the 1<sup>st</sup> Respondent. It is further stated that the Petitioner by seeking that the Court finds that the 1<sup>st</sup> Respondent is criminally liable for the alleged fabrication, and giving false information in violation of the Penal Code, the Petitioner is seeking that this Court sitting as a Constitutional Court sits as a Criminal Court of first instance, yet this Court has no jurisdiction to investigate and determine the 1<sup>st</sup> Respondent's alleged criminal liability in so far as the allegations are concerned as a court of first instance.

18. To buttress the aforesaid the 2<sup>nd</sup> Respondent sought to rely on the case of *Frankline Mithika Linturi v Ethics and Anti-corruption Commission & 3 others [2018] eKLR* where the Court was faced with a similar case and declined to exercise jurisdiction.

19. Likewise the 2<sup>nd</sup> Respondent sought support on the same issue from decision in Pet No. 331 of 2015 *Jacob Juma vs. Evans Kidero [2016] eKLR* where it was held:-

***“For the foregoing reasons, it is not within the mandate of this court to sit as a criminal court of first instance, without any input of the relevant criminal justice players to make a finding whether the Respondent is guilty or not guilty of criminal offences pertaining to fraud and theft of funds belonging to the Mumias Sugar Co. Ltd.”***

20. Similarly in the case of *Silas Make Otuke vs. Attorney General & 3 Others [2014] eKLR* expresses the correct legal position when the Court opined that:-

***“If we were to allow before us the hearing and determination of the issue of obtaining and of uttering a false degree we would be denying the Director of Public Prosecutions the constitutional right of directing investigations and prosecuting the alleged crime of fraud.”***

21. On issue of the High Court not being an Election Court and having no jurisdiction to determine a suit predicated upon election dispute the Honourable Court of Appeal addressed itself in the case of *Orange Democratic Movement vs. Yussuf Ali Mohammed and 5 others [2018] eKLR* where the Court had opportunity to seize and determine a similar matter in which a Preliminary Objection was raised on the issue of a High Court (that is not an Election Court) having jurisdiction to determine a suit predicated upon an election dispute whatever its manifestation.

22. The Court of Appeal in the abovementioned case had specifically been invited to determine whether a Superior Court, unless duly gazetted as an Election Court, had jurisdiction to seize and determine a suit in the nature of an election dispute.

23. Further the Learned Judges of Court of Appeal espoused and offered that any impugn against an electoral process can only be challenged after the election by way of an election Petition.

24. A clear perusal from the face of the pleadings and prayers in the instant Petition, it is ascertainable that the main impugn is that of the eligibility and validity of the election of the 1<sup>st</sup> Respondent as the Taita Taveta County governor. It is not in dispute as of now, that the 1<sup>st</sup> Respondent was duly elected and gazetted, pursuant to the Elections Act, as Governor of Taita Taveta. I find that there is no dispute that the trite law that the regime that governs and prescribes procedure attendant to eligibility and registration of candidates for elective posts together with resolution of disputes arising therefrom are contained and outlined in the *Elections Act, 2012*.

25. The question raised within the 1<sup>st</sup> Respondent Preliminary Objection is clear and is whether a Constitutional Petition before the High Court can be invoked to initiate an Election related dispute prior to or subsequent to gazettement of an elected candidate. I find that this question goes to the root of jurisdictional competence of the High Court to hear and determine election disputes by way of Constitutional Petitions.

26. In ascertaining the nature of a constitutional Petition it is incumbent for a court to interrogate both the substance of the claim and the relief sought in order to determine the jurisdictional competence of the Court. (See *Orange Democratic Movement vs. Yusuf Ali Mohammed and 5 others (2018) eKLR*).

27. I have perused the pleadings and reliefs sought, which emerge out as follows:-

***(a) That substratum of the Petition is the electoral process, to wit, the 2017 General Elections, especially the Taita Taveta gubernatorial race,***

***(b) That crux of the main impugn and/or dispute, to wit, eligibility to vie for the gubernatorial seat, is enshrined and contained in the Election Act,***

***(c) That the overall and consequential effect of the prayers sought is to invite this Honourable Court to overturn the 1<sup>st</sup> Respondent's registration as a 2017 General Election gubernatorial candidate, annul the 1<sup>st</sup> Respondent's eligibility for candidature and declare his election null and void.***

28. I find that it is clear that both the substance of the Petition and reliefs sought are election related and Election Petition contestation by reasons, that the substratum of the Petition arise from an electioneering process. This to the contrary is clear that the substratum of the

Petition do not fall within the ambit of constitutional petition nor is the Constitutional and Human Rights Court clothed with jurisdiction pursuant to **Article 165(3)(d) of the Constitution** to hear this Petition as it is not seeking interpretation of the Constitution and also under **Article 165(6) of the Constitution** as alluded to by the Petitioner; but I find this to be an election Petition envisaged and provided for in the **Election Act, 2011**.

29. The present Petition being founded and premised on an election process, I find that this is purely an election dispute and whose resolution mechanism is clearly outlined and provided for and a count must be invoked to seize and adjudicate upon those contestations.

30. **Section 75 of the Elections Act 2012** clearly makes provisions on the question to validity of election of County Governor and states that the issue shall be determined by the High Court within the county or nearest to the county. From the said section it emerges that the first qualification provided for under the statute is that the High Court within the subject county or the nearest to that county shall deal with such a dispute. In addition, further qualification is provided under the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, where at **Section 6(1)** it is stated that:-

**“An election court shall be properly constituted for purpose of hearing a petition in respect to Parliament or to the governor if composed of one High Court Judge.”**

31. Further **Section 6(2) (a) & (3) of the Elections (Parliamentary & County Elections) Petition Rules, 2017** provides that:-

**“The Chief Justice may in consultation with the Principal Judge of the High Court designate such judges” and:**

**“The Chief Justice shall publish the name of the judge...in the Gazette and in at least one newspaper in circulation.”**

32. It turns out from the above that for a Court to constitute an Election Court, so as to derive jurisdiction to determine electoral disputes the following must exist:-

**a) That the Chief Justice must designate judge of the High Court as such,**

**b) That the Chief Justice must publish the name of the Judge in the Gazette and at least one newspaper in circulation,**

**c) That the High Court must be within the county in dispute or one that is nearest.**

33. It therefore follows that designation, gazetement and posting of name of a Judge/Court, as an Election Court is the bedrock that determines the forum, that has jurisdictional competence to hear and determine dispute arising out of electoral process. The Supreme Court in the case of **Moses Masika Wetangula vs. Musikari Nari Kombo & 2 Others**, observed that it is now an indelible principle of law that the proceedings before an electoral Court are *sui generis*, whereby they are neither criminal nor civil. I find that it is clear that a court cannot therefore derive jurisdiction to seize and determine an electoral dispute unless it has been clothed with the requisite authority pursuant to unequivocal provision of the **Elections Act, 2012 and Elections (Parliamentary and county Elections) Petition Rules, 2017**.

34. It is of paramount importance to refer to provisions of **Section 11 of the Ethics and Anti-corruption Commission Act and the Leadership and Integrity Act**, on the Jurisdiction of instituting Criminal and complaint that the 1<sup>st</sup> Respondent did not hold the necessary qualifications to vie as a candidate for Governor for county Government of Taita Taveta. The Petitioner herein had the liberty to invoke the necessary dispute resolution mechanisms to have the matter settled. To buttress this proposition reference was made to the case of **William Kabogo Gitau v. Ferdinand Ndung'u Waititu [2016] eKLR** where Lenaola J (as he then was) rendered himself thus:-

**“I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under the Constitution. I also appreciate that Article 258 of the Constitution grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. I however take the view that parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.**

**I take the further view that the existence of Articles 165 and 258 of the Constitution is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties.”** (emphasis added)

35. Further on similar issue the High Court clearly addressed itself on assuming jurisdiction to determine matters relating to qualification and integrity in the case of **Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkediye & 3 others Nairobi Petition No. 6 of 2013 (2013) eKLR, 49** where Mabeya J, held that; *the law does provide a detailed procedure for pre-election dispute resolution which must be followed and that it would be a usurpation of jurisdiction for the High Court as an election court to enquire into pre-election disputes which are the preserve of another body, the IEBC;*

**“My view is that, the law did not provide the detailed procedure for pre-election dispute resolution mechanisms for no reason. It was intended that the procedure be strictly followed. There is ample authority, including Diana Kethi Kilonzo’s case cited above, Kituo Cha Sheria vs. John Ndirangu Kariuki (2013) eKLR, ICPC & 5 others vs. AG & 4 others (2013) eKLR, Re Francis Gitau Parsimei & others vs. National Alliance Party & Others Pet. No. 356 of 2012 (UR) to the effect that once a procedure on dispute resolution has been provided for, the court has no business extending its tentacles thereto. It should be noted that the provisions I have cited above are clear that a decision on those disputes must be rendered before the subject re-election. A dissatisfied party to**

*such a dispute can only appeal to the High Court in its normal jurisdiction against such a decision to an election Court. In Kituo Cha Sheria Vs. John Ndirangu & Another (2013) eKLR Kimondo J was of the view that only in instances of outright negligence by the IEBC in the nomination process that infringe on the constitution that the election court can re-open the issues relating to nomination. I agree with that holding.*

*A reading of Section 75 of the Elections Act shows what issues an Election Court can delve into. The Election Court enquires into the validity of an election. This to my mind does not extend to pre-election disputes whose procedure is well set out in Article 88(4) (e) of the Constitution and Section 74 of the Election Act.*

*In regard, I find that the Petitioner failed to use the prescribed procedure as provided by law to question the eligibility of the 2<sup>nd</sup> Respondent and the other 2 candidates. Having failed to do so, I find that this Court cannot usurp the jurisdiction assigned to another body. He should have pursued the appellate process but he did not. Neither has he failed to process undertaken by the DRC. In the foregoing, I am of the view that this Court will not be acting properly if it extended its jurisdiction to determine matters relating to the qualifications and eligibility of the 2<sup>nd</sup> Respondent and Nina Daniel Mpule which were properly dealt with but not challenged by him on appeal. The same however, does not apply to the issue raised by the Petitioner on the eligibility of Dr. Obadiah Kimani Njoroge to run for Governor of Kajiado County.”*

36. Following the undisputed gazette of the 1<sup>st</sup> Respondent as a valid nominee to contest for the gubernatorial seat and thereafter as the governor elect of Taita Taveta County I find that it is incumbent therefore that resolution of any dispute as to the validity of the election and/or results immediately subjected from any other forum to exclusively to that of an Election Court and not a Constitutional and Human Rights Division as attended to by the Petitioner. In the Indian Supreme Court in the decided case of **Jyoti Basu & Others v. Debi Ghosal & others [1982] AIR 983; [1982] SCR (3) 318** it was determined that an Election Petition is not an action at Common Law nor in equity but a statutory proceedings to which neither the common law nor the principles of Equity apply but only those rules which the statute makes and applies. The Court went on further, to state that an election Petition is a special jurisdiction and that it always has to be exercised in accordance with the statute creating it and that in the trial of election disputes the court is put in a straight jacket.

37. Having carefully considered the pleadings herein and reliefs sought, it is apparent clear that the substance of the petition is purely an electoral dispute which through the craftsmanship and legal craftsmanship has been couched to purport and portray as a Constitutional Petition contrary to tenets of law. It is settled law that party cannot, through its pleadings, purport to confer jurisdiction to a court when none exists. I am further on this point guided by a decision of Supreme Court in **Moses Mwigigi & 14 others v Independent Electoral and Boundaries commission & 5 others [2016] eKLR**, where the Court stated that to allow an electoral dispute to be transmuted into a Petition for the vindication of fundamental rights under **Article 165(3) of the Constitution**, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.

38. In view of the aforesaid findings and guided by numerous authorities herein above stated, I find that it would be against clear provisions of the law to turn electoral disputes into constitutional Petitions for the verification of fundamental rights under **Article 165(3) of the Constitution** through a Constitutional Petition or Judicial Review Proceedings. The Constitutional and Human Rights Courts as well as Judicial Review Courts lack jurisdiction to make a finding and determination on whether the 1<sup>st</sup> Respondent herein was qualified to vie for the seat of governor, in County Government of Taita Taveta. I find that such jurisdiction is purely and solely placed upon the internal mechanisms set out by the law, which the Petitioner was expected to have invoked prior to proceeding to file the present petition in the Constitutional and Human Rights Division. It is clear that Petitioner in its prayers sought a declaration of the election of the 1<sup>st</sup> Respondent without satisfying the educational and ethical qualifications prescribed by law for candidates for such office is null and void. This Court is not an Election Court but a Constitutional and Human Rights Court, which in my view has no jurisdiction to annul the election of a governor and/or any elective post as set down under the Constitution. I therefore find that this Court lacks jurisdiction to hear and determine the present Petition.

***B. WHETHER THE 2<sup>ND</sup> RESPONDENT FAILED TO DISCHARGE ITS DUTIES UNDER ARTICLE 88(4) (F) AND 192(1) (B) OF THE CONSTITUTION IN DISREGARDING THE PETITIONER'S INTEGRITY VERIFICATION REPORT DATED 20<sup>TH</sup> MAY 2017.***

39. The 2<sup>nd</sup> Respondent; IEBC, mandate is specifically enshrined in the Constitution under **Article 88 of the Constitution 2010**; which includes the conducting or supervising referenda and elections to any elective body or office established by the Constitution or other laws. The Constitution mandate of the IEBC it appears does not include authenticating academic certificates. It therefore follows the 2<sup>nd</sup> Respondent, IEBC, lacks power to investigate and/or determine the validity or otherwise of the certificates presented by the intending candidates as long as on the face of it, the candidate presents a prima facie valid document.

40. The Petitioner however in its letter dated 30<sup>th</sup> May 2017 termed as Integrity Verification Report, indicated that investigations had established that the 1<sup>st</sup> Respondent as a candidate does not have a degree certificate and is culpable of falsification of certificate, I find in view of the 2<sup>nd</sup> Respondent's constitutional mandate the 2<sup>nd</sup> Respondent could not legally based on the allegation in the report, proceed to stop the 1<sup>st</sup> Respondent from vying for the gubernatorial race for Taita Taveta County. I further find the Petitioner was not only required to furnish the Integrity Verification Report but should have provided the 2<sup>nd</sup> Respondent with a record of any adverse findings of either a judicial or quasi-judicial body on the complaint for breach of **Chapter Six of the Constitution**, or the **Penal Code** and / or **Leadership and Integrity Act** on matters of integrity, morality and ethics. The Petitioner further did not demonstrate that the 1<sup>st</sup> Respondent had been prosecuted or was standing trial for the alleged falsification of the academic credentials and further no order of court or quasi-judicial body had been availed to 2<sup>nd</sup> Respondent for consideration and necessary action.

41. It appears as it stands the Petitioner had only in its possession a letter dated 30<sup>th</sup> May 2017 termed as Integrity Verification Report, which in itself was not conclusive on the issue raised in the aforesaid letter. The process in my view that would have lead to final determination of

the validity of the documents is a preserve of the judicial institutions and not the 2<sup>nd</sup> Respondent, the IEBC. The 2<sup>nd</sup> Respondent has no investigative machinery to undertake enquiries into the validity and legitimacy of academic certificates and credentials supplied to it by various candidates but merely acts in trust on the face value of the documents. I find although there are serious aspersions on the qualifications of the 1<sup>st</sup> Respondent, it is common knowledge, that the 1<sup>st</sup> Respondent has not been charged with any criminal offence related with either uttering false documents or fraudulent conduct. I find such aspersion or suspicion however strong it may be; do not amount to any finding of the Court of law or a quasi-judicial body.

42. Further of great importance and concern the veracity of the documents presented by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent are yet to be conclusively interrogated and determined, so as to make the matter ripe for determination before the court of law.

***43. In view of the findings herein above I find the Petitioner's failure to institute the Petition before the Election Court is a fundamental omission which goes to the root of the Petition and which cannot be allowed to stand as this court lacks jurisdiction to hear and determine this Petition.***

***44. The upshot is that the 1<sup>st</sup> Respondent's Preliminary Objection dated 24/1/2018 is meritorious and the same is upheld. The Petitioner's Petition is struck out for want of jurisdiction with costs.***

**Dated, Signed and Delivered at Nairobi on this 11<sup>th</sup> day of March, 2021.**

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**J. A. MAKAU**

**JUDGE**