



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO. 3 OF 2017**

**(FORMERLY MIGORI HIGH COURT PETITION NO. 6 OF 2016)**

**BETWEEN**

**GEORGE OBUYA OWUOR.....1<sup>ST</sup> PETITIONER**

**GEORGE OHURU BONYO.....2<sup>ND</sup> PETITIONER**

**WILSON CHACHA CALEB.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**ZACHARY OKOTH OBADO.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES.....2<sup>ND</sup> RESPONDENT**

**ORANGE DEMOCRATIC**

**MOVEMENT (ODM).....1<sup>ST</sup> INTERESTED PARTY**

**PEOPLES DEMOCRATIC PARTY**

**OF KENYA (PDP).....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. This petition raises an important question regarding the circumstances under which the office of a county governor in Kenya can be declared vacant. More specifically, it raises the question whether a governor who resigns from the political party on which he was elected to office and joins another party before the expiry of his term should vacate office.

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are adult residents and registered voters of Migori County in the Republic of Kenya. The 1<sup>st</sup> respondent was elected as the governor of Migori County on the 2<sup>nd</sup> interested party's ticket in the 4<sup>th</sup> March 2013 general election. The 2<sup>nd</sup> respondent is a corporate body established under the **Political Parties Act, Act No. 11 of 2011**, with the legal capacity to sue and to be sued. It has the statutory mandate to, inter alia, register, monitor, regulate, investigate and supervise political parties to ensure compliance with the provisions of the Act.

3. The 1<sup>st</sup> interested party, the Orange Democratic Movement Party (*hereinafter "ODM"*) and the 2<sup>nd</sup> interested party, the People's Democratic Party (*hereinafter "PDP"*) are registered political parties in Kenya which participated in the 2013 general election.

4. The events that precipitated the filing of this petition occurred on diverse dates between July 2016 and March 2017. According to the petitioners, on 8<sup>th</sup> July 2016, at about 4:30 pm, while at Migori Stadium, the 1<sup>st</sup> respondent publicly declared that he had decamped from PDP and joined ODM. The petitioners assert that this was contrary to the provisions of the Constitution of Kenya 2010 and the Political Parties Act, specifically sections 14(4), (5) and 34(f) thereof which outlaw concurrent membership of political parties.

5. The petitioners further assert that in March 2017, the 1<sup>st</sup> respondent formally resigned from PDP and joined ODM. They therefore claim that as voters of Migori County, they are entitled to approve the new party that the 1<sup>st</sup> respondent has shifted to through a declaration of a vacancy in the office of the governor to be followed by a by-election. This is because, in their view, the change in party took place before the expiry of the 1<sup>st</sup> respondent's term in office. They place before the Court the question whether resignation by a governor from the political party that sponsored him to office before the expiry of his term should lead to a declaration of a vacancy in the said office.

6. In their petition dated 10<sup>th</sup> August 2016, the petitioners seek the following orders:-

***a) A declaration that an elected official who switches Political Parties from the one which sponsored him in any election violates the voters' sovereignty unless such changes of parties is authorized by law.***

***b) A declaration that the right to exercise sovereignty by any voter/elector includes the right to give fresh mandate to an elected official who switches parties or changes status before completion of the term that the elector /voter elected him to serve meaning that a voter is entitled to vote afresh when switching of political parties occur.***

***c) A declaration that the right to elect a person to office on the ticket of a political party or an independent candidate enjoins the elected official to stick with the political party or independent status, except as provided for under section 11 of the Political Parties Act.***

***d) As a consequence of prayers (a), (b) & (c) a declaration that Migori County governor's seat is vacant and therefore laws relating to the vacancy in the office of the Governor to ensue.***

***e) An order directing the 2<sup>nd</sup> respondent to ensure that the 1<sup>st</sup> respondent does not violate the provisions of section 14(4) of the Political Parties Act by belonging to two Political Parties concurrently in accordance with section 34(f) of the Political Parties Act.***

***f) Any other order that this Honourable Court deems fit to grant.***

***g) Costs of the Petition be borne by each party.***

7. The petition is supported by an affidavit sworn by the 1<sup>st</sup> petitioner, who deposes that he swears the said affidavit with the authority of his co-petitioners.

8. The 1<sup>st</sup> petitioner makes various depositions with regard to the circumstances that led to the filing of this petition. He states that he was at Migori Stadium on 8<sup>th</sup> July 2016 and Rongo Township on 13<sup>th</sup> July 2016 when he heard the 1<sup>st</sup> respondent publicly declare that he had decamped from PDP and joined ODM with effect from 8<sup>th</sup> July 2016.

9. The petitioners contend that the 1<sup>st</sup> respondent could not purport to change parties without the approval

of the voters, who include the petitioners, on whose behalf the 1<sup>st</sup> respondent was exercising sovereignty as the governor of Migori County. According to the petitioners, the 1<sup>st</sup> respondent's action of switching parties violates the Constitution and the laws governing the operations of political parties in Kenya.

10. The petitioners also filed a supplementary affidavit in response to the 1<sup>st</sup> respondent's statement of reply to the petition. In the supplementary affidavit sworn on 17<sup>th</sup> March 2017 by the 1<sup>st</sup> petitioner, the petitioners assert that the 1<sup>st</sup> respondent had overtly demonstrated that he is a member of ODM by constructing a building for ODM, campaigning in motor vehicles with ODM banners, and attending ODM meetings in full ODM attire and regalia. They attach photographs in support of their allegation that the 1<sup>st</sup> respondent has decamped from the party on whose ticket he was elected governor.

11. They maintain that contrary to assertions by the 2<sup>nd</sup> respondent, the petition raises constitutional issues regarding the conduct of the 1<sup>st</sup> respondent which they claim infringes upon their constitutional rights because 1<sup>st</sup> respondent is deemed to have resigned from PDP and joined ODM. They contend that in the circumstances, the 2<sup>nd</sup> respondent should initiate the necessary steps towards removing the 1<sup>st</sup> respondent's name from the PDP membership list so as to facilitate the appropriate action to be taken by the Independent Electoral and Boundaries Commission towards conducting a by- election for the office of the County governor of Migori.

## **The Response**

### **The 1<sup>st</sup> Respondent's Case**

12. The 1<sup>st</sup> respondent opposed the petition through a preliminary objection dated 28<sup>th</sup> September 2016 and a statement of reply to the petition dated 1<sup>st</sup> February 2017. The preliminary objection was, however, withdrawn by consent on 5<sup>th</sup> May 2017 when the parties to the petition agreed to pursue the main petition.

13. In his statement of reply to the petition, the 1<sup>st</sup> respondent contends that the dispute herein relates to membership of a political party and therefore ought to be resolved in accordance with the political party's constitution as stipulated under section 40(2) of the Political Parties Act. This section, according to the 1<sup>st</sup> respondent, provides that disputes relating to party membership ought to be referred to the party's internal dispute resolution mechanism first before being referred to the Political Parties Disputes Tribunal established under section 39 of the Political Parties Act.

14. The 1<sup>st</sup> respondent contends that the Political Parties Disputes Tribunal is among the institutions created under Article 169(1) (d) of the Constitution, and its relevance is articulated under Article 159 of the Constitution. According to the 1<sup>st</sup> respondent, the petitioners should have exhausted this statutory dispute resolution mechanism before invoking the jurisdiction of this Honourable Court.

15. He reiterates that the circumstances under which a member of a political party is deemed to have ceased to be a member of that party are stipulated under section 14 of the Political Parties Act which include, *inter alia*, where the member has given written notice or where the person is deemed to have resigned under subsection (5). He thus states that the determination of whether one should be deemed to have resigned from the political party is not an issue to be determined by the High Court unless the statutory dispute resolution mechanism has been exhausted.

16. It is the 1<sup>st</sup> respondent's position that Article 194 of the Constitution applies only to circumstances under which a member of a county assembly may vacate office. He distinguished the provisions of Article 194(1) (e) and Article 182 of the Constitution and contended that the former applies where a member of a county assembly resigns from his nominating party, while the latter deals with instances when a vacancy can arise in the office of the county governor, and states that resignation from a political party is not one of the grounds for creating a vacancy in the office of a county governor.

17. The 1<sup>st</sup> respondent further contends that the declaratory orders sought by the petitioners, particularly under prayers (a), (b) and (c) of the petition, are premature as they presuppose that the 1<sup>st</sup> respondent has already resigned from the political party that sponsored him to the gubernatorial seat.

18. The Court notes, however, that the 1<sup>st</sup> respondent's statement of reply to the petition was filed prior to his formal resignation from his sponsoring party (PDP). In later pleadings, the 1<sup>st</sup> respondent admits that he has left the party on whose ticket he was elected governor of Migori. In his further affidavit sworn on 28<sup>th</sup> April 2017, he expressly states that even though he was elected governor of Migori County on the PDP ticket in the 2013 general election, he had, on 16<sup>th</sup> March 2017, in exercise of his political rights under Article 38 of the Constitution, formally tendered his resignation to the PDP and joined ODM. He attached a copy of the resignation letter to his affidavit.

19. He further deposes that having met all the conditions set out in ODM's constitution, the relevant national legislation and having gone through the set procedures, he successfully sought ODM's nomination to defend his seat in the upcoming general election.

20. The 1<sup>st</sup> respondent further states that in view of the fact that the present petition is premised on the "deeming" process, and having formally resigned from PDP in line with section 14(1) of the Political Parties Act, this petition has been overtaken by events and the orders sought spent.

### **The 2<sup>nd</sup> Respondent's Case**

21. The 2<sup>nd</sup> respondent opposed the petition through the replying affidavit of Lucy K. Ndungu sworn on 4<sup>th</sup> December 2016. Ms. Ndungu deposes that she is the Registrar of Political Parties charged with the duties of monitoring, regulating and supervising political parties especially with regard to "deeming" (*sic*), suspending and or expelling a member of a political party from a political party as provided for under section 14 of the Political Parties Act 2011.

22. She further avers that disputes relating to membership of political parties are heard and determined in line with the respective political parties' constitution and the verification process provided for under section 34(f) of the Political Parties Act, which relates to the register of members of political parties submitted to the 2<sup>nd</sup> respondent by political parties. The 2<sup>nd</sup> respondent therefore contends that recruitment and expulsion of members of political parties is the exclusive responsibility of political parties.

23. According to the 2<sup>nd</sup> respondent, Article 181 of the Constitution and section 33 of the County Governments Act provide for the law and procedure to be followed in removing a county governor from office. Under those provisions, the 2<sup>nd</sup> respondent has no role to play in such removal. The 2<sup>nd</sup> respondent therefore termed her inclusion in this case a misjoinder.

24. It is also the 2<sup>nd</sup> respondent's contention that this petition does not raise any constitutional question, is bad in law and ought to be dismissed.

### **The Submissions**

#### **The Petitioners' Submissions**

25. The petitioners filed written submissions dated 31<sup>st</sup> May 2017 which were highlighted by their Learned Counsel, Mr. Roch Odhiambo and Mr. Bosire Gichana. In the said submissions, the petitioners outlined how the 1<sup>st</sup> respondent had progressively moved from PDP, the party that sponsored him to the Migori county gubernatorial position in the 2013 general election, to ODM. While conceding that the law is scanty on the issue of resignation of a governor from his sponsoring political party, the petitioners contended that the shift of political parties by the 1<sup>st</sup> respondent before the expiry of his term creates a

vacancy in the office of the governor. In their view, the 1<sup>st</sup> respondent should seek a fresh mandate as governor from the electorate in the County of Migori under his new political party. They argue that the 1<sup>st</sup> respondent is not covered under the Political Parties Act (as amended) that provides for mergers and coalitions. They therefore urged the court to declare a vacancy in the office of the Migori county governor.

26. With respect to the legal basis for their petition and submissions, the petitioners cited **Republic vs Speaker of the National Assembly & Another ex parte Jusuf Mahmoud Aboubakar Mombasa High Court Civil Misc. Appn. No. 184 of 2002 (2002) eKLR**. In this case, the applicant had sought a declaration that the Likoni parliamentary seat had fallen vacant after the incumbent, Suleiman Shakombo, had defected from the Shirikisho Party, on whose ticket he had been elected to Parliament, to Kenya African National Union (KANU). They also relied on **Party Law in Modern Europe (the Legal Regulation of Political Parties in post war Europe) Laws Against Party-Switching, Defecting or Floor-Crossing in National Parliaments** by **Kenneth Janda North Western University** to support their contention that upon leaving his party, the 1<sup>st</sup> respondent should also have vacated the seat of governor, and the Court should so declare.

27. The petitioners argued that since Article 180(2) of the Constitution stipulates that to be eligible for election as a county governor, a person must be eligible to be elected as a member of a county assembly (MCA), then the provisions of Article 194(1) (e) (i) that deal with vacation of office by members of county assemblies should be deemed to be applicable to the vacation of office of the governor. They contend therefore that the governor should be deemed to have resigned if he failed to comply with the legislation contemplated under Article 194(2) which is the Elections Act, specifically section 14(5) thereof.

### **Submissions in Response**

28. The 1<sup>st</sup> respondent's position as presented by his Learned Counsel, Mr. Sagana, was that the circumstances under which a county governor can be removed from office or his office declared vacant are expressly provided for under Article 181 and 182 of the Constitution. Such grounds include gross violation of the Constitution or any other law, serious reasons for believing that the governor has committed a crime under national or international law, abuse of office or mental or physical incapacity to perform the functions of his office. He also points out that under Article 182(2), the office of governor can only be declared vacant on the death of the governor, his resignation in writing addressed to the speaker of the county assembly, his ceasing to be eligible to be elected governor in accordance with Article 180 (2) (which is that he should be eligible for election as a member of a county assembly), is imprisoned for a term of at least 12 months, or is removed under the Constitution. The 1<sup>st</sup> respondent argues that none of the above grounds have been proven against him by the petitioners, and his resignation from his sponsoring political party to another is not one of the grounds set out in the Constitution for removal of a governor.

29. It was further submitted on behalf of the 1<sup>st</sup> respondent that it was correct that for one to be eligible for election as a county governor, one must be eligible for election as a member of the county assembly, and that such eligibility criteria includes being nominated by a political party or being an independent candidate. However, after the conclusion of the 2013 general election, the issue of "nomination by a political party" was spent. Further, that nomination is a one off event and not a continuous process as the petitioners wanted the court to believe.

30. In support of his argument on this point, the 1<sup>st</sup> respondent posed the question: what would happen to an elected county governor who was nominated by a political party in 2013, does not resign from his party, but loses in the just concluded party primaries ahead of the 2017 general election? His submission was that such a seat cannot be declared vacant since nomination was for the 2013 general election and as such, is spent and the present party nominations is for the upcoming August 2017 general election. It has, in his view, nothing to do with his eligibility in respect of the 2013 general election or the remainder of his term as governor.

31. The 1<sup>st</sup> respondent further contends that once an elected county governor officially resigns from his political party in line with section 14 of the Political Parties Act, it cannot be said that he ceases to be nominated by a political party and subsequently ceases to be eligible to be a member of the county assembly hence a declaration of a vacancy in his seat. He argues that unlike the case of members of Parliament (MP) and members of county assemblies (MCAs), whose functions are purely legislative in nature, the offices of the county governor and that of the President perform executive functions and do not become vacant upon resignation by the holders of these offices from the sponsoring political party.

32. He relied for this submission on the provisions of Article 103 of the Constitution. Under this Article, the seat of an MP who resigns from the party on whose ticket he was elected to Parliament or is deemed to have resigned from that party in accordance with legislation enacted pursuant to that Article, becomes vacant. Similarly, under the said Article, the seat of an MP elected as an independent candidate but who subsequently joins a political party also becomes vacant.

33. In his view, while Articles 103 and 194 of the Constitution specifically provide that the offices of an MP and MCA shall become vacant if, having been elected to the assembly as a member of a political party, such a member resigns or is deemed to have resigned from the political party that sponsored him or her, there is no such provision with respect to resignation by the President or governor under Articles 146 and 182 of the Constitution respectively. In the 1<sup>st</sup> respondent's view, nothing would have been easier than for the makers of the Constitution to include the provisions for declaration of such a vacancy upon resignation from a political party for all the elective positions, just as they had done for the positions of an MP and MCA.

34. As for the manner in which the Court should interpret the provisions of the Constitution with regard to the declaration of his office vacant as prayed by the petitioners, the 1<sup>st</sup> respondent submitted that interpreting the text and structure of the Constitution entails considering the intention of the drafters in order to ascertain why certain provisions were made. He urged the Court to adopt the originalist and prudential mode of interpretation of the Constitution which emphasises that the Court considers not only the text and structure of the Constitution, but also its social, economic and political interpretation.

### **Analysis and Determination**

35. We have considered the pleadings of the parties and the respective submissions, both oral and written, of the petitioners and the 1<sup>st</sup> respondent. We have also read and considered the authorities relied on by the parties. We note that the interested parties have not evinced an interest in the matter, whether in support of or in opposition to the petition. The 2<sup>nd</sup> respondent did not file written submissions or make oral submissions on the matter.

36. In our view, this petition raises three main issues and two subsidiary issue for determination. The main issues for determination are as follows:-

***1) Whether the Office of the county governor becomes vacant upon the resignation of the governor from the political party on whose ticket he was elected.***

***2) Whether the petitioners have demonstrated that any of their constitutional rights were infringed by the 1<sup>st</sup> respondent's resignation from his sponsoring party;***

***3) Who has the jurisdiction to determine the issues raise in this petition.***

37. The two subsidiary issues are:-

***1. Whether the 2<sup>nd</sup> respondent was properly joined in these proceedings;***

***2. What orders are appropriate in the circumstances of this case?***

38. It was not disputed that the 1<sup>st</sup> respondent was elected governor of Migori County on a PDP ticket in the 2013 general election. This court notes that at the time of filing this petition, the 1<sup>st</sup> respondent was, in law at least, still a member of PDP. The petitioners had therefore sought orders, *inter alia*, for a declaration that the 1<sup>st</sup> respondent be deemed to have resigned from his sponsoring party (PDP), and as a consequence thereof, the Migori County governor's seat be declared vacant.

39. The situation changed, however, when, on 16<sup>th</sup> March 2017, the 1<sup>st</sup> respondent formally tendered his written resignation from PDP and applied to be a member of ODM as evidenced in his resignation letter attached to his further affidavit. Upon his resignation from PDP and his joining ODM, the issue is no longer whether the 1<sup>st</sup> respondent should be deemed to have resigned from his sponsoring political party, but whether, by virtue of the said resignation, the office of the governor of Migori County should be declared vacant. We shall address ourselves to this question, which we believe is the substantive issue that this petition raises, later in this judgment.

40. We believe that it is appropriate, at this point, to deal with the first subsidiary issue that this petition raises: whether the Registrar of Political Parties, the 2<sup>nd</sup> respondent, was properly joined to this petition.

### **The Role of the Registrar of Political Parties**

41. In dealing with this issue, we shall consider the provisions of section 14 of the Political Parties Act, on the basis of which the petitioners argue that the 1<sup>st</sup> respondent should be deemed to have vacated the office of the governor of Migori County.

42. Section 14 titled “Resignation from political party” provides as follows:

***(1) A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to—***

***(a) the political party;***

***(b) the clerk of the relevant House of Parliament, if the member is a member of Parliament; or***

***(c) the clerk of a county assembly, if the member is a member of a county assembly.***

***(2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.***

***(3) The political party of which the person is a member, the member, or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within seven days of the resignation.***

***(3A) Upon receiving the notification under subsection (3), the Registrar shall cause the name of such member to be removed from the membership list of that political party.***

***(4) A person shall not be a member of more than one political party at the same time.***

***(5) A person who, while being a member of a political party—***

***(a) forms another political party;***

***(b) joins in the formation of another political party;***

***(c) joins another political party;***

***(d) in any way or manner, publicly advocates for the formation of another political party;  
or***

***(e) promotes the ideology, interests or policies of another political party, shall, notwithstanding the provisions of subsection (1) or the provisions of any other written law, be deemed to have resigned from the previous political party.***

***(5A) A political party whose member is deemed to have resigned under subsection (5), shall in accordance with the procedure set out in the constitution of that political party, notify the Registrar of such decision within seven days.***

***(6) Subject to specific provisions of a coalition or merger agreement, subsection (5) (c), (d) and (e) shall not apply to a member of a political party which enters into a merger or a coalition with another party.***

***(7) A member of a political party may only be expelled from that political party if the member has infringed the Constitution of the political party and after the member has been afforded a fair opportunity to be heard in accordance with the internal party disputes resolution mechanisms as prescribed in the Constitution of the party.... (Emphasis added)***

42. From the above provision, it is clear that the role of the Registrar of Political Parties is confined, under section 14(3A), to removal of the name of a member of a political party from the membership list of the political party. Under section 14(3), however, the Registrar can only act upon receipt of notification from the member, his political party, or the clerk of the relevant House of Parliament or county assembly of which the person is a member. It is therefore our finding that the 2<sup>nd</sup> respondent was not a proper party to this petition. In view of the fact that there was no notice sent to the Registrar in this case, we agree with her contention that there was misjoinder of her office to these proceedings.

#### **Who has the jurisdiction to deal with the issues raised in this petition?**

43. Related to the question whether the Registrar was properly joined to this petition is the question whether the dispute before us is a matter that should have been resolved through the internal dispute resolution mechanism of PDP. In our view, the internal dispute resolution mechanism of the 1<sup>st</sup> respondent's original party would have been activated if there was any doubt as to his intentions. This would have arisen when the question of whether the 1<sup>st</sup> respondent could be "deemed" to have left PDP for ODM had arisen and was still live. This was the position at the early stages of the matter.

44. However, by the time the petition was canvassed before us, the question whether or not the 1<sup>st</sup> respondent had decamped from PDP had become moot: he had already resigned in writing from PDP and formally joined ODM. We therefore do not consider it necessary to exercise our minds on an issue that is only of academic importance at this stage.

45. It may be argued, however, that this is not a matter for determination by this court. This appears to us to be the direction taken by the 1<sup>st</sup> respondent in his submissions that this is a matter for resolution by the internal party dispute resolution mechanism. However, we note that the petition is premised on alleged violation of the Constitution and the fundamental rights of the petitioners. That being the case, we are satisfied that under Article 165 and 22 of the Constitution, this court has the jurisdiction to hear and determine the issues raised in this petition.

46. We now turn to consider the first substantive issue that arises in this matter.

#### **Whether the office of the county governor becomes vacant upon his resignation from the political party on whose ticket he was elected.**

47. The 1<sup>st</sup> respondent has argued that his resignation was lawful and in tandem with the provisions of

Article 38 of the Constitution which guarantees him the right to exercise his political right to become a member of a political party of his choice. The party of his choice, ODM, has already given him the ticket to contest the governor's seat in the upcoming 2017 general election.

48. The question before us is whether the resignation by a governor from the political party that sponsored him to the said position has the same consequences as the resignation of an MP or an MCA. In these latter cases, the consequences are the declaration of a vacancy in the said positions. In addressing this question, we consider the various provisions in the Constitution relating to the circumstances under which the office of a governor becomes vacant *vis a viz* the provisions for how vacancies may arise in the other elective positions.

49. Article 181 and 182 of the Constitution contain the provisions with respect to the circumstances under which a governor of a county may be removed, and under which the seat of a county governor may be declared vacant, respectively. With respect to removal, Article 181 provides as follows:

***(1) A county governor may be removed from office on any of the following grounds:-***

***a) Gross violation of this Constitution or any other law;***

***b) Where there are serious reasons for believing that the county governor has committed a crime under national or international law;***

***c) Abuse of office or gross misconduct; or***

***d) Physical or mental incapacity to perform the functions of county governor***

***(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1)"***

50. Under Article 182(1), the Constitution provides the circumstances under which the office of governor may become vacant:

***(1) The office of the county governor shall become vacant if the holder of the office—***

***(a) dies;***

***(b) resigns, in writing, addressed to the speaker of the county assembly;***

***(c) ceases to be eligible to be elected county governor under Article 180 (2);***

***(d) is convicted of an offence punishable by imprisonment for at least twelve months; or***

***(e) is removed from office under this Constitution. (Emphasis added)***

51. The question before us is whether the resignation of the 1<sup>st</sup> respondent from PDP, the party on whose ticket he was elected governor in 2013, is a ground on which he can be removed from office, or his seat declared vacant, under Article 181 and 182 of the Constitution. The petitioners have argued that the provisions of Articles 182(1)(c), when read with Article 180(2) of the Constitution, should be interpreted to mean that once a governor is found to be ineligible to be elected as a county governor, then his seat ought to be declared vacant. Article 180(2) stipulates as follows:

***To be eligible for election as county governor, a person must be eligible for election as a member of the county assembly.***

52. Article 193 of the Constitution sets out the qualifications for election as a member of the county assembly. It provides that:-

**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 a registered as a voter;**

**(b) satisfies any educational, moral and ethical requirements prescribed by the 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.**

53. The petitioners further argue that since the conditions for eligibility for election as a county governor are the same as those for election as a member of a county assembly, then the conditions under which the office of a member of a county assembly becomes vacant as provided under Article 194 of the Constitution should also be applicable with respect to vacation of the office of a governor. Article 194 of the Constitution states that:

**194. (1) The office of a member of a county assembly becomes vacant—**

**(a) if the member dies;**

**(b) if the member is absent from eight sittings of the assembly without permission, in writing, of the speaker of the assembly, and is unable to offer satisfactory explanation for the absence;**

**(c) if the member is removed from office under this Constitution or legislation enacted under Article 80;**

**(d) if the member resigns in writing addressed to the speaker of the assembly;**

**(e) if, having been elected to the assembly—**

**(i) as a member of a political party, the member resigns from the 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;...**

54. The petitioners also draw an analogy between the conditions under which the seat of an MP may be declared vacant and the position of a county governor. These provisions are set out in Article 103, which provides as follows:

**103.(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;**

55. Having considered the provisions of Articles 194 and 103 set out above *vis a vis* the provisions of Article 182(1), we are of the view that these latter provisions, which relate to the circumstances under which the office of a county governor may be declared vacant, or for the removal of a county governor, give specific provisions for the circumstances under which the office of the governor becomes vacant. Further we are of the view that the requirements for removal or vacation of office of a governor cannot be equated to those applicable to an MP or MCA.

56. We have reached this conclusion upon taking into account the principles for interpretation of the Constitution, one of which has already been alluded to by the 1<sup>st</sup> respondent. This is that the court should consider the intention of the drafters in arriving at the interpretation of a provision of the Constitution.

57. We have also noted the submissions by the petitioners that the Constitution should be read as an integrated whole, with no one provision destroying the other. The petitioners have in this regard relied on the decision in, among others, **Olum –v- AG [2002] 2 EA 508**.

58. We also bear in mind the sentiments of the Court in **Advocates Coalition for Development and Environment & Others --v- Attorney General & Another [2014] 3 E.A 9**, where the Ugandan Constitutional Court held as follows:

***“The principles which govern..... the construction of constitutional provisions... include the following:***

***a. 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 certain context, a liberal interpretation of the constitutional provision may be called for.***

***b....***

***c. The entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other, but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness and the rule of paramountcy of the written Constitution.***

***d. No one provision of the Constitution is to be segregated from the others and be considered alone, but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.”***

59. In this case, the Constitution contains specific provisions with respect to the circumstances under which the office of a governor would be declared vacant. Had the people of Kenya, in drafting and enacting the 2010 Constitution, intended that the office of a governor would be declared vacant on the same conditions as were applicable to an MP or MCA, nothing would have been easier than for them to so provide expressly.

60. Our view is that the issue of a vacancy in an elective office is such an important issue that it could not have been left to be subjected to guess work or conjecture. Reading through the Constitution as a whole, we observe that there are clear provisions for the qualifications for one to be elected to the various

elective positions created under the Constitution, and similarly, clear provisions on the circumstances under which the offices become vacant.

61. From the above mentioned provisions of the Constitution, it is apparent that the resignation of a county governor from his sponsoring party to another political party is not one of the grounds under which the office of a governor can become vacant. And, we believe, this was for good reason.

62. Indeed, the provisions for the vacation of office of a county governor, the executive of a county, are analogous to the provisions with respect to the vacation of office by the President, provided for under Article 146 of the Constitution, in the following terms:

***(1) The office of President shall become vacant if the holder of the office—***

***(a) dies;***

***(b) resigns, in writing, addressed to the Speaker of the National Assembly; or***

***(c) otherwise ceases to hold office under Article 144 or 145 or under any other provision of this Constitution.***

63. Article 144 deals with the issue of removal of the President on the grounds of incapacity, and the process to be followed for such removal. Article 145 deals with the process of impeachment of the President for gross violation of the Constitution or of any other law, where there is reason to believe that the President has committed an offence under national or international law, or for gross misconduct, all reasons that are echoed in Article 181 of the Constitution with respect to the removal of a county governor.

64. In our view, had the intention of the drafters of the constitution been that the office of the governor and President should fall vacant once the holders of those offices change their political party allegiance, then Articles 182 and 146 of the Constitution would have made specific provisions to that effect. We say this upon due consideration of the functions of the governor at the county government level, and those of the President at the national government level. The powers of these two offices are executive in nature. The governor and President perform executive functions in the county and national governments respectively. Their duties entail working for every resident in the county or nation as dictated by the Constitution and relevant legislation, irrespective of their party affiliations. This is to be contrasted with the duties and functions of members of county assemblies and Parliament, whose core mandate is representative and legislative in nature, and who have to support and propagate the ideologies and agendas of their respective sponsoring political parties in Parliament or county assemblies.

65. We are bolstered in our view of this clear distinction between the manner of removal or vacation of office by the governor and President when contrasted with that of MPs by the provisions of Article 104 of the Constitution. This Article gives the electorate a right to recall MPs before the expiry of their terms. There is no similar provision with respect to governors. What there is in relation to removal of a governor is contained in section 33 of the County Governments Act, which contains provisions similar to those for impeachment of a President under Article 145 of the Constitution. It is therefore our finding, and we so hold, that the seat of a county governor does not fall vacant upon the holder resigning from his sponsoring political party.

66. However, even had we found that the 1<sup>st</sup> respondent should have vacated office as Migori County governor upon shifting from PDP to ODM, we believe that the public interest and logic would militate against such an order at this time. The general election is less than two months away. The electorate will have a chance to elect a new governor. As the 1<sup>st</sup> respondent submitted, there are other governors who have lost the nomination ticket of the parties on which they were elected, but are still in office until after the election. Proper administration of the counties demands that they remain in office and properly hand over to the incoming governor after the election.

67. Having said that, however, we must observe that we recognise the critical question that this petition raises with respect to the election of county governors. Like members of Parliament and county assemblies, one would expect that a level of party loyalty and discipline would be observed by the governors; that they would not be hopping parties at every election; and that those who elect them would be entitled to expect that the ideology which their party subscribes to would be respected by the person they elect governor.

68. However, such is the deplorable nature of party discipline in our elective politics that to expect that any elected official would remain faithful to any one party or coalition of parties from one election to the next has become, sadly, a tall order in our nascent democracy, if one can describe it as such. Which brings us to the next issue for consideration in this petition.

### **Whether there has been a violation of the petitioners' rights by the 1<sup>st</sup> respondent changing party affiliation**

69. The petitioners have alleged that their fundamental rights have been infringed by the 1<sup>st</sup> respondent's resignation from PDP. From the pleadings, it appears that two of the petitioners are members of ODM, while one is a member of PDP. They have not, however indicated in what manner their rights have been violated by the 1<sup>st</sup> respondent's decision to decamp from PDP.

70. The threshold for proof in constitutional petitions was set out in the landmark case of **Anarita Karimi Njeru vs Republic (1979) KLR 154** in which the Court stated:

*"We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."*

71. In **Trusted Society of Human Rights vs Mumo Matemu High Court Petition No. 290 of 2012**, the High Court expounded the principle in **Anarita** in the following words:

*"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged."*

*The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."*

72. The question is whether the petitioners have met the threshold set in **Anarita** and expounded in the **Mumo Matemu** case. They have alleged that in electing or not electing the 1<sup>st</sup> respondent, they were exercising their constitutional rights under Article 1(1) (2) (3) and (4) of the Constitution. They argue that their rights under these provisions have been infringed by the 1<sup>st</sup> respondent's resignation from his sponsoring political party to another party.

73. In the words used in the **Mumo Matemu** case, we do not expect talismanic formalism in a petition

alleging violation of constitutional rights, nor do we demand that parties set out their case with mathematical precision. However, it is expected that a party alleging violation of constitutional rights would place before the Court facts on the basis of which the Court could consider whether indeed there has been any infringement, or threat of infringement, of constitutional rights.

74. As we noted above, the petitioners have alleged violation of Article 1(1) (2) (3) and (4). We observe, however, that this Article and sub-articles do not contain any of the fundamental rights guaranteed under Chapter 4 of the Constitution. These provisions relate to the exercise of sovereign power by the people, and state as follows:

***1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***

***(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.***

***(3) Sovereign power under 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.***

***(4) The sovereign power of the people is exercised at—***

***(a) the national level; and***

***(b) the county level.***

75. The petitioners may be aggrieved that the governor of the county of Migori, who was elected on the PDP ticket, has decided to decamp from his party and join another, a short time before the 2017 general election. While his actions display a deficiency in ideological conviction demonstrated by many seeking elective office in Kenya, there is nothing before the Court that shows a violation of the Constitution, or of the constitutional rights of the petitioners. The closest that the actions of the 1<sup>st</sup> respondent can be said to approach an infringement of a fundamental right is with respect to Article 38. However, while the petitioners have cited this Article in the heading of their petition, they have not demonstrated how their rights under the said Article have been violated by the 1<sup>st</sup> respondent, nor can it be said that the 1<sup>st</sup> respondent's exercise of his political right under Article 38(1) violates the petitioners' rights under the said Article.

76. In the circumstances, we are unable to find any merit in the petition dated 10<sup>th</sup> August 2016. The only order that we can issue in respect thereof is one of dismissal, but with the further order that each party bears its own costs of the petition.

77. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE 2017**

**MUMBI NGUGI      WILFRIDA OKWANY      JOHN ONYIEGO**

**JUDGE                      JUDGE                      JUDGE**

**DATED, DELIVERED AND SIGNED AT KISII THIS 15<sup>TH</sup> DAY OF JUNE 2017**

**WILFRIDA OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Bosire for the petitioner/Applicant
- Mr. Sagana for the 1<sup>st</sup> Respondent
- Omwoyo: Court Clerk