REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION NO. 44 OF 2013

IN THE MATTER OF: ARTICLES 1, 2, 3, 19, 10, 21, 22, 23, 47, 88, 120 AND 258 OF THE

CONSTITUTION AND THIRD SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 38, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:THE PURPORTED NOMINATION AND ELECTION OF HASSAN ALI JOHO AS THE GOVERNOR OF MOMBASA COUNTY COMMENCING MARCH, 2013

AND

IN THE MATTER OF: THE QUALIFICATIONS AND REQUIREMENTS FOR NOMINAITON OF

CANDIDATES FOR ELECTION TO THE POSITIONS OF GOVERNOR AND DEPUTY GOVERNOR

AND

IN THE MATTER OF: THE IMPLEMENTATION AND OF ADHERENCE WITH THE

ELECTIONS ACT, 2011 (ACT NO. 24 OF 2011).

BETWEEN

SILAS MAKE OTUKE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (I.E.B.C.).....2ND RESPONDENT

AND

HON. HASSAN ALI JOHO.....1ST INTERESTED PARTY

HAZEL EZABEL NYAMOKI OGUNDE.....2ND INTERESTED PARTY

RULING

Introduction

On 20th August, 2013 Silas Make Otuke (hereinafter the Petitioner) filed a Petition against the Hon. Attorney General, the Independent Electoral and Boundaries Commission (I.E.B.C.), as the first and second Respondents, and Hon. Hassan Ali Joho and Hon. Hazel Ezabel Nyamoki Ogunde, respectively the Governor and Deputy Governor of the County of Mombasa, as the 1st Interested Party and 2nd Interested Party.

The Hon. Attorney General is sued in his capacity, as the principal adviser to the government and his mandate under Article 156 of the Constitution. The I.E.B.C. is the independent commission responsible under Article 88 of the Constitution for conducting and supervising referenda and elections to any elective body or office established by the Constitution.

The gist of the averments in the Petition is that the 1st Interested Party was not qualified to be nominated to vie for the position of Governor by virtue of the fact that he did not hold a degree certificate from a recognized university, a requirement of the Elections Act. Consequently that his nominations as a candidate and subsequent election to the office of Governor constitutes a nullity. The Petitioner's claims are stated to be based upon adverse findings through investigations conducted by relevant authorities in Uganda into the question whether the 1st Interested Party holds a degree from Kampala University.

The Petitioner therefore contends that the 1st Interested Party obtained nomination to vie for the Governor's office in a fraudulent manner. Further that by virtue of the foregoing the 1st Interested Party lacked capacity to nominate the 2nd Interested Party as a running mate, which action is also a nullity. The Petitioner seeks the following prayers:

> ***1. That the part of Gazette Notice No. 3155 dated 13.3.2013 which published that HASSAN ALI JOHO and HAZEL EZABEL NYAMOKI OGUNDE as the Governor and Deputy Governor of Mombasa County, respectively be declared as null, void and of no legal consequence. Further that all the nominations and appointments that have been effected by the said HASSAN ALI JOHO and HAZEL EZABEL NYAMOKI OGUNDE in purported exercise of their powers as Governor and Deputy Governor of Mombasa County respectively since 13.3.2013 be declared as null, void and of no legal consequence.***
>
> ***2. That the 2nd Respondent be ordered to carry out fresh elections to fill up the offices of Governor and Deputy Governor of Mombasa County.***
>
> ***3. That costs of this petition be paid by the 2nd Respondent and the 1st and 2nd Interested Parties jointly and severally.***
>
> ***4. Any other relief that the Court may deem fit to grant.***

The Petitioner has sworn several affidavits in support of the Petition.

Preliminary Objections

In response to the Petition, the 1st Interested Party raised a preliminary objection through the firm of

Mogaka Omwenga & Mabeya Advocates taking issue with Petition which he described as an abuse of the Court process for the reason that the matters raised are res judicata Nairobi Petition No. 116 of 2013 ***Janet N. E. Mbete v I.E.B.C. & Others*** and Mombasa Election Petition No. 8 of 2013 ***Suleiman Said Shahbal v IEBC and 3 others***. The Court's jurisdiction to entertain the matter was also objected to. A second preliminary objection was filed by the 2nd Interested Party on 20th October, 2013. Substantially this preliminary objection echoes the grounds in the first preliminary objection but in addition ground 6 therein asserts that the question of nominations ***"****ought to have been dealt with in accordance with the provision section 74 of the Elections Act and not otherwise."*

The Petitioner also filed a preliminary objection to the preliminary objections by the Interested Parties, which is basically an answer to the said preliminary objections. The key plank therein is that there is no legal grounding for the raising of a preliminary objection in a Constitutional Petition. With regard to Nairobi High Court Constitution Petition No. 116 of 2013 ***Janet N. E. Mbete v I.E.B.C. & Others,*** (hereinafter the ***Mbete*** *case*) it is asserted that the decision thereon is a subject of appeal and is therefore not final.

On 14th February, 2014 the 2nd Interested Party filed a further preliminary objection. This further preliminary objection was centered on the question of eligibility of persons to vie for the position of Governor as prescribed in Article 192 as read with Article 180 (2) of the Constitution. This further preliminary objection was withdrawn through a notice filed on 27th February, 2014.

On the 19th February, 2014 there was filed a preliminary objection by the firm of Balala & Abed Advocates described in the notice as advocates for the 1st Respondent. However, the preliminary objection itself is entitled as the "1ST INTERESTED PARTY'S NOTICE OF PRELIMINARY OBJECTION" (sic). This preliminary objection cites Article 181 of the Constitution and related provisions of the County Governments Act and asserts that the Court has no jurisdiction to entertain this Petition. Secondly, it raises the defence of issue estoppel in regard to the question of *"the validity of the degree issued to the 1st Interested Party."* It would seem as confirmed at the hearing that the firm of Balala & Abed Advocates was acting alongside the firm of Mogaka Omwenga & Mabeya Advocates for the 1st Interested Party, hence the preliminary objection dated 19th February, 2014 is really a further preliminary objection or further grounds to the earlier preliminary objection by the same party.

On 17th June, 2014 this court directed that the two preliminary objections by the Interested Parties be first disposed of. Parties agreed to exchange and file written submissions in that regard. Oral submissions were received on 23rd July, 2014 with Mr. Gikandi representing the Petitioner, Mr. Eredi for the 1st Respondent, Mr. Khagram for the 2nd Respondent, Mr. Mogaka and Mr. Balala for the 1st Interested Party and Mr. Buti for the 2nd Interested Party.

Factual Background

The undisputed facts, forming the background to this case are as follows: The 1st & 2nd Interested Parties are the Governor and Deputy Governor, respectively, Mombasa County having been elected into office in the General Election held in March, 2013. Prior to the said election, one Janet N.E Mbete had challenged the nomination and candidature of the 1st Interested Party as approved by IEBC (Nairobi Petition 39 of 2013 ***-Janet Ndago Ekumbo Mbete v Hon Attorney-General & Others.)*** She sought inter alia a declaration that the 1st Interested Party and his running mate the 2nd Interested Party did not meet the basic academic qualification for the governor's office, namely a degree from a university recognised in Kenya. This Petition was dismissed and it would seem the said Petitioner subsequently lodged her complaints with IEBC, who nonetheless proceeded to process the nomination papers presented by the 1st Interested Party and issued him and his running mate with a nomination certificate.

The Petitioner went back to court by filing the ***Mbete*** *Case* seeking , *inter alia,* a declaration nullifying the said nomination certificate and an order of prohibition against the 1st Interested Party from contesting

position of Governor Mombasa County. By the date the judgment was delivered on 15th March, 2013 the general elections had been held. The Petition was dismissed for want of evidence that the 1st Interested Party's degree was fraudulently obtained.

Another Constitutional Petition by an unsuccessful candidate, Nairobi Constitutional Petition no. 162 of 2013 ***Suleiman Said Shahbal v IEBC & 3 others*** the latter who included the 1st Interested Party, was filed in the same period to restrain the IEBC from, *inter alia*, gazetting or swearing in the 1st Interested Party and an order for the repeat of the elections. This Petition was struck out and the Petitioner advised to file a proper Election Petition which he did. The Mombasa Election Petition No. 8 of 2013 ***Suleiman Said Shahbal v IEBC & 3 Others,*** was unsuccessful.

Issues Raised by the Preliminary Objections

Broadly speaking, the preliminary objections by the 1st Interested Party and by the 2nd Interested Party raised similar issues which fall into three related categories: jurisdiction, res judicata and issue estoppel. It is therefore unnecessary to restate separately the individual submissions by the counsel appearing for the parties. Upon considering the oral and written submissions that have been made, as well as the Petition as filed, we have identified the following broad issues for determination:

1. What is the true nature of the proceedings before us? Is the Petition a disguised nomination dispute/election petition or a petition seeking the removal of governor?

2. In view of the previous undisputed litigation, in particular the ***Mbete*** *case*, Constitutional Petition no.116 of 2013, is this Petition barred under the doctrine of *Res Judicata* or issue estoppel?

3. Whether the Petition is tenable or liable for striking out. Does the Court have jurisdiction to strike out a Petition?

NATURE OF THE SUIT BEFORE THE COURT AND THE COURT'S JURISDICTION

It was submitted on behalf of the 2nd Respondent that notwithstanding the invocation of diverse articles of the Constitution on the face of the Petition, a plain reading of the key averments (paragraphs 7-9) and (11-14) as well as the prayers, this matter presents a nomination dispute. By virtue of the mandate vested upon the IEBC by Article 88, of the Constitution, section 74 of the Elections Act and Rules made there-under the jurisdiction for settlement of nomination disputes lies exclusively with the IEBC. The case of ***Jared Odoyo Okello v IEBC & Others ,***Kisumu H.C Election Petition No.1 OF 2013 [2013] eKLR was cited as authority for this proposition and that the jurisdiction of the High Court can only be invoked under Article 165 (6) upon the exhaustion of the IEBC dispute resolution process. This is the deferent approach also urged in the ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others,*** Court of Appeal at Nairobi, Civil Appeal No. 290 OF 2012 [2013] eKLR. (the ***Mumo Matemu*** *case*)

Secondly, Mr. Buti for the 2nd Interested Party argued that this Petition, not being in its nature a dispute arising from an election and therefore brought as an Election Petition under the Elections Act, cannot3 yield the kind of orders sought in the prayers therein. Besides, a Constitutional Court, not being an election court within the meaning of the Elections Act, lacks jurisdiction. In this regard several decisions flowing from the *locus classicus*, ***Speaker of the National Assembly v Karume (***2008) 1 KLR (EP) 425 (***Karume's*** *case*) were relied upon as authority for the proposition that where the Constitution and the law prescribe clear procedures for redress of any grievance, such procedure ought to be strictly followed. (see also ***Kipkalya Kiprono Kones v R & Anor ex parte Kimani wa Nyoike & 4 Others,*** **Suleiman Said Shahbal v IEBC & 3 Others** (2013) eKLR and Mombasa Civil Appeal No. 106 of 2010 (UR) ***Mohamed Salim & Others v Municipal Council of Mombasa & Anor*** As a corollary, it was argued that the Constitution and the Elections Act provide a very strict time limitation for the filing and hearing of electoral disputes and that the Petitioner was using a "backdoor" to perpetuate electoral litigation.

Mr. Balala submitted that despite the invocation of many rights and fundamental freedom articles in the

title of the Petition, there is no pleading in the body of the Petition to support breaches thereof. Referring specifically to paragraph 15 of the Petition, Mr. Balala questioned whether the integrity of degrees from Ugandan universities is a Constitutional right worthy of protection. He cited ***Tom Kusienya & 11 others v Kenya Railways Corporation*** Nairobi Const. Petition No. 353 of 2012, [2013] eKLR where Lenaola J. adopted the finding in ***Minister for Home Affairs v Bickle & Others*** (1985) LRC (Const.) as applied in ***Papinder Kaur Atwal v Majit Singh Arut*** NBI Petition No. 236 of 2011 that not every breach of rights becomes actionable under the Bill of Rights as a Constitutional question, and moreover that, where other avenues exist for obtaining a remedy the Constitutional Court will decline to take up such a question.

Mr. Balala also took issue with the alleged failure by the Petitioner to specifically plead the breach alleged and invited the Court to consider the observations of the Court of Appeal in the ***Mumo Matemu*** in this regard. He argued that on the basis of the decision of the Supreme Court in ***Hassan Ali Joho v Shahbal and 2 Ors.,*** case *No. 10 of 2013* (2014) eKLR, the nullification of the gazette Notice No. 3155 of 13th March, 2013 sought in prayer 1 cannot effectively remove the governor from office, or create a basis for ordering fresh elections which, at any rate, this court has no jurisdiction to do. He argued that the nomination, election and electoral disputes cycle is now completed and the only avenue remaining for the removal of a governor is impeachment in accordance with Article 181 of the Constitution and the County Governments Act, which procedure does not include a court, or the consequences of fresh elections as the Deputy Governor takes over pursuant to Article 182 (2) of the Constitution.

Mr. Khagram invited the Court to consider the pleadings and prayers in the Petition and to conclude that the Petition before the Court is an electoral dispute, which if allowed to challenge the election of the Interested Parties will open the proverbial Pandora's Box. The decisions in ***E.T. v. Attorney General & Anor.*** Nairobi Petition No 212 OF 2011 [2012] eKLR (***E. T****. case*) and ***Robert Mwangi v Shephered Catering Limited & Another,*** Nairobi Petition 84 of 2012 *[2012]eKLR* were reiterated by Mr. Khagram who also pointed out that the logic of the law in Nairobi Petition no. 162 of 2013 ***Suleiman Said Shahbal v IEBC & 3 others*** was the same flowing from the ***Karume*** *case*. He further contended that precious judicial time ought not to be expended on matters foreclosed by the Constitution and that the matter before the Court is an attempt to circumvent the Constitution.

In answer to the attack upon the prayers contained in the Petition, the Petitioner argued that this is a matter for the Court to determine upon hearing the Petition and making its findings on issues raised. To submissions that the Petition is a disguised election Petition filed out of time, Mr. Gikandi argued that the High Court always retains its supervisory jurisdiction under Article 165 of the Constitution to question the constitutionality of anything said to be done under the Constitution or any law. In the present case, such question is whether the 1st Interested Party satisfied the requirement under Section 22 of the Elections Act and whether in nominating him the IEBC complied with the law.

Secondly, counsel for the Petitioner submitted that any finding of fraud on the part of the 1st Interested Party regarding his acquisition of the degree certificate would raise the question of his compliance with Chapter Six of the Constitution on Leadership and Integrity. He further submitted that contrary to the submissions of the Interested Parties, nomination and elections are not a closed matter. He relied on the ***Mumo Matemu*** *case* for this submission and for the assertion that a suit is not defined by prayers sought but by the judicial determination or findings out of which orders flow.

Thus, according to Mr. Gikandi, the Petition before the Court is not an election Petition but a challenge based on alleged violation of the Constitution with regard to integrity issues under Article 10 of the Constitution as raised against the 1st Interested Party and IEBC; lack of accountability and transparency by IEBC contrary to Article 81, 82 of the Constitution and alleged fraudulent acts by the 1st Interested Party. Therefore the authorities cited by the Respondents and Interested Parties regarding election Petitions have no application in this matter.

Counsel urged the Court to hear the Petition so that "juridical effects", as anticipated in Rule 27 (2) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (**Mutunga Rules), are made known and thereby uphold the values and principles of the

Constitution. He contended that until the Petition is heard in full, the Court cannot determine whether it is a genuine Constitutional Petition or a disguised election Petition. Further, he argued that the Petition should not be defeated merely because it emanates from similar facts from which a second or third cause of action arose – whether criminal, electoral or Constitutional. He termed as misplaced and premature submissions to the effect that this Court lacks jurisdiction in view of the removal procedure of a Governor under Article 181 and 182 of the Constitution. He urged the Court to dismiss the preliminary objections.

Analysis and Determination

These proceedings were initiated by way of a Constitutional Petition which is the pleading the Petitioner stands on. The Petitioner cites numerous Articles of the Constitution including:

- Article 1- Sovereignty of the people
- Article 2- Supremacy of the Constitution
- Article 3- Defence of the Constitution
- Article 10- National Values & Principles of Governance
- Article 19- Bill of Rights, Purpose , Nature & Scope
- Article 21- Implementation of Rights & Fundamental Freedoms
- Article 22- Enforcement of Bill of Rights
- Article 23- Authority of High Court to uphold/enforce Bill of Rights
- Article 47- Right to Fair Administrative Action
- Article 88- Mandate of IEBC
- Article 120- Official languages of Parliament
- Article 258- Enforcement of Constitution.

As to the fundamental rights and freedoms allegedly contravened , the Petitioner has cited rights in Articles hereunder:-

- Article 27- Equality & Freedom from Discrimination
- Article 28- Human Dignity
- Article 38- Political Rights
- Article 47- Fair Administrative Action
- Article 50- Fair Hearing

The Petitioner also cited Section 22 of the Elections Act which states:

> "**Section 22. (1) A person may be nominated as a candidate for an election under this Act only if that person—**
>
> **(a) is qualified to be elected to that office under the Constitution and this Act; and**
>
> **(b) holds a certificate, diploma or other post secondary school qualification acquired after a period of at least three months study, recognized by the relevant Ministry and in such manner as may be prescribed by the Commission under this Act.**
>
> **(2)Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.**"

The Interested Parties and the Respondents have taken issue with the multiple citation of the Articles of the Constitution arguing that there is no nexus between them and the body of the Petition. Mr. Balala was particularly skeptical as to whether the Petitioner's interest to protect the credibility and integrity of Ugandan degrees as pleaded in paragraph 15 of the Petition is a right capable of enforcement. In his submissions, Mr. Gikandi highlighted Article 10, 165 (3) (d)(ii) and 258 of the Constitution and conceded that there may be need to provide further and better particulars and that the Petition can be amended, however urging that lack of particulars would not justify the draconian act of striking out a Petition.

We have looked at the body of the Petition and the cited Articles. Even on a cursory consideration, it is not possible to make an immediate connection between some of the Articles cited, for example Article 27 and 120 to the body of the Petition.

In the ***Mumo Matemu*** *case cited by both sides, the Court of Appeal had this to say concerning a similar pleading before it:*

> *"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court...The principle in* ***Anarita Karimi Njeru*** *(supra) underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to* ***Article 159*** *of the Constitution … Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in* ***Anarita Karimi Njeru*** *(supra) that established the rule that requires reasonable precision in framing of issues in Constitutional Petitions is an extension of this principle"*

The requirement for precise pleading is the essence of Rules 4 & 10 of the **Mutunga** Rules upon which the Petitioner has placed much reliance. A clearer form of pleading would have left little room for speculation regarding the rights and fundamental freedoms that the Petitioner is seeking to enforce under Article 22 of the Constitution. From his pleading, it is not discernible whether the Petitioner is alleging contravention or infringement of his political right, right to equality and protection from discrimination, to fair hearing and fair administrative action there being no corresponding pleading in the body of the Petition. For instance, regarding Article 38 of the Constitution (political rights) he does not even claim to be a resident or registered voter in Mombasa County. Indeed in the affidavit sworn in support of this Petition and other affidavits filed, the Petitioner describes himself as a resident of Nairobi. In view of all the foregoing, we think the concession by Mr. Gikandi regarding the wanting state of the pleadings was the right thing to do.

Now moving on to the question whether the Petition is a disguised electoral Petition or nomination dispute, our first observation is that the advocates for the Interested Parties and the Respondents have ably and accurately stated the law governing nomination and electoral disputes. Secondly, we agree that if indeed the Petition before us is an electoral dispute whether in masquerade or not, we would have no jurisdiction to entertain it.

In attempting to characterize the Petition as a nomination /electoral dispute the Interested Parties and Respondents dwelt upon the constant reference to the question of nomination in the Petition (paragraphs 7,8,9,11,12,14,16) and the nature of the prayers therein. In addition Mr. Balala questioned both the legality and the efficaciousness of prayer 1 & 2 as drafted, based on the Supreme Court's pronouncement in ***Hassan Ali Joho & Anor v Suleiman Said Shahbal & 2 others. [2014] eKLR -Supreme Court*** case no. 10 of 2013 regarding the purpose and effect of gazettement of election results.

We think that it is necessary to read the impugned paragraphs and indeed the Petition in its entirety rather than in a selective manner before arriving at a characterization. Further, that caution is necessary while so doing that undue emphasis is not placed upon the previous electoral disputes whose initiators have not been shown to be privies of, or working in collusion with, the present Petitioner. The previous litigation especially,the ***Mbete Case*** appears to be like a cloud looming over these proceedings. More will be said regarding that issue in our consideration of the question of issue estoppel and *res judicata.*

Quite clearly, a determination that the dispute before us is electoral in nature is of necessity a jurisdictional question. In this regard Mr. Gikandi's answer to the objection is that the Court's jurisdiction is being invoked in this matter under Article 165 and 258 of the Constitution, in a bid to enforce Article 10 thereof. Article 165 (3) (d) (ii) reads-

> ***Subject to clause (5), the High Court shall have—***

"(a) …

(b) ...

(c) ...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. …

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;"

The Petitioner strongly resisted the characterisation of his Petition as an election/nomination dispute whether by the prayers therein or otherwise. Mr. Gikandi argued that final orders to be made by a court are dependent upon the Court and flow from findings made . In his written submissions he stated:

"The question that arises under the current Petition is whether the 1st Respondent (sic should be Interested Party) satisfied the requirement of Section 22 of the Elections Act and whether the 1st Respondent in purporting to nominate him actually complied with the law."

The other question was stated to be whether the 1st Interested Party was an accomplice in the fraudulent acquisition of a "fake" degree certificate for the purpose of nomination. In our view, paragraphs 7, 8, 9, 10, 11, 13, 14 and 16 of the Petition appear to vindicate these submissions.

We accept the 2nd Respondent's submissions that the ***Mumo Matemu*** *case involved the review of the appointment of the Petitioner rather than an elected official. However, we are of the view that a narrow interpretation of Article 165 (3)(d)(ii) as suggested by the Respondents would run counter to the provisions of Article 259. We view the provisions of Article 165 (3)(d)(ii) as being broad enough, in proper circumstances, to accommodate a review of the actions of the IEBC and it matters not that the person elected has assumed office. See* ***Center for Rights Education and Awareness & 20 others v John Harun Mwau & 6 Others [2012] eKLR).*** (***CREAW*** *case). However, we hasten to add that such a review would be undertaken in a most cautious manner and that before assuming such a jurisdiction, the Court would seek sufficient assurance as to the propriety of its actions as urged in the* ***Mumo Matemu*** *case.*

This caution is borne of the fact that election results represent the will of the majority of the electorate and therefore the Court will be slow to interfere in this manner except where compelling reasons exist. The allegation in this case, roughly stated is that 1st Interested Party procured nomination through fraudulent means, namely a "fake" degree and that the IEBC abetted these alleged criminal acts. These remarkable allegations portend serious consequences, not least of which is criminal prosecution. As Mr. Gikandi has aptly pointed out, if there is credibility to these allegations, a court of law cannot look away and thereby appear to connive with the alleged perpetrators of the criminal acts. We use these words purposely to bring out the gravity of the allegation s contained in this Petition.

As in this case, the Respondents in the ***Mumo Matemu*** *case had sought to define the Petition as a removal procedure. The Interested Parties and Respondents in addition to casting this Petition as an electoral dispute called to aid Articles 181 & 182 of the Constitution which provide for the removal of a governor. This is what the Court of Appeal stated in the* ***Mumo Matemu*** *case:*

"In our considered opinion, the Petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The Petition was a challenge to the constitutionality of the process and manner of the appellant's appointment. This Court takes the view therefore that it is not the outcome of litigation that is determinative of

its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure."

The Court of Appeal proceeded to affirm the holding of the High Court in the Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another ***(2011) eKLR.*** *We find it apposite to quote a portion of the said holding for emphasis*

"If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment. "

Similarly, in this case it is true that the election cycle has closed as Mr. Balala submitted. However if the nomination of the 1st Interested Party has subsequently been shown to be tainted with illegality, it will be no answer to say that this Court has no jurisdiction and that it is too late to raise a challenge. This matter will be revisited in more detail while dealing with third issue under determination.

We therefore reject the characterisation of the Petition before us as primarily an election dispute or a removal procedure. Instead , we take the position that the Petition as presented is on the face of it one brought under Article 258 and invoking Article 165 (3)(d)(ii) of the Constitution the subject matter notwithstanding. Whether or not it represents a collateral attack on a previous litigation in particular the ***Mbete*** *case and is therefore res judicata is another matter. We will now consider that question.*

WHETHER THE PETITION IS BARRED UNDER THE DOCTRINE OF *RES JUDICATA* OR ISSUE ESTOPPEL BY THE DECISION IN CONSTITUTIONAL PETITION NO.116 OF 2013.

Mr. Buti for the 2nd Interested Party quoted the provisions of Section 44 of the Evidence Act and referred to annexture "SMO 2" to the Petitioner's first affidavit to demonstrate that a final *judgment in rem* having been rendered in the ***Mbete*** *case* no court can re-open the matter as the 1st Interested Party was already adjudged to be entitled to hold the degree in dispute.

Terming the Petition as an abuse of the Court process on account of the doctrine of res judicata, Mr. Mogaka for the 1st Interested Party described the public policy rationale behind the doctrine as pre-empting judicial absurdities where courts of concurrent jurisdiction arrive at divergent decisions on same dispute, waste of judicial time and to curb malicious litigation. The aim, he said, was to foster reliability and finality in judicial decisions.

In counsel's view this Petition is a re-litigation of the Election Petition No. 8 of 2013 ***Shahbal v. Joho***, supra, which was ongoing at the time the present Petition was filed. He stated that a decision was rendered by Lenaola J. in the ***Mbete*** case on the same issues now raised by this Petition; that the decision has not been appealed as the Petitioner therein had abandoned the appeal and is presently seeking review. Hence the judgment by Lenaola J. is final and all that the present Petitioner can do is seek to be enjoined in the application for review. He referred to the Nigerian case of ***Elder S. A. Soyinka v Dr. Olaiya Oni & Others*** (2011) LPELR – CA 1B/209/2005 and the Ugandan case ***Nobert Mao V A.G.*** *Court of Appeal, Uganda, Constitutional Petition No. 9 of 2002, [2003] UGCC 3* for the proposition that this court cannot revisit the decision of a court of concurrent jurisdiction.

Mr. Balala further argued that issue estoppel has arisen as the same issue, namely the qualification by the 1st Interested Party to participate as a candidate in the gubernatorial elections has been determined in the ***Mbete*** *case* by Lenaola J. He relied on the case of ***Royal Media Services Limited & 2 others v Attorney General & 8 others*** , Petition No. 557 of 2013, [2013] eKLR to support his submissions that issue estoppel can be successfully raised even where the cause of action and parties in the former determined matter and the latter case are different.

Reliance was also placed on the case of ***Fatuma A. Chamkono & 40 others v D. C. Msambweni & Another*** Mombasa H.C Const. Petition 12 of 2012, [2013] eKLR by Mr. Eredi for the 1st Respondent in supporting the submissions of the Interested Parties. In that case Tuiyott J. relied on ***Hunter v Chief Constable of West Midlands & Anor*** *[1981] 3 All ER 727 ,[1981] 3 WLR 906* to the effect that issue estoppel can and does arise even where parties were not involved in prior litigation as the core issue is whether a particular point has been expressly decided in a final decision of a court.

On his part, Mr. Khagram for the 2nd Respondent submitted that the Petitioner could have appealed Lenaola J's decision if thereby aggrieved (See **CREAW case**). He reiterated that the Mombasa Election Petition No. 8 of 2013 was preceded by Nairobi Constitutional Petition No. 162 of 2013. The latter was ordered struck out as it was a matter challenging the suitability of the 1st Interested Party to be elected governor and therefore should have been brought as an election petition. That the election petition later filed was equally dismissed. He concluded that the present Petition constitutes an attempt to have another bite at the cherry. The Court was urged to ignore the Petitioner's submissions tending to go into the merits of the Petition at this stage and to ultimately uphold the preliminary objections and strike out the Petition. The Petitioner's response was that res judicata does not apply to constitutional petitions and that there is no provision under the Constitution or the **Mutunga Rules** for striking out a constitutional Petition. Moreover, the Civil Procedure Act does not apply to constitutional matters.

According to Mr. Gikandi for the Petitioner, the Court's duty is to hear the Petition and to render judgment and it ought not to entertain technicalities. Article 159(2) was called to aid as well as the standing of the Petitioner to approach the Court under Article 258 and his invocation of the Court's supervisory jurisdiction under Article 165 of the Constitution. He dismissed as irrelevant the fact that Janet N. Ekumbo had previously filed Constitutional Petition No. 116 of 2013 there being no evidence of collusion between the two petitioners or that one litigated on behalf of the other. He cited the case of ***Maria Kevina Sentamu v Kikondo Kyaterekera Growers Co-op society,*** (1996) KALR 754 for the proposition that res judicata can only arise if parties in the suits are the same.

Secondly, Mr. Gikandi argued that the res judicata and issue estoppel defence cannot succeed where there is fraud. With regard to his submissions that fraud unravels everything including final judgments, counsel cited the House of Lords decision in ***Arnold v National Westminster Bank Plc*** [1991] 2 A.C 93 where the Court stated inter alia that one of the purposes of estoppel was to work justice between parties. And further that exceptions to issue estoppel would arise only in special circumstances as found in ***Henderson v Henderson*** (1843 – 60) ALL ER 378 and that the finding of the Criminal Investigations and Intelligence Department (CIID) and Council for Higher Education in Uganda amount to special circumstances. He further cited the English case of ***Lazarus Estates Ltd v Beasley*** (1956) 1 ALL ER 341 to support the proposition that a court of law cannot allow a person to keep an advantage obtained by fraud, and reiterated the *ex turpi causa* maxim as upheld by the privy council in ***Mistry Amar Singh v Serwano Wofunira Kulubya*** [1963] EA 408. It was his position that the decision in the ***Mbete*** *case* was not final as it was under appeal which right is not exhausted and secondly that its effect was blunted by the allegations of fraud raised herein. In this regard he relied on ***Equity Bank Ltd v West Link Mbo Ltd*** [2013] eKLR***; Suleiman Said Shahbal v IEBC*** Malindi Civil Appeal No. 42 of 2013, [2014] eKLR *and* ***Benham v Plotner*** (1795) P.2d 510 (Okla 1990) *and also the Indian case of* ***Baijnath Karnani Vs. Vallabhdas Damani AIR 1933 Madras 511***

Mr. Gikandi submitted that Section 44 of the Evidence Act cannot override the provisions of Article 10, 50, 258 and 259 of the Constitution and that illegality destroys the idea of finality of a judgment. He relied on the case of ***Henry Wanyama Khaemba v Standard Bank (K) Ltd.*** [2014] eKLR to support the submission that res judicata requires probing of evidence not possible within the limited scope of a preliminary objection.

In reply, Mr. Balala cited the provisions of Rule 3(8) of the Mutunga Rules which reserves the court's inherent power to prevent abuse of court process through re-litigation, and stated that failure to plead with exactitude infringes Rule 10(2) of the Rules.

Mr. Khagram distinguished the present case from the ***Lazarus*** *case* where the impugned judgment had

been obtained by fraud, and from the ***Mumo Matemu*** *case* which dealt with the process of appointment, rather than election involving popular will of electorate. Mr. Gikandi was allowed to address the Court on a final point in which he conceded the inherent power of the Court to prevent abuse of the Court process. He added the rider that the primary jurisdiction of court is to hear the petition and that striking out should be in exceptional cases where abuse is clear and that this Petition does not belong to this latter category.

Analysis and Determination

In determining the matter of *res judicata*, the Court was therefore invited by the parties to consider whether the plea of *res judicata* is available under the Constitutional litigation procedure for enforcement of Constitutional provisions; whether the bar of *res judicata* may be removed by allegations of fraud, appeal from earlier judgment or review; and whether, in the circumstances of this case, the Petitioner had properly invoked fraud as a justification for the invocation of the exception to applicability of *res judicata.*

The principle of res judicata is entrenched in section 7 of the Civil Procedure Act as follows –

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

The principle of finality of court decisions is emphasized by the fact that the conclusive evidential character of decisions determining any legal character or entitlement of a person is statutorily underpinned under Section 44 of the Evidence Act, which provides as follows:

> ***"44. Judgments in rem***
>
> ***(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.***
>
> ***(2) Such judgment, order or decree is conclusive proof—***
>
> ***(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;***
>
> ***(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;***
>
> ***(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;***
>
> ***d. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."***

In our view, however, the provisions of section 44 of the Evidence Act create a rule of evidence as to admissibility and proof existence of a judgment in rem giving effect to the conclusive character of such a judgment on the legal character or entitlement of a person as at the time of the judgment. It does not preclude such a judgment from being set aside on appeal or review under the applicable rules of the

Court.

Although the Constitutional principles for fair hearing under Article 50 (1), access to justice under Article 48, promotion and protection of the Bill of Rights under Articles 22, and enforcement of the Constitution under Article 258 would generally call for full inquiry into disputes that may be resolved by operation of law consistently with the rule of law, the principle of *res judicata* as a cardinal principle for the finality of litigation and for the prevention of abuse of the Court process must be in-built in the any Constitutional litigation that may be preferred for that purpose.

We agree with the Privy Council decision in ***Thomas v. The AG of Trinidad and Tobago*** (1991) LRC (Const) 1001, cited in ***E.T. v. Attorney General & Anor***. [2012] eKLR, where the Board was "*satisfied that the existence of a Constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata' and* referred to a decision of the Supreme Court of India; ***Daryao and others v The State of UP and Others*** *(1961)* 1 SCR 574, 582-3 where Gajendragkar J held that the principle of *res judicata* was applicable in cases under Article 32 of the Constitution of India -

> *'But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in Petitions filed under Art. 32'.*

See also ***Charo Kazungu Matsere & 273 Ors. v Kencent Holdings Limited & Anor.***Mombasa H.C Constitutional Petition 136 OF 2011, *[2012] eKLR and* ***Booth Irrigation v. Mombasa Water Products Ltd. (Booth Irrigation No. 1)*** *Nairobi HC Misc. Appl. NO. 1052 of 2004.*

Accordingly, we unhesitatingly find that the principle of res judicata is applicable to Constitutional litigation and its relevance is not affected by the substantial justice principle of Article 159 of the Constitution which overrides technicalities of procedure.

In a leading case on res judicata ***Arnold v. Westminster Bank*** (1991) AC 93 H.L., the House of Lords held that cause of action estoppel "*is an absolute bar in relation to all points decided unless fraud or collusion is alleged,* ***such as to justify setting aside the earlier judgment***." In the same decision, the Court agreed that the same considerations apply for reopening of the cause of action in the previous suit as with particular issues in the action which are the subject of issue estoppel. In acknowledging similarity of the principles applicable to both cause of action estoppel and issue estoppel, Lord Keith stated that:

> "*Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to reopen that issue." Ibid at* at *p.105 parag. D-E"*
>
> And that:
>
> "*It thus appears that, although* ***Henderson v Henderson*** (1843) 3 Hare 100, [1843-60] All ER Rep 378 *was a case of cause of action estoppel, the statement there by Wigram V-C has been held to be applicable also to issue estoppel. That statement includes the observation that there may be special circumstances where estoppel does not operate*." Ibid at at ***p.107 parag. C***

Lord Keith, with whom the other Law Lords concurred concluded that –

> "*In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the Carl-Zeiss case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947.*" -ibid at ***p.109 parag. A-B.***"

Similarly, the learned authors of ***Mulla, Code of Civil Procedure***, 18th Ed. 2012 at p. 293 have observed that the principle of *res judicata* as a judicial device for finality of court decisions is subject to the special circumstances of fraud, mistake or lack of jurisdiction –

> *"The principle of finality or* ***res judicata*** *is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened* ***unless fraud or mistake or lack of jurisdiction*** *is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."*

Accordingly, we find that a determination on a particular point giving rise to issue estoppel is similarly open to challenge on the basis of fraud which vitiates the previous court's finding on the point notwithstanding that the said court's determination on the point is in the nature of a judgment *in rem.*

We think that in the present case, the Petitioner would be entitled to bring evidence, such as that which the Court in the ***Mbete*** lamented was not availed, to demonstrate that the 1st Interested Party's degree certificate was fraudulently obtained. Such evidence must, however, be of such nature as to convince the Court that there was actual fraud as pleaded, vitiating the judgment in the previous decision. As we understand it, this is the effect of the decision of the Court in ***Lazarus Estates Limited v. Beasley*** (1956) 1 ALL ER 340 where in declining a submission that a defence of fraud was time barred, the court held that –

> "N*o court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.*"

See also ***Mistry Amar Singh v Serwano Wofunira Kulubya*** (1963) EA 408.

We agree that the finality of a decision is destroyed by an appeal. In our view, however, a Notice of Appeal is deemed an appeal for purposes only of applications for stay of execution or injunction pending appeal not for purposes of res judicata. We did not hear serious submissions as to whether a decision is res judicata when it is under review by the Court that made the decision. However, on the principle that the decision may be altered on review the matter cannot properly be said to have finally determined. In the present proceedings, however, nothing turns on the status of the decision as the Petitioner in this case though pursuing the same reliefs as the Petitioner in the ***Mbete*** is a different person and it has not been shown that the two are parties litigating under the same title or that one is a proxy of the other.

It cannot be said as in ***Hunter v. Chief Constable of the West Midlands Police & Ors.*** (1981) 3 WLR that the present proceedings were an abuse of the process of the Court for having been initiated by the petitioner "*for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which had been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had full opportunity of contesting the decision*."

Moreover, although the Petitioner in this case may have appealed from the decision in the ***Mbete*** case, under the provisions of the Court of Appeal Rules, he could not have participated in the review application as he was not a party to the High Court Petition. The Petitioner would properly be entitled to approach the Court directly as he has done in this Petition subject only to the fulfilment on his part of applicable requirements for the mounting of competent Constitutional proceedings. In these circumstances the judgment in the ***Mbete*** case cannot operationalise *res judicata* to the present Petition.

We would agree, however, that as the matter of the 1st Interested Party's qualification to be nominated and elected as a governor is pending review before a court of concurrent jurisdiction, although the judgment of the Court is not res judicata, good order in the justice system would call for the Constitutional Court to stay its hand until the review proceedings are concluded and ruling thereon delivered.

Whether, in the circumstances of this case, the Petitioner had properly invoked fraud

In the decision which the Respondents and the Interested Parties contend to operate *res judicata* to this matter, ***Janet Ndago Ekumbo v. The Independent Electoral Boundaries Commission and 2 Ors.*** (the ***Mbete*** case), the trial judge found as follows:

> *"The issue I am however called upon to determine is whether the 3rd Respondent held a degree at the time of nomination to contest for the gubernatorial position…. It is not in dispute that the 3rd Respondent has finished his studies and has passed the exams required for the conferment of a degree of a degree in his area of study, being Business Management (Human Resource Management Option) notwithstanding that he has not formally graduated…. Having found as above,* ***I am therefore satisfied that the 3rd Respondent holds the qualifications envisaged by section 22(2) of the Elections Act*** *and the Petitioner, despite all her spirited efforts, has failed to bring evidence that the 3rd Respondent used fraudulent means to obtain his degree. How can this court uphold her objections when Kampala University and the Council for Higher Education have said that he is qualified?"*

The present Petition is based on fraud allegedly discovered after the decision in the ***Mbete*** case following inquiries made by the Petitioner after he learnt of the Court's decision that the 1st Interested Party was holder of a valid degree certificate from Kampala University. In accordance with caselaw authority, the issue of fraud when proved would justify the reopening of a matter or issue which has been previously determined.

WHETHER THE PETITION IS TENABLE OR LIABLE FOR STRIKING OUT. DOES THE COURT HAVE JURISDICTION TO STRIKE OUT PETITION?

Analysis and Determination

Whether the petition is tenable or liable for striking out

Having found that the defence of *res judicata* and issue estoppel is not available where there is fraud, we must turn our minds to the next question - whether this petition is tenable or liable to be struck out alongside the secondary issue whether this court is the appropriate forum for the inquiry that will of necessity have to be made in this case. Whereas this matter, as we have found, has been brought as a Constitutional Petition under Article 258 of the Constitution, there is no escaping the fact that what the Petition is essentially alleging against the Interested Party and the IEBC constitutes not just any vague fraud but a gross violation of the law; in fact criminal offences.

Black's Law Dictionary, 9th Ed. defines fraud as *'a knowing misrepresentation of truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is willful it may be a crime – also termed as 'intentional fraud'*. Criminal fraud is defined as:

'Fraud that has been made illegal by statute and that subjects the offender to criminal penalties such as fines and imprisonment.'

Sections 351 and 353 of the Penal Code criminalize, so far as relevant to this Petition, the fraudulent acts of forgery and uttering a false document as follows:

"351. Any person who forges any judicial or official document is liable to imprisonment for seven years."

353. Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question."

As discussed below, the nature and particulars of fraud pleaded in this Petition manifest themselves in the criminal offences of forgery and uttering under sections 351 and 353 of the Penal Code. The acts of collusion pleaded against the IEBC also amount to criminal offences of aiding and abetting the fraud both under the Penal Code and the Elections Act.

In Paragraph 11 of the Petition, the petitioner pleads –

"11.That clearly the 1st Interested Party obtained the Nomination Certificate to vie for the said Governor's Office from the 2nd Respondent in a fraudulent and deceitful manner.

Particulars of Fraud

a. Lying that he was ever a student in Kampala University at any time between 2009 when he knew that was false.

b. Uttering a false document to the 2nd Respondent , to wit, a letter dated 30.11.2012 which he knew to have been false and untrue."

From his own submissions, counsel for the Petitioner appears to be quite aware of the implications which go with the allegations of fraud in that these are serious criminal offences which were allegedly committed by Mr. Joho and the 2nd Respondent and which take us right into the centre of a criminal court. At page 15-16 of his submissions, counsel for the petitioner submits the following:

"For example assume for the sake of argument that Mr. Joho uttered a fake degree certificate to the 2nd Respondent and that the 2nd Respondent conspired with Mr. Joho in nominating Mr. Joho to contest when under Section 22 of the Elections Act Mr. Joho was not qualified to vie for the gubernatorial seat. What then comes out of the above Petition:-

That serious criminal offences would have been committed by both Mr. Joho and the 2nd Respondent so we are taken right into the centre of the criminal court….

Above scenario would also find its way, if followed up in an election court Petition.

Above scenario would also find its way in a Constitutional court. All three courts would have jurisdiction to hear the matter but would issue out such orders as each court has jurisdiction to grant."

Shorn of all its legalese, the Petition before us is an accusation that the 1st Interested Party was party to the procurement of a 'fake' degree certification and with the abetment of persons inside the IEBC, was cleared to run for a position for which he was not academically qualified. The criminal nature of these allegations has definite legal ramifications some of which are discussed below.

The material contained in the affidavits of the Petitioner which are in the form of reports by various

bodies in Uganda including by the Criminal Investigations and Intelligence Department, Uganda and the Council for Higher Education Uganda all point to a criminal inquiry against the 1st Interested Party. It would seem from the prayers in the Review Application in Petition 116 of 2013 that no local bodies so far have investigated these matters. Yet under the Kenyan Constitution there are several bodies vested with the mandate of investigation which lies with the Criminal Investigation Department, CID, to prosecute, the office of Director of Public Prosecution, DPP and to try offenders, the Criminal Court.

The serious allegations herein require an intensive fact finding enquiry. There are specific guarantees under the Constitution and the criminal law regime regulating pre-trial (investigations) and trial process, as underpinned under Article 50 of the Constitution. These guarantees apply to all persons under due process to ensure justice and fairness. This Court like all other organs of State, is under an obligation to uphold the Bill of Rights and to apply the Constitution in a manner that promotes its purposes, values and principles and also advances the rule of law, human rights and fundamental freedoms in the Bill of Rights (See Article 259(1)(a) & (b) of the Constitution.)

Granted, we have the powers of summoning witnesses and receiving oral evidence and arriving at a determination upon conclusion of this case, but will we have accorded the 1st Interested Party and the 2nd Respondent a fair hearing as provided for under Article 50 of the Constitution? The material before this court intended for determining whether there was fraud, are reports obtained from the Criminal Investigations and Intelligence Department and Council for Higher Education both of Uganda.

The mandate to order investigation and prosecution are vested in the office of the Director of Public Prosecutions pursuant to the provisions of Article 157 of the Constitution. Article 157(4) of the Constitution provides:

> **"The Director of public prosecutions shall have power to direct the inspector-general of the National Police Service to investigate any information or allegation of criminal conduct and the inspector General shall comply with any such direction."**

Article 157(6) provides: **"The Director of Public Prosecutions shall exercise state powers of prosecution."**

Under Article 157 (10) of the Constitution it is provided:

> "**The Director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the direction or control of any person or authority."**

If we were to allow before us the hearing and determination of the issue of obtaining and of uttering a false degree we would be denying the Director of Public Prosecutions the Constitutional right of directing investigations and prosecuting the alleged crime of fraud.

> *This petition clearly calls for an intensive fact-based inquiry. The question that has exercised our minds is this: is it proper for the Constitutional Court to undertake the inquiry we are now being invited to undertake? Does this court possess the expertise, mandate and wherewithal to do all of the following:- to investigate what is essentially a criminal matter, entertain its prosecution by private persons before a Constitutional Court to the standard of proof applicable therein, and to eventually arrive at definite findings as to criminal culpability so as to ultimately find the 1st Interested Party unqualified and unfit to hold office as governor, and consequently order fresh elections?*
>
> *We are of the view that such an undertaking is not only onerous but one that amounts to an usurpation of the mandate the appropriate state organs including the police, CID, the DPP and the criminal courts, and in addition offends the constitutional order. What effect would our decision have on any future prosecution, if any, were to be preferred against the 1st Interested Party and*

IEBC officials before the Magistrate's court? The subordinate court would clearly be embarrassed by our decision one way or the other.

In our view, if this court takes up this matter the 1st Interested Party and the 2nd Respondent would be effectively denied the opportunity of having the matter commenced at the subordinate court and if found guilty, the opportunity of lodging their appeal to the High Court. We consider that this petition ought to have been brought only after the criminal process is exhausted and a relevant finding of guilt against the 1st Interested Party is made by a criminal court. We make this determination being well aware of the undesireability of opening the floodgates of litigation, regarding allegations of fraud or other illegal conduct brought against persons holding state office by virtue of the popular mandate of the electorate. The prayers of the Petition seek orders to upset the will of the electorate as exercised pursuant to Article 38 of the Constitution, not to mention the consequential personal loss resulting from removal that the Interested Parties would have to bear.

The procedure for trying criminal offences and the degree of proof therein is distinct from the procedure applicable to Constitutional Petitions. In relying on ***William Cheruiyot Kandie Vs Republic*** Court of Appeal
at Nakuru, Criminal Appeal No.21 OF 1996 [1997] eKLR to support the proposition that the Petitioner's case has, for want of replying affidavits, not been controverted and is therefore deemed to be proved, the petitioner is improperly avoiding the criminal procedure standard of proof applicable to fraud related offences alleged against the 1st Interested Party in favour of the much lower standard of balance of probabilities in civil litigation.

Returning to the ***Mumo Matemu*** *case,* the Court of Appeal noted two crucial observations made in the High Court regarding the evidence of the Petitioner therein. We are alive to the fact that in this Petition the evidence has yet to be produced or tested by cross examination. However, it is possible to glean its general nature from the Petition and affidavits before us. First, the Court of Appeal observed that at the end of the trial (Petition) the High Court could not make a definite finding whether or not allegations concerning the integrity of the Respondent had been proved. The High Court had stated:

"That will have to await appropriate legal proceedings tailored for that purpose."

Second, the Court of Appeal observed that the High Court had noted that the evidence relied upon by the Petitioner had " *yet to be tested in judicial proceedings and cannot be taken as the truth of the matter"*. The Court of Appeal contrasted this situation with the authority considered in the matter namely the South African Constitutional Court decision in ***Democratic Alliance v The President of the Republic of South Africa & 3 Others,*** *CCT 122/11 [2012] ZACC 24. where the Court was supplied with the "tested evidence about the moral probity of the appointee" in the form of reports of Commission of Inquiry and Public Service Commission as well as the sworn testimony of the appointee before the said bodies.*

In the ***Mumo Matemu*** *case, the Court of Appeal proceeded to give useful guidance as follows:*

"The evidentiary standard in Constitutional cases of this nature is a balance of probabilities. In cases involving heightened review, or "intensely fact-based inquiry," as noted by the superior court below, that balance acquires a higher gradation and must be exercised judiciously. Moreover, it does not do to shift the burden of proof to the institutions whose actions are impugned, or the person whose appointment is questioned, to prove procedural propriety or suitability.....the determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. When presented as a Constitutional challenge, the evidentiary standard is on a balance of probabilities. This standard is heightened, given its implications on due process, fairness and equal protection. An approach in this regard is to undertake what the High Court called "an intensely fact-based enquiry."

Under the Constitution, the 1st Interested Party's right and indeed the right of every accused to a fair trial in Article 50 is one that is not subject to limitation (See Article 25). There are

competent State organs charged with the responsibility of receiving and investigating criminal complaints, laying charges before courts which try them in accordance with the law.

Notwithstanding the undisputed jurisdiction of the Constitutional Court under Article 258, this court is not persuaded that the circumstances of this case warrant its assumption and exercise of that jurisdiction . We consider that this is an ideal case where the Constitutional Court ought to defer to other relevant bodies created under the Constitution and to give them an opportunity to exercise their respective mandates with regard to the Petitioner's complaint (See the ***Mumo Matemu and Tom Kusienya*** *cases).*

Whether the Court has jurisdiction to strike out a constitutional petition.

We have concluded that to the extent that the Petition was brought to this court directly before other constitutionally mandated organs had opportunity to process the Petitioner's complaint, the Petition before us is premature . It is our view that the Petitioner's first port of call ought to be the criminal and other investigative bodies of the land. We have been invited by the Petitioner to find that the Court has no option but to hear this Petition to its logical conclusion as there is no power for striking it out. The authority for this proposition is the ***Mutunga Rules****. With respect, nothing in the* ***Mutunga Rules*** *bars the Court from preventing the abuse of process.*

Rule 3(8) of the **Mutunga Rules** as the rules are popularly known, provides

> ***"Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

Even if Rule 3(8) did not exist, we would take the position that a premature invocation of the Articles 165 (3)(d) (ii) and 258 of the Constitution which give this court jurisdiction to act, is incompetent and an abuse of the process of the Court. There is a long line of authorities to the proposition that where a certain procedure is prescribed for redressing a grievance, such procedure must be used and taken to its logical conclusion. Reference was repeatedly made to the Court of Appeal decision in the ***Karume*** case where the Court held:

> *"In our view there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed."*

The Petitioner's argument taken to its logical conclusion would result in this court being held at ransom to fully hear on the merits any and every Petition placed before it, including those that may be barred by res judicata. We cannot endorse such a construction of the ***Mutunga*** *Rules as it amounts to an absurdity. We are grateful that Mr. Gikandi did eventually concede the Court's power to prevent abuse of court process.*

As we have said before, this court affirms the Petitioner's right to approach the Court seeking the enforcement of constitutional provisions regarding the integrity of the 1st Interested Party within the context of Section 22 of the Elections Act. Should the allegations that the 1st Interested Party by himself or with others improperly obtained and utilized a degree qualification to secure nomination be true, it would amount to a reprehensible fraud on the people of the County of Mombasa and Kenya as a whole. However, despite the orders we are about to make, we consider that the Petitioner is not without a remedy as he may utilise the avenues pointed out above or as he may be otherwise advised by his counsel in addressing his grievance.

We have said enough to demonstrate that the Petition before us is premature and must be struck out in limine. We so order.

Costs

As regards costs, we consider that this was a public interest litigation and we, therefore, direct that each party bears its own costs. See ***John Harun Mwau & Others –vs- Attorney General and Others*** Nairobi Petition No. 65 of 2011 (unreported).

Orders accordingly.

Dated signed and delivered on the 16th day of October 2014.

C. MEOLI

PRESIDING JUDGE

EDWARD M. MURIITHI

JUDGE

M. MUYA

JUDGE

In the presence of: -

Mr. Gikandi with Mrs. Kariuki and Ms. Murage..…….....…for the Petitioner

Ms Lutta.....…… for the 1st Respondent

Mr. Khagram with Mr. Nyamodi……for the 2nd Respondent

Mr. Mogaka and Mr. Balala ……for the 1st Interested Party

Mr. Buti ……...……...for the 2nd Interested Party

Linda and Oliver…….. Court Assistants