REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 210 OF 2020

[FORMERLY KIAMBU H. C. PETITION NO. 8'B' OF 2019]

HON. CLEMENT KUNGÚ WAIBARA.....PETITIONER

VERSUS

HON. ANNE WANJIKU KIBEH.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

JUDGEMENT

Introduction

1. This petition is before this Court for a new trial pursuant to the order issued by the Court of Appeal on 19th June, 2020 in **Nairobi Civil Appeal No. 431 of 2019, Hon. Clement Kung'u Waibara v Hon. Anne Wanjiku Kibeh & the Independent Electoral and Boundaries Commission.** The order was issued following the successful appeal by the appellant, who is the Petitioner herein, against the judgement issued on 14th August, 2019 by Lydia Achode, J dismissing his petition against the respondents in **Kiambu H.C. Petition No. 8'B' of 2019.** Hon. Anne Wanjiku Kibeh, the 1st Respondent and the Independent Electoral and Boundaries Commission (IEBC), the 2nd Respondent were the respective 1st respondent and the 2nd respondent in the appeal.

2. A perusal of the decision of the Court of Appeal and the pleadings and submissions of the parties disclose that the only issue that remains for the determination of this Court in this petition is whether the seat of the Member of the National Assembly for Gatundu North Constituency should be declared vacant by dint of Article 99(2)(d) as read together with Article 103(1)(g) of the Constitution.

3. A brief background will suffice. Hon. Anne Wanjiku Kibeh was elected to represent Gatundu North Constituency in the National Assembly in the General Election held on 8th August, 2017. She contested the election on a Jubilee Party ticket as per Gazette Notice No. 6253 of 2017 of 27th June, 2017 published by the Independent Electoral and Boundaries Commission ('IEBC'). Prior to contesting the National Assembly seat, she was a nominated Member of County Assembly ('MCA') of Kiambu.

The Petitioner's Case

4. The Petitioner's case is that Article 99(2)(d) of the Constitution disqualifies an MCA from being elected a Member of Parliament ('MP') and any MCA desirous of participating in the nomination process for election as MP must resign pursuant to Article 194(1)(d) of the Constitution otherwise his or her seat shall be declared vacant at any time during the life of Parliament as per the cited provisions of the Constitution.

5. According to the Petitioner the Elections Act, 2011 reinforces the said constitutional provisions by providing at Section 22(1)(a) that a person may be nominated as a candidate for an election only if the person is qualified to be elected to that office under the Constitution and the Elections Act.

6. The Petitioner submits that applying the interpretation that an election is not lodged in a single event and starts from the nomination of the candidates by political parties, the 1st Respondent ought to have first relinquished her seat as an MCA prior to her nomination on 27th June, 2017 as a candidate for the parliamentary seat. The Petitioner cites Court of Appeal and Supreme Court decisions in the cases of **Kennedy Moki v Rachel Kaki Nyamai & 2 others [2018] eKLR; Advisory Opinion No. 2 of 2012, In the Matter of the Principle of Gender**

Representation in the National Assembly and the Senate; and **John Harun Mwau & 2 others v IEBC & 2 others [2017] eKLR** in support of the submission that nominations are an integral part of elections and go to the root of the electoral process as it determines qualification of a candidate to vie.

7. It is the Petitioner's assertion that a holistic interpretation of Article 99(2)(d) of the Constitution within the context of the principles and norms espoused under Articles 2, 10, 38, 81, 82 and 259 leads to the inevitable conclusion that the 1st Respondent, with the connivance of the 2nd Respondent, deliberately violated a non-derogable proscription of the Constitution with the consequence that her seat should be deemed vacant under Article 103(1)(g) of the Constitution. Further, that the respondents' actions violated Article 27 of the Constitution in respect of other Jubilee Party candidates who complied with all the legal requirements but were denied an opportunity to contest the parliamentary seat in favour of a candidate who knowingly and willingly violated the Constitution. Also, that the respondents' collusion disenfranchised the electorate by offering them options that were otherwise undeserving of their consideration.

8. According to the Petitioner, the limitation of the right to contest an election under Article 99(2) of the Constitution is justifiable and reasonable. Reliance is placed on the decision of Lenaola, J (as he then was) in **Charles Omanga & another v Independent Electoral and Boundaries Commission & another [2012] eKLR**, as cited by the Judge in his later decision in **Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another [2015] eKLR** that:

> **"In the Kenyan arena now and for a long time to come, whether one runs for elective office as an independent candidate or a nominee of a political party, election campaigns are a must. This includes movements around the elective area to popularize oneself with the electorate. It cannot be the intent of the Law that such a candidate should also be pursuing his public service duties and obligations during the campaign period."**

9. Turning to the decision of Mativo, J in **Stephen Wachira Karani & another v Attorney General & 4 others [2017] eKLR** (hereinafter simply referred to as the **Karani Case**), the Petitioner contends that the said decision is not binding on this Court and it should not be followed as it was made *per incuriam.* The decisions in **Jasbir Singh Rai & 3 others v The Estate or Tarlochan Singh Rai & 4 others, Supreme Court Petition No. 4 of 2012;** and **Bakari v Mohamed & 2 others [2003] eKLR** are cited in support of the argument that the *per incuriam* principle is applicable to the **Karani Case.**

10. According to the Petitioner, a careful consideration of the judgement in the **Karani Case** shows that the same was mistaken or disregarded relevant provisions of the Constitution and binding precedent and was accordingly made *per incuriam.* It is urged that had the learned Judge considered all laws and precedents he would not have arrived at the decision for the reasons that the decision was made pursuant to the Court's general jurisdiction under Article 165 and not Article 105(1)(b) of the Constitution; that the decision was made in ignorance of settled and binding precedent that nomination is an integral component of an election; that the decision was made in disregard of settled and binding precedent that there is no right to hold public office to the end of the prescribed term of the office; and that the decision elevated statutory provisions over binding constitutional provisions.

11. In support of his claim that the **Karani Case** is distinguishable because it was made pursuant to the High Court's general jurisdiction under Article 165 of the Constitution, the Petitioner submits that it is not a coincidence that the framers of the Constitution deemed it necessary to carve out the special jurisdiction of Article 105(1)(b), which can be invoked at any time during the life of Parliament, from the expansive jurisdiction under Article 165.

12. According to the Petitioner, had the learned Judge been moved under Article 105(1)(b) and thereby caused to consider the harmonious effect of the said provision alongside Articles 103(1)(g) and 99(2)(d) to (h), he would have reached a different finding. It is urged that the distinct jurisdiction provided in Article 105(1)(b) serves the legitimate purpose of enforcing compliance with Chapter Six and Articles 103(1)(g) and 99(2)(d) to (h) of the Constitution during the term of service of a public servant and ought to be given the intended effect. He asserts that any other interpretation will effectively render the Court's jurisdiction under Article 105(1)(b) redundant.

13. In support of the allegation that the decision was made in ignorance of precedent, the Petitioner cites the decisions in **Luka Angaiya Lubwayo & another v Gerald Otieno Kajwang & another [2013] eKLR; Kennedy Moki (supra); Supreme Court Advisory Opinion No. 2 of 2012 (supra);** and **John Harun Mwau & 2 others (supra),** as holding that an election is not an event but is set in a plurality of stages which include nominations. Consequently, Mativo, J is faulted for holding that **"nomination to contest as a Member of Parliament is not an election within the meaning of Article 99."** It is asserted that the holding went against the decisions of the Supreme Court which were controlling and binding on the High Court by virtue of Article 163(7) of the Constitution. According to the Petitioner, the learned Judge unduly restricted the meaning of *'election'* and created a dangerous precedent by creating an artificial definition of election for purposes of Article 99(2)(d) of the Constitution. This, it is urged, was wrong and departed from the settled holistic, harmonious and purposive principles of constitutional interpretation.

14. On the argument that the Judge disregarded settled and binding precedent that there is no right to hold public office to the end of the prescribed term of office, the Petitioner cites the Court of Appeal decision in **Attorney General & another v Andrew Kiplimo Sang Muge & 2 others [2017] eKLR** as holding that no one in possession of an office has a constitutional right to remain therein for the full term for which he is elected. In that regard, the **Karani Case** is faulted for the decision in paragraphs 70 to 72 that since the Constitution creates a 5-year term of office for MCAs, a requirement that they vacate office in order to contest election as MPs would be unfair and impracticable. According to the Petitioner, there is no property in a public office, and where holding onto a position while vying for another office would be in violation of an express and binding provision of the Constitution, a public officer is under obligation to comply with the Constitution and resign. It is pointed out that the learned Judge's decision presupposes a right to hold public office for the full term of office.

15. The Petitioner urges that Article 99(2) of the Constitution cannot be interpreted as done in the **Karani Case** and points out that the requirement that an MCA cannot hold both parliamentary and county assembly seats at the same time is emphasized in clauses (a) and (d) of the provision. It is stated that Article (99)(2)(a) bars State officers, other than MPs, from contesting parliamentary elections. The Petitioner points out that Article 260 of the Constitution includes MCAs in the definition of State officers but Article 99(2)(d), nevertheless, proceeds to specifically disqualify MCAs from contesting parliamentary elections. According to the Petitioner, it was by design and for good reason that

the framers of the Constitution and the people deemed it necessary to make additional proscriptions disqualifying sitting MCAs from contesting parliamentary elections. The Petitioner submits that had the Constitution makers not intended to debar MCAs from contesting parliamentary elections, nothing would have been easier than to leave the proscription to the general provisions of Article 99(2)(a) of the Constitution.

16. The Petitioner further submits that Article 103(1)(g) restricts the circumstances under which the office of MP can remain vacant **"to the situations under Articles 99(2)(d)-(h) only and thereby elevates Article 99(2)(d) as among the premium and non-derogable disqualification considerations for parliamentary candidates relative to the requirements of Article 99(2)(a)-(c)."** The Court is therefore urged to find that Section 43(6)(g) of the Elections Act is unconstitutional in so far as it purports to legitimize that which the Constitution expressly proscribes.

17. This Court is also asked to find that the **Karani Case** was made *per incuriam* for allegedly elevating Section 43(5) and (6) of the Elections Act above express and absolute provisions of Article 99(2)(d) of the Constitution that clearly prohibit sitting MCAs from contesting parliamentary elections. It is submitted that the Elections Act must be read and interpreted as an enabling law that gives effect to the provisions of the Constitution.

18. The Petitioner asserts that Article 2(1) proclaims the Constitution as the supreme law of Kenya and that Article 2(4) states that any act or omission in contravention of the Constitution is invalid. It is urged that to the extent that Section 43(6)(g) of the Elections Act purports to dilute or contradict the express proscription of Article 99(2)(d) of the Constitution, the same is unconstitutional, invalid and void. The Court is urged to follow the decision in **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), Nairobi H.C. Petition 150 & 234 of 2016 (Consolidated)** and avoid a strained interpretation of the constitutional provision in question. Consequently, the Petitioner prays for the issuance of a declaration that the seat of the Member of Parliament, Gatundu North has become vacant.

The 1st Respondent's Case

19. The 1st Respondent in opposing the petition enters the stage by highlighting the tools available to the courts for interpreting the Constitution. Article 259(1) of the Constitution is identified as requiring interpretation that promotes the purpose, values and principles of the Constitution; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of laws; and contributes to good governance. Further, that as per Article 259(3) of the Constitution **"every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking."**

20. It is urged that the Constitution should, firstly be construed purposively and contextually; secondly, that the text should not be given a meaning that it is not reasonably capable of bearing; and, thirdly, that no one provision should be segregated from another and considered in isolation. The submissions are supported by reference to the decisions in the cases of **Apollo Mboya v Attorney General & 2 others [2018] eKLR;** and **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR.**

21. It is urged that the purposive approach seeks a construction that is in line with the discernible purpose while the textual approach, on the hand, favours the language of the Constitution. Reliance is placed on the Supreme Court decisions in **Re: The Matter of Interim Independent Electoral Commission [2011] eKLR;** and **Re: The Matter of Kenya National Commission on Human Rights [2014] eKLR** as expounding on the said approaches to constitutional interpretation.

22. The 1st Respondent submits that the literal rule is preferred where the text of statute is plain and unambiguous, whereas the mischief rule assists the court to decipher the legislative intent by undertaking an inquiry into the problem Parliament intended to address in enacting a particular statute.

23. Finally, the 1st Respondent urges that courts should avoid an interpretation that produces absurd, unworkable or impracticable, and irrational or illogical results; creates anomalies; or is inimical to public interest. The **Karani Case** is identified as confirming these principles.

24. The 1st Respondent asserts that the petition has no merit and states that the same is solely founded on the Petitioner's flawed *'reading in'* of the word *'elected'* in Article 99(2)(d) of the Constitution. It is the 1st Respondent's position that the interpretation advanced by the Petitioner is unduly strained, mischievous and against the canons of constitutional interpretation.

25. The 1st Respondent dismisses the Petitioner's assertion that an election is not an event but a plurality of processes and states that the argument is not founded on the constitutional text but on dictum in the cited cases, which she terms as sound bites. According to the 1st Respondent, although the phrase *'elections are a plurality of processes'* has been accepted as trite by numerous courts, this does not mean that every provision of the Constitution with the word *'election'* should be construed as referring to other processes, like nomination as submitted by the Petitioner. The 1st Respondent contends that the Constitution should be interpreted contextually as the strained interpretation suggested by the Petitioner would amount to constitutional heresy and would set different provisions of the Constitution on a collision course thereby rendering them otiose.

26. According to the 1st Respondent, the Constitution explicitly distinguishes *'nomination'* from *'election'*. Examples given are Article 99(1)(c) as expressly listing *'nomination'* of a candidate by a political party as one of the eligibility criteria for *'election'* to Parliament; and Article 82(1)(b) which directs Parliament to enact legislation to provide for *'nomination'* as contrasted with Article 82(1)(d) which directs Parliament to enact legislation on the conduct of *'elections and referenda'*.

27. The 1st Respondent submits that since Article 82 of the Constitution left it to Parliament to enact legislation on *'nominations'* and *'elections'*, reference must be made to the Elections Act which was enacted pursuant to that provision. It is pointed out that Section 2 of the

Act states that the word *'election'* means *'a presidential, parliamentary, county election (including a by-election)'* whereas the term *'nomination'* means *'the submission to the commission of the name of a candidate in accordance with the Constitution and the Act'*. According to the 1st Respondent, the cited provisions show, even at a semantic level, that the Petitioner's interpretation is unworkable and self-defeating. Further, that the cited provisions highlight the Petitioner's failure to apply context in his reliance on the phrase *'elections are a process'*.

28. The 1st Respondent additionally contends that the interpretation advanced by the Petitioner does not accord with the canons of constitutional interpretation. She asserts that no construction can be advanced to give Article 99(2)(d) of the Constitution the meaning that *'a person is disqualified from nomination if they are a member of county assembly'*, as suggested by the Petitioner. The Court is urged to find that the framers of the Constitution distinguished nomination at Article 99(1) from election at Article 99(2). The 1st Respondent's submission is that one of the reasons why the Constitution did not set nomination qualification criteria is the centrality of political parties to democracy and the express recognition under Article 99(1)(c) as read with Articles 91 and 92 that political parties have the liberty to nominate their candidates. The Court is referred to Section 13 of the Elections Act as establishing the procedure by which political parties nominate candidates. It is asserted that the Petitioner's arguments are no more than legal sophistry and a deliberate misreading of the clear text of the Constitution and ignorance of its spirit and purpose.

29. Lastly, the 1st Respondent turns to the **Karani Case** and urges this Court to agree with Mativo, J that *'nomination'* is not an election for the purposes of Article 99(2) of the Constitution; that an MCA is not disqualified from being nominated to contest in a general election as an MP by virtue of Article 99(2)(d) of the Constitution; and that Section 43(6) of the Elections Act exempts MCAs from the requirement to resign six months before a general election.

30. The 1st Respondent signs off by an illustration as to why adopting the Petitioner's alleged flawed interpretation will provide absurd and unworkable results. She takes the example of Nairobi City County and points out that in every general election some serving MCAs opt to pursue higher elective offices like membership of Parliament or governorship. She posits that it is possible that over two thirds of the 123 MCAs may be forced to resign six months before a general election thereby resulting in lack of the quorum required under Section 19 of the County Governments Act, 2012 leading to failure by the Assembly to discharge its oversight function or pass crucial bills even as the close of the financial year approaches. It is her case that such a situation would require the holding of elections six months to a general election to fill the vacancies of the MCAs who will have resigned. This, it is asserted would be absurd.

31. The Court is therefore urged to find that the only meaning that Article 99(2)(d) of the Constitution is reasonably capable of bearing is that the concurrent holding of the offices of MP and MCA is prohibited. Consequently, the Court is asked to dismiss the petition with costs to the 1st Respondent.

The 2nd Respondent's Case

32. The 2nd Respondent joins the 1st Respondent in opposing the petition. The 2nd Respondent faults the Petitioner's assertion that the 1st Respondent's nomination to contest the seat of the Member of Parliament for Gatundu North Constituency was not valid. It is the 2nd Respondent's proposal that the Court should apply Article 259 when interpreting Article 99.

33. In support of the argument that constitutional provisions must be construed purposively and contextually; that courts may not impose a meaning that a text is not reasonably capable of bearing, that is to say, that interpretation should not be unduly strained; and, that no provision is to be segregated from another and considered in isolation, the 2nd Respondent relies on the Supreme Court decisions in **Re: The Matter of Interim Independent Electoral Commission [2011] eKLR; Re: The Matter of Kenya National Commission on Human Rights[2014] eKLR;** and **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR.**

34. The 2nd Respondent urges this Court to agree with the interpretation of Article 99(2)(d) in the **Karani Case.** Specific reference is made to the holding at paragraph 56 of the judgement that:

> **"The "first Petition" states that a sitting member of a County Assembly is not eligible to be "nominated" to vie as a Member of Parliament because such a person is not eligible under Article 99 (2) (d). A reading of Article 99 shows that it deals [with] qualifications and disqualifications for election of Members of Parliament. It does not mention "nominations" or "qualifications for nominations by political parties." Regulation of nomination processes and qualifications for nominations are dealt with by the relevant statues."**

35. The 2nd Respondent urges this Court to find that the Petitioner has not adduced evidence to show that the 1st Respondent was not qualified to vie.

36. It is the 2nd Respondent's case that the petition goes against all known canons of constitutional interpretation and Section 43(6) of the Elections Act which exempts MCAs from the requirement to resign six months before a general election.

37. As if the submissions of the 2nd Respondent were done by the person who did those of the 1st Respondent, the assertion that it would be absurd to agree with the Petitioner is supported by use of Nairobi City County as an illustration. The arguments around this illustration are similar to those of the 1st Respondent and require no restatement in this judgement.

38. Finally, it is urged that this Court should interpret the provision in question in the manner in which Okwany, J interpreted Article 180(2) of the Constitution in the case of **Isaac Aluoch Polo Aluochier v Council of Governors & another [2019] eKLR.** The Court is therefore asked to dismiss the petition with costs to the 2nd Respondent.

Analysis and Determination

39. This petition calls for the interpretation of Article 99(2)(a) and (d) of the Constitution. The relevant provisions of Article 259 states the constitutional interpretation principles as follows:

> **"259. (1) This Constitution shall be interpreted in a manner that—**
>
> **(a) promotes its purposes, values and principles;**
>
> **(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
>
> **(c) permits the development of the law; and**
>
> **(d) contributes to good governance.**
>
> **(2) ….**
>
> **(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"**

40. The interpretation principles have been explained in several cases. The Supreme Court in **Constitutional Application No. 2 of 2011, In The Matter of Interim Independent Electoral Commission** urged that formalism should be abandoned in favour of the purposive approach. In that regard the Court stated:

> **"[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] ….**
>
> **[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."**

41. That a holistic approach to the interpretation of the Constitution is recommended was endorsed by the Supreme Court in its decision **In The Matter of Kenya National Commission on Human Rights [2014] eKLR** where the Court explained the meaning of such an approach as follows:

> **"[26] In his written and oral submissions, Mr. Kitonga has persistently urged us to holistically, broadly and robustly interpret the Constitution, so as to find that Article 163(6) means *all persons*, and not just the entities mentioned therein, can apply for advisory opinions. Counsel is, in effect, asking us to find that Article 163(6) of the Constitution does not mean what it says, through *"a holistic interpretation"*. 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."**

42. The Supreme Court reiterated the supremacy of the holistic and purposive approaches in constitutional interpretation when it held in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR** that:

> **"In *Sammy Ndung'u Waity v. Independent Electoral & Boundaries Commission & 3 Others,* SC Petition No. 33 of 2018, this Court in a majority decision, extensively reviewed the decisions of the High Court and Court of Appeal, regarding the question. The Court emphasized the fact that the Constitution has to be interpreted *holistically* and *purposively,* and that the Constitution, being a living charter, is always speaking, and that in interpreting its provisions, a Court of law must keep in mind that, the constitution cannot subvert itself. *Towards this end, every constitutional provision supports the other, and none can be read so as to render another inoperable.* At paragraph 67, the Court stated:**

> ***"In our perception, this conflict cannot be resolved by either, discounting [outright] one school of thought, or wholly embracing the other. What is critical is the need to harmonize these well-reasoned opinions, so as to give effect to both Articles 88(4) (e), and 105 (1) (a) of the Constitution, as read with Section 75 (1) of the Elections Act. Doing so would be to stay faithful to the edict that a Constitution must be interpreted purposively and holistically.""***

43. The Supreme Court had earlier in the case of **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."**

44. Although the Ugandan case of **Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997)** has acquired the status of an anthem in respect of the statement that the Constitution should be read as an integrated whole, Manyindo, DCJ outlined other important tools to be used in interpreting a Constitution. He deserves to be quoted at length:

> **"I think it is now well established that the principles which govern Construction of Statutes also apply to the Construction of Constitutional provisions. And so the widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters….**
>
> **In my opinion Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import of its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico-cultural issues so as to extend the benefit of the same to the maximum possible.**
>
> **In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those in whom the rights have been conferred by the Constitution….**
>
> **The second principle is 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. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten conventions, precedents and practices. I think it is now also accepted that a Court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution."**

45. In the case of **Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR,** Githinji, JA summarised the 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 statues 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."**

46. The principles of constitutional construction as expressed in the cited decisions are self-explanatory and need no elaboration. I will bear them in mind as I proceed to explain my understanding of Article 99(2)(a) and (d) of the Constitution.

47. I now turn to Article 99 of the Constitution which provides as follows:

> **(1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person**
>
> > **(a) is registered as a voter;**
> > **(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and**
> > **(c) is nominated by a political party, or is an independent candidate who is supported-**
> >
> > > **(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or**
> > > **(ii) in the case of election to the Senate, by at least two thousand registered voters in the county.**
>
> **(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;**
> > **(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;**
> > **(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;**
> > **(d) is a member of a county assembly;**
> > **(e) is of unsound mind;**
> > **(f) is an undischarged bankrupt;**
> > **(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or**
> > **(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.**
>
> **(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted."**

48. Clause (1) provides the conditions that have to be met in order for one to qualify for election as MP. Clause (2) then proceeds to provide the factors that would make a person incapable of election as MP.

49. The Petitioner's argument is that the 1st Respondent was not qualified for election by virtue of Clause 2(a) and (d). It is urged that the two clauses expressly disqualified the 1st Respondent by virtue of being a State Officer, other than a member of Parliament, and for being a member of a county assembly.

50. Article 103 of the Constitution provides for events that will result in the vacancy of the office of a Member of Parliament:

> **"(1) The office of a member of Parliament becomes vacant--**
>
> > **(a) if the member dies;**
> > **(b) if, during any session of Parliament, the member is absent from eight sittings of the relevant House without permission, in writing, from the Speaker, and is unable to offer a satisfactory explanation for the absence to the relevant committee;**
> > **(c) if the member is otherwise removed from office under this Constitution or legislation enacted under Article 80;**
> >
> > **(d) if the member resigns from Parliament in writing to the Speaker;**
> >
> > **(e) if, having been elected to Parliament--**
> >
> > > **(i) as a member of a political party, the member resigns from that party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or**
> > > **(ii) as an independent candidate, the member joins a political party;**
> >
> > **(f) at the end of the term of the relevant House; or**
> > **(g) if the member becomes disqualified for election to Parliament under Article 99 (2) (d) to (h)."**

51. Here again at Clause (1)(g), one of the grounds for ceasing to be a Member of Parliament is if the person becomes a member of a county assembly. It is therefore apparent that under Articles 99(2)(d) and 103(1)(g) one cannot become or remain a Member of Parliament prior or after election if the person is a member of a county assembly.

52. In the **Karani Case**, Mativo, J interpreted Article 99(1)(d) thus:

> **56. … A reading of <u>Article 99 shows that it deals qualifications and disqualifications for election of Members of Parliament</u>.**

It does not mention "nominations" or "qualifications for nominations by political parties." Regulation of nomination processes and qualifications for nominations are dealt with by the relevant statues….

63. In my view, a purposive and liberal construction of the provisions reveals that the law prohibits a situation whereby a Member of a County Assembly would upon being elected as a Member of Parliament end up holding the two offices concurrently.

64. I must, for the sake of clarity and good jurisprudence make it clear that the above construction cannot apply in the event of a by-election for a Member of Parliament in the event a Member of County Assembly desires to contest. This is because the term of the County Assembly will still be running. In the event of a by-election, to be eligible, a Member of a County Assembly will be required to resign as the law demands.

65. It is my view that the law only prohibits a person occupying the office of a Member of Parliament concurrently with the office of a Member of the County Assembly. As stated earlier, the law is clear on when the term of County Assemblies ends. Thus, at the time the person is elected at the general election, he cannot be said to be occupying two offices concurrently.

66. The law does not prohibit a Member of County Assembly from being nominated to vie for a Parliamentary seat by a political party. Nomination to contest as a Member of Parliament is not an election within the meaning of Article 99.

67. A purposive reading of Article 92 demonstrates that it is aimed at promoting the legitimate state interest of ensuring a Member of a County Assembly does not hold a Parliamentary office concurrently. The spirit, purpose, architecture and scheme of the Constitution aims at ensuring accountability and transparency in public affairs and good governance….

70. The drafters of the 2010 constitution entrenched the term of Parliament and local authorities in the Constitution to eliminate a vacuum and to ensure that the peoples sovereignty and will is exercised should the need arise prior to the general elections. A reading of Article 194 on vacation of office of a Member of County Assembly shows that among the grounds listed, nomination to contest a Parliamentary seat is not included. Equally, Members of Parliament, Governors or even the President and Deputy offering themselves for re-election are not required to resign in order to be eligible to contest.

71. The law also protects the term of Parliament and the County Assemblies to ensure that there is no vacuum. The above provisions should be construed with this as one of the intentions of the Constitution.

72. In my view, an argument that a Member of a County Assembly is required to vacate office on any other ground other than those stipulated in Article 194 would in my view raise constitutional questions on the peoples right to representation.

73. It is also clear that the law does not prohibit a Member of a County Assembly from being nominated to contest for a Parliamentary seat in a general election. It is also clear that the term of office ends on the date of the general election. However, if the election in question is a by-election which would ordinarily take place before the term of the County assembly expires, then, such a Member would obviously be required to resign."

53. I hold a different view on some of the holdings by the learned Judge. At paragraph 57 he finds that the Elections Act at Section 22(1) provides **"that a person may be nominated as a candidate for an election under the Act only if *inter alia* he is qualified to be elected to that office under the Constitution and the Act."** The Constitution at Article 99(1)(a) and (d) clearly states that State officers and other public officers or members of a county assembly are disqualified from election as members of Parliament. Clause (a) is clear that the only persons not disqualified by that rule are members of Parliament. This shows that the drafters of the Constitution intentionally excluded sitting members of county assemblies from contesting parliamentary elections. How then can a member of a county assembly be nominated to run for Parliament without violating Section 22 (1) of the Elections Act?

54. One of the meanings attributed to the term *"State office"* by Article 260 of the Constitution is *"(h) member of county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government."* The same Article provides that *"State officer"* means a person holding a State office. That therefore means that Article 99(2) bars a member of a county assembly from being elected a member of Parliament on two fronts; under clause (a) for being a State officer and under clause (d) for being a member of a county assembly.

55. Related to the above issue is the suggestion in the judgement that there is a distinction between a general election and a by-election. In my view, the same legal regime is applicable to by-elections and general elections. It cannot be said a member of a county assembly should resign before vying for the seat of Member of Parliament during a by-election but should not do so during a general election.

56. I also hold a different view on the statement that nomination to contest membership of Parliament is not an election within the meaning of Article 99 of the Constitution. In my view, for one to vie for any political seat established by the Constitution he or she must be qualified to do so. In nominating candidates for various seats, political parties need to ensure that the candidates meet the requirements of the Constitution and the Elections Act. At the time of receiving nomination papers from candidates, the IEBC is duty-bound to confirm that the candidates are not disqualified from contesting. Clearance by the electoral body to vie for an election is part and parcel of the election process.

57. Indeed, the dicta that *"an election is a process"* which the 1st Respondent casually dismissed is a well-established principle of electoral law that has been pronounced time and again by various levels of courts in this country. The Court of Appeal in **Kennedy Moki v Rachel Kaki Nyamai & 2 others [2018] eKLR** stressed the importance of eligibility during nomination by holding that:

"57. Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of other competent organs, an election court has jurisdiction to hear and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate….A nomination dispute that goes to the root of the electoral process, or one that determines qualification and eligibility of a candidate to vie, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute.

58. A similar statement was made by the Supreme Court in **Advisory Opinion No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate** thus:

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

59. Again in **John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR,** the Supreme Court restated the principle as follows:

"[234] 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."

60. My understanding of the cited case law leads me to the conclusion that there is an unbreakable link between nominations and elections for without nominations there cannot be elections. In determining whether to accept or reject nomination papers of a candidate, the IEBC bases its decision on the qualifications and disqualifications in the Constitution and any other constitutionally compliant law.

61. In my view, the IEBC has no authority to accept the nomination papers of a candidate barred from contesting for membership of any of the two houses of Parliament by Article 99(2) of the Constitution. Doing so amounts to a violation of clear constitutional provisions.

62. Indeed, the plain meaning of Article 99(2) is confirmed by making reference to Article 137(2) which provides the disqualifications for election as President as follows:

"137. (2) A person is not qualified for nomination as a presidential candidate if the person—

(a) owes allegiance to a foreign state; or

(b) is a public officer, or is acting in any State or other public office."

63. Sub-Article (3) provides an exception to Clause (2)(b) by stating that:

"(3) Clause (2) (b) shall not apply to—

(a) the President;

(b) the Deputy President; or

(c) a member of Parliament."

64. In my view, the provision does not allow a member of a county assembly to contest the presidential election before vacating office. If the makers of the Constitution intended otherwise, they could have added members of county assemblies in the list of persons not disqualified to run for the President's seat by virtue of the office they hold. Again in this instance a member of a county assembly is expressly disqualified for being a State officer. It is therefore my view that a person holding membership in a county assembly cannot participate in a presidential election before quitting membership of the county assembly.

65. Sub-Article 3 is clear that the only holders of political office who can stand in a presidential election without relinquishing their offices are the President, the Deputy President or a Member of Parliament. Not even a Governor or Deputy Governor is exempted by the provision. The reason is that in the constitutional matrix, governors and deputy governors belong to the same family with members of county assemblies. The drafters of the Constitution created a distinction in the qualifications and disqualifications for persons who want to contest seats in the national government and those seeking political offices in county governments.

66. A reading of the Constitution does not disclose discrimination of those holding political offices in county governments. That elected politicians in county governments have not been treated differently from those in the national government is confirmed when one takes into account the qualifications for election as member of county assembly as provided by Article 193 of the Constitution. The provision states:

> **"193. (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person —**
>
> **(a) is registered as a voter;**
>
> **(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and**
>
> **(c) is either—**
>
> **(i) nominated by a political party; or**
>
> **(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.**
>
> **(2) A person is disqualified from being elected a member of a county assembly if the person—**
>
> **(a) is a State officer or other public officer, other than a member of the county assembly;**
>
> **(b) has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;**
>
> **(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;**
>
> **(d) is of unsound mind;**
>
> **(e) is an undischarged bankrupt;**
>
> **(f) is serving a sentence of imprisonment of at least six months; or**
>
> **(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.**
>
> **(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted."**

67. Clause 2(a) clearly shows that State officers or public officers, other than members of county assemblies, are disqualified from vying for membership of a county assembly. This would mean that the President, the Deputy President and members of Parliament cannot contest a county assembly election before resigning their political offices. By virtue of Article 180(2) & (5) one cannot contest for governorship or deputy governorship if they are not qualified or are disqualified under Article 193. For purposes of clarity, this means that the President, the Deputy President or a Member of Parliament, being State officers and not being exempted by the provisions of Article 193, are barred by Article 193(2)(a) from being nominated by IEBC to vie for the membership of a county assembly. They can only qualify if they resign their positions before presenting their nomination papers to the IEBC.

68. As correctly submitted by the Petitioner, there is no right to public office and any holder of an elective political office who wants to move from the county government to the national government or vice versa must first relinquish his or her post before his or her nomination papers are accepted by the IEBC. That is my understanding of the Constitution and that is my finding.

69. There was an argument by the respondents that the petition should fail because the Petitioner seeks a declaration that Section 43(6) of the Elections Act is unconstitutional without having made such a prayer in his petition. In my view, once this Court interprets a constitutional provision, any statutory provision that has been found to contravene the Constitution automatically becomes invalid without the need for a declaratory order. This is in line with Article 2(4) of the Constitution which declares the supremacy of the Constitution thus:

> **"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."**

70. This clear constitutional edict applies to Section 43(6) of the Elections Act in so far as it seeks to override the express provisions of Articles 99, 137 and 193 of the Constitution.

71. No State organ, may it be the Judiciary, Parliament or the Executive has power to correct perceived *"errors"* in the Constitution because the Constitution itself provides for the presumption of completeness of its contents hence the provision in Article 2(3) that the *"validity or legality of this Constitution is not subject to challenge by or before any court or other State organ."* No one is allowed to add or subtract from that which the Constitution provides. I therefore find no merit in the argument by the respondents that the Constitution should bend backwards to accommodate the unconstitutional provisions of a statute. In my view, an unconstitutional provision cannot be salvaged by

whatever means.

72. The power of this Court to hear and determine any question whether a seat of a member has become vacant during the term of Parliament was confirmed by the Court of Appeal in **Nairobi C. A. Civil Appeal No. 431 of 2019 Hon. Clement Kung'u Waibara v Hon. Anne Wanjiku Kibeh & another** when it held that:

> **"Our understanding is that the appeal before us borders on determining whether the High Court should have invoked its original jurisdiction under Article 105(1)(b) of the Constitution as read with section 76(1)(c) of the Elections Act. To our mind Article 105(1)(b) of the Constitution as read with section 76(1)(c) of the Elections Act is not coincidental at all. It serves a legitimate purpose within a democratic society, to determine whether a seat of the Member of Parliament has become vacant whether immediately upon resumption of office or during the term of five years. The jurisdiction can be invoked at any time during the life of Parliament and that such a petition must be heard and determined within six months in accordance with the provisions of Article 105(2) of the Constitution."**

73. This position was earlier upheld by the majority in the Supreme Court case of **Mohamed Abdi Mahamud (supra)** as follows:

> **"[68] So as to ensure that Article 88 (4) (e) of the Constitution is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election Court under Article 105 of the Constitution, the Court developed the following principles:**
>
> ***(i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;***
>
> ***(ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court;***
>
> ***(iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;***
>
> ***(iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court;***
>
> ***(v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition;***
>
> ***(vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election."***
>
> [Emphasis supplied]

74. The undisputed evidence placed before this Court by the Petitioner demonstrates that the 1st Respondent was a nominated Member of the County Assembly of Kiambu on 27th June, 2017 when her nomination to run for the Gatundu North National Assembly seat was gazetted by the 2nd Respondent. It therefore follows that at the time of her election on 8th August, 2017 she was ineligible for election as Member of Parliament as she was disqualified by Article 99(2)(a) and (d) of the Constitution from contesting. Her participation in the election and her subsequent election was therefore unconstitutional, null and void.

75. In light of what I have stated above, the inevitable conclusion is that the election of the 1st Respondent as the Member representing Gatundu North Constituency in the National Assembly was in violation of Article 99(2)(a) and (d) of the Constitution. Based on this finding, and in exercise of the power granted to this Court by Article 105(1)(b) of the Constitution, I declare and hold that the seat of the Member of the National Assembly for Gatundu North Constituency currently held by the 1st Respondent, Hon. Anne Wanjiku Kibeh, has become vacant by the operation of Article 103(1)(g) of the Constitution. It follows that a by-election must be held for the seat.

76. In the circumstances, I direct the Deputy Registrar of the Constitutional and Human Rights Division to immediately and without delay, transmit this decision to the Speaker of the National Assembly for action in accordance with the provisions of Article 101(4) of the Constitution.

77. On the issue of costs, I find that this is a matter in the nature of public interest litigation and the appropriate order is to ask each party to meet own costs of the litigation. That is my order.

Dated, signed and delivered virtually at Nairobi this 7th day of October, 2020.

W. Korir,

Judge of the High Court