



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
PETITION NO. 93 OF 2016

BETWEEN

HON. WILLIAM KABOGO GITAU.....PETITIONER

AND

HON. FERDINAND NDUNG’U WAITITU.....RESPONDENT

RULING

Introduction

1. The Petitioner, William Kabogo Gitau, is resident of Kiambu County within the Republic of Kenya. He is also the Governor of Kiambu County. The Petitioner filed the present Petition under Certificate of Urgency. He seeks the following orders:

- a. A declaration that Ferdinand Ndung’u Waititu is a distinct person from Clifford Ndungu Waititu.*
- b. A declaration that the Deed Poll made by Ferdinand Ndung’u Waititu for change of name to Ferdinand Clifford Ndung’u Waititu dated 11th January 2013 and registered in the Registry of Documents at Nairobi on 10.00 hrs 18th January 2013, under presentation 660 Volume D1 6/238 and File MMXIII is invalid, null and void and of no effect.*
- c. A declaration that the Respondent has violated Articles 10 (2) and 73 of the Constitution and is therefore unfit to hold any public office in the Republic of Kenya.*
- d. A declaration that the Respondent is consequently ineligible to contest for any elective office under the Election Act, 2011.*
- e. If the Court makes a finding that the self-declaration forms by the Respondent filed pursuant to Section 13 of the Leadership and Integrity Act, No. 19 of 2012 are false, investigations by the relevant State agencies to ensue to establish whether an offence of false declaration has been committed under the Oaths and Statutory Declarations Act and for appropriate legal action to be taken.*

f. Costs of this Petition be provided for.

2. In response to the Petition, the Respondent, Ferdinand Ndung'u Waititu, also a resident of Kiambu County, filed a Notice of Preliminary Objection dated 4th April 2016 which is the subject of this Ruling.

The Respondent's Case

3. The Respondent's case was argued by Mr. J.Harrison Kinyajui.

4. The Respondent opposed the present Petition on the following grounds namely:

1. That this Honourable Court has no jurisdiction to entertain the Petitioner's Notice of Motion dated 10th March 2016, and the Petition dated 10th March 2016 as no proper constitutional issues arise for determination.

2. That by dint of Article 82 (1) (b) and 88 (4) (d) (e) and (k) of the Constitution, the body vested with investigating the academic issues raised by the Petitioner, of the Respondent in relation to his Kabete Constituency Member for National Assembly elective post is the Independent Electoral and Boundaries Commission and not this constitutional Court.

3. That by operation of Articles 79 and 80 of the Constitution as read with Section 4 (2) of the Leadership and Integrity Act, No. 19 of 2012, this Honourable Court is divested of jurisdiction to venture to investigate integrity issues alleged against the Respondent in the first instance, the sole mandate of such investigations being vested on the Ethics and Anti-Corruption Commission.

4. That the Petitioner has relied on a fraudulent, forged document, to wit the copy of a purported Certificate of Primary Education "Certificate" in the name of one "Clifford Ndung'u Waititu" which was forged to purport that Mbagathi Primary School was bearing the examination code 52019 whereas in truth the said code 52019 belonged to Chemsangi Primary School which is located in Bomet County, Saosa Constituency, a fact which the Petitioner has sought to suppress and conceal, by violating Rule 9 of the Oaths and Statutory Declarations Act, Rules, of the Laws of Kenya.

5. That the matters sought to be adjudicated upon relating to the Respondent's election as the current elected Kabete Constituency Member for National Assembly and his education ante the said election are res judicata as they were the subject to similar applications before the Independent Electoral and Boundaries Commission and this Honourable Court vide:

a. Petition Nos. 102 and 145 of 2015 9 (as consolidated); and

b. IEBC/DRC/KCBE/6/2015, which dealt with the same issues and dismissed them.

5. In his Written Submissions dated 18th April 2016, the Respondent relied on the decisions in **Motor Vehicle M.V Lillian 'S' vs. Caltex Oil (Kenya) Ltd, (1989) KLR 1, Kimani Wanyoike vs. Electoral Commission, Civil Appeal No. 213 of 1995;** and **International Centre for Policy and Conflict and 5 Others vs. Attorney General and 5 Others [2013] eKLR**, to emphasize the importance of jurisdiction. In that regard, it was the Respondent's position that where there is a law prescribed by either the Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance, that procedure ought to be strictly followed.

6. The Respondent asserted that these proceedings are disguised as a constitutional Petition yet at its core, essentially it is a political contest between him and the Petitioner for the Kiambu gubernatorial seat in the forthcoming General Elections. In the Respondent's view, there is in effect no tenable constitutional issue for determination raised and hence no bench of Judges ought to be set to hear and determine the same as the Petition is incompetent and merely disguised as a constitutional Petition.

7. It was the Respondent's submission that the Petitioner alleges that his educational background was not looked into prior to his election as a Member of the National Assembly for Kabete Constituency and yet, he (the Petitioner) seeks to have him declared unfit to hold any such elected position. In the Respondent's view, this is not the appropriate forum for addressing those issues and in any event, if the Petitioner had any such objections prior to his election as a Member of Parliament, then the constitutionally envisaged and established organ is the Independent Electoral and Boundaries Commission and not this Court.

8. The Respondent maintained that by operation of **Article 88 (4) (e)** of the **Constitution**, this Court is divested of jurisdiction to entertain the present proceedings. Further, that the academic qualifications of the Petitioner for his election is a dispute relating and directly arising from his nomination as a candidate of Jubilee Alliance Political Party and that pursuant to the said Article, once the Returning Officer of the Independent Electoral and Boundaries Commission issued a nomination certificate to the Petitioner, in respect of Kabete Constituency by-Election, his decision could only be challenged by lodging a complaint with the Independent Electoral and Boundaries Commission. In that regard, the Respondent relied on the dictum by the Courts in **Diana Kethi Kilonzo and Another vs. Ahmed Isack and Another [2014]eKLR** and **Africog vs. Independent Electoral and Boundaries Commission [2013]eKLR**.

9. It was the Respondent's further view that **Article 88 (4) (e)** of the **Constitution** ought to be read together with **Section 74** of the **Elections Act** which expressly delineates the procedure to be adopted in challenging nominations on grounds such as the ones raised in the present Petition. The Respondent relied on **Jaldesa Tuke Dabelo vs. Independent Electoral and Boundaries Commission [2015] eKLR** and **Dr. Billy Elias Nyonje vs. National Alliance Party of Kenya and Another, J.R App. No. 61 of 2013** in support of the foregoing contention and he submitted further that **Rule 9** of the **Elections Regulations, Legal Notice No. 139 of 3rd December 2012**, outlines the procedure of resolving such disputes.

10. The Respondent also noted that by dint of **Rule 13** of the said **Elections Regulations**, if a person is aggrieved by the decision of a Returning Officer, the option is to appeal to the Independent Electoral and Boundaries Commission, as was held in **Zaddock A. Kisiyena vs. Independent Electoral and Boundaries Commission and Another [2013] eKLR**.

11. The Respondent submitted further that pursuant to **Section 4 (2)** of the **Leadership and Integrity Act**, the Ethics and Anti-Corruption Commission is charged with the responsibility of overseeing and enforcing the said Act and not this Court and furthermore, since **Section 4 (5)** therein stipulates that in the event that the public entity, such as the Independent Electoral and Boundaries Commission has not complied with the requirements of enforcing **Chapter Six** of the **Constitution**, the Ethics and Anti-Corruption Commission must thus move the Court but with the disclaimer that the Independent Electoral and Boundaries Commission has its stated Dispute Resolution Committee.

12. That in any event, the Petition does not raise any allegations that he has violated any specific section of the **Leadership and Integrity Act** or even the Constitution, so as to constitute a violation of the integrity threshold under **Chapter Six** of the **Constitution**. In the Respondent's further view, **Section 42 (4)** of the Leadership and Integrity Act is couched in manner that protects a person against whom a complaint has been made so that there is fairness in the entire process. As such, the manner in which the Petitioner has approached the Court is a violation of this set procedure and hence in violation of **Article 25 (c)** of the **Constitution** and thereby rendering the present Petition an abuse of the Court process.

13. It was the Respondent's other position that whereas the powers of the Court to investigate allegations of breach of the Constitution are enshrined in **Article 23 (1)** of the **Constitution**, it does not take away the fact that where the Constitution itself has laid down the path towards resolution of an issue, that procedure must be followed and additionally, that the orders sought in the Petition making a declaration on his integrity based on allegations that are pending before a competent Court of equal jurisdiction is injurious to the public interest.

14. In support of his allegations that the Petition is *res judicata*, the Respondent maintained that the matters raised in the Petition have been previously dealt with in **Godfrey Mwaki's case (supra)** and in

IEBC/DRC/KCBE/6/2015, and as such, the Court cannot re-open the issue.

15. Accordingly, that the Petitioner has not demonstrated in any manner that **Article 99 (3)** of the **Constitution** threshold has been met in regard to the alleged integrity issues and as such, this Court's jurisdiction is ousted. Further, the Petitioner has not complied with **Rule 9** of the **Oaths and Statutory Declarations Act Rules** in that in affixing his 'exhibits' to his Affidavit, he has lumped a series of documents into one exhibit which has included a fraudulent, forged, a purported Certificate of Primary Education in the name of one 'Clifford Ndung'u Waititu'. In the Respondent's view, the Rule requires that the said document be marked independent of any other for purposes of production as exhibit. In that regard, the Respondent pointed out that the failure to mark the particular document as an independent exhibit is in breach of the said Rule and not the contents of the said documents therein, as that would be an issue of mixed law and fact.

16. The Respondent finally relied on the decision in **Stanley Kilimo Kore vs. Edward Katama Ngeywa and 2 Others [2013] eKLR** for his final submission that the Independent Electoral and Boundaries Committee has to be moved via a complaint in order to perform its constitutional and statutory mandate in the inquiry into any dispute brought to its attention and for its subsequent resolution.

17. For the foregoing reasons therefore, the Respondent urged the Court to uphold its Preliminary Objection and dismiss the Petition with costs to him.

The Petitioner's Response

18. Mr Issa Mansur urged the Petitioner's case.

19. In his Written Submissions dated 4th May 2016, the Petitioner submitted that he seeks to enforce the provisions of **Chapter Six** of the **Constitution** on leadership and integrity and hence, the Petition is not in any way questioning the election of the Respondent as a Member of the National Assembly. It was his position that the jurisdiction of this Court flows from the Constitution as was stated by the Supreme Court in **In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR**. Further, that this Court is vested with the jurisdiction to hear any question of the interpretation of the Constitution and that under **Article 165 (3) (d) (ii)** and **(iii)**, the drafters of the Constitution specified the core areas of interpretation but that was not intended to be any matter with specific jurisdiction.

20. According to the Petitioner, **Chapter Six** of the **Constitution** does not limit or oust the jurisdiction of the High Court on matters of integrity and suitability to hold public office. Further, that this Court and the Court of Appeal has upheld the jurisdiction of the Court to determine any integrity issues that arise after elections and the suitability of a person to hold a public office, whether elective and appointive.

21. In the petitioner's view, a purposive interpretation of the Constitution will therefore confirm that this Court is the body mandated to interpret the national values and principles of governance under **Article 10** and **Chapter Six** of the **Constitution** in that regard, the Respondent relied on the holding in **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR**.

22. While relying further on the definition of the phrase 'integrity' as stated in **Trusted Society of Human Rights Alliance vs. Attorney General and 2 Others [2012] eKLR** and argued that the present Petition raises weighty issues of law and matters of great public importance to wit, the eligibility of the Respondent to seek or hold public office in view of Chapter Six of the Constitution and in light of the deliberate suppression of material facts and distortion of the truth by the Respondent in regard to his academic qualifications or lack thereof, blotting his integrity, character and probity.

23. The Petitioner asserted that the Petition raises numerous questions as to his integrity in view of his conduct thus:

- i. The Respondent claims to have obtained a degree certificate from Punjab University under names Clifford Ndung'u Waititu yet his birth certificate, National Identity Card and Kenyan Passport bear

the name Ferdinand Ndung'u Waititu;

ii. The Respondent claims to have worked as an accountant at the Treasury, yet the Public Service Commission has confirmed that he was never employed at the National Treasury; and

iii. The Respondent has made discriminatory and derogatory remarks against the Maasai people in public.

24. In the Petitioner's further view, the Petition herein invites the Court to make a determination *inter alia* as to whether, in light of the questionable academic qualifications and inflammatory public utterances, the Respondent is in breach **Chapter Six** and **Article 73** of the Constitution. The Petitioner placed further reliance on **International Centre for Policy and 5 Others vs. Attorney General and 5 Others [2013] eKLR** in support of his case and argued that **Section 74** of the **Elections Act** has no application to the issues raised in the Petition and cannot in any way oust this Court's jurisdiction to determine issues pertaining to Hon. Waititu's integrity.

25. The Petitioner relied on the authority in **Abdulrahman Ahmed Abdalla and 3 Others vs. Uhuru Kenyatta and Another eKLR** for the proposition that the Section of the Political Parties Act vesting the Political Parties Tribunal with jurisdiction to determine disputes between members of a political party did not oust the jurisdiction of the High Court. Additionally, it was the Petitioner's argument that under **Section 74** of the **Elections Act**, the jurisdiction of the IEBC is limited to disputes arising from the nomination process. As such, the petition does not question the nomination process and hence it is properly before this Court.

26. According to the Petitioner, under **Section 4(2)** of the **Leadership and Integrity Act**, the role of the Ethics and Anti-Corruption Commission is to enforce and oversee the implementation of the Act and its role in that regard is complementary to that of this Court and as such, if the Court deems it appropriate to have the present Petition transferred to the Commission, that would be an appropriate remedy within this Court's jurisdiction. In any event however, the Section does not in any way oust the Court's jurisdiction to interpret and give meaning to **Chapter Six** of the **Constitution**.

27. Furthermore, the Petitioner contended that a reading of **Article 79** of the **Constitution**, **Section 4 (2)** of the **Leadership and Integrity Act**, and **Section 11 (d)** of the **Ethics and Anti-Corruption Act** clearly demonstrates that this Court has the jurisdiction to determine the question of the integrity of a State officer. That without any prejudice to the foregoing, in some instances, the Ethics and Anti-Corruption Commission plays a complementary role to the Court and in view of **Article 252 (2)** of the **Constitution**, where one has a complaint about a State officer's suitability to be in office on account of lack of integrity, one may elect to make a complaint to the Ethics and Anti-Corruption Commission or invoke this Court's jurisdiction. The Petitioner in that regard relied further on **Isaac Aluoch Polo Aluochier vs. Attorney General and 2 Others [2013]eKLR** and **Benson Riitho Mureithi vs. J.W Wakhungu and 2 Others [2014] eKLR**.

28. On whether the Petition herein is *res judicata*, it was the Petitioner's position that the contentions in that regard by the Respondent are unmerited. While associating himself with the holding of the Courts in **Karia and Another vs. Attorney General and Others [2005] 1 EA 83** and **Okiya Omtatah Okoiti and Another vs Attorney General and 6 Others [2014] eKLR**, it was his further argument that juxtaposing the instant Petition with **Godfrey Mwaki Kimathi and 2 Others vs. Jubilee Alliance Party and Others, Petition No. 102 and 145 of 2015**, the Respondent's plea of *res judicata* does not meet the minimum requirements outlined in the **Karia and Another vs Attorney General case (supra)**.

29. Accordingly, that the cause of action in the **Godfrey Mwaki Kimathi and 2 Others Case (supra)** was fundamentally different from the present case as it was brought against the Jubilee Alliance Party and the Independent Electoral and Boundaries Commission challenging the Respondent's nomination to vie for a seat as the representative of Kabete Constituency in the National Assembly. As such, the instant Petition does not touch on the Respondent's nomination. Furthermore, that in the said two cases, the Court unequivocally stated that they had not determined the integrity or otherwise of the Respondent and

therefore that remains to be determined.

30. In the Petitioner's further view, the Respondent has not brought forth any evidence of the proceedings in **IEBC/DRC/KCBE/6/2015** to aid the Court in determining whether the issues in the said matter are the same as those before this Court and in any event, the copy of the Ruling adduced by the Respondent reveals that the Independent Electoral and Boundaries Commission took the position that it had no mandate to determine integrity issues and hence it is justifiable for the Court to assert its jurisdiction.

31. The Petitioner finally submitted that the instant Petition meets the standard set for reference to the Chief Justice for the empanelling of a bench of an uneven number of Judges not being less than three to hear the Petition under **Article 165 (4)** of the **Constitution**.

32. For the foregoing reasons, the Respondent urged the Court to dismiss the Preliminary Objection herein with costs and send the file to the Chief Justice for the empanelling of a bench.

Determination

33. Considering the Parties' respective pleadings and submissions, both oral and written, the key issues for determination obtain in the Notice of Preliminary Objection.

34. The law on Preliminary Objections is well settled and it is that Preliminary Objections must basically be purely founded on questions of law and the Court ought not to engage on matters that shall call for evidence from either Party: see **Mukisa Biscuit Manufacturing Company Ltd vs. Westend Distributors Ltd (1969) EA 696** and **Kenya Council of Employment Migration Agencies vs. Nyamira County Government and 10 Others, Petition No. 1 of 2015**.

35. I shall therefore limit my findings in the present Preliminary Objection on matters purely of law. In that regard, the first ground adduced by the Respondent is that this Court lacks the jurisdiction to entertain the Petition.

36. On that basis, the importance of the jurisdiction of the Court to hear and determine a matter cannot be gainsaid and that is why the Supreme Court in the **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank and 2 Others, Application No. 2 of 2011**, pronounced itself on jurisdiction thus:

"[68] 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Respondent), Constitutional Application Number 2 of 2011. 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."(Emphasis provided).

37. Furthermore, in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd and 4 Others, Petition No. 27 of 2014, Ibrahim SCJ**. Opined that:

"[16]This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant's pestering. The

Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework.... Courts of justice have the jurisdiction to do justice and not injustice...
(Emphasis added)

38. Against that background, the question then that I must pose is whether this Court has the jurisdiction to hear and determine the present Petition.

39. In that context, I must begin by firstly stating that Prayers (a) and (b) do not raise any constitutional issues to warrant the jurisdiction of this Court under **Article 165 (3)** of the **Constitution**. It therefore follows that the ultimate issue for determination shall be whether Respondent has acted contrary to **Articles 10 (2)** and **73** of the **Constitution** to warrant a declaration to that effect.

40. **Article 10 (2)** of the **Constitution** provides that:

The national values and principles of governance include-

- a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
- b. Human dignity, equity, social justice, non-discrimination and protection of the marginalized;*
- c. Good governance, integrity, transparency and accountability; and*
- d. Sustainable development.*

41. **Article 73** on the other hand prescribes for the responsibilities of leadership in the following terms thus:

1. Authority assigned to a State officer-

a. Is a public trust to be exercised in a manner that-

- i. Is consistent with the purpose and objects of this Constitution;*
- ii. Demonstrates respect for the people;*
- iii. Brings honour to the nation and dignity to the office; and*
- iv. Promotes public confidence in the integrity of the office; and*

b. Vests in the State officer the responsibility to serve the people, rather than the power to rule them.

2. The guiding principles of leadership and integrity include-

- a. Selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*
- b. Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*
- c. Selfless service based solely on the public interest, demonstrated by-*
 - i. Honesty in the execution of public duties; and*

ii. *The declaration of any personal interest that may conflict with public duties;*

d. *Accountability to the public for decisions and actions; and*

e. *Discipline and commitment in service to the people.*

42. **Article 79** of the Constitution in that regard mandates Parliament to establish the Ethics and Anti-Corruption Commission with powers of a commission under **Chapter Fifteen** of the **Constitution**, for purposes of ensuring compliance with, and enforcement of, the foregoing provisions.

43. A closer perusal of the Petition would reveal that the Petitioner largely challenges the academic credentials of the Respondent. The Petitioner makes various allegations for instance at various paragraphs namely:

“(28) The Respondent deliberately suppressed material facts in relation to the First Schedule of the Leadership and Integrity Act, in purporting to be the person who graduated from Punjab University.

(41) It is a mandatory requirement that such information is supplied on oath under the penalty of false declaration under the Oaths and Statutory Declarations Act and your Petitioner avers that the Respondent made a false declaration and hence committed the offence of perjury in law.

(42) The Petitioner avers that the deliberate suppression of material facts and distortion of the truth are a blot on a candidates integrity, character and probity, which in turn renders them ineligible to seek or hold any public office.

(43) Your Petitioner is also aware that on 25th June 2014 the Respondent by way of an Affidavit sworn on 11th January 2013 purported to claim that he is the same person as Clifford Ndung’u Waititu who sat for the Certificate of Primary education in Mbagathi Primary School in 1975. The false deposition is dishonest and amounts to identity theft in law. Your Petitioner avers that such an act of the Respondent constitutes criminal conduct punishable under the Penal Code and violates Section 13 of the Leadership and Integrity Act.

(44) Your Petitioner avers that as a consequence of the acts complained of against the Respondent under the foregoing paragraphs, the Respondent has committed acts expressly prohibited by statute and is therefore unfit to hold a public office in that the Respondent is guilty of:

i) Gross violation of the Constitution,

ii) Gross misconduct,

iii) Breach of the Penal Code and the Leadership and Integrity Act.

AND, he is therefore, unsuitable to hold a public office by dint of his conduct complained of herein.

(55) On 24th of September 2012, the Respondent uttered the following words, which vilified and debased the Maasai people inter alia. ‘...tunasema namna hii kutoka leo hio wamasai wote hatutaki kuwaona hapa Kayole. Wamaasai wote nilazima waondoke niwatumwe Tanzania na hawana vitambulisho, watu wetu wanaweza kufanya kazi ya watchman.’

(56) That the acts complained of hereinabove were discriminatory and derogatory of members of the Maasai community, who form part and parcel of the Kenyan nation and fabric.

(56) That it is a criminal offence and contrary to the values espoused in the letter and spirit of the Constitution, if the unlawful vilification includes a threat of harm to a person or their property. The

unlawful vilification is therefore:

a) a public act as was the case with the Respondent.

b) was inciteful,

c) portrayed hatred towards, serious contempt for, or severe ridicule of Maasais.

d) was discriminatory on the ground of race, religion, sexuality or gender identity of the person or group.

(58) That the Respondent by his utterances was in breach of Article 73 of the Constitution and Section 13 of the Leadership and Integrity Act and therefore unfit to hold any public office in the Republic of Kenya.

44. Effectively, the Petitioner is questioning the Respondent's integrity, leadership qualities and ability to hold (a public) office.

45. It is also worthy of note that the Petitioner has outlined various issues, which in his view ought to be determined by the Court and among them, is that: "*Whether the Court should recommend the prosecution of the Respondent for deliberate violations of the Constitution or the Leadership and Integrity Act*".

46. Does this Court then have the jurisdiction to hear and determine the issues aforesaid? My answer to that is in the negative. I hold so firstly because, the issues raised by the Petitioner, and which he seeks this court to interrogate, touch on matters within the purview of other constitutional bodies such as the Office of the Director of Public Prosecutions and the office of the Inspector General of the National Police Service which are enjoined to undertake investigations. It will be noted that under **Article 245 (4) of the Constitution**, no person may give a direction to the Inspector General with respect to the investigation of any particular offence or offences; and the enforcement of the law against any particular person or persons. Furthermore, pursuant to **Article 157 (10) of the Constitution**, the office of the Director of Public Prosecutions is an independent office which does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of those powers or functions, the office is not under the direction or control of any person or authority.

47. In the Petition, the Petitioner by his own admissions asserts that the Respondent's acts constitute criminal offences and that he is in breach of the Penal Code and the Leadership and Integrity Act. In that context, he even concludes that the Respondent is guilty and hence should be declared unfit to hold office. The admission as to there being criminal offences being committed is by itself sufficient reasons to warrant the Petitioner to move the relevant organ be it the National Police Service or the Director of Public Prosecutions for them to take action within their mandate.

48. In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of **Article 165 (3) (a) of the Constitution**, that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of **Articles 10 (2) and 73 of the Constitution**.

49. I hold the view that the Petitioner's contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations.

50. It is also uncontested that the Leadership and Integrity Act was enacted as a derivative statute to give

effect to **Chapter Six** of the **Constitution**. I must quickly refer to the holding in **Charles Omanga and 8 Others vs. Attorney General and Another, Petition No. 29 of 2014** where Majanja J., noted thus:

“[29] The Leadership and Integrity Act (“theAct”) is legislation enacted to, inter alia, establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution.”

51. The Leadership and Integrity Act specifically empowers the Ethics and Anti-Corruption Commission the role to oversee the implementation and enforcement thereof. It is thus incumbent that any person, who feels that the Act has been contravened, ought to move the relevant bodies charged with the mandate under the Act.

52. I must further state that this Court has the general jurisdiction to enforce **Chapter Six** of the **Constitution** pursuant to Article 165 but such jurisdiction is to be exercised subject to existing and especially derivative statutes, if any. The doctrine of subsidiarity would so dictate and in the instant case the Leadership and Integrity act, which was enacted to give effect to Chapter Six of the Constitution is the relevant statute. In the present case however, and for the above stated reasons, it would be premature for this Court to exercise its jurisdiction on matters that fall within the jurisdiction of other authorities specifically mandated under the Leadership and Integrity Act.

53. Based on my reasoning above, I am satisfied that the Preliminary Objection herein must succeed on the ground that the Court does not have the jurisdiction to hear and determine the Petition, and more specifically, issues dealing with the Respondent’s integrity. The court cannot in the circumstances of this case be the first port of call. The appropriate organs namely, the Office of the Director of Public Prosecutions, the National Police Service and the Ethics & Anti- Corruption Commission ought to be moved first and as may be appropriate.

56. Having reached the conclusion that the Preliminary Objection herein succeeds on the ground of no jurisdiction on the part of this Court, I am not inclined to address my mind to other issues raised by the Notice of Preliminary Objection. However, I shall address and place my mind on the same for a more conclusive disposal.

55. In that regard, the Respondent further asserted that the Petition ought to be dismissed on the basis that the Petitioner relied on a fraudulent, forged document being a copy of a purported Certificate of Primary Education in the name of Clifford Ndung’u Waititu, and hence the alleged forgeries have been suppressed and concealed by violating **Rule 9** of the **Oaths and Statutory Declarations Act Rules**. In that regard, I must out rightly remind the Parties that the allegations in regard to forgery ought to be raised with the relevant authorities for the necessary action to be taken. I hold so because, **Section 345** of the **Penal Code, Chapter 63 of the Laws of Kenya** defines the word ‘*forgery*’ as:

The making of a false document with intent to defraud or to deceive

Section 347 (d) (i) thereof stipulates thus:

Any person makes a false document who signs a document in the name of any person without his authority, whether such name is or is not the same as that of the person signing.

Section 349 thereof provides for the punishment for the offence of forgery in the following terms:

Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

56. The above provisions thus make it clear that forgery is a criminal offence and hence it is necessary that the relevant Court for the Court to determine whether there has been any such forgery committed. In that regard, the determination of whether there has been any forgery, where the alleged forgery or fraud

does not constitute a cause of action, as alleged is not within the purview of this Court and as such that ground in the Preliminary Objection must fail.

57. The final ground raised by the Respondent is that the matters raised in the Petition are *res judicata* and have been dealt with in **Godfrey Mwaki Kimathi and 2 Others vs Jubilee Alliance Party and Others [2015]eKLR** and **IEBC/DRC/KCBE/6/2015**. It will be noted that the law on *res judicata* is outlined generally in **Section 7** of the **Civil Procedure Act** which is to the effect that:

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

59. The Civil Procedure Act additionally has explanatory notes as to the components of the doctrine of *res judicata* whose effect is that the expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it and that the matter presently being litigated upon must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. In essence, the effect of the doctrine is that litigants are barred from continuously litigating over matters that have already been litigated upon and heard and determined on merits by Courts of competent jurisdiction.

59. In the cases of **Aggrey Chiteri vs. Republic [2016]eKLR** and **Edward Okongo Oyugi & 2 Others vs. The Attorney General [2016]eKLR**, this court held that the doctrine of *res judicata* applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice. So said the court in **Edward Okongo Oyugi & 2 Others vs. The Attorney General [supra]**:

“[11] The application of the principle of res judicata has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed off without venturing into the merits. Consequently, the factors and circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case”

60. Have the matters raised in the Petition been determined on merits in the two aforesaid cases? I note that in the **Godfrey Mwaki Case (supra)** the case revolved around the question of the nomination of the Respondent, as a Jubilee Alliance Party candidate for By-elections that had been slated for 4th May 2015. The Petitioner’s therein challenged the decision by the Independent Electoral and Boundaries Commission to clear Mr. Waititu. In that regard, the Petitioners therein sought the following orders:

“(1) That a declaration be issued under Article 73 of the Constitution as read with the Fifth and Sixth schedule to the Constitution, the Respondent is under a duty to have regard to personal integrity, character, and suitability prior to issuing the Interested Party with the clearance certificate to vie for the seat of Member of Parliament (MP), of Kabete constituency.

(2) That a declaration be issued that the Respondent has failed to have regard to the personal integrity, character, competence and suitability of the Interested Party when it issued him with the clearance certificate to vie for the seat of Member of Parliament of Kabete (MP), Constituency.

(3) That a declaration be issued that the Respondent’s failure or omission to consider the personal integrity, character, competence and suitability of the Interested Party when issuing him with the clearance certificate is illegal and unconstitutional.

(4) That a declaration be issued that the Respondent is to have regard to the personal integrity, character, competence and suitability of a candidate before issuing them with clearance to vie

for any elective public office. The clearance of the Interested Party therefore is void ab initio and ought to be struck off to pave way for nomination of a suitable candidate.

(5) That an order do issue directing the Respondent to take steps to ensure that regard to the personal integrity, character, competence and suitability of a candidate before issuing them with clearance certificates to vie for any public office.

(6) That the 1st Respondent be ordered to nominate another person forthwith to vie for the parliamentary elections for Kabete Constituency.

(7) That the costs of, and incidentals to, this Petition be awarded to the Petitioner against the Respondent.

(8) That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.”

61. A perusal of the said Judgment indicates that the key challenge in that Petition was in regard to the nomination of the Respondent to vie for the parliamentary elections for Kabete Constituency. Once again, it was a question of the Respondent's integrity. Juxtaposing the **Godfrey Mwaki Case** to the instant Petition, it will be noted that the Petitioner challenges the participation and subsequent election of the Respondent as a Member of the National Assembly of Kabete Constituency. In that regard, at **paragraph 59 (iii)** of the Petition, the Petitioner outlines one of the issues for determination as:

“Whether the Respondent (Mr. Waititu) has violated the oath of office under Article 74 of the Constitution as Member of the National Assembly by contesting and participating in the Kabete by-elections and assuming office in breach of the Leadership and Integrity Act.”

62. In that context, and in light of the findings of the Court in the **Godfrey Mwaki Case (supra)**, it is apparent that the question of the validity and constitutionality or otherwise of the participation of the Respondent in the Kabete By-elections was duly addressed by Odunga J. and as such, this Court cannot open an inquiry into the said issue. The mere fact that the Petitioner was not a Party to the **Godfrey Mwaki Case (supra)** cannot be a basis for him re-opening the issue of whether the participation of the Respondent in the By-elections was unconstitutional.

63. In my view, if the Petitioner had any challenges to the participation of the Respondent in the said By-elections, he ought to have raised the same at that particular time and with the Independent Electoral and Boundaries Commission which had cleared him the Respondent to participate and contest in the same. By dint of **Article 88 (4)(e)** of the **Constitution**, the Independent Electoral and Boundaries Commission has the mandate of settling electoral disputes, including disputes relating to or arising from nominations of candidates to vie for elections. In the present case, as evidenced by the **Godfrey Mwaki Case (supra)**, such a challenge was made and it subsequently ended before the Court. The question of the constitutionality or otherwise of the participation of the Respondent in the Kabete By-elections thus remains *res judicata* and it will be an absurdity for this Court to open an inquiry into the same. There is, in short, a case made out by the Respondent for issue preclusion and I agree.

64. As regards **IEBC/DRC/KCBE/6/2015**, I have seen the Ruling rendered by the Dispute Resolution Committee of the Independent Electoral and Boundaries Commission on 31st March 2015. As can be discerned from the Ruling, the complainants were Stephen Charles Maina and Naomi Wambui. They alleged that the nomination of the Respondent by the Jubilee Alliance Party in regard to the Kabete Constituency By-election that had been scheduled for 4th May 2015 was improper. In the Ruling, the Tribunal notes thus:

“The Complainants allege violations of gross misconduct and disrespect for the law by the 2nd Respondent and cite in particular, public incitement against members of the Maasai communities while serving as Member of Parliament of Embakasi Constituency and a view to

injuring them and causing actual bodily harm.”

65. The Tribunal then set out the issues for determination as follows:

“(1) Whether the Dispute Resolution Committee has jurisdiction in the matter? And whether the Committee has jurisdiction to determine matters of integrity?”

(ii) Whether the 1st Respondent has the legal duty to investigate the affairs of the 2nd Respondent to ensure that he is suitable for office? Whether the 1st Respondent exercised due diligence in establishing the suitability of their candidate?

(iii) Whether the 1st Respondent violated the principles of Chapter Six of the Constitution of Kenya.

(iv) Whether the 2nd Respondent is eligible to present his nomination papers to the Returning Officer?”

66. The foregoing thus indicates that the complaint in the said matter as well related to the nomination of the Respondent’s nomination by the Jubilee Alliance Party to vie for the Kabete By-elections.

67. Based on my above analysis and reasoning, I’m satisfied that the Preliminary Objection herein must succeed.

68. I do not need to address my mind to the question as to whether the matter should be referred to the Chief Justice for the empanelling of a bench under **Article 165 (4)** of the **Constitution** for the now pretty obvious reasons.

Conclusion and Disposition

69. I conclude by stating that issues of integrity could be dogging the Respondent but it is not for this court to determine whether the issues are well founded. The forum here is *non conveniens*. I am satisfied that the Petitioner has access to the appropriate alternate forums.

70. Where the Constitution has placed faith on various institutions to undertake certain mandate and functions, this court must also oblige and extend that faith to those institutions or organs. I will do so now by declining to entertain the instant Petition in its entirety.

71. The Preliminary Objection Application dated 4th April 2016 succeeds on the ground that this Court does not have the jurisdiction to entertain the Petition and that the constitutionality or otherwise of the participation of the Respondent in the Kabete By-elections is *res judicata*.

72. The Petition dated 10th March 2016 is hereby struck out with costs to the Respondent.

Dated signed and delivered this 7th day of December 2016

J.L.ONGUTO

JUDGE