



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: Mrima, J.)**

**PETITION NO. E369 OF 2020**

**KENNEDY IRUNGU NGODI.....1<sup>ST</sup> PETITIONER**

**MARTIN NJUGUNA NGUGI.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**MARY WAIHERA NJOROGE.....1<sup>ST</sup> RESPONDENT**

**CATHERINE WANJIKU WARUGURU.....2<sup>ND</sup> RESPONDENT**

**SUSAN WAKARURA KHIKA.....3<sup>RD</sup> RESPONDENT**

**CLEOPHAS MALALA.....4<sup>TH</sup> RESPONDENT**

**PATRICK KARIUKI MARIRU.....5<sup>TH</sup> RESPONDENT**

**JOYCE CHEPKOECH KORIR.....6<sup>TH</sup> RESPONDENT**

**JOASH NYAMOKO.....7<sup>TH</sup> RESPONDENT**

**ASHA HUSSEIN MOHAMMED.....8<sup>TH</sup> RESPONDENT**

**OUDA FRED ODHIAMBO.....9<sup>TH</sup> RESPONDENT**

**MUTAI JAPHETH KIPLANGAT.....10<sup>TH</sup> RESPONDENT**

**GEORGE SUNKUNYIA RISA.....11<sup>TH</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....12<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction:**

1. The Petitioners herein, *Kennedy Irungu Ngodi* and *Martin Njuguna Ngugi* are residents of Maragua Constituency within the Republic of Kenya. They are aggrieved that the 1<sup>st</sup> to the 11<sup>th</sup> Respondents who currently are Members of Parliament, hold those positions when in fact they were ineligible to vie and be elected as Members of Parliament in the General Elections held in 2017.

2. The 1<sup>st</sup> Respondent, *Mary Waihera Njoroge*, is the current Member of Parliament for Maragua Constituency. Prior to her election, she was a nominated Member of County Assembly of Maragua County.

3. The 2<sup>nd</sup> Respondent, *Catherine Wanjiku Waruguru*, is currently the Women Representative for Laikipia Constituency, prior to her election, she was the nominated Member of County Assembly of Laikipia County.
4. The 3<sup>rd</sup> Respondent, *Susan Wakarura Kihika*, is the Senator for Nakuru County. Prior to her election to the position, she was the Speaker for the County Assembly of Nakuru County.
5. The 4<sup>th</sup> Respondent, *Cleophas Malala*, is the Senator for Kakamega County. Prior to his election as, he was the Member of County Assembly of Kakamega County.
6. The 5<sup>th</sup> Respondent, *Patrick Kariuki Mariru*, is the Member of Parliament for Laikipia West Constituency. Prior to his election to the position, he was the Speaker of the County Assembly of Laikipia County.
7. The 6<sup>th</sup> Respondent, *Joyce Chepkoech Korir*, is the Women Representative for Bomet County. Prior to her election to the position, she was a Member of County Assembly of Bomet County.
8. The 7<sup>th</sup> Respondent, *Joash Nyamoko*, is the Member Parliament for North Mugirango Constituency. Prior to his election, he was the Speaker of the County Assembly of Nyamira County.
9. The 8<sup>th</sup> Respondent, *Asha Hussein Mohammed*, is the Women Representative for Mombasa County. Prior to her election, she was a nominated member of County Assembly of Mombasa County.
10. The 9<sup>th</sup> Respondent, *Ouda Fred Odhiambo*, is the Member of Parliament for Kisumu central Constituency. Prior to his election to that position, he was a Member of the County Assembly of Siaya County.
11. The 10<sup>th</sup> Respondent, *Mutai Japheth Kiplangat*, is the Member of Parliament for Bureti Constituency. Prior to his election to the position, he was the Speaker of the County Assembly of Kericho County.
12. The 11<sup>th</sup> Respondent, *George Sunkunya Risa*, is the Member of Parliament for Kajiado West Constituency. Prior to his election to the position, he was a member of County Assembly of Kajiado County.
13. The 12<sup>th</sup> Respondent is *The Independent Electoral and Boundaries Commission*. It has the constitutional mandate to conduct elections in Kenya.

**The Petition:**

14. By an Amended Petition dated 11<sup>th</sup> November 2020 and supported by Affidavits of Kennedy Irungu Ngodi sworn on 9<sup>th</sup> and 11<sup>th</sup> November 2020, the Petitioners approached this Court with the grievance that the 1<sup>st</sup> to 11<sup>th</sup> Respondents were ineligible to vie and be elected as Members of Parliament during the General Election held in 2017.
15. They contend that their ineligibility was brought about by provisions of the Constitution and the Elections Act, No. 24 of 2011.
16. The Petitioners argue firstly that, since the Respondents were Members of various County Assemblies when the General Election was conducted, they were barred from contesting the seat of Members of Parliament, by virtue of being State Officers as provided for under Article 260 as read with Article 99(2) of the Constitution.
17. The Petitioners plead that Article 99(2)(a) of the Constitution disqualifies from being elected as a Member of Parliament any person who is a State Officer or other public officer, other than a Member of Parliament.
18. They further posit that according to Article 99(2)(d) of the Constitution, a person who is a member of a County Assembly is disqualified from being elected as a Member of Parliament.
19. As a result of the foregoing constitutional provisions, the Petitioners contend that the 1<sup>st</sup> to the 11<sup>th</sup> Respondents were ineligible to vie and be elected as Members of Parliament.
20. Secondly, the Petitioners claim that 1<sup>st</sup> to the 11<sup>th</sup> Respondents did not comply with the provisions of Section 43(5) of the Elections Act which requires State Officers to first resign from the office they hold at least six months prior to the date of election in order to be allowed to vie for any elective public office.
21. Thirdly, it is the Petitioners case that under Article 77 of the Constitution, full-time State Officers are restricted from participating in any other gainful employment and that any appointed State Officer could not hold office in a political party.
22. The Petitioners fault the 12<sup>th</sup> Respondent for allowing the 1<sup>st</sup> to the 11<sup>th</sup> Respondents to stand for parliamentary elections in knowledge that they were Members of County Assemblies at the time of their nomination for election as Members of Parliament elections, in flagrant violation of the Constitution and the Elections Act.

23. The Petitioners further contend that by allowing the 1<sup>st</sup> to the 11<sup>th</sup> Respondents to contest the elections, the 12<sup>th</sup> Respondent discriminated against State Officers who did not contest the 2017 General Elections on proscription of Article 99(2)(a) of the Constitution and Section 43(5) of the Elections Act, in violation of Article 27 of the Constitution.

24. The Petitioners also claim that by accepting the nominations of unqualified contestants, the 12<sup>th</sup> Respondent violated Article 38 of the Constitution by illegally eliminating the possibility of other qualified candidates from contesting the said elections through their preferred tickets then held by the 1<sup>st</sup> to the 11<sup>th</sup> Respondents.

**Petitioners' Submissions:**

25. The Petitioners filed written submissions dated 18<sup>th</sup> March, 2021.

26. **Mr. Omondi**, Counsel for the Petitioners, submits that it is not controverted the 1<sup>st</sup> -11<sup>th</sup> Respondents were Members of various County Assemblies prior to becoming Members of Parliament.

27. Counsel further submits that through Gazette Notice No. 6253 of 2017, the 1<sup>st</sup> -11<sup>th</sup> Respondents were nominated members for various parties which were fronting seats of the positions they currently hold. The said Respondents, he submits, were gazetted as duly nominated members on 27<sup>th</sup> June 2017 while still holding office as Members of County Assemblies.

28. On the foregoing, Mr. Omondi states that the Petition's singular question, is whether the seats of the 1<sup>st</sup> -11<sup>th</sup> Respondents have become vacated by dint of Article 99 of the Constitution.

29. Counsel drew the attention of the Court to the conflicting decisions in *Petition No. 321 of 2017 Steven Wachira Karani & Another -vs- The A.G & 4 Others* (hereinafter '**The Karani Petition**') and the one in *Petition No. 210 of 2020, Clement Kung'u Waibara -vs- Anne Wanjiku Kibeh & Another 2020 (eKLR)* (hereinafter '**The Waibara Petition**') that dealt with the same issue raised in the instant Amended Petition.

30. Counsel argued that the Karani Petition was made *per incuriam* as it went against the basic legal principle of *stare decisis*. That, in the said decision, the Court went against the Court of Appeal and the Supreme Court definition of what *elections* are in our system.

31. It is his submission that elections as has been stated by the Supreme Court to include nominations.

32. Counsel further stated that the Karani Petition went against the policy that any Member of Parliament can serve less than five-year period and as such the Respondents were required to fulfil the mandatory requirement of resigning before vying for the current positions.

33. On the foregoing basis, the Amended Petition sought the following prayers: -

a) A declaration that the election of the 1<sup>st</sup> Respondent as the member of the National assembly for Maragua Constituency was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

b) A declaration that the election of the 2<sup>nd</sup> Respondent as the Women Representative in the National Assembly for Laikipia County was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

c) A declaration that the election of the 3<sup>rd</sup> Respondent as the Senate Member for Nakuru County was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

d) A declaration that the election of the 4<sup>th</sup> Respondent as the Senate Member of the National assembly for Kakamega County was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

e) A declaration that the election of the 5<sup>th</sup> Respondent as the member of the National assembly for Laikipia West Constituency was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

f) A declaration that the election of the 6<sup>th</sup> Respondent as the Women Representative to the National Assembly for Bomet County was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

g) A declaration that the election of the 7<sup>th</sup> Respondent as the Member of National assembly for North Mugirango Constituency was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

h) A declaration that the election of the 8<sup>th</sup> Respondent as the Women Representative to the National Assembly for Mombasa County was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

i) A declaration that the election of the 9<sup>th</sup> Respondent as the Member of National Assembly for Kisumu Central Constituency was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

j) A declaration that the election of the 10<sup>th</sup> Respondent as the Member of National Assembly for Bureti Constituency was in violation of

Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

k) A declaration that the election of the 11<sup>th</sup> Respondent as the Member of National Assembly for Kajiado West Constituency was in violation of Article 99(2)(a) and (d) of the Constitution and thus Constitutional, null and void.

l) A declaration that the seats of the Members of Parliament currently held by the 1<sup>st</sup> to 11<sup>th</sup> Respondents have become vacant by operation of Article 103(1)(g) of the Constitution.

34. The Petition is vehemently opposed by the Respondents.

**The 1<sup>st</sup>, 5<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Respondents' Case:**

35. The 1<sup>st</sup>, 5<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Respondents filed Grounds of Opposition dated 15<sup>th</sup> March 2021.

36. It is their case that the entire Petition is incompetent for being *res-judicata* the decision of this Court in the *Karani Petition*.

37. They assert that in the *Karani Petition*, the Court, rightly so held, that the term of Members of County Assembly including County Assembly Speakers expire on the date of the next General Election; that a Member of County Assembly is not disqualified from being nominated to contest in a general election as a Member of Parliament by virtue of Article 99(2)(d) of the Constitution; that the law only prohibits the election of a Member of Parliament if such would result in such a person holding the office of County Assembly and Parliament concurrently.

38. It is further their case that nomination to contest for election is not an election for purposes of Article 99(2) of the Constitution and that the said provisions do not disqualify a Member of County Assembly from being nominated to contest in a General Election.

39. They contended that the purposive interpretation of Article 99(2) of the Constitution only prohibited concurrent holding of the two offices but not the exclusion of sitting Members of County Assemblies from contesting Parliamentary elections.

40. **Mr. Njenga** appeared for the 1<sup>st</sup>, 5<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Respondents. In his submissions, Counsel stated that the Petition is an abuse of the Court process since the Petitioners ought to have applied to be enjoined in the *Karani Petition* where similar issues as raised in the instant Petition were litigated. Counsel submits that Section 7 of the Civil Procedure Act barred the Petitioners from having this suit determined again.

41. As regards the reliance on the *Waibara Petition* by the Petitioners, Counsel stated that the decision is unavailable since it was stayed by the Court of Appeal.

42. Counsel also challenged the Petitioners' prayer for declaration of Section 43(6) of the Elections Act as unconstitutional. He stated that since no such prayer could be traced to the Petition, then the same could not be introduced in the submissions.

43. In asking the Court to dismiss the Amended Petition, they stated that the Petitioners did not adduce evidence to show that the Respondents were not qualify for their current positions. They also contend that the Amended Petition is not brought in good faith.

**The 7<sup>th</sup> Respondent's Case:**

44. The 7<sup>th</sup> Respondent, *Joash Nyamoko*, filed Grounds of Opposition dated 6<sup>th</sup> April 2021. He also filed an Amended Notice of Motion dated 19<sup>th</sup> April, 2021 seeking a stay of any further proceedings in this matter pending hearing and determination of the *Court of Appeal*, Civil Appeal No. E314 of 2020 *Anne Wanjiku Kibeh & Another vs. Hon. Clement Kung'u Waibara & Others* (hereinafter referred to as '***the Waibara Appeal***').

45. The 7<sup>th</sup> Respondents also filed submissions on both the Notice of Motion and the Petition.

46. He posits that the Petitioners have not adduced any evidence demonstrative of his non-compliance with the Constitution and the Elections Act.

47. It is further his case that since there are two contradictory High Court decisions, that is the *Karani Petition* and the *Waibara Petition* for which the latter has been appealed against and is pending determination in the *Waibara Appeal*, it is prudent, reasonable and in the interest of saving judicial time to await the Court of Appeal decision.

48. The decision in *Republic of Uganda v East African Law Society [2013] eKLR* was cited in support of the submission.

**The 8<sup>th</sup> Respondent's Case:**

49. In response to the Amended Petition, the 8<sup>th</sup> Respondent, *Asha Hussein Mohammed*, filed Grounds of Opposition dated 22<sup>nd</sup> February 2021.

50. It is her case that the Petition is misconceived and bad in law on the basis that nomination to contest as a Member of Parliament is not an election within the meaning of Article 99(2) of the Constitution.
51. She pleads that the import of Article 99(2) was to ensure that a person does not occupy the office of Member of Parliament concurrently with the office of a Member of the County Assembly.
52. Further, she contends that the Petitioners' interpretation of Article 99(2) would deny constituents at the Ward level their constitutional right to representation for six months in instances where a Member of County Assembly intended to contest the office of Member of Parliament.
53. **Mr. Omwenga** appeared for the 8<sup>th</sup> Respondent. In his submissions, Counsel stated that there is a difference between nomination and election and since the operative word in the Constitution is '**Elected**' the two words must be distinguished.
54. It is his submission that Article 99(2) deals with disqualification from being elected whereas Article 137(2) deals with nomination. He stated that the variance in the wording of the two Articles is intentional. According to him *elected* means at the point of declaration of election results by returning officer.
55. He further submitted that the requirement under Section 43(5) of the Elections Act for Public Officers to resign at least 6 months before elections does not support the provision of Article 99 of the Constitution as such the 6-month period is unconstitutional. That the requirement is discriminatory as it applies to Members of County Assembly who want to be Members of Parliament but not Members of Parliament who want to become Governors.
56. Counsel submits further that the 6-month resignation requirement was against public interest. That it violated the constitutional requirement of representation at Ward level and would be a costly process since whenever a seat of a Member of County Assembly falls vacant a by-election must be held within 3 months.
57. It is his further submission that under Article 38 anyone had the right to aspire any public office and as such Section 43(5) of the Elections Act is unconstitutional and ought not to stand. He urged the Court to interpret the Article 99 of the Constitution in a manner that supports the social contract to of representation of the people.
58. As regards the variance in the *Karani Petition* and the *Waibara Petition*, Counsel submits that since the former decision has not been appealed against, it still stands. He, however, faulted the Petitioners for relying on the latter decision which has been stayed. Counsel urged this Court to await the outcome of the Court of Appeal in the *Waibara Appeal*.
59. Counsel drew the attention of this Court to *Erick Cheruiyot & 7 Others -vs- IEBC & 7 Others*, where the Court opined that Section 43(5) of the Elections Act is unconstitutional.
60. In closing, Counsel referred to Article 10 of the Constitution and stated that the Constitution ought to be interpreted in a manner that attains the ends of society.
61. He prayed that the Amended Petition be dismissed with costs.

#### **The 12<sup>th</sup> Respondent's Case:**

62. The 12<sup>th</sup> Respondent, *Independent Electoral and Boundaries Commission*, filed a Response to the Petition. It is dated 15<sup>th</sup> March 2021.
63. It is its case that the 1<sup>st</sup> to the 11<sup>th</sup> Respondents were duly nominated by their respective political parties to vie for elections as Members of Parliament.
64. According to it, the provisions of Section 43(5) of the Elections Act and Article 99(2) of the Constitution only prohibit a person from occupying the office of a Member of County Assembly concurrently with the office of a Member of Parliament. Further, that since the Respondents were holders of constitutional elective posts, their nomination to run for elections as Members of Parliament did not in any way contravene Section 43(5) of the Elections Act.
65. It is further contended that in allowing the 1<sup>st</sup> to the 11<sup>th</sup> Respondents to run for election as Members of Parliament, the 12<sup>th</sup> Respondent applied the exception under section 43(6) of the Elections Act.
66. In rebutting the allegation of discrimination against other contestants, the 12<sup>th</sup> Respondent stated that no one was denied the opportunity to participate in violation of Article 27 of the Constitution. As such, the allegation of illegal elimination of other contestants is malicious.
67. **Mr. Obura** appeared for the 12<sup>th</sup> Respondent. In his submissions, Counsel associated himself with the decision in the *Karani Petition*.
68. It is his submission that the law does not prohibit a Member of County Assembly to vie for the position of a Member of Parliament.
69. Further, Counsel submits that a nomination to contest as a Member of Parliament is not an election within the meaning of Article 99 of the Constitution. That, by dint of Article 102(1) of the Constitution, the term of each House of Parliament expires on the date of the next general elections. As such, the term of a Member of County Assembly and a Member of Parliament expire on the same day of the next

general election and a person cannot be said to be holding two offices concurrently.

70. In the end, the 12<sup>th</sup> Respondent prayed that the Amended Petition be dismissed.

**The Petitioners' Rejoinder:**

71. In response to the Grounds of Opposition filed, the 1<sup>st</sup> Petitioner, Kenney Irungu, filed a Further Affidavit which he swore on 18<sup>th</sup> March, 2021.

72. It was his deposition that the plain reading of Section 7 of the Civil Procedure Act (Cap 21) leads to the conclusion that the doctrine of *res-judicata* does not apply to the present Petition.

73. The Petitioners reiterated this Court's jurisdiction as set out in Article 103(1)(g) and the import of Article 99(2)(d) to (h) of the Constitution on when vacancy arises in the office of a Member of Parliament and the disqualification of such members.

74. The Petitioners also buttressed the fact that it was not controverted that the 1<sup>st</sup> to the 11<sup>th</sup> Respondents were duly nominated candidates for their various parties in the general elections for the year 2017 at a time when they all held offices as Members of County Assemblies.

75. Mr. Omondi submits that nominations form part of elections in our laws. That, according to the provisions of the Constitution and Section 22 of the Elections Act a candidate must be qualified to contest elections before vying for nominations. It is Counsel's position that qualifications under Section 22(1) are not merely prescriptive norms but rather substantive ones binding the 12<sup>th</sup> Respondent.

76. Counsel asserts that Article 99 of the Constitution, therefore, proscribe a Member of County Assembly from accepting nomination for the position of a Member of Parliament while still serving.

77. Counsel stated that there is an unbreakable link between elections and nominations.

78. With respect to the pendency of the *Waibara Appeal*, Counsel submits that there is no legal position holding this Court to await the Appellate Court's determination as the instant case is not an ordinary Petition. Counsel urged the Court not to abdicate its constitutional role.

79. As regards the constitutionality of Section 43(6)(a) of the Elections Act, Counsel stated that this Court can declare the said section unconstitutional *suo moto*.

80. All in all, the Petitioners prayed that the Petition be allowed against all the Respondents with costs.

**Issues for Determination:**

81. Having considered the respective parties' pleadings, arguments and counter arguments and the decisions variously referred to by the parties, I discern the following issues for determination: -

i. *Whether the Petition is res-judicata the decision in the Karani Petition and whether the Petition should await the outcome of the appeal against the Waibara Petition in Civil Appeal No. E314 of 2020, Anne Wanjiku Kibeh & Another -vs- Clement Kung'u Waibara.*

ii. *The constitutionality of Sections 43(5) and 43(6)(g) of the Elections Act.*

iii. *Whether there is a distinction between 'Election' and 'Nomination to contest an election' for purposes of Article 99(2) of the Constitution.*

iv. *Whether the 1<sup>st</sup> to 11<sup>th</sup> Respondents were eligible to vie and be elected as Members of Parliament under the provisions of Article 99(2)(a) and (d) as read with Article 260 of the Constitution.*

v. *What orders, if any, should issue?*

82. I will deal with the issues in seriatim.

**i. Whether the Petition is res-judicata the decision in the Karani Petition and whether the Petition should await the outcome of the appeal against the Waibara Petition in Civil Appeal No. E314 of 2020, Anne Wanjiku Kibeh & Another -vs- Clement Kung'u Waibara.**

83. The above issue has two limbs. I will, first, deal with the first limb which is on the aspect of *res judicata*.

84. The definition, application and objective of the doctrine of *res-judicata* is well articulated both in our codified laws and judicial precedents.

85. The **Civil Procedure Act in Section 7** defines and sets out the guiding principles in the application of the doctrine in the following terms:

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which the such issue has been subsequently raised, and has been heard and finally decided by such court.*

86. In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR** The Supreme Court in considering the foregoing section summarized the application of the doctrine of *res-judicata* as follows: -

(a) *The suit or issue was directly and substantially in issue in the former suit.*

b) *That former suit was between the same parties or parties under whom they or any of them claim.*

(c) *Those parties were litigating under the same title.*

(d) *The issue was heard and finally determined in the former suit.*

(e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

87. As to what constitutes *res-judicata*, the Court of Appeal in **Suleiman Said Shahbal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR** observed thus:

To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.

88. The objective of the doctrine of *res-judicata* was aptly captured by the Court of Appeal in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, a decision quoted with approval by the same Court more recently in **Civil Appeal 43 of 2018, Accredo AG & 3 others v Steffano Ucceli & another [2019] eKLR** when it was observed as follows: -

*The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.*

89. I will now apply the foregoing synopsis on the definition, application and rationale of the doctrine of *res-judicata* to this case. It is worth noting that the issue of *res judicata* is not raised against the *Waibara Petition*.

90. Admittedly, the issues in the *Karani Petition* are similar to the ones raised in the instant *Petition*. The issues primarily revolve around interpretation of Article 99(2) of the Constitution and Section 43(5) of the Elections Act regarding eligibility of Members of County Assemblies to vie and be elected as Members of Parliament.

91. In respect to the parties in the *Karani Petition* and the instant *Petition*, suffice to say that the disputants in the two suits are different. It has neither been proved that the parties in the *Karani Petition* were acting for and on behalf of the parties in the instant *Petition* nor that the parties in both matters are acting under the same title.

92. This Court, therefore, finds that the instant *Petition* is not barred by the doctrine of *res judicata*.

93. Intricately connected to the foregoing analysis is the question whether this Court must await the Court of Appeal decision in *the Waibara Appeal*.

94. Whereas this instant *Petition* is not bared by the doctrine of *res judicata* in relation to the *Karani Petition*, there is no doubt that the *Karani Petition* and the *Waibara Petition* raised similar issues. The trial Courts arrived in different findings. The *Karani Petition* was dismissed and no appeal was filed against the decision. The trial Court in the *Waibara Petition* allowed the *Petition* and ordered that a by-election be scheduled. The decision in the *Waibara Petition* was appealed against to the Court of Appeal. The appellate Court stayed the said decision vide the *Waibara Appeal*.

95. This Court has not been informed of the hearing and possible determination of the *Waibara Appeal*.

96. The instant *Petition* is, however, unique. It is a *Petition* under **Article 105(1)(b)** of the Constitution. Under **Article 105(2)** of the Constitution, such a *Petition* must be disposed of within six months of lodging. The *Petition* herein was lodged in Court on 11<sup>th</sup> November, 2020. It must, hence, be determined by 10<sup>th</sup> May, 2021.

97. The six months' timeline is fixed by the Constitution. As such, the period can neither be enlarged nor reduced by any Court. This position was clearly stated by the Supreme Court in **Civil Application No. 6 of 2014 George Mike Wanjohi -vs- Steven Kariuki & 2 others [2014] eKLR**. In the case, the Court was confronted with the question as to whether it could stop the constitutionally triggered timeline under Article 101(4) of the Constitution which made it a requirement that a by-election shall be held within 90 days of the occurrence of a vacancy in the office of a member of National Assembly elected under Article 97(1)(a) or (b) or of the Senate elected under Article 98(a). In making the finding that constitutional timelines must be kept sacred, the Learned Judges made the following finding: -

***[45] Consequently, any statutory process or act done ultra vires the provisions of the Constitution, this Court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the Court cannot do is to extend the 90 days' period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this Court, a creature of the Constitution, cannot extend it.***

98. It, therefore, means that the instant Petition shall suffer natural attrition if no decision is rendered by the 10<sup>th</sup> May, 2021. If this Court allows such to happen, then it would have visited an injustice to the Petitioners further to abdicating its constitutional mandate under Article 105(2) of the Constitution.

99. It is for such reasons that the contention that the determination of the instant Petition awaits the outcome in the *Waibara Appeal* as well as the 7<sup>th</sup> Respondent's Notice of Motion dated 7<sup>th</sup> day of April, 2021 fail and are for rejection.

100. Resulting from the above analysis, both limbs of the first issue are answered in the negative.

#### **ii. The constitutionality of Section 43(5) and 43(6)(g) of the Elections Act.**

101. The issue as to whether Sections 43(5) and 43(6)(g) of the Elections Act are unconstitutional arose when Counsel made their final submissions on the Amended Petition.

102. The Petitioners' Counsel, *Mr. Omondi*, while acknowledging that the issue was not contained in the pleadings, but arose later in the submissions, posited that this Court can, nevertheless, *suo moto* issue the requisite declarations of unconstitutionality of Sections 43(5) and 43(6)(g) of the Elections Act.

103. *Mr. Omwenga*, Counsel for the 8<sup>th</sup> Respondent supports the position that the 6-month resignation period required of State Officers desirous of contesting political positions is unconstitutional.

104. *Mr. Njenga* for the 1<sup>st</sup>, 5<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Respondents opposes the proposition. He asserts that since the issue of declarations of unconstitutionality of Sections 43(5) and 43(6)(g) of the Elections Act is not part of the Petition, then this Court cannot vest itself the jurisdiction to determine it. The issue is to be disregarded.

105. It is a settled position in law that parties are not allowed to travel outside the four corners of their pleadings. Similarly, a Court is duty bound to confine itself to issues as raised in the pleadings. It is not open for a Court to frame and determine issues that do not arise from the pleading of the parties.

106. In the case of ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR*** the Apex Court in its ruling stated as follows on the importance of pleadings: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...

107. Further, the Court of Appeal in ***Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR*** cited with approval the decision of the Supreme Court of Nigeria in ***Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002*** where **Sylvester Umaru Onu, JSC** stated that: -

*It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.*

**Adereji, JSC** in the same case expressed himself thus on the importance and place of pleadings: -

*....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....*

*...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*

108. This Court has reproduced the prayers sought in the instant Petition *verbatim* in the initial part of this judgment. The Petition seeks no prayer for declaration of unconstitutionality of the said provisions of the Elections Act.

109. As this Court is bound by the doctrine of *stare decisis*, the only available option is to decline the invitation by the Petitioners to declare Sections 43(5) and 43(6)(g) of the Elections Act unconstitutional in the unique circumstances of this case. This Court so holds.

110. Having said so, this Court is aware that Section 43(5) of the Elections Act was declared unconstitutional by the High Court in 2015 in ***Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another [2015] eKLR***.

111. In declaring Section 43(5) of the Elections Act unconstitutional, the Court found that there was no justification for denying a public officer the right to contest a vacant seat in a by-election if he had resigned as soon as a vacancy had occurred and that was as soon as the Speaker of either House of Parliament had given notice of the vacancy to the IEBC under article 101(4)(a) of the Constitution. The Court further held that to hold otherwise would be to promote an absurdity that was never intended by the drafters of the Constitution.

112. Further, in 2017 the Employment and Labour Relations Court at Kericho in ***Eric Cheruiyot & 7 others v Independent Electoral and Boundaries Commission & 7 others [2017] eKLR*** held as follows: -

*i. That a declaration be and is hereby issued that S. 43 (5) of the Elections Act, 2011 is unconstitutional and without any legal basis or force ab initio.*

*ii. That Section 43(6) of the Elections Act, 2011 is innocent and harmless. It is a replication of the Constitution on the subject.*

*iii. That a declaration that public officers can only leave office to participate in the election process on nomination for the general election or conclusion of the nomination process for the said general election.*

*iv. That a permanent injunction be and is hereby issued restraining the 1st – 4th Respondents by themselves, servants, agents, employees, assignees, proxies and or representatives from disqualifying public servants from the next or any other general election for not vacating office six months to election date.*

113. Both decisions were not appealed against.

114. In view of the above, although this Court has declined, for the reasons given, to render itself on the constitutionality of Sections 43(5) and 43(6)(g) of the Elections Act, nevertheless, the issue is already settled.

**iii. Whether there is a distinction between ‘Election’ and ‘Nomination to contest an election’ for purposes of Article 99(2) of the Constitution:**

115. The resolution of the contention as to whether there is a distinction between *election* and *nomination* for purposes of Article 99(2) of the Constitution is an invitation for this Court to interpret the said Article.

116. Before undertaking the said duty, this Court will briefly deal with the manner in which the Constitution ought to be interpreted.

117. This Court dealt with this subject recently in ***Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okiiti vs. Public Service Commission & 73 Others*** (unreported). The Court rendered itself as follows: -

*54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).*

*55. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.*

*56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21<sup>st</sup> December, 2011 in ***In the Matter of Interim Independent Electoral Commission [2011] eKLR*** discussed the need for Courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The Court stated as under: -*

*[86] .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*

*[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human*

rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” **Article 20** requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

[88] ..... **Article 10** states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

[89] **It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.**

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR** affirmed the holistic interpretation principle by stating that:

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -

**...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.**

59. In a Ugandan case in **Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997)** the Court was of the firm position that the Constitution should be read as an integrated whole. The Court observed 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, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution....

60. In **Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR**, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

[21] ... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

- that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming

*public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.*

118. In **Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR**, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

*...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.*

119. The Court went ahead and gave further meaning of the term *purposive* by making reference to the decision in the Supreme Court of Canada in **R -vs- Drug Mart** (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

120. The Supreme Court, while referring to the South African Constitutional decision in **Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)**, went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’

121. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in **S -vs- Zuma (CCT5/94) 1995** when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

122. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

*8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.*

123. The Court of Appeal while dealing with holistic interpretation of the Constitution in **Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwangi & 6 others [2012] eKLR** stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

124. Having looked at the manner in which the Constitution ought to be interpreted, I now turn to the issue as to whether there is a distinction between an *election* and *nomination*.

125. *Article 260* of the Constitution defines certain words used in the Constitution for purposes of interpretation. The said Article however neither defines *election* nor *nomination*.

126. The next best stop is **The Elections Act**. Section 2 is on interpretation. It defines *election* and *nomination* in the following terms: -

“election” means a presidential, parliamentary or county election and includes a by-election;

“nomination” means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;

127. The Black’s Law Dictionary, 9<sup>th</sup> Edition, Thomson Reuters Publishers, defines ‘**election**’ at page 595 as follows;

3. The process of selecting a person to occupy an office (usually a public office), membership, award, or their title status.

128. The Encyclopaedic Law Dictionary Legal & Commercial, Wadhwa and Company Publishers defines ‘**election**’ at page 551 to mean;

An act or process of electing; the fact of being elected; the right, power or privilege to make a choice.

129. The Black’s Law Dictionary (supra) defines ‘**Nomination**’ at page 1148 in the following manner: -

1. The act proposing a person for election or appointment.

130. The Encyclopaedic Law Dictionary (supra) defines **nominate** as follows: -

to designate, name; select or propose for appointment to an office or place; to propose as a candidate for election to office.

131. The Petitioners’ case is that under *Article 99(2)(a) & (d)* of the Constitution, the 1<sup>st</sup> to the 11<sup>th</sup> Respondents were disqualified from

being elected as Members of Parliament.

132. Article 99(2) of the Constitution provides as follows: -

*(2) a person is disqualified from being elected a member of Parliament if the person-*

*(a) is a State Officer or other public officer, other than a member of Parliament.*

*(d) is a member of county assembly.*

133. Article 260 defines a **State officer** as ‘a person holding a State office’. The provision also names the State offices to include that of a Member of Parliament and Member of a County Assembly. Further, a **public officer** is defined as any State officer or any person, other than a State officer, who holds a public office. A **public office** is defined to mean an office in the national government, a county government or in the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.

134. Chapter 7 of the Constitution is on *Representation of the People*. Part 1 deals with *Electoral System and Process*. It provides as follows in Article 82(1)(b) and (d);

*82 (1) Parliament shall enact legislation to provide for-*

*(b) the nomination of candidates.*

*(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.*

135. The legislation contemplated by the foregoing is the **Elections Act**. Save for Section 2 which defines nomination, the substantive mention of the term ‘Nomination’ is in **Part III**. It is entitled ‘Elections’. It reads as follows: -

### **PART III - ELECTIONS**

#### **13. Nomination of candidates by a political party**

*(1) A political party shall nominate its candidates for an election under this Act at least ninety days before a general election under this Act in accordance with its constitution and nomination rules. (emphasis added).*

136. Courts have addressed themselves to the entire process of elections and nominations in our country. The Supreme Court in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** case (supra) stated as follows in respect to the electoral process: -

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

137. More recently, in ***Petition 2 & 4 of 2017 (Consolidated), John Harun Mwau & 2 others -vs- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR***, the Apex Court grappled with the issue whether failure to conduct nominations for purposes of elections rendered the electoral process unconstitutional.

138. In a synopsis, it was the Petitioners’ case that upon nullification of the election held on 8<sup>th</sup> August 2017, all process pertaining to that election had been spent and as such were no longer usable in any other presidential election. They claimed that failure to nominate the 3<sup>rd</sup> Respondent (President Uhuru Kenyatta) as required under various provisions of the Constitution and Elections Act made him unqualified to participate in the fresh Presidential elections.

139. The Petitioners claimed that nomination under Article 137 of the Constitution and Section 14 of the Elections Act was a requirement under any election and as such fresh nominations was mandatory. On the foregoing, the Petitioners sought to nullify the presidential election.

140. In rebutting the proposition, the Respondents stated that based on the Supreme Court decision in ***Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR***, where presidential election was invalidated, there would be no need for fresh nominations. Candidates would be limited to the President-elect and those who had contested the first election. It was further their case that the repeat election was *sui-generis* and required no fresh nominations.

141. On the same issue, the 1<sup>st</sup> Interested-Party, ***Dr. Ekuru Aukot*** stated that there was no need for fresh nominations due to impracticalities occasioned by constitutional time-frames.

142. In resolving the rival positions, the Supreme Court comprehensively addressed the electoral process in Kenya. It shed light to the place of nominations in election process in Kenya. The Learned Judges observed: -

[231] The nomination process is deeply rooted in the Constitution, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions.

143. The Court in reference to presidential election and the requirements under to *Article 138(8)* of the Constitution further pointed out the centrality of nomination and the fact that presidential election shall be cancelled if no person has been nominated. It then made an important remark on what nominations are in the electoral process. The Court observed as follows: -

...*Nomination, therefore, is not just a formality, or an exercise in futility, nor can it be dispensed with, save for lawful cause.*

...In summary, therefore, at a general level, nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election. (emphasis added)

144. From the above analysis it can be only the case that the whole concept of election is a **process**. The electoral process has several components. Nomination is one such components in the line. *Nomination* is, therefore, inseparably conjoined to *elections* in an electoral process. The two cannot be divorced or isolated as distinct and totally independent events.

145. Accordingly, in a row of falling dominos, nomination is the first domino (*'the inciting incident'*) that once tipped, launches a succession of chain of events that ultimately gets one announced as a validly elected candidate.

146. Having so said, the 1<sup>st</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> & 12<sup>th</sup> Respondents' contention that nomination to contest for election is not an election for purposes of Article 99(2) is respectfully a misapprehension of the law.

147. I will, in the next issue, deal with the eligibility of the 1<sup>st</sup> to 11<sup>th</sup> Respondents to vie and be elected as Members of Parliament in light of Article 99(2) of the Constitution.

148. In the end, this Court finds that *nomination* and *election* are crucial activities in an electoral process. The two are, however, different activities in that singular electoral process. *Nomination* is the first activity in the electoral process whereas *election* is the last activity which results to the election of a candidate.

149. *Nomination* and *Election* are, hence, inseparable. In other words, if there is no valid nomination of candidates, there cannot be a valid election of a candidate.

**iv. Whether the 1<sup>st</sup> to 11<sup>th</sup> Respondents were eligible to vie and be elected as Members of Parliament under the provisions of Article 99(2)(a) and (d) as read with Article 260 of the Constitution:**

150. This issue is the elephant in the room. The contention is whether the 1<sup>st</sup> to 11<sup>th</sup> Respondents were barred from, first, being nominated and, later, being elected as Members of Parliament given that they were all Members of various County Assemblies at the time each of them was nominated to vie for the respective positions of Member of Parliament.

151. A determination of the foregoing contention will answer the question as to whether vacancies arose in the offices of Member of Parliament held by the 1<sup>st</sup> to 11<sup>th</sup> Respondents.

152. To be able to render the position, it is critical to understand the election cycle in Kenya. The cycle is in respect of the elections for the President, Members of Parliament, Governors and Members of the County Assemblies.

153. *Article 136(2)(a)* of the Constitution states as follows: -

*(2) An election of the President shall be held-*

*(a) on the same day as general election of Members of Parliament, being the second Tuesday in August every fifth year.*

154. *Article 93(1)* of the Constitution establishes the Parliament of Kenya which consists of the National Assembly and the Senate. *Article 101(1)* of the Constitution is tailored as follows: -

*1. A general election of the members of Parliament shall be held on the second Tuesday in August every fifth year.*

155. *Article 102(1)* of the Constitution prescribes the term of Parliament in the following manner: -

*(1) The term of each house of Parliament expires on the date of the next general elections.*

156. *Article 180(1)* of the Constitution states as under: -

*The County governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.*

158. Article 177(1)(a) of the Constitution provides that: -

*(1) A county assembly consists of –*

*(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;*

159. And, Article 177(4) of the Constitution further provides that: -

*A county assembly is elected for a term of five years.*

160. A common thread in the term of office for the President, Members of Parliament, Governors and Members of the County Assemblies is five years and that, elections to those offices are held on the second Tuesday of August every fifth year. That is the electoral cycle in Kenya.

161. Inevitably, by operation of the law, the President, Members of Parliament, Governors and Members of the County Assemblies relinquish their political positions on the date of the next general elections. It, therefore, means that the President, Members of Parliament, Governors and Members of the County Assemblies do not have to explicitly resign as the law renders them out of office on the second Tuesday of August every fifth year, of course except the President during the temporary incumbency under Article 134 of the Constitution.

162. It further means that as at the general election on the second Tuesday of August every fifth year, except for the President, the Members of Parliament, Governors and Members of the County Assemblies cease to be State Officers.

163. On the same footing, except for the President, the Members of Parliament, Governors and Members of the County Assemblies do not hold their offices on the day of the general election.

164. The Court of Appeal in ***Centre for Rights Education and Awareness & Another vs. John Harun Mwau & 6Others (2012) eKLR*** found that under the 2010 Constitution, the President has no power to dissolve Parliament. I must add that the position applies to County Assemblies. In view of that position, the term of Parliament and the County Assemblies, hence, ends at the expiry of the five years from the preceding general election.

165. It is, therefore, the finding of this Court that in view of the foregoing coupled with the provisions of Articles 38 and 41 of the Constitution, Section 43(6) of the Elections Act and the decisions in *Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another* case (supra) and in *Eric Cheruiyot & 7 others v Independent Electoral and Boundaries Commission & 7 others* case (supra), a Member of County Assembly who intends to vie for the seat of a Member of Parliament in the next general election does not have to resign from the membership of the County Assembly either before the party nominations or at all.

166. The above position is, however, to be contrasted with a case where a vacancy occurs in any of the said offices other than in a general election during an election cycle. A common example is a case of a by-election. Ordinarily, a by-election is held within an election cycle or term.

167. In a case where a vacancy occurs in Parliament in the course of an election cycle and a by-election is to be conducted, if a Member of County Assembly intends to be elected as the Member of Parliament for the vacant seat, then that member must resign from the position of the member of County Assembly once the declaration of vacancy is made by the Speaker of either House of Parliament.

168. **Section 43(5A)** of the Elections Act specifies the period within which a State officer or any other public officer ought to resign, for purposes of a by-election, as follows: -

***A public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy.***

169. The Constitution and the Elections Act are silent the timing as to when a State officer or other public officer, other than the President, the Members of Parliament, Governors and Members of the County Assemblies, ought to resign from office with respect to a general election. The issue was, however, dealt with in *Eric Cheruiyot & 7 others v Independent Electoral and Boundaries Commission & 7 others* case (supra).

170. The Court held that, in respect to general election, public officers can only leave office to participate in the election process on nomination or on conclusion of the nomination process for the said general election.

171. Given the position in law as affirmed by the Supreme Court in ***Petition 2 & 4 of 2017 (Consolidated), John Harun Mwau & 2 others - vs- Independent Electoral and Boundaries Commission & 2 others*** case (supra) that nominations and elections are inseparable, I will on my part, and in relation to a general election take the position that, a State officer or other public officer, other than the President, the Members of Parliament, Governors and Members of the County Assemblies, subject to any law, ought to resign after the Independent Elections and Boundaries Commission gives notice for a general election.

172. For clarity as to the time of the resignation, I will refer to the High Court in a Multi-Judge bench in ***Adrian Kamotho Njenga v Attorney***

**General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR** where in dealing with instances where the Constitution is silent on timelines, the Court stated as follows: -

149. *In our view, the appointment of judges by the President, should be immediate and as soon as the recommendations are forwarded to him by the 1<sup>st</sup> Interested Party. That is the spirit of Article 259(8) of the Constitution, which demands that actions be taken without unreasonable delay, and as often as the occasion arises. The President is only required to put in place plans to appoint the persons recommended as judges. Such plans cannot take much time and, therefore, in our considered view, the reasonable time contemplated by the Constitution, should be within 14 days from the date recommendations are received to the President.*

173. In consideration of the fact that a State officer or other public officer, other than the President, the Members of Parliament, Governors and Members of the County Assemblies, will require time to hand over and be cleared from office, I find that a period of 14 days from the day the Independent Elections and Boundaries Commission gives notice for a general election is sufficient time within which the public officer, other than other than the President, the Members of Parliament, Governors and Members of the County Assemblies, ought to tender his or her resignation from the public office.

174. Guided by the manner in which a Constitution ought to be interpreted, I find that a holistic and purposive interpretation and which most favours Article 99(2)(a) and (d) must be able to draw a distinction on when the election, which nominations must be first held, is to be held. If the election of the member of Parliament is to be at the general election, then the requirement of resignation of a member of a County Assembly does not arise. However, if the election is any other election other than a general election, then a person who intends to vie in that election must, in the first instance, comply with Article 99(2)(a) and (d) of the Constitution.

175. In other words, for general elections, Article 99(2)(a) and (d) of the Constitution does not disqualify a sitting Member of County Assembly from contesting the seat of a Member of Parliament. However, if a Member of County Assembly intends to vie in a **by-election** for the seat of a Member of Parliament, the Member of County Assembly must, pursuant to Section 43(5A) of the Elections Act, resign from that position within seven days of the declaration of a vacancy by the Speaker of either House of Parliament.

176. Another canon of interpretation of the Constitution and statutes is the presumption against absurdity. This principle calls for an interpretation by a Court which avoids an absurd result.

177. Article 101(4) and (5) of the Constitution states as follows: -

4. *Whenever a vacancy occurs in the office of a member of the National Assembly elected under Article 97(1)(a) or (b), or of the Senate elected under Article 98(1)(a)—*

*(a) the respective Speaker shall, within twenty-one days after the occurrence of the vacancy, give notice in writing of the vacancy to the Independent Electoral and Boundaries Commission; and*

*(b) a by-election shall be held within ninety days of the occurrence of the vacancy, subject to clause (5).*

5. *A vacancy referred to in clause (4) shall not be filled within the three months immediately before a general election.*

178. The import of the above provision is that a by-election for the seat of a Member of Parliament shall not be held three months before a general election. There is, however, no corresponding provision for a by-election for the seat of a Member of County Assembly in the Constitution.

179. One of the reasons for not conducting a by-election three months to a general election is that going by the various timelines and processes involved in organising for an election, it is not practical to hold a by-election three months before a general election. Another reason has to do with the cost of conducting a by-election alongside a general election. The reasons, among others, are plausible.

180. The foregoing reasons must, hence, find room in respect to a by-election in a county assembly which is to be held three months to a general election. In essence, such a by-election should not be conducted.

181. In that case, therefore, if members of County Assemblies who intend to vie for the seats of Members of Parliament in a general election are to resign before nomination of party candidates, which according to Section 13(1) of the Elections Act a party must nominate its candidates for an election at least 45 days to a general election, then such vacancies shall not be able to be filled in by-elections.

182. This Court is alive to the fact that people generally aspire to progress their various life ambitions. That is a fact which this Court ought to take judicial notice of under Section 60(1)(o) of the Evidence Act, Cap. 80 of the Laws of Kenya. The members of county assemblies are not an exception. Many a times, members of county assemblies have ascended to the seats of Members of Parliament, just to say the least. That is the case in this matter.

183. In a case where majority members of county assembly aspire for other seats, other than members of county assembly, and are required to resign, then it will mean that the county assembly will lack quorum and will not be able to discharge its constitutional mandate for the remainder of its term, which term is set under Article 177(4) of the Constitution.

184. Having said so, it is clear that an interpretation of Article 99(2)(a) and (d) of the Constitution which calls for members of county assemblies who aspire to vie for other positions in the next general election to resign before party nominations breeds absurdity. That cannot have been the intention of the drafters of the Constitution and the law.

185. Further, allowing such an interpretation to prevail will be contrary to the presumption against unworkable or impracticable result which principle calls for a Court to avoid a construction which produces unworkable or impracticable result. It will also be against the grain on the presumption against anomalous or illogical result. The principle calls for a Court to find against a construction that creates an anomaly or otherwise produces an irrational or illogical result. The principle in the presumption against artificial result which calls for a Court to find against a construction that produces artificial result will as well be flouted. Lastly, such an interpretation will flout the principle that the law should serve public interest. A Court should strive to avoid adopting a construction which is in any way averse to public interest, economic, social and political or otherwise. Allowing a county assembly not operate within a term set under the Constitution leads to non-representation of the people; an act which is unconstitutional and which any Court must frown at.

186. I believe I have said enough. In the end, there is no doubt that the 1<sup>st</sup> to 11<sup>th</sup> Respondents were all Members of various County Assemblies and that they were all elected as Members of Parliament at the general election held in 2017. As such, this Court finds that the 1<sup>st</sup> to 11<sup>th</sup> Respondents were eligible to vie and be elected as Members of Parliament under the provisions of Article 99(2)(a) and (d) as read with Article 260 of the Constitution.

187. The issue is answered in the affirmative.

**Disposition:**

188. The foregoing analysis, therefore, settles the various issues raised in the Amended Petition. It is the finding of this Court that: -

(i) The current Petition is not *res-judicata* the decision in the *Karani Petition*.

(ii) The current Petition is brought under Article 105(1)(b) of the Constitution. Under Article 105(2) of the Constitution, the Petition must be determined within 6 months from the date of lodging. The Petition cannot, therefore, await the outcome of the appeal against the *Waibara Petition* in *Civil Appeal No. E314 of 2020, Anne Wanjiku Kibeh & Another -vs- Clement Kung'u Waibara*. To that end, the 7<sup>th</sup> Respondent's Notice of Motion dated 7<sup>th</sup> April, 2021 fails and is hereby dismissed.

(iii) Parties are bound by their pleadings. A party is not permitted to introduce and/or seek the determination of any issue that does not arise from the pleadings.

(iv) An election is a process involving several events. Nomination and election are inseparable events in an electoral chain. Nomination is the first event in such a process whereas election of a candidate is the culmination of an electoral process. There cannot be a valid election of a candidate if the nomination process is impugned.

(v) In Kenya, a general election involves the election of the President, Members of Parliament, Governors and Members of the County Assemblies. The electoral cycle is for a period of five years. It begins at a general election and ends on the second Tuesday of August every fifth year.

(vi) A sitting President, Member of Parliament, Governor or a Member of the County Assembly who intends to vie for any position in the **general election**, next upon the expiry of the current electoral cycle, need not resign before the general election.

(vii) A sitting Member of County Assembly or any other State officer and public officer who intends to vie for the seat of a Member of Parliament in a **by-election**, must resign within 7 days of the declaration of vacancy by the Speaker of either House of Parliament.

(viii) A State officer, and any other public officer, other than a sitting President, Member of Parliament, Governor or a Member of the County Assembly, who intends to vie for any position in the next **general election**, subject to any law, must resign within 14 days of the issuance of the Notice of General Election by the Independent Elections and Boundaries Commission or any time before party nominations are held whichever comes first.

(ix) A by-election shall not be conducted within three months immediately before a **general election** where there is a vacancy in a seat of a Member of County Assembly.

(x) As the 1<sup>st</sup> to 11<sup>th</sup> Respondents were sitting Members of County Assemblies before the **general election** held in 2017, they were all eligible to vie and be elected as Members of Parliament in the general election held in 2017 under the provisions of Article 99(2) (a) and (d) as read with Article 260 of the Constitution.

**Conclusion:**

189. Flowing from the above findings, the Amended Petition dated 11<sup>th</sup> November, 2021 is without merit. It is hereby dismissed with no orders as to costs since the matter is a public interest litigation.

190. Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 4<sup>th</sup> May, 2021**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Omondi**, Counsel for the Petitioners.

**Mr. Njenga**, Counsel for the 1<sup>st</sup>, 5<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents.

**Mr. Mogaka**, Counsel for the 7<sup>th</sup> Respondent.

**Mr. Omwenga**, Counsel for the 8<sup>th</sup> Respondent.

**Mr. Muchemi**, Counsel for the 12<sup>th</sup> Respondent.

**Elizabeth Wambui** – Court Assistant.