**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**CONSTITUTIONAL PETITION NO. 12 OF 2017**

**(CONSOLIDATED WITH PETITION NOS. 13, 14, 15 AND 16 OF 2017)**

**HON. FAITH SYOKAU WATHOME KITHU (MBS) & OTHERS....PETITIONERS**

**-VERSUS-**

**1. MACHAKOS COUNTY ASSEMBLY.....1ST RESPONDENT**

**2. THE SPEAKER, COUNTY ASSEMBLY OF MACHAKOS....2ND RESPONDENT**

**3. THE CLERK, COUNTY ASSEMBLY OF MACHAKOS.....3RD RESPONDENT**

**AND**

**THE GOVERNOR,**

**MACHAKOS COUNTY GOVERNMENT.....INTERESTED PARTY**

**JUDGEMENT**

**Parties**

1. This Judgement arises from Petitions 12-16 which were consolidated by an order made by **Kemei, J** on 30th November, 2017.

2. The Petitioners herein are adult resident of Machakos whose names were presented to the County Assembly of Machakos (the County Assembly) as nominee for the County Executive Committee Members.

3. The 1St Respondent is the County Assembly of Machakos established under Article 178(1) of the Constitution while the 2nd and 3rd Respondents are the Speaker and Clerk of the said Assembly respectively (hereinafter referred to as "the Speaker" and "the Clerk" respectively).

4. The interested party, on the other hand is the Governor of the County Government of Machakos (hereinafter referred to as "the Governor").

**Petitioners' Case**

5. According to the Petitioners the Governor nominated the Petitioners to serve as County Executive Committee Members pursuant to section 30(2)(d) of the ***County Government Act*** as read with Article 179(2)(b) of the Constitution. Pursuant thereto the Speaker committed the Petitioners' names to the Committee of Appointments in accordance with the provisions of the ***Public Appointments (County Assemblies Approval) Act*** and the Petitioners were summoned by the Clerk to appear before the Assembly's said Committee chaired by the Speaker.

6. It was however averred that the said Committee tabled its reports before the Assembly which reports were purportedly debated and adopted by the Assembly. In adopting the said reports, the Assembly resolved that the Petitioners were not suitable for appointment as the respective County Executive Committee Members to which they had been nominated by the Governor for the reasons that they did not satisfy the requirements of five (5) ears' experience as set out under section 35(3)(d) of the ***County Government Act***; they did not have first degrees in the respective positions to which they were nominated; they were unable to exonerate themselves from accusations of

mismanagement; they lacked leadership skills and had integrity issues and they scored less than 70% pass mark.

7. According to the Petitioners, while the Committee correctly found that the nominees had academic qualifications and experience, it wrongly observed that the same were not relevant to the portfolios to which they were nominated. The Petitioners' positions were that the law does not require a nominee to have a specific degree to be nominated to a particular department. It was the Petitioners' case that the functions of a County Executive Committee Member under Article 183 of the Constitution as read with section 36 of the ***County Government Act***, are wide and framed in a manner that they are managerial and policy oriented. Therefore the Committee erred in tying the discharge of the duties to a specific professional qualification.

8. It was further contended that the provisions of section 8(a) of the ***Public Appointments (County Assemblies Approval) Act*** is not applicable to the extent that it requires shortlisting of County Executive Committee Members for being in contravention of Article 179(2)(b of the Constitution as read with section 30(2)(d) of the ***County Government Act*** which donate to the Governor express power and authority to appoint County Executive Committee Members. In the alternative, it was stated that the criteria to be met is provided under section 35 of the ***County Government Act*** which was fully complied with by the letter forwarding the names of the nominees to the Assembly.

9. The Committee was further accused of having generalised its findings and overstepped its mandate under section 7(8) of the ***Public Appointments (County Assemblies Approval) Act*** based on personal prejudices devoid of proof. In this regard it was contended that the finding that there was possibility of mismanagement of public finance was not based on any evidence while the finding that the County Government had a bloated workforce was not one of the laid down criteria hence was an extraneous consideration.

10. According to the Petitioners, the Assembly, in adopting the Committee's Reports violated the letter and spirit of Article 73 of the Constitution as relates to the exercise of the authority of a state officer which applies to Members of County Assembly as state officers.

11. In support of their petitions, the Petitioners relied on Article 50 of the Constitution; sections 35 and 36 of the County Government Act; and section 7 of the ***Public Appointments (County Assemblies Approval) Act***, and contended that the assessment by the Committee was not impartial or objective and that the Committee imposed an unlawful pass mark of 70% which is not provided in law and went further to set a criteria of awarding marks that was skewed and deliberately designed to reflect the Petitioners as unsuitable i.e. by setting up a criteria by which the first degree and the 5 year experience constituted in total 50 marks.

12. It was the Petitioners' contention that the Assembly violated their rights to protection of the law under Articles 27 and 47 of the Constitution by arbitrarily rejecting the Petitioners' nomination by citing non-existent and unlawful pass mark of 70%. It was further contended that the Assembly violated the Petitioners' right to fair hearing in that the Petitioners were ambushed by petitions alleging mismanagement by the petitioners when they appeared before the Committee for the approval hearing and were thus denied time to study the allegations and respond adequately. To the Petitioners, the said petitions were procured through forgery. In any case the Assembly violated the Petitioners' rights to fair treatment under the law by relying on the petition which contained mere allegations devoid of proof.

13. It was further contended that the decision reached by the Assembly violated the Petitioners' right to due process of the law in that the Petitioners were not under an investigation for mismanagement of public resources or integrity by any investigative agency in Kenya; the Petitioners had never been charged in any court of law with an offence relating to Chapter Six of the Constitution; and the members of the Assembly were never given time to read, understand and internalise the report in order to make informed contributions during the debate before the same was adopted.

14. The Petitioners therefore averred that the Respondents' actions were in violation of the national values and principles of governance of equity, inclusiveness, equality and social justice as enshrined in Article 10 of the Constitution and that their right to legitimate expectation to be reappointed or appointed in the positions they qualified for hence their rights to fair treatment under the law was infringed. To the Petitioners, the Respondents' actions are not impartial or objective and are otherwise motivated by political considerations contrary to the objectives set out in section 3 of the ***Public Appointments (County Assemblies Approval) Act.***

15. They Petitioners therefore sought the following orders:

**a) An order of Mandamus.**

**b) A declaration that the respondents in rejecting the nomination of the petitioners to the position of county executive committee members misinterpreted and misapplied the provision of Articles 10, 19, 20, 22, (1) 38, 47, 165, 174, 175,176, 179,183, 196, of the Constitution, section 35{3}{d} and 36 of the County Government Act 2012 and section 7 of the Public Appointments {County Assembly Approval} Act 2017 and thus reached and invalid decisions.**

**c) An order of certiorari to remove to this court and quash the reports of the committee together with any other proceedings relating to it including its adoption by the 1st Respondent.**

**d) A declaration that S.8(a) of Public Appointments (County Assemblies Approval) Act is unconditional to the extent that requires shortlisting of nominees for the Appointment of county Executive Committee contrary to Article 179 (2(b) of the Constitution as read with s. 30(2)(d) of the County Government Act.**

**e) A declaration that the words" first degree from university recognized in Kenya" as used under s.35(3)(b) should be interpreted to include the word "or its equivalent".**

**f) A declaration that in computing experience under s.35(3)(b) of County Government Act, it should be construed as experience acquired cumulatively in a management, policy making and/or leadership position held but not experience in a particular professional field.**

**g) A declaration that the petitioners have satisfied the requirements set out in Law for appointment as County Executive Committee Member.**

**h) Any other order the honourable court may deem fit and expedient in the circumstances of this case.**

**i) Costs of this petition to be borne by the Respondents.**

16. The Petitions were supported by affidavits sworn by the Petitioners in which they set out their particulars including work experiences, personal achievements and academic trainings.

17. The Petitioners reiterated the averments in the petition and deposed that when they appeared before the Committee of Appointments for vetting, they were not treated fairly as the Committee appeared to have pre-informed decisions and that they were questioned haphazardly without any order or procedure.

18. In answer to the allegations by the Respondents that this Court lacks jurisdiction to supervise constitutional bodies carrying out their mandate within the confinements of the Constitution, the Petitioners relied on **Abdikadir Suleiman vs. County Government of Isiolo [2015] eKLR,** cited in **George Maina Kamau vs. County Assembly of Muranga & 2 Others [2016] eKLR** and **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR.**

19. It was submitted that the doctrine of the separation of powers postulates that each organ of government is independent and none should interfere with the functions of the other. This doctrine also holds that each organ (of government) is to act as a check and balance of the other to ensure that each organ functions within the provisions of the Constitution or Statute. The High Court which is a creature of the Constitution is the only body that is empowered to determine the constitutionality or otherwise of the functions of the other state organs. According to the Petitioners, under Article 165(d) of the Constitution of Kenya 2010, the High Court is vested with the jurisdiction to hear and determine any question respecting the interpretation of the Constitution. In addition thereto, the High Court is also vested with jurisdiction under Article 23 to hear and determine applications for redress of a denial, violation, or infringement of, threat to, a right or fundamental freedom in the Bill of Rights. Therefore, all persons and institutions are subject to review by the High Court in exercise of its jurisdiction to safeguard the principles and values of the constitution and to uphold its supremacy. In support of this position the Petitioner relied on **Mumo Matemu vs. Trusted Society of the Human Rights Alliance & 5 Others [2013] eKLR**, **Trusted Society of Human Rights Alliance vs. Attorney-General & 2 Others [2012] Eklr,**

20. **Speaker of the National Assembly & Others vs. De Lille, M.P. & Another [297/298] [1999] ZASCA,** and submitted that the Court is thus vested with the jurisdiction to determine the constitutionality of the process of appointments by the County Assembly of the nominees by the Governor, as well as the constitutionality of making such appointments by the Governor. The scope of the court's jurisdiction extends to the procedural improprieties, as well as the legality of the appointment decision to determine whether it accords with the constitutional threshold. The court applies an objective test where each case is determined on its own merit. The Petitioners in this regard made reference to the decision of **Chitembwe, J** in the case of **Amina Rashid Masoud vs. Governor Lamu County & 3 Others.**

21. According to the Petitioners, the role of the county assembly in the appointment of County Executive Committee Members under section 35 of the ***County Government Act, 2012*** performs a *quasi-judicial* role and is therefore subject to the jurisdiction of this Court vide Article 22 and Article 165 of the Constitution of Kenya, 2010. It was submitted that it is the duty of the High Court to review the decision of the County Assembly, the 1st Respondent herein, to determine whether facts had been laid to establish the finding of the 1st Respondent as envisaged in Article 165(3)(d)(ii) of the Constitution of Kenya which vests jurisdiction to hear any question on whether anything said to be done under the authority of the Constitution or any law contravenes the Constitution. Further, Article 165(6) provides for supervisory jurisdiction of the High Court over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

22. It was submitted that the political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question of anything said to be done under the authority of the constitution or of any law which is inconsistent with or contravention of the Constitution as per Article 165(3)(d)(ii) of the Constitution of Kenya.

23. Based on the forgoing, the Petitioners asserted that this Court has jurisdiction to determine this matter.

24. As to whether the orders sought in the Petition ought not to be granted on the ground that the same are general, speculative and do not disclose real controversy capable of resolution by this Court since the Court cannot grant omnibus orders based on non-existent threats of nomination of unspecified persons, it was submitted that the judicial review order of certiorari is available as a procedure through which a party may come to court for the determination on any constitutional issue which includes striking down legislation which may be unconstitutional. Reference was made to **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR, Republic vs. Attorney-General and Registrar of Societies – Misc. Application No. 769 of 2004, Republic vs. Kenya Roads Board, ex parte Harun Mwau (Misc. Application No. 1372 of 2000)** and **Council of Civil Service Unions vs. The Minister For Civil Service [1985] AC 374 HL, Attorney-General vs. Fulham Corporation [1921] 1 Ch. 440.**

25. It was the Petitioners' case that each of the Petitions herein to, bring out the unfair and unjust decision arrived at by the 1st Respondent. The Petitioners cited Constitutional Petition No 12. of 2017 - **Hon. Faith Syokau Wathome Kithu (Mrs) –vs- Machakos County Government & 3 Others** and submitted that the Petitioners were denied a fair hearing as provided for under Article 50 of the Constitution of Kenya. It was therefore submitted that the 1st Respondent violated the Petitioners' right to fair treatment under the law by relying on the petition presented before them, which were mere allegations without proof. Further, the 1st Respondent also violated the petitioners' right to due process of the law for the reason that; the petitioners were not under any investigation for mismanagement of funds of public resources by any investigation agency, the petitioners were never charged in any court of law with an offence relating to Chapter Six of the Constitution of Kenya and the petitioners were never given time to read and understand the report in order to make informed contributions

during the interview. Thus we submit that the Respondents violated the rights of the petitioners enshrined in Article 10.

26. It was reiterated that the Committee generalized its finding and overstepped its mandate as provided for under section 7(8) of the ***Public Appointments (County Assemblies Approval) Act*** based on personal prejudices without prove of the allegations. For instance the committee, by making a finding that there was a possibility of mismanagement of Public finance when there was no proof of the said adverse allegations.

27. According to the Petitioners, the 1st Respondent in adopting the report violated the letter and spirit of Article 73 of the constitution of Kenya as relates to exercise of authority of a state officer which applies to members of county assemblies as state officers. Accordingly, their actions were not impartial and that the same was motivated by political considerations contrary to the objectives set out in section 3 of the ***Public Appointments (County Assemblies Approval) Act, 2017***. They further failed to exercise their function to the fullest extent with the requirements of the enabling law rendering their findings *ultra vires* to the section 35 of the ***County Government's Act*** and this Court ought to grant the Petitioner herein the orders sought.

28. As regards' Petition 13 of 2017 - **Hon. Ruth Nduku Mutua –versus- Machakos County Government & 3others** -, it was submitted that the 1st Respondent violated the petitioner's right to fair hearing by denying the petitioner time to give answers to the questions that the panel asked. Further, the 1st Respondent purely based their decisions on the Academic qualifications of the Petitioner. According to the Petitioner, the same decision was based on bias since the functions a county executive member laid down in Article 183 of the Constitution of Kenya as read together with section 36 of the ***County Government Act*** No. 7 of 2012 do not tie any function to a specific Professional Qualification. To the Petitioners, the 1st Respondent's decision is purely biased since the same qualifications by the petitioner were the same ones used previously to qualify her for her previous position as the County Executive Committee Executive Member in charge of the department of Agriculture, Fisheries Livestock, Water and Irrigation from May 2015 to 2017. Therefore the said actions of the 1st Respondent violated the petitioner's right to legitimate expectation to be reappointed in a position she qualified for and thus infringed on her fair treatment under the law. It is therefore our submission that the rights of the Petitioner envisaged under Article 27 of the Constitution of Kenya were infringed.

29. Regarding Petition 14 of 2017 - **Kimeu Mbithi Kimeu –versus- Machakos County Government & 3 Others –** it was submitted that the Petitioner herein was presented with a petition filed in the Assembly on 16th October, 2018, on the 12th October, 2017 when he appeared before the 1st Respondent for vetting. The said petition was not handed to the Petitioner before vetting and therefore he was not able to prepare a response. Furthermore, the Standard newspaper cutting of 5th October, 2017, invited members of the public to submit information opposing the suitability of the candidates listed at the offices of the 1st Respondent between 8.00am and 5.00pm on or before the 12th October, 2017.

30. As regards Constitutional Petition No 15. of 2017 - **Dr. Ali Maalim Mohamud –versus- Machakos County Government & 3others –** it was submitted that the petitioner was denied time to give answers to the questions that the panel of the 1st Respondent asked. Further, the 1st Respondent purely based their decisions on the documents that the Petitioner had submitted without ensuring that an expert took a look at the documents belonging to the petitioner to confirm their authenticity. The 1st Respondent decided on its own that the passport the petitioner presented together with the birth certificate were suspect. Further the 1st Respondent violated the Petitioner's right to fair treatment under the law by not getting confirmations from the relevant government institution on the issue relating to the Petitioner's Passport and National Identification card.

31. It was therefore submitted that the same decision was based on bias and made in bad faith violating the right to fair administrative actions of the petitioner herein and a violation of Article 47 of the Constitution of Kenya. From the above, it is clear that the 1st Respondent violated the petitioner's right to fair hearing enshrined in Article 50 of the Constitution of Kenya and his right to fair hearing.

32. According to the Petitioners, section 8(a) of the ***Public Appointments (County Assemblies Approval) Act No. 5 of 2017*** is not applicable to the extent that it requires shortlisting of County Executive Committee members for being in contravention of Article 179(2)(b) Constitution as read together with Section 30(2)(d) of the ***County Government Act*** which give the governor express power and authority to appoint of County Executive Committee members.

33. As regards Constitutional Petition No 16. of 2017 - **Hon. Naomi Mutie Kamala –versus- Machakos County Government & 3 Others –** it was submitted that the petitioner filed a request for extension of time to be able to file a response to the petition against her but the 1st Respondent denied her request (See NMK14). However, the Petitioner managed to file a response which was not factored and considered by the Committee. It was therefore submitted that the 1st Respondent violated the petitioner's right to fair hearing under Article 50 of the Constitution, Articles 27 and 47 of the constitution by arbitrary rejecting the Petitioners nomination by citing a non-existent and unlawful pass mark of 70%. Similarly, the 1st Respondent was purely biased since the same qualifications by the petitioner were the same ones used previously to qualify her for her previous position as the County Executive Committee Member in charge of the department of Health and Emergency Services from April 2015 to 2017 hence the rights of the Petitioner envisaged under Article 27 of the Constitution of Kenya were infringed.

34. It was therefore submitted that the Respondents, in rejecting all the petitioners to the positions of county executive committee members in the department of water, irrigation, environment and sanitation, misinterpreted and misapplied the provisions of Article 10, 19, 20, 22(1), 38, 47, 165, 174, 175, 176, 179, 183 and 196 of the Constitution of Kenya, section 35(3)(d)and 36 of the ***County Government Act, 2012*** and section 7 of the ***Public Appointments (County Assembly Approval) Act, 2017*** and the decisions the 1st Respondent arrived at were invalid.

35. To the Petitioners, it is clear from paragraph 23-27 above that the 1st Respondents Committee failed to comply with the procedures laid down in Article 183 of the Constitution of Kenya, section 35 of the ***County Government Act, 2012*** and Article 176 (2)(b) of the Constitution of Kenya as read together with section 30(2)(d) of the ***County Government Act*** that the 1st Respondent committed a procedural error and illegality. To the Petitioners, the order of certiorari is the most competent remedy to deal with the actions of the 1st Respondent's actions and

omissions that contravenes the Constitution and the other statutory provisions.

36. On the issuance of the order of Mandamus, the Petitioners' submissions were based on **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR,** at paragraph 11.01.

37. In the Petitioners' view, they had laid the basis for this Court to grant the order of Mandamus since the 1st Respondent committee failed to follow the laid down principles in appointing County Executive members.

38. It was submitted that the petitioners in Petition 12, 13, and 16 herein, were disqualified for the simple reason, among others that, "*the nominee does not have a first degree related to the department …as required in section 35(3)(b) of the* ***County Assembles (Approval)Act, 2017*** *and sections 8(c) and 7(9) of the* ***Public Appointments (County Assemblies Approval) Act, 2017***." However the Petitioners relied on section 35(3)(b) of the ***County Assembles (Approval) Act, 2017,*** section 7(9) of the ***Public Appointments (County Assemblies Approval) Act, 2017*** and section 8(c) of the ***Public Appointments (County Assemblies Approval) Act, 2017*** and submitted that the words, *first degree from a university recognized in Kenya* ought to be interpreted in its equivalent and not to mean a first degree from a university recognized in Kenya in respect to the relevant field the nominee seeks. It was further submitted that in computing experience under section 35(3)(d) of the ***County Government Act***, it should be construed as an experience acquired cumulatively in a management, policy making and/or leadership position held and not experience in a particular professional field since this is what section 35(3)(d) provides.

39. As regards the question whether section 8(a) of the ***Public Appointments (County Assemblies Approval) Act*** is unconstitutional to the extent that it requires shortlisting of nominees for the Appointment of County Executive Members contrary to Article 179(2)(b) of the Constitution as read together with section 30(2)(d) of the ***County Government Act***, it was submitted that the supremacy of the Constitution is envisaged in Article 2(4) of the Constitution of Kenya, 2010. In this regard the Petitioners reproduced section 8(a) which provides that:

> "***The issues for consideration by the relevant County Assembly in relation to any nomination shall be— (a) the procedure used to arrive at the nominee including the criteria for the short listing of the nominees;"***

40. They also reproduced Article 179(2)(b) and section 30(2) of the ***County Government Act*** respectively state that:-

> ***179(2) The county executive committee consists of—***
>
> ***(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.***
>
> ***30(2) Subject to the Constitution, the governor shall—***
>
> ***Appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution;"***

41. It was the Petitioners' submission that the ***Public Appointments (County Assemblies Approval) Act 2017*** is a new statute that is yet to take root and be applied by other County Assemblies and that the same seems to bring in new set criteria for appointment of County Executive Committee Members. It was therefore submitted that section 8(a) of the ***Public Appointments (County Assemblies Approval) Act*** is unconstitutional to the extent that it requires shortlisting of nominees for the Appointment of County Executive Members contrary to Article 179(2)(b) of the Constitution as read together with section 30(2) (d) of the ***County Government Act***.

42. It was the Petitioners' case that The Petitions herein raise arguable points of public interest and that the constitutional rights of the petitioners herein were infringed and that the 1st Respondent was malicious and biased in rejecting the petitioners as county executive members. They therefore prayed that the petitions herein are allowed and the court grants orders sought in the Petition No. 12-16 of 2017 together with costs.

**Respondents' Case**

43. The Petitions were opposed by the Respondents vide a replying affidavit sworn by the Speaker of the Assembly, **Florence Muoti Mwangangi**. According to her, the Petitioners seek to impede the functions of the Constitutional office holders yet one cannot stop a person or an organ of the state or any other constitutional body from carrying out their constitutional mandate. It was therefore contended that the petitions offend the doctrine of separation of powers as the same invite the Court to direct the County Assemblies which are Legislative branches of government on their procedures and how they ought to run their affairs.

44. It was deposed that the legislative authority of the County Government is vested and exercised by its County Assembly as provided in Article 185(1) of the Constitution while the role of the County Assembly is as provided in section 8 of the ***County Government Act***. Further, the Assembly has in compliance with section 14(1) of the said Act made Standing Orders consistent with the Constitution that regulate the procedure of Committees established therein. It was therefore contended that it was deceitful to allege that the Committee did not act as per the laid down procedures.

45. According to the Respondents the applicable procedure is guided by section 35 of the ***County Government Act*** which provides for the criteria for qualification being 5 years' experience in the relevant field and first degree in the relevant field, Chapter 6 thereof, the ***Public Appointments (County Assemblies Approval) Act 2017,*** sections 7, 8, 9, 10, 11 and 12 and the schedules to the Act, the ***County Assemblies Standing Orders*** and the ***Evidence Act*** among other laws all of which were complied with. It was deposed that Standing Order No. 184(1) of the ***Machakos County Assembly Standing Orders*** establishes a select Committee known as the Committee on Appointments whose role is to consider for approval by the Assembly, appointments under Article 179(2)(b) of the Constitution and as provided for in Standing Order

184(4) and the procedure is provided for in the ***Public Appointments (County Assemblies Approval) Act 2017.*** According to the deponent, the Committee adhered to the same procedure.

46. It was deposed that the Petitioners have not stated what the procedure is for vetting and how the Respondents allegedly breached the same.

47. It was disclosed that upon receipt of the letter from the Governor, the Interested Party, the Assembly referred the matter to the said Committee as mandated by the law and accorded the Petitioners ample opportunity to be heard and to defend themselves as to why they qualified for nomination. Upon the completion of its work, the Committee tabled its report before the Assembly for debate and recommended that the nominees were not suitable nor qualified for the positions to which they had been nominated. Upon rejection by the County Assembly, the Clerk forwarded the Report made by the Committee to the Governor. It was the Respondents' case that the Assembly complied with the principles in Article 10 of the Constitution.

48. It was the Respondents' case that this Court has no jurisdiction to force and or nominate the Petitioners to their positions.

49. It was their case that the proceedings of the Committee were open to the public during the vetting of the nominees and that the provisions of the law were complied with hence this Court has no jurisdiction to supervise a constitutional body on how to conduct its business. To the Respondents the allegations made by the Petitioner are premature and speculative and seek that the Court evaluates he merits and demerits of the proceedings and evidence before the Committee.

50. The Court was therefore urged to dismiss the petitions with costs.

51. On 4th July, 2018, this Court noted that the respondents' submissions were no on record and directed them to ensure that they were placed on record. However by the time of writing this judgement there were no such submissions on record. Similarly the Court directed the parties to furnish soft copies of their pleadings but none were furnished by the Respondents.

**Interested Parties' Case**

52. The interested party herein, the Governor in supporting the petitions deposed that he nominated the Petitioners to serve in their respective positions in accordance with s. 30(2)(d) of ***County Government Act*** as read together with Article 179(2)(b) of the Constitution**.** Consequently, he forwarded their names to the 2nd Respondent for Approval by the County Assembly of Machakos. He was however surprised to know that their names were rejected yet some of them had served on a similar portfolio which had been approved by the predecessor of the 1st Assembly.

53. According to the Governor, it is quite obvious that the Respondents did not adhere to the national values and principles of governance of equity, inclusiveness, equality and social justice as enshrined in Article 10 of the Constitution since, in his view, it is not logical to have the same Assembly approve the name of a nominee and five years later, it turns around to claim that she is not qualified for the same Job Description.

54. The Respondent's position was that this Court has jurisdiction to make a determination on whether Acts of parliament are inconsistent with the Constitution. In particular, the Court should declare the unconstitutionality or otherwise of section 35 [3] of the ***County Government Act 2012,*** S. 7(8) & 8(a) of the ***Public Appointments (county Assemblies Approval) Act*** *vis-à-vis* Article 183 of the Constitution as read together with 36 of the ***County Government Act 2012*** *and* Article 179(2)(b) Constitution as read together with S. 30(2)(d) of ***County Government Act.***

55. It was his position that since the law allows for appointment of not more than 10 County Executive Committee Members, it would thus mean that if every devolved function should be headed by an Executive Committee Member with specific Law Degree, then some very critical departments would lack leadership and managerial directions. This is because the Constitution of Kenya devolved very many functions to County Governments. As such, the law should be interpreted and applied in a manner to promote devolution and not to scuttle its purpose and service delivery to the citizenry.

56. The Governor asserted that since a County Governor, at his sole discretion has powers to transfer a County Executive Committee Member from one ministry to another for strategic implementation of the county mandate, insisting on specific academic qualification would infringe on that statutory powers of a Governor by barring him to transfer the Committee members from one department to another and that would be arbitrary interpretation and application of the law.

57. It was his position that as the 1st Respondent and its predecessor were exercising authority as trustees of the people of Kenya and more specifically the residents of Machakos County under Article 73 of the Constitution, it is thus surprising how the same Constitutional body cannot arrive at two different reports on the same nominee for a similar Job description.

58. The Governor urged the Court to state with finality on the unconscionability of the pass mark set by the Respondents and proceed to set out the criteria for determining lawful pass mark which would ensure that the Respondents do not act arbitrary based on personal prejudices as against certain nominees.

59. On behalf of the interested party, the Governor, reliance was placed on the case of **Mumo Matemu vs. Trusted Society of the Human Rights Alliance and 5 Others (2013) eKLR** the court of appeal adopted with approval the reasoning of the South African Case of **Speaker of the National Assembly and Others vs. De Lille, M.P. and Another [297/298] [1999] ZASCA**.

60. According to the interested party, in nominating the petitioners herein for considerations to serve as County Executive Committee

members of the County Government of Machakos, he was invoking the provisions of Article 179(2) (b) of the constitution of Kenya 2010 which donates powers to him to appoint members to the County Executive Committee. He submitted that section 35(3) of the ***County Government Act, 2012*** provides for the qualifications that a member of the County Executive Committee has to meet to be appointed to that office. From the Affidavits filed in Court by them, the petitioners herein have met the qualifications provided for in section 35(3). Further, the Petitioners herein satisfy the requirements of chapter 6 of the Constitution since they are not facing any criminal charges before any court of law in any court in the Republic of Kenya. They are also not a subject of any investigations that might lead to them being charged with a criminal offence. They are not also under any investigations by the Ethics and Anti-corruption commission for wrong doing. The allegations contained in the petition by **Charles Kyalo Mutiso** are just but mere allegations which are not supported by facts. **Charles Kyalo Mutiso** was even charged in Mavoko Law Courts under Criminal case no. 507/2017 for forgery which is still pending in court. He was charged with forging the signature of **G.N. Thiongo Advocate** on the affidavit in support of the petition against the petitioner herein.

61. It was submitted that some of the Petitioners herein served as Country Executive Committee Members of the Machakos County Government after being approved by the predecessors of the Respondents. The Respondents did not, in their report and in their replying Affidavit inform the Petitioners and the Court what changed for them to become unsuitable being sitting and serving County Executive Committee members.

62. According to the Governor's submissions, the petitioners have the knowledge and experience to be appointed as County Executive Committee Members for the respective departments as nominated and are Kenya citizens by birth holding various academic qualifications.

63. It was submitted that to show express bias, the committee on appointments made wrong findings that the Degrees held by the Petitioners herein were not relevant to their respective nominations. The provision of section 35(3) of the ***County Government Act, 2012*** provides that for a person to be appointed a County Executive Committee Member must be a holder of at least a first degree from a recognized university in Kenya. The provision does not provide that the degree must be specific to the department a nominee is being appointed to. The committee of appointments therefore overstepped its mandate by rejecting the nomination of the Petitioners on non-existent provisions of the law.

64. It was further submitted that Article 179(1) of the Constitution of Kenya 2010 provides that the interested party is empowered to appoint members of the County Executive Committee and the interested party in invoking the provisions of Article 179(1) of the Constitution did appoint the Petitioners to the positions enumerated herein above. The committee of appointments of the 1st respondent in rejecting the nominations of petitioners went against the letter and spirit of Article 179(2) of the Constitution. To the interested party, the Constitution of Kenya 2010 is the supreme law of the law and any other provision or finding by the committee which in inconsistent with it is unconstitutional.

65. It was submitted that the Respondents misapplied the law in arriving at a decision to reject the nominations of the petitioners by the interested party and that Article 179(2)(b) of the Constitution should have been the guiding law and the findings should have been consistent with it. It was his contention that the committee of appointment of the 1st Respondent and chaired by the 2nd Respondent overstepped its mandated by considering issues that were not provided under section 7(8) of the ***Public Appointments (County Assemblies Approval) Act***. He reiterated that section 7(8) provides that an approval hearing shall focus on a candidate's academic credentials, training and experience, personal integrity and background. The committee on the other hand considered allegations made by **Charles Kyalo Mutiso** and members of Machakos County Education Board which were not substantiated and devoid of facts.

66. In the Governor's view, since the Respondents were exercising quasi-judicial powers but not legislative powers so to speak, the doctrine of separation of powers cannot thus apply in this case. As such, it was submitted that the Court does find that it has jurisdiction to hear the Petition and proceed to allow them. In this regard the interested party relied on **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others [2014] eKLR.**

**Determinations**

67. I have considered the issues raised in this Petition.

68. Since the Respondents raised the issues revolving around this Court's jurisdiction to grant the orders sought herein, it is important that the said issue be resolved *in limine*. This was the position adopted by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** where he stated that:

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

69. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As**

**soon as that is done, the court should hear and dispose of that issue without further ado."**

70. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

71. The issue of jurisdiction in this matter is however based on the doctrine of separation of powers. According to the Respondents, petitions offend the doctrine of separation of powers as the same invite the Court to direct the County Assemblies which are Legislative branches of government on their procedures and how they ought to run their affairs. That the doctrine of separation of powers applies to the national government as well as devolved governments was appreciated in **Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 Others (2013) eKLR** at page 13 thereof where it was held as follows:

> **"County governments are miniature national governments structures and ordered in line with traditions and principles that govern the national Government. To this extent the doctrine of separation of powers apply with equal measure."**

72. **Montesquieu** had sought to address this doctrine in his work, ***De L'esprit Des Lois*** [***The Spirit of the Laws*** (1948)]in the following words:

> ***When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.***

73. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution ***"belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***":

> ***"…is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive structures in the county governments; and***
>
> ***(c) the Judiciary and independent tribunals.***

74. This was appreciated by the High Court in **Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

> **"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."**

75. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the *Executive, Legislature* and *Judiciary.*

76. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from **Commission for the Implementation of The Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR where Njoki, SCJ** opined that:

> "**The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting** ultra vires **the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."**

77. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. This was restated by **Twinomujuni, JA** in **Masaluand Others vs. Attorney General [2005] 2 EA 165**

**(CCU)** as follows:

> **"The Constitution, the supreme law, vests all judicial power of the people in the Judiciary and whether the dispute involves the interests of the Judiciary or individual judicial officers or not, it is only the judiciary which is vested with judicial power to resolve it. However the judiciary must resolve the dispute "in the name of the people and in conformity with law and with the values, norms and aspirations of the people"……The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive and the judicial in separate department, each relatively independent of the others; and it was recognised that without this independence if it was not made both real and Enduring, the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially the legislature…….The executive not only dispenses honour but holds the sword of the community. The Legislature not only commands the purse, but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary on the contrary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement. This simple view of the matter suggests several important consequences. It proves incontestably that the Judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the two; and that all possible care is requisite to enable it defend itself against their attacks. The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, it is one, which contains certain specified exceptions to the legislative authority; such as for instance that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without all this, all the reservations of particular rights or privileges would amount to nothing…A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."**

78. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."**

79. However, Article 2(4) of our Constitution which provides as follows:

> ***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.***

80. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to **"…** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

81. My position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR** where the court stated *inter alia* at paragraph 125 that:

> **"Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution… Article 2 of**

**the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid…"**

82. Therefore when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. As was held in **Jayne *Mati & Another vs. Attorney General and Another* - Nairobi Petition No. 108 of 2011** at paragraph 31:

**"…separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."**

83. On that note, the Supreme Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated that:

**"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "**

84. The Court went on to state as follows:

**"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."**

85. As was held the case of **De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c)** in which the Court stated as follows:

**"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."**

86. On appeal the Appellate Court in **Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999)(ZASCA 50)** rendered itself as follows:

**"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."**

87. The South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 at** paragraph 99 **underscored** the Court's role to protect the integrity of the Constitution thus:

***"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."***

88. I am are duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of

Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

89. This however does not mean that the Judiciary should superintend the other two arms of government in all their undertakings in order to determine whether their decisions are "right" or "wrong". As was appreciated by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; eKLR [2012]**:

> **"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other's functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore cannot agree with the High Court's dicta in the Petition, subject of this Petition that -**
>
> **'Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions.'"**

90. It was therefore appreciated by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** that:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation… By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."**

91. In the words of **Ackermann, J** in the South African case of **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99**:

> **"the other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."**

92. The rational for exercise of restraint was explained in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** in which a 3 judge bench of the Court stated that:

> **"In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies."**

93. In **Patrick Ouma Onyango & 12 others vs. Attorney General and 2 Others [2005] eKLR** the court, on the issue of whether it should interfere with a political or legislative process stated:

> **"The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters".**

94. In my view the issue for determination before this Court is the manner in which the County Assembly is supposed to carry out is process of approval of the nominees of the Governor as County Executive Committee members and what factors the Assembly ought to consider in that process and whether in this case the County Assembly kept to its mandate.

95. There is no doubt at all that the appointment of the members of the County Executive Committee is an act that requires the application of the Constitution and the law. Clearly therefore there can be no doubt that before the said persons are appointed, the process of their

appointment must comply with the constitutional principles. This was the position in **Trusted Society of Human Rights Alliance vs. Attorney-General & 2 Others [2012] eKLR** where the Court said:

> **"The doctrine of separation of powers did not disentitle the court from entertaining the controversy surrounding the appointment of the Interested Party. A constructive reading of the Constitution, case law on the question, and comparative jurisprudence from other jurisdictions on the question have led us to the conclusion that the High Court of Kenya would properly review both the procedure of appointment of the Interested party as well as the legality of the appointment of itself – including determining whether the Interested Party met the constitutional threshold, for appointment to the position. The constitution consciously delegates the sovereign power under it to the three branches of government and expects each will carry out those functions assigned to it without interference from the other two…this must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislation intent. Yet...the courts have an interpretive role, including the last word in determining the constitutionality of all governmental action. That too is an incidence of the doctrine of separation of powers."**

96. A similar position was adopted in the High Court's decision in ***Mumo Matemu's Case*** where it is said:

> **"In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the objective and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya. Under this Act, the courts will not be sitting in appeal over the opinion of the organ of appointment, but will only be examining whether the relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus to the constitutional nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of the mind of the decision maker. This in our view, provides a fact dependent objective test that is judicially administrable in such cases."**

97. It is not in doubt that this Court has the power and the jurisdiction to strike down the actions of County Assemblies where such orders are warranted. I therefore associate myself with the decision in **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR,** where it was held that:

> **" It is thus clear to this Court that a County Assembly exercising its administrative function of approval of nominees, has a statutory duty to exercise that function to the fullest extent with the requirements of the enabling law, and failure to do so, may render its findings, determinations and decisions and recommendations ultra vires the Act…"**

98. As to whether this Court should interfere with the actions of the Respondents herein must however depend on the facts of these petitions. It was submitted that the petitioners in Petition 12, 13, and 16 herein, were disqualified for the simple reason, among others that, "*the nominee does not have a first degree related to the department …as required in section 35(3)(b) of the* ***County Assembles (Approval)Act, 2017*** *and sections 8(c) and 7(9) of the* ***Public Appointments (County Assemblies Approval) Act, 2017***."

99. It is true that section 35(3)(b) of the ***County Assembles (Approval) Act, 2017*** which provides that:-

> ***A person may be appointed as a member of the county executive committee***
>
> ***if that person—***
>
> ***(b) is a holder of at least a first degree from a university recognised in***
>
> ***Kenya;***

100. To the Petitioners, since the issue of relevancy of the degree held by the nominee to the position to which one is nominated is not an express requirement under section 35(3)(b) of the ***County Assembles (Approval) Act, 2017,*** by stating that the Petitioners did not have *a first degree related to the department* the Respondents considered a matter which they were not required to consider. It is however not in dispute that under section 8 of the ***County Government Act*** the County Assembly is obliged to vet and approve nominees for appointment to county public offices as may be provided for in the Act or any other law. The question that arises is whether a consideration by the County Assembly of the relevancy of the nominee's degree to the position to which he/she has been nominated is outside the powers of the County Assembly conferred upon it by Article 185(1) of the Constitution as read with section 8 of the ***County Government Act***. It is worth noting that section 35(3)(a) aforesaid does not state that a person who meets the criteria thereunder must be appointed to the post to which he is nominated. The word used is "may". Therefore notwithstanding the fact that a person meets those minimum requirements, he/she may still fail the approval test if for example he/she fails to meet other criteria for appointments. For example Article 232(1)(g) of the Constitution provides that the values and principles of public service include fair competition and merit as the basis of appointments and promotions. Under Article 232(2)(a) the values and principles of public service apply to public service in all State organs in both levels of government.

101. It is therefore my view that a County Assembly is obliged to take into account whether the Governor's nominee merits appointment to the position to which he/she has been nominated. It is therefore my view that even going by the constitutional provisions where the degree held by a nominee is not suitable for the purposes of performance of the duties the nominee is intended to perform, County Assembly is properly entitled to decline to approve the nomination. My view is reinforced by the provisions of the ***Leadership and Integrity Act***, specifically sections section 3(2)(g) which provides that a State officer shall respect the values, principles and the requirements of the Constitution, including in so far as is relevant, the values and principles of Public Service as provided for under Article 232 of the Constitution.

102. The Petitioners also took issue with the fact that the Committee imposed an unlawful pass mark of 70% which is not provided in law and went further to set a criteria of awarding marks that was skewed and deliberately designed to reflect the Petitioners as unsuitable i.e. by setting up a criteria by which the first degree and the 5 year experience constituted in total 50 marks. Whereas that decision may well be frowned upon in some quarters, that was clearly a threshold issue. This Court cannot clearly prescribe to the County Assembly what it considers as the appropriate threshold in order to determine whether a nomine ought to be approved for appointment. Similarly, the Court cannot prescribe what marks to award in respect of particular head of evaluation. This is so because the decision as to whether a nominee merits the appointment is a matter purely within the powers of the County Assembly and this Court cannot direct the Assembly on what constitutes merit or otherwise. In the same vein this Court cannot interrogate the decision of the Assembly whether the material presented before it was sufficient to prove mismanagement by some of the nominees so as to arrive at a decision whether the said decision was correct or not.

103. Apart from the constitutional principles, section 8(c) of the ***Public Appointments (County Assemblies Approval) Act, 2017*** provides that the issues for consideration by the relevant County Assembly in relation to any nomination shall be the suitability of the nominee for the appointment proposed having regard to whether the nominee's credentials, abilities, experience and qualities meet the needs of the body to which the nomination is being made. It is therefore clear that the County Assembly was obliged to consider whether the Petitioners' credentials including their degrees meet the needs of the departments to which they were being nominated. This is my understanding of the decision of **Mumbi Ngugi, J** in **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR** where the learned Judge held that pursuant to section 22 of the ***Public Officers Ethics Act***, the 1st respondent had a duty, imposed on her by the people of Kenya, to consider the Interested Party's suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution. The Learned Judge then held that though the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria, that burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution hence those to be appointed must meet certain integrity and competence standards.

104. In the premises I cannot fault the Respondents for making a decision based on the relevancy of the degrees held by the Petitioners to the positions to which they were nominated by the interested party.

105. It was however contended that since some of the Petitioners had been approved by the previous Assembly, as the 1st Respondent and its predecessor were exercising authority as trustees of the people of Kenya and more specifically the residents of Machakos County under Article 73 of the Constitution, it was thus surprising how the same Constitutional body can arrive at two different reports on the same nominee for a similar Job description. This issue brings To fore the question as to whether the County Assembly differently constituted from the previous one is bound by the decisions made by the previous Assembly in approving the nominees. If this position was true it would mean that those who were serving in the previous government would automatically qualify for approval by the Assembly once nominated by the Governor. With due respect, if this was the intention it would have been expressly stated in the legislation. This Court cannot read in such a drastic proposition of law which is not expressly provided. In **Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others Civil Application No. Nai. 268 of 1999** it was held that:

> **"The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in their ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation."**

106. As was held by the Court of Appeal in **Italframe Ltd vs. Mediterranean Shipping Co. [1986] KLR 54; [1986-1989] EA 174:**

> **"It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission…It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the Courts to repair the blunders that are to be found in legislation. They must be corrected by the legislature."**

107. In **Republic vs. Principal Secretary Agriculture Livestock and Fisheries & 2 Others Ex-parte Douglas M Barasa & 2 Others [2015] eKLR** it was held by this Court at paragraphs 49 and 50 that:

> **"It may be argued that the aforesaid provisions and principles only apply to initial appointment. In my view the said provisions ought to apply to reappointment as well. The appointee may have in the course of his duties committed certain acts or omissions which contravene the said provisions and principles hence it is necessary that before exercising the powers of reappointment the appointing authority complies with the same provisions and principles. In other words the appointing authority before renewing the appointment ought to ensure that the appointee still meets the conditions for the appointment. The appointee ought not in the course of his appointment to have been blemished in a manner that militates against his eligibility to continue serving in the same position otherwise such reappointment would defeat the constitutional provisions and principles and violate the same hence defeat the spirit of the Constitution… It is based on the same reasoning that I find that in the event that the appointing authority contemplates the reappointment of a person whose term has expired, even if there is no time limit provided for the tenure of service, before the power of reappointment is exercised, the above provisions and principles must be adhered to."**

108. In **Godffrey Mwaki Kimathi & Others vs. Jubilee Alliance Party [2015] eKLR,** this Court held that:

**"the mere fact that at one point in time a nominee was found to be a person of integrity does not bar issues of integrity being raised against him or her in subsequent nominations. Similarly, it is my view that the issue of integrity must be based on the prevailing circumstances and the mere fact that one was found to lack integrity at one point does not ipso facto permanently bar him or her from being nominated subsequently as long as he or she can prove that the circumstances have since changed in his or her favour. In other words integrity or lack of it is not a permanent feature."**

109. According to the Petitioner, in computing experience under section 35(3)(d) of the ***County Government Act***, it should be construed as an experience acquired cumulatively in a management, policy making and/or leadership position held and not experience in a particular professional field. However, section 35(3)(d) provides that the person being nominated ought to have:

***knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.***

110. If the County Assembly interpreted this provision to mean that the experience should be in a particular professional field, that view cannot be faulted by this Court as that is a matter that goes to the merit of its decision.

111. The Petitioners also took issue with the fact that the person who petitioned for the rejection of their nomination was charged with the offence of forgery in respect of the said petition. That may be so; however it is not contended that a final determination has been made on that charge in order for this Court to base its decision thereon. As to whether the said petition disclosed material on the basis of which the Assembly could properly reject the Petitioners' nomination is a matter which this Court cannot determine without unjustifiably seen to be interfering with the constitutional powers of the Assembly.

112. It was further contended that the Petitioners were confronted with the petitions when they appeared before the Committee without being given adequate time to prepare. It is however my view that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the ***Fair Administrative Action Act*** provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings. The proceedings before the Committee were however not exhibited hence there is no indication that the Petitioners sought for adjournment of the proceedings before the Committee. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR,** the court held the view that:

**"I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing."**

113. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

**"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."**

114. It is therefore my view that there is no basis upon which the decision of the Respondent in rejecting the nominations of the Petitioners can be successfully assailed in these proceedings.

115. The Petitioners further contended that section 8(a) of the ***Public Appointments (County Assemblies Approval) Act*** is unconstitutional to the extent that it requires shortlisting of nominees for the Appointment of County Executive Members contrary to Article 179(2)(b) of the Constitution as read together with section 30(2)(d) of the ***County Government Act***. The general principle is however that that every statute passed by the Legislature enjoys a rebuttable presumption of constitutionality as the Court of Appeal of Tanzania in **Ndyanabo vs. Attorney General [2001] 2 EA 485**, noted when it held that:

**"In interpreting the Constitution the court would be guided by the general principles that…there was a rebuttable presumption that legislation was constitutional, and…the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction…Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."**

116. The Supreme Court of India in **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** held that:

**"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."**

117. The impugned section 8(a) of the ***Public Appointments (County Assemblies Approval) Act*** provides that:

"***The issues for consideration by the relevant County Assembly in relation to any nomination shall be— (a) the procedure used to arrive at the nominee including the criteria for the short listing of the nominees;"***

118. Article 179(2)(b) of the Constitution on the other hand provides that

> ***The county executive committee consists of (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.***

119. Section 30(2) of the ***County Government Act*** on its part states that:-

> ***Subject to the Constitution, the governor shall appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution;"***

120. It is however clear that neither Article 179(2)(b) of the Constitution nor section 30(2) of the ***County Government Act*** provide for what the County Assembly ought to take into account in approving or rejecting the Governor's nominees. To that extent I am not satisfied that section 8(a) of the ***Public Appointments (County Assemblies Approval) Act*** is unconstitutional.

121. In the premises, this petition fails and is dismissed with no order as to costs

122. It is so ordered

**Read, signed and delivered in open Court at Machakos this 5th day of November, 2018.**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Loko for Mr Nyamu for the Petitioners***

***Ms Kamende for the Respondents***

***Mr Nthiwa for the Interested Party***

***CA Geoffrey***